ROSEVILLE

REQUEST FOR COUNCIL ACTION

Date: October 25, 2010
Item No.: 13.b

Department Approval

Acting City Manager Approval

Item Description: Discussion of Asphalt Plant Issues Raised at September 27, 2010 City Council meeting. (Councilmember Ihlan)

BACKGROUND

At the September 27, 2010 City Council meeting, Councilmember Ihlan asked that the City Council have a discussion on whether the proposed Bituminous Roadways Asphalt Plant at 2280 Walnut Street was a permitted use under the City's codes and also if state law or state administrative rules prevented the City from denying a land use request while there is pending environmental review related to the project.

The City Attorney has prepared a memo addressing the issues raised which is included with this report as Attachment A. In summary, the City Attorney finds that the amendment to Chapter 1007.015 adopted on October 11, 2010, does not permit asphalt plants in Industrial Districts. Since Bituminous Roadways has not obtained any vested rights to use the site as an asphalt plant, their proposal is not allowed. Therefore, the question on whether the asphalt plant is permitted is moot, according the City Attorney, since the new ordinance amendment applies to their proposal.

The City Attorney however, per Council request, did analyze the previous ordinance and how it would have affected the Bituminous Roadways proposal. The City Attorney finds that:

- Under the previous ordinance, while the production and processing of asphalt was a permitted use, there are other components of Bituminous Roadways proposal such as crushing of aggregate that are not permitted.
- In addition, the proposal will need to meet the City's performance standards set forth in Chapter 1007.01. If it is determined that the proposal cannot meet the performance standards, then the use would not be a permitted use.
- The storage piles and fuel storage tanks are not permitted and must be approved by the conditional use process. The applicant must meet the criteria for granting conditional uses as listed in Chapter 1014.01D.
- Concrete and bituminous crushing is not considered a manufacturing use and therefore is neither a permitted or conditional use. The only way crushing could be allowed would be through the granting of an interim use by the City Council.

The City Attorney also addressed the point raised during the meeting on whether or not the City could deny the conditional use application prior to the environmental review being completed by

the Minnesota Pollution Control Agency. The City Attorney cites a case (Allen vs. City of Mendota Heights, App. 2005, 694 N.W. 2d 799) which requires the environmental review process occur before the City take action on an application for a proposed development. Based on that court case, the City Attorney states that the City should not proceed with the Bituminous Roadways application until the environmental review is completed.

The City Attorney will plan on presenting this information in more detail at the City Council meeting.

POLICY OBJECTIVE

Not applicable

FINANCIAL IMPACTS

Not applicable

STAFF RECOMMENDATION

As the City Attorney suggests, the City Council should not make a decision on the land request until all environmental review is completed.

REQUESTED COUNCIL ACTION

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

Prepared by: Patrick Trudgeon, Community Development Director (651) 792-7071

Attachments:
A: Memo from City Attorney Charles Bartholdi, dated October 14, 2010
B: Email from Gregg Downing – Environmental Quality Board
C: Memo from Tam McGehee regarding Asphalt Plant
D. Statement from Council Member Ihlan, October 11, 2010
E. Email from Gregg Downing, dated October 20, 2010

Attachment A

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

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*

TO: Mayor Klausing and Members of the City Council
City of Roseville

FROM: Charles R. Bartholdi & Caroline Bell Beckman

RE: City of Roseville re: Bituminous Roadways Application
Our File No: 1011-00196-1

DATE: October 14, 2010

We were asked at the September 27th Council Meeting to provide you with a determination as to whether an Asphalt Plant is a permitted use on the proposed Bituminous Roadway Site.

Since that meeting the City Council on October 11, 2010, pursuant to its current code revision process, adopted an Ordinance amending Section 1007.015 regarding permitted uses in this I-2 District. This ordinance amendment, upon publication, will in our opinion prohibit Bituminous Roadways from building an Asphalt Plant since it has not obtained a vested right to use the Site for an Asphalt Plant. The passage of the recent amendment to Section 1007.015 of the Zoning Code makes the issue of whether an Asphalt Plant was a permitted use under the City Code prior to the amendment moot. However, **the following is a discussion of the merits of the Bituminous Roadways application prior to the Zoning Code Amendment**.

Section 1007.015 Uses

According to the information which has been submitted to the City by Bituminous Roadways, the operation of the Asphalt Plant will include the production of asphalt, maintaining storage piles of material, storage tanks, a laboratory and crushing operations. Section 1007.015 of the Roseville City Code lists "Manufacturing and repair-heavy" as a permitted use in an I-2 District. While the processing of asphalt by itself may be considered "manufacturing," the processing of asphalt is only one of the components of the Asphalt Plant being proposed. Since not all of the other components are permitted uses in an I-2 District, the Asphalt Plant as proposed is not a permitted use.

Attachment A

Performance Standards

The determination of whether an asphalt plant is a permitted use also requires an analysis of the Requirements and Performance Standards set forth in Section 1007.01 of the City Code. Chapter 1007.01 sets forth various requirements and performance standards which must be met with respect to development within I-2 Districts. Consequently, the requirements and performance standards will need to be met in order for the Asphalt Plant to be a permitted use on the Site. The analysis of whether performance standards are met should be done at staff level. At this time City staff is waiting for the conclusion of the Minnesota Pollution Control Agency ("MPCA") process in order to receive all pertinent information for the performance standards analysis. If the staff determines that performance standards cannot be met then the Applicant should be so informed and no building permit should be issued for the Project. If the Applicant disagrees with this decision the Applicant has a right to appeal the decision pursuant Section 1015.04 of the City Code to the City Council, acting as the Board of Adjustments and Appeals, for a reconsideration of the decision.

Storage Piles and Storage Tanks As A Conditional Use

Under Section 1007.015 of the Roseville City Code the maintenance of storage piles and storage tanks on the property will require conditional use approval. The Bituminous Roadways application which has been submitted to the City is a request for conditional use approval for outdoor storage. The requirements for a conditional use are set forth in Chapter 1014 of the Roseville City Code. The applicant must meet the criteria listed in the Chapter 1014.01D in order to be entitled to a Conditional Use Permit. Also, the Planning Department has been analyzing the crushing portion of the operation under the Conditional Use Permit. However, the crushing operation is not included in outside storage.

Crushing Operation

Concrete and bituminous crushing is not considered manufacturing because the material is not transformed into a new product. Therefore, the crushing operations are neither a permitted nor a conditional use under Section 1007.015, and as such are not allowed on the Site. Crushing operations have been allowed in the past by the City through an interim use permit. Therefore, if Bituminous Roadways intends to have concrete and bituminous crushing it must apply for interim use permit, subject to the regulations of the Code. However, keep in mind that an interim use permit contemplates a temporary use and in this case concrete and bituminous crushing appears to be an integral part of Bituminous' operation, and although not a daily activity a permanent ongoing activity. It's questionable whether an interim use permit is appropriate for the concrete and bituminous crushing operations being proposed.

Current Conditional Use Application Status

Currently Bituminous' application for a Conditional Use Permit is on hold due to the Minnesota Pollution Control Agency's Environmental Assessment Worksheet process which was initiated by a Petition submitted by concerned citizens. Once the Minnesota Pollution Control Agency ("MPCA") concludes that process the application will be referred back to the City Council for a decision on the CUP request. Also, pursuant to Minn. Stat. §15.99 the time limit in which the City is required to make a decision has been stayed while the MPCA conducts its review. It is appropriate, therefore to return the CUP request to the Council for decision at the conclusion of MPCA request.

Attachment A

Status of Application Pending MPCA Environmental Review

We were also asked at the September 27th City Council to give our opinion as to whether the City can proceed with the application of Bituminous Roadways while the MPCA environmental review pertaining to the project is pending. As a result of our review of the applicable rules, statutes and case law, we have determined as follows:

1. Minnesota Statutes §116D.04, Subd. 2b, and Minnesota Administrative Rules Section 4410.3100, Subpart 1, provide that if an Environmental Assessment Worksheet ("EAW") or Environmental Impact Statement ("EIS") is required for a governmental action, a project may not be started and a final governmental decision may not be made to grant a permit, approve a project, or begin a project, until:

   A. A petition for an EAW is dismissed;
   B. A negative declaration on the need for an EIS is issued;
   C. An EIS is determined adequate; or
   D. A variance has been granted from making an EIS by the Environmental Quality Board.

2. The Minnesota Court of Appeals in the case of Allen v. City of Mendota Heights, App. 2005, 694 N.W.2d 799, stated that the Minnesota Environmental Policies Act requires an environmental review process to occur before a City acts on a written request for action on a proposed development. The Court referenced the need for a governmental entity to consider economic, technical and environmental considerations before reaching a decision on matters before it which involve environmental review. The information provided by the environmental review which is being conducted by the MPCA will provide relevant environmental information which the City will need to consider when it acts on the Bituminous Roadway Application.

Based upon the foregoing the City should not proceed with the Bituminous Roadways Application until the environmental review process currently pending with the MPCA has been completed.

Minnesota Administrative Rules Section 4410.46, Subpart 2, which was referenced in the letter given to the City Council by Tam McGehee, does provide the following exceptions to the Minnesota Environmental Policy Act:

A. Projects for which no governmental decisions are required;
B. Projects for which all governmental decisions have been made;
C. Projects for which, and so long as, a governmental unit has denied a required governmental approval;
D. Projects for which a substantial portion of the project has been completed and an EIS would not influence remaining construction; and
E. Projects for which environmental review has already been completed or for which environmental review is being conducted pursuant to part 4410.3600 or 4410.3700.

The only exemption which could apply to the pending Bituminous Roadways application is subparagraph C. However, it would be inappropriate for the City to act on the Bituminous Roadways application at this time since the information elicited in the pending environmental

review process should be considered as part of the City Council's criteria in determining whether to approve or deny the Conditional Use application.

CRB/alb/CBB/kmw

Attachment B

From: Tam McGehee [mailto[redacted]
Sent: Monday, October 18, 2010 3:27 PM
To: Margaret Driscoll
Subject: [FWD: RE: Rules Issues]

Margaret,

This is the material I would like to have the Council have for this evening's meeting. Please get a copy to Chris Miller as well if he is still Acting City Manager.

Thank you,

Tam McGehee
-------- Original Message --------
Subject: [SPAM] RE: Rules Issues
From: "Downing, Gregg (ADM)" <Gregg.Downing@state.mn.us>
Date: Mon, October 18, 2010 11:00 am
To: Tam McGehee [redacted]
Cc: "Larsen, Jon (ADM)" <Jon.Larsen@state.mn.us>

Ms. McGehee,

In regard to your question to us, it is our standard guidance to RGUs (and others) when asked about the scope of the prohibitions on governmental actions when environmental review is required, that the prohibition applies only to actions that approve or authorize the project in question and NOT to actions to deny approval for the project.

This opinion is based on the plain language of the stature and rule (which explicitly prohibit decisions to grant permits, approve projects and begin projects, but say nothing about denials of projects), and also the common sense conclusion that if a project fails to meet a black-and-white requirement for approval it is just a waste of time and resources to go through the environmental unit process and then deny approval anyway.

I hope this answers your question to us.

Gregg Downing
Environmental Review Coordinator
EQB

Attachment C

To: Roseville City Council
Roseville City Attorney
From: Tammy McGehee
Date: October 18, 2010
Re: Council Packet Item 13 a, Asphalt Plant

As Counsel has named me in this letter attached in the packet I feel I must respond.

On September 20, 2010, ten days following the close of the comment period for the Bituminous Roadways EAW, I provided to the Council and Counsel a document outlining the case for denial of the Conditional Use Permit citing our present criteria for a CUP and the required performance standards for an industrial zone. I also explained that the decision to deny can be made during pendency of environmental review under the EQB Rules, the primary ones of interest are 4410, 3100 and 4410.4600. I very much appreciate the City Attorney's findings that the proposed Asphalt Plant project is not allowable under either the current CUP criteria or the Performance Standards for Industrial Zones, a finding which raises a question of why the issue ever came forward to the Council from the Planning Staff (5/18/09).

On the issue of the Council's ability to deny this application and permit during the pendency of environmental review, I believe Counsel is incorrect. I believe the rule is very clear and I have attached an e-mail from Gregg Downing, Coordinator of Environmental Review for the Environmental Quality Board, in which he states:

> *In regard to your question to us, it is our standard guidance to RGUs (and others) when asked about the scope of the prohibitions on governmental actions when environmental review is required, that the prohibition applies only to actions that approve or authorize the project in question and NOT to actions to deny approval for the project.*
>
> *This opinion is based on the plain language of the stature and rule (which explicitly prohibit decisions to grant permits, approve projects and begin projects, but say nothing about denials of projects), and also the common sense conclusion that if a project fails to meet a black-and-white requirement for approval it is just a waste of time and resources to go through the environmental unit process and then deny approval anyway.*

Counsel further bolsters his opinion that one cannot deny at this time by citing a case: Allen vs City of Mendota Heights. This case pertains to a clarification of the rule requiring the tolling of the 60 day requirement for decisions on permit applications. This particular case was one in which the petitioner claimed that their permit was automatically approved because the Council failed to rule within the 60 day period, a period during which environmental review was being done pursuant to a Citizen's Request for an EAW. The district court ruled that the 60 day rule, under MN Statute 15.99, was tolled until the review was complete. The appellate court upheld that ruling.

> **OPINION**
>
> **TOUSSAINT**, Chief Judge
>
> In this mandamus proceeding, appellants argue that their applications for permits to respondent City of Mendota Heights were automatically approved under **Minn. Stat. §**

> **15.99 , subd. 2** (2004). Upon a citizens' petition for environmental review of appellants' project, the city tolled the running of the automatic approval period. Because the city and district court correctly interpreted an express exception in **section 15.99** to allow for tolling of the deadline for agency action on the applications pending the environmental review process under the **Minnesota Environmental Policy Act**, we affirm. The city's motion to supplement the record is granted.
>
> **DECISION**
>
> Because a citizens' petition for an environmental-assessment worksheet under **Minnesota's Environmental Policy Act** initiated a process that must occur before agency action on a written request under **Minn. Stat. § 15.99, subd. 2** (2004), and that made it impossible to act within 60 days, the 60-day deadline of **section 15.99** is extended by **subdivision 3(d)** to 60 days after completion of the last environmental-review process required by MEPA.
> **Affirmed; motion granted.**

I believe the passage quoted by Counsel in his letter of 10/14/10 regarding this cited case,

> *that the Minnesota Environmental Policies Act requires an environmental review process to occur before a City acts on a written request for action on a proposed development. The Court referenced the need for a governmental entity to consider economic, technical and environmental considerations before reaching a decision on matters before it which involve environmental review.*

has many interpretations, but nowhere does it state that **all** the environmental review be **completed** before a project is **denied**. The remarks, not in the opinion, could have been a reminder to Mendota Heights, whose initial approvals were granted before the Citizen's Petition came forward, that they, like Roseville, should always consider these important issues before reaching a decision. Roseville now has more than sufficient information, economic, technical, and environmental, from our EAW process and its 167 comments to make a well argued and defensible denial, especially when supported by Counsel's previous finding regarding the project's inability to meet either the Roseville's CUP criteria or industrial performance standards.

Therefore, I again and respectfully ask that the Council deny the permit now based on our own code in place at the time of the initial application, the many substantive questions raised in the 167 published comments on the EAW, and the finding by Counsel regarding this project's failure to meet our existing code requirements. (Letter of October 14, 2010)

E-Mail from Gregg Downing Attached

Statement of Council Member Amy Ihlan in Support of Proposed Amendment to Roseville Code Section 1007.015 (Industrial Uses and Zoning Districts)

I support the proposed amendment to Roseville's industrial zoning code because it clarifies what is already prohibited under our existing code.

The staff's memorandum states that the proposed asphalt plant "is considered a permitted use" under Roseville's industrial zoning code. Whether the proposed asphalt plant is permitted under our industrial code is ultimately for the city council to decide. The council has not yet had the chance to consider that question. The council should have a hearing and vote on this issue, because based on what we now know about the scope and operations of the proposed plant, and the evidence and comments received in the industrial review process, the asphalt plant is not permitted under our current standards in Roseville Code Section 1007.010(D) (including standards for noise, smoke and particulate matter, toxic or noxious matter, odors, vibrations, glare or heat). If the city has evidence that the proposed plant can't meet the operating standards in the industrial zoning code, then it's not permitted under the code and there's no basis for granting land use approval.

Our current code also contains a provision in Section 1007.015 prohibiting industrial uses of chemicals involving "noxious odors or dangers from fire or explosives." Section 1002.02 defines "noxious matter" as

> Material which is capable of causing injury or malaise to living organisms or is capable of causing detrimental effect upon the health of the psychological, social or economic well-being of human beings.

We have learned from the environmental review process that the proposed asphalt plant will involve noxious chemicals under this definition – thus the plant is not a permitted industrial use. The proposed plant does not fit within any of the other currently permitted uses described in Section 1007.015.

For these reasons, the proposed asphalt plant is already prohibited under Roseville's industrial zoning code, and for the same reasons, the other industrial uses the amendment adds to the code are also already prohibited (by specific language in the uses chart, under the performance standards, or under the general prohibition against industrial uses involving noxious or dangerous chemicals). I support the proposed industrial uses involving noxious or dangerous chemicals). I support the proposed amendment because it makes these already-existing prohibitions more clear.

Council Member Amy Ihlan
October 11, 2010

From: Downing, Gregg (ADM)
To: Pat Trudgeon
Cc: [redacted]; Larsen, Jon (ADM)
Subject: RE: Roseville Asphalt Plant
Date: Wednesday, October 20, 2010 11:37:28 AM

Mr. Trudgeon,

I have read the opinion you received from your attorneys. I am not sure I understand the situation entirely, but it appears to me that the letter indicates that information developed through the EAW could help the city staff determine whether or not the asphalt plan is a permitting use under the city's zoning code. If that is true, then I would agree with the attorneys that the City should not act until the EAW has been completed and the potential useful information has been obtained.

However, in a case where EXISTING information reveals that a project fails to meet a necessary zoning (or some other) requirement we believe that a governmental unit can act to DENY the project without waiting for an EAW to be prepared. That is the type of scenario I had in mind when answering Ms. McGehee's question to us.

I hope this clarifies this issue for you.

Gregg Downing

-----Original Message-----
From: Pat Trudgeon [mailto:pat.trudgeon@ci.roseville.mn.us]
Sent: Wednesday, October 20, 2010 10:04 AM
To: Downing, Gregg (ADM); Larsen, Jon (ADM)
Cc: Charles R. Bartholdi
Subject: Roseville Asphalt Plant

Gregg and Jon,

Tam McGahee shared your email regarding the proposed Bituminous Roadways Asphalt Plant in Roseville at the City Council meeting on Monday night. I am passing along the City Attorney's opinion on the matter for your information. Please let me know if you have any thoughts on his memo.

Pat Trudgeon

-------- Original Message --------
Subject: [SPAM] RE: Rules Issues
From: "Downing, Gregg (ADM)" <Gregg.Downing@state.mn.us>
Date: Mon, October 18, 2010 11:00 am
To: Tam McGehee [redacted]
Cc: "Larsen, Jon (ADM)" <Jon.Larsen@state.mn.us> Ms. McGehee,

In regard to your question to us, it is our standard guidance to RGUs (and others) when asked about the scope of the prohibitions on governmental actions when environmental review is required, that the prohibition applies only to actions that approve or authorize the project in question and NOT to actions to deny approval for the project.

This opinion is based on the plain language of the stature and rule (which explicitly prohibit decisions to grant permits, approve projects and begin projects, but say nothing about denials of projects), and also the common sense conclusion that if a project fails to meet a black-and-white requirement for approval it is just a waste of time and resources to go through the environmental unit process and then deny approval anyway.

I hope this answers your question to us.

MEMORANDUM

TO: MEMBERS OF THE ROSEVILLE CITY COUNCIL

FROM: AMY IHLAN

SUBJECT: MOTION TO SET HEARING TO CONSIDER DENYING APPROVAL OF PROPOSED ASPHALT PLANT

DATE: OCTOBER 20, 2010

We were forwarded an e-mail last Monday from Gregg Downing, Environmental Review Coordinator of the Minnesota Environmental Quality Board, indicating that although the city council is prohibited from approving the proposed asphalt plant until environmental review is complete, the council is not prohibited from denying approval.

Based on available information from the environmental review process and the large amount of public input we have received, it appears that the proposed asphalt plant does not meet the city's requirements for land use approval. For example:

- We have evidence from the environmental review process that the proposed asphalt plant will involve chemicals and odors that meet the definition of "noxious matter" prohibited under our city zoning code[1] and that the plant will not meet required performance standards[2], including standards for noise, smoke and particulate matter, toxic or noxious matter, odors, vibrations, glare or heat. We have an opinion from the city attorney that if the proposed asphalt plant does not meet these performance standards, it is not a permitted industrial use in Roseville.

- The city attorney has also concluded that some of the other components of the proposed asphalt plant operations (such as concrete crushing) are not permitted under our industrial code.

- We have information learned from the environmental review process and other public input from surrounding businesses and neighbors that the proposed asphalt plant will not meet requirements to be permitted as a conditional use under our zoning code.[3] There is evidence that the proposed plant will cause significant negative impacts on traffic, parks, streets and other public facilities, and the market value of contiguous properties, as well as the general public health, safety and welfare – and that the plant is not compatible with the surrounding businesses and community.

Given all of the strong evidence that the proposed asphalt plant will not meet the city's land use standards, the city council should exercise leadership and bring this issue to a vote. There is no point in delay, which will only cause greater costs and uncertainty for all concerned.

[1] See Roseville Code Sections 1002.02 and 1007.015.
[2] See Roseville Code Section 1007.01(D).
[3] See Roseville Code Section 1014.01(D).

I propose that the council:

1. Direct staff and the city attorney to analyze and report on possible grounds for the city council to deny approval of the proposed asphalt plant, and
2. Set a hearing for the council to consider and vote whether to deny land use approval of the proposed asphalt plant. (I suggest that the council receive the staff report at our November 8 meeting, and hold the hearing on November 15).

I request a council vote on these proposals (in the form of a motion or resolution) at the October 25 meeting.