



**City of Newport
Board of Appeals Minutes
April 12, 2012**

1. CALL TO ORDER

Chairperson Lindoo called the meeting to order at 6:10 P.M.

2. ROLL CALL -

Commissioners present – Susan Lindoo, Dan Lund, Katy McElwee-Stevens, Matt Prestegaard

Commissioners absent – Janice Anderson

Also present – Brian Anderson, City Administrator; Renee Helm, Executive Analyst; Tom Ingemann, Council Liaison; Fritz Knaak, City Attorney

3. APPEAL FROM VEOLIA ENVIRONMENTAL SERVICES

A. Appeal of Denied Building Permit to Install a 15,000 Gallon Above-Ground Storage Tank

Attorney Knaak and presented on this item as outlined in the April 12, 2012 Board of Appeals packet and provided information on the board of appeals process. The packet is attached as part of the official minutes. The Board of Appeals will be making a final decision to determine whether or not the decision to deny the building permit was correct.

The Public Portion opened at 6:14 p.m.

Tim Keane, Attorney for Veolia Environmental Services, presented on this item as outlined in his letter dated February 21, 2012. Mr. Keane’s letter is attached as part of the official minutes.

Dan Lund – On the first page of your letter you stated “The inability of Veolia to fuel its vehicles at this location creates a distinct impediment in its ability to continue to operate competitively at this location,” could someone expand on that?

Dave Schneider, Area Manager for Veolia – Tim had managed the disadvantage of fueling offsite, but the trucks have always been fueled on site, a company comes in to fuel the trucks. The only thing changing is that we would have our own tank there. The disadvantage that you were asking about is that on average it’s about \$0.23 per gallon more for us to fuel our trucks onsite than have a tank.

Admin. Anderson presented on this item as outline in the April 12, 2012 Board of Appeals packet.

Dan Lund – What was this zoned as before this was changed to mixed-use?

Admin. Anderson – I believe it was light industrial.

Dan Lund – So in your understanding of the land use classification, this wouldn’t have even been allowed in light industrial.

Admin. Anderson – You would have to take a look at that, there may have been a conditional use permit for that but if you just go by the code, then no.

Susan Lindoo – As I understand it, our comprehensive plan is our guiding principle and it confirms that this is a mixed-use district. You go with what the law is presently, and the comp plan is our guiding principle.

Admin. Anderson – I don't think they even submitted something for an interim use permit, which would be for three years. I still don't see how that could be an option. I don't mean to try to play hardball but I think we would have a lot of questions as to why we're allowing it. It's not written in our code that we allow it. That's the way I see it, our planner sees it, and our attorney sees it.

Attorney Knaak – I would like to focus on the issue. I think everyone would agree that a standalone tank on a vacant piece of land in the MX-1 district is not allowed. The only real issue here is, by virtue of the fact that you have this existing non-conforming use, whether that should be the basis for allowing this to be used as an accessory use. It has not been used as an accessory use for the last 25 years so essentially the argument is "We didn't use it but we could have." It really boils down to whether or not it's a new use. They're arguing that they're fueling there already, which would indicate that this is not a substantial increase. I think the applicant needs to be aware of that Newport is aware of issues relating to above-ground storage of fuel. If the code says or doesn't say that it's an allowed use in one place or another, you need to assume that the City knows where it does and does not want above-ground storage tanks. If you have an alternative to constructing it, which it sounds like you do, that weakens your argument a little bit.

Admin. Anderson – No other city allows above-ground storage tanks in their mixed-use districts.

Attorney Knaak – You will need to stay focused on what your code allows or doesn't allow.

Mr. Schneider – What is your definition of fueling store above ground on the site? We have 50 trucks with 60 gallon tanks that are stored there permanently; I don't see a difference from that to the above-ground storage tank.

Dan Lund – We have a land use that's called out in the City code, the exact language is "storage and distribution of bulk, petroleum products, oil and gasoline."

Jeff Ellerd, Area Engineer for Veolia – I would argue two things related to that. First off, that chart is for primary uses, not accessory uses, so defaulting to that right off the bat is not accurate. Secondly, this is not bulk petroleum storage, this is for consumption for our business.

Dan Lund – So how many gallons do you need for bulk petroleum storage?

Jeff Ellerd – Well it's for definition for what it's for. We're doing it for consumption by our own fleet. The point I would make is that nowhere in your code does it outline above-ground versus under-ground storage tanks. Your code allows a gas station in this district and nowhere does it state that their tanks need to be underground. So the Super America, across the street, which has an above-ground propane tank, could put an above-ground storage tank and there would be no problem according to your code.

Matt Prestegaard – I was wondering if someone could expand on Super America.

Attorney Knaak – That said, you're dealing with a district, where the policy is for mixed-uses and certainly an automobile related service such as gasoline sales is part of that. Really, what this comes down to is whether or not you view this as an accessory use to this operation. Again, the problematic thing is they've never done this before. Why hasn't it happened there before? They should be coming in to say that this will eliminate the fuel truck that comes in already. I indicated to you the issue of modernization. You're not required to watch the technology run by if you have a non-conforming use. You're allowed to invest in newer technologies. I don't think you've heard whether or not this is a modernization. There is no indication that it's safer and better for the other residents, which you need to take into effect.

Susan Lindoo – I think we've heard from all sides and I think it's time that we...

Mr. Schneider – I didn't really come to argue the legal part, I was going to talk to you from a business standpoint. I'm surprised from all the resistance that we've received from the Administration Department. It seems that at a time when everyone is trying to attract businesses, we're trying to be pushed out. Even by the notation in the memo from Renee that states we've temporarily moved out, which we haven't. I have put it down to the bare minimum operations. Even noting that they have better plans for the property.

Admin. Anderson – I asked her to put that in there so that it wouldn't come as a surprise to the Planning Commission.

Mr. Schneider – To us, it sounds like you want us out.

Admin. Anderson – That's a statement, that's a fact. You guys have moved out.

Mr. Schneider – We're still running there. You're presumption is pretty insulting.

Admin. Anderson – It could be redeveloped because it is zoned MX.

Mr. Schneider – You're talking about 50 jobs here, 50 patrons to your local businesses.

Attorney Knaak – Since we're talking about perception, one of the things that the City is used to is applicants disrespecting the City by thinking that it's an industrial area and we don't care what it looks like, that's the City's problem. I am seeing this attitude reflected a little bit in this argument. You get that attitude that consistently comes before the City, that "Really, you want to stop this? You think this will make things worse for the City?" You don't need to get into those kinds of...

Mr. Schneider – I don't think that assumption has ever been made from us. It's strictly business, no disrespect to the City.

Attorney Knaak – I'm just saying that the attitudinal thing cuts both ways.

Susan Lindoo – Do you have more questions or should we get on with our decision?

Dan Lund – I have a question for Mr. Keane. Is it your opinion that the case law plus your position, would require us to approve this use or is it our discretion to not approve the application?

Mr. Keane – I'm arguing that it is well within your discretion to conclude that this is an accessory use to this property and its expansion is certainly permitted and consistent with your ordinance. You would not be doing either violence to your code or straining your regulations by coming to the conclusion that this use is allowed. The point is that it's well within your use to do so.

Dan Lund – Are you agreeing that we're not required to do so?

Mr. Keane – That's not my determination and my conclusion won't make any difference to this body. I did put forth the supreme courts guiding premise that zoning ordinances should yield to the reasonable use of private property when there's interpretation.

Dan Lund – Are you aware of the zoning rules at the time when this property was built?

Mr. Keane – No, we contacted the planner but she couldn't find them.

Matt Prestegaard – I would make a comment to Section 1300.03(H) which states “To prohibit the use of buildings, structures, and lands that are incompatible with the intended use or development of lands within specified zones.” I think the intent of MX-1 is clear, which I was compelled by. I feel the intent of the zoning is clear.

Susan Lindoo – I think it’s a difficult case because it feels like a no-win. My feeling is much closer to Matt’s, which is that we’re abiding by a comp plan that precedes the MX district has being a certain type of district. A 15,000 gallon tank is storage of bulk products and that is the perception that a resident would have and the fact that this is the first time that this is necessary in 20-some years. If I obey our code and our comp plan then it feels this is not allowed in the MX district.

Dan Lund – I kept trying to get to the bottom of it. It’s not clear that they were ever allowed to have the tank on this site per the code. I think the argument that this is a substantially similar use is a bit of a red herring.

Susan Lindoo – I’m sorry, we’re...

Mr. Ellerd – You never closed the public hearing, can I address that please? I would argue that the Super America is bulk storage, they have more fuel underground then we would have in our above-ground tank and nowhere in your code does it distinguish between above-ground and below-ground tanks.

Dan Lund – It distinguishes between retail sales because that is a specific land use, bulk petroleum storage is a separate land use. There are two categories, I think this falls under the bulk petroleum storage. I know you made the argument that this isn’t the primary use but I don’t think you can take that argument to the ends of the earth, that you’re primary use is allowed so you can have these other uses too, that doesn’t make a lot of sense. It’s specifically prohibited here. I think it’s pretty clear.

The Public Portion closed at 7:08 p.m.

Susan Lindoo – I think it’s time for someone to make a motion to accept or reject the appeal.

Matt Prestegaard – Could we clarify the Super America issue at the next meeting?

Susan Lindoo – I think what we would be voting on next time is the final decision.

Motion by Lund, seconded by McElwee-Stevens to affirm the finding of the City Administrator to reject the building permit and to direct staff to establish a Findings of Fact. With 4 Ayes, 0 Nays, 1 Absent, the motion carried.

Motion by McElwee-Stevens, seconded by Prestegaard, to continue the proceedings until April 19, 2012 at 5:00 p.m. With 4 Ayes, 0 Nays, 1 Absent, the motion carried.

Signed: _____
Susan Lindoo, Chairperson

Respectfully submitted,

Renee Helm
Executive Analyst