



**CITY OF NEWPORT  
BOARD OF APPEALS  
NEWPORT CITY HALL  
APRIL 12, 2012 – 6:00 P.M.**

Chairperson:	Susan Lindoo	City Administrator:	Brian Anderson
Vice-Chair:	Daniel Lund	Executive Analyst:	Renee Helm
Commissioner:	Janice Anderson	Council Liaison:	Tom Ingemann
Commissioner:	Katy McElwee-Stevens		
Commissioner:	Matt Prestegaard		

## **AGENDA**

- 1. CALL TO ORDER**
- 2. ROLL CALL**
- 3. APPEAL FROM VEOLIA ENVIRONMENTAL SERVICES**
  - A. Appeal of Denied Building Permit to Install a 15,000 Gallon Above-Ground Storage Tank
- 4. ADJOURNMENT**



# MEMO

TO: Newport Planning Commission  
Brian Anderson, City Administrator

FROM: Renee Helm, Executive Analyst

DATE: April 5, 2012

SUBJECT: Veolia Environmental Services – Appeal of Denied Building Permit

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## BACKGROUND

At the December 8, 2011 Planning Commission meeting, the members discussed a request from Veolia Environmental Services to install a 10,000 gallon above-ground storage tank at its facility, located at 1545 7<sup>th</sup> Avenue. City staff informed both the Planning Commission and Veolia that the building became nonconforming when the zoning district changed to MX-1 in 2000 and that expansion is only allowed for an existing use, building or structure. The Planning Commission informed Veolia that their request is not allowed per the Code and requested that the City continue to work with Veolia regarding their request. City staff met with Veolia in January and informed Veolia that an aboveground storage tank of any size is considered a new accessory use and therefore is not allowed per the Code. After the meeting, Veolia submitted a building permit application for a 15,000 gallon above-ground storage tank, at which time City staff denied the permit.

## DISCUSSION

The following is attached for your review:

- Memorandum from Fritz Knaak, City Attorney
- Memorandum from Sherri Buss, TKDA Planner, that was distributed prior to the December 8, 2011 meeting
- Various letters from Veolia
- Denied building permit

The Planning Commission will need to discuss this matter and make a final decision about whether or not an above-ground storage tank of any size is allowed at this property. Please note that Veolia has temporarily moved out of its office and maintenance building located on 7<sup>th</sup> Avenue stating that it was too expensive to operate out of Newport. This should not have any effect on your final decision. Staff feels that there are better uses for this site if Veolia were to move out completely.

## RECOMMENDATION

It is recommended that the Planning Commission denies Veolia's request for a building permit to install a 15,000 gallon above-ground storage tank.

**KNAAK & ASSOCIATES, P.A.**

Attorneys at Law

Frederic W. Knaak\*  
Donald W. Kohler

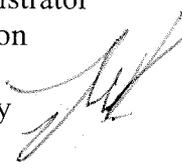
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*Of Counsel*  
Thomas M. Dailey, P.A.  
Matthew E. Ludt  
Joseph B. Marshall

**MEMORANDUM**

TO: Brian Anderson, City Administrator  
Newport Planning Commission

FROM: Fritz Knaak, City Attorney 

Date: April 5, 2012

RE: Veolia Environmental Services

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I have been asked to review the materials before the Planning Commission in its consideration of Veolia's appeal from the denial of a building permit for an outside fuel storage structure for its trucks operating out of its Newport facility. These consist primarily in the application, the denial, various letters from Veolia and its legal counsel, as well as the Memorandum from the City Planner, Sherri Buss.

The central document for review, in my opinion, is Ms. Buss' excellent summary of the ordinances and the appeal itself in her memorandum to the Commission. There are two key points to her analysis: 1) Veolia's current operation is a non-conforming use, and 2) outside storage of fuel materials is neither an allowed use in that particular zoning district, nor a proper new ancillary use or structure in that zone.

Those two points alone could serve as a reasonable basis for denial of the appeal.

Veolia's response to this obvious position is quite interesting and subtle. In its best light, what Veolia essentially argues is that the storage of fuel at their location was always an incidental part of their operation that they are now seeking to modestly expand. The fact that they had not previously invested in a fuel tank at that site was nothing more than an economic decision that current, successful operations now requires them to remedy. It was always, they are arguing, an intrinsic part of the nature of their operation. This is not a "new" use, they would argue, but merely an "intensification" of an allowed non-conforming use.

While Minnesota courts and law have not specifically addressed this issue, in neighboring Wisconsin a relatively recent case can throw light on the argument. In Racine County v. Cape,

250 Wis. 2d 44, 2002 WI App. 19. 639 N.W. 2d 782 (Ct. App. 2001), a Wisconsin appellate court addressed the issue of whether placement of sizeable new crushing equipment in an outdoor gravel operation that significantly increased efficiency on the site was an unlawful expansion of that non-conforming use.

Holding that installation of the modern equipment to the outdoor usage of the site was an allowed intensification, the Court in Cape noted:

... Wisconsin law protects expansion of a legal non conforming use **so long as the essential character of the use is not identifiably changed.**....(W)e now conclude that a change in the method or quantity of production of a nonconforming use is not an entirely new use **when the original character of the use remains the same.** This holding allows the operator of a nonconforming use to incorporate modern technology into his or her business without fear of losing that business. Cape, supra, at 2202 WI App 19, p. 5 (Emphasis added).

In this case, this argument takes on the “flavor” of saying that increasing the fueling capabilities of the site is modernizing the non-conforming use and improving its efficiency, not adding an additional use to the site. Moreover, Veolia is taking pains to say that the underlying use of the facility is not changing or expanding, as such.

The problem with this argument, however, is that the Newport Code does identify outdoor fuel storage as an allowed use in other districts for certain specified uses, none of which apply to this case in this zoning district. In other words, outside fuel storage is not an unanticipated specific use that is clearly incidental to this business. Rather, it has been recognized as a specific use and accommodated only in those places in which it is expressly allowed or provided for. For purposes of interpretation of the Code, it is my assessment that the Planner’s analysis that this is a recognized use in the City in other districts and a new (ancillary) use in this instance is the correct one.

Given the foregoing, I concur in the analysis of the Planner.

## MEMORANDUM

<b>To:</b> Newport Planning Commission Brian Anderson, City Administrator	<b>Reference:</b> Veolia Request for New Accessory Use in MX-1
<b>Copies:</b> Renee Helm, Executive Analyst	
<b>From:</b> Sherri Buss, R.L.A., Planner	<b>Proj. No.:</b> 14842.000
<b>Date:</b> November 28, 2011	<b>Routing:</b>

## BACKGROUND

Veolia Environmental Services is located at 1375 7<sup>th</sup> Avenue in Newport, within the MX-1 Zoning District. It is a nonconforming use in the MX-1 District, and was developed when the area was zoned differently. Veolia is requesting that the City approve adding an above-ground fuel storage tank (AST) approximately 10,000 gallons in size at their facility. This proposed use would expand the nonconforming use on the property by adding a new accessory use.

Veolia provided a letter to the City dated November 28, 2011 that includes the company's rationale for allowing the AST on their site. In brief, their rationale includes the following:

- The AST should be considered as an Accessory Use that is needed to support the principle use on the site.
- Their current nonconforming use should be allowed to expand. Veolia suggests that the expansion should be allowed due to the length of time that their business has been in operation, that there will be no adverse impacts on surrounding properties, and the expansion is consistent with the implementation of the Comprehensive Plan.

The sections that follow address the Veolia request to allow the addition of an AST on their site.

## USES IN THE M-X 1 DISTRICT

The City's Development Code Section 1330.04 *Uses* allows Storage and Distribution of Bulk Petroleum Products, Oil and Gasoline only in the IS (Industrial Storage) District, with a Conditional Use Permit. An AST is not permitted as a Primary or Accessory Use in the MX-1 District on the table included in 1330.04. Other sections of the code discuss permitted accessory uses in various zoning districts, such as garages, exterior storage, parking, etc. An AST is not identified as a Permitted Use or Accessory Use in the MX-1 District anywhere in the Development Code. Fuel storage is explicitly identified as a Permitted Use only in the IS (Industrial Storage) District.

Section 1330.04 states the following regarding permitted and accessory uses: *"Within the City's zoning districts, no land or buildings may be used or occupied in any manner except for the uses set forth in the following land use classifications chart and described in the following subsections. If a use is not identified in the following land use classification chart, the Zoning Administrator shall issue a statement of*

*clarification, finding that the use is or is not substantially similar in character and impact to a use regulated in the land use classification chart. If the use is not substantially similar to any other use regulated in the land use classification chart, the Zoning Administrator shall refer the matter to the City Council for determination. The Zoning Administrator and City Council shall take into consideration if the use meets the City's goals and plans, what zoning district may be most appropriate for the use as well as what conditions and standards should be imposed relating to development of the use."* Section 1310.13 of the Code indicates that the Zoning Administrator should refer the determination of similar use to the Planning Commission, which will make a recommendation to the City Council regarding the proposed use. The Council will make the final determination related to similar use.

In this case, staff suggest that the proposed AST use is most similar to the "storage and distribution of bulk petroleum products, oil and gasoline" use identified on the chart in Section 1330.04. This use is permitted with a Conditional Use Permit in the Industrial Storage district, and is not identified as a Permitted or Permitted Accessory use in any other district in the Code.

Veolia suggests that the AST should be considered an Accessory Use that is needed to support the Principal Use (hauling company). However, Veolia has operated for 20 years on its site without an AST, and the AST was not permitted as an accessory use that was required for the primary use. The situation is not similar to the underground storage tanks permitted for convenience stores and retail gas sales. Underground tanks are typically permitted as a part of those uses at the time the use is permitted, because the tanks are required for operation of the use.

### ***Zoning Ordinances in Neighboring Communities***

Staff reviewed zoning ordinances of other cities around Newport to identify code requirements for bulk fuel storage in above-ground tanks. Other codes also limit this use to Industrial districts, and often require a conditional use permit for the use:

- Woodbury limits the location of above-ground fuel storage tanks to its Light Industrial District. In addition to this limit on location, Woodbury's code requires that bulk storage tanks in the Light Industrial District "be hidden from public view with materials and designs matching those used for the principal structure. Where equipment cannot be fully hidden with matching building materials, landscaping may be used as additional screening."
- Cottage Grove limits the location of outside, above ground storage facilities for fuels to its Industrial Districts. They are permitted as an accessory use in those districts.
- St. Paul Park allows above-ground fuel storage tanks only in its I-2 General Industrial District, with a Conditional Use Permit.

### **POTENTIAL EXPANSION OF A NONCONFORMING USE**

The Veolia letter notes that it is a nonconforming use in the MX-1 District. As noted, it is allowed to continue its current use under section 1320.02 of the Development Code.

The Section 1320.03 allows expansion of the existing nonconforming use, building or structure under some conditions. However, Veolia is not requested to expand an existing use, building or structure. It is requesting to add a new accessory use, above-ground fuel storage, in the MX-1 District, which does not allow this use. Sections 1320.03 and 1320.09 cited in the letter refer only to expansion of permitted or existing uses, including accessory uses, not new uses.

Development Codes generally operate to limit or prohibit the expansion of nonconforming uses, in order to bring uses and structures within districts into compliance with the code over time.

### **PURPOSE AND USES IN THE MX-1 DISTRICT**

The Comprehensive Plan notes that the specific intent of the “MX-1 Downtown District shall be to provide sites for small scale retail and service commercial uses to support a mix of residential and office type uses in an aesthetically pleasing and dense but safe and walkable development pattern... In order to build and strengthen a pedestrian oriented environment, this district is primarily intended for more pedestrian-oriented uses such as specialty retail stores, professional services, sit-down restaurants, coffee shops, floral shops, etc...” This District was established after the adoption of Newport’s 2020 Comprehensive Plan, over 10 years ago. The goals and purpose of the district were reaffirmed in the 2030 Comprehensive Plan.

Veolia notes in its letter that its business was established over 20 years ago. In that era, a variety of highway and auto-oriented uses were permitted by the zoning ordinance in areas adjacent to Highway 61. With the recent changes in access to Highway 61 and physical relationship to the roadway, the City has revised its goals, zoning map and purposes of the districts along Hastings Avenue and 7<sup>th</sup> Street so that these areas will evolve into mixed use districts including residential, commercial and office uses with a pedestrian and transit-oriented character.

While the Development Code allows existing, nonconforming uses to continue operating in the MX-1 District, and allows limited expansion of existing uses and structures, adding new uses that are not permitted in the MX-1 District is not compatible with the goals of the Comprehensive Plan, and the Development Code that implements the plan.

### **PLANNING COMMISSION ACTION**

The Planning Commission should consider the Veolia request to add a new use (Storage of Petroleum Products) to its site within the MX-1 District, and make a recommendation regarding the following:

- Whether the use is similar to another permitted use or permitted accessory use in the MX-1 District, and may therefore be permitted;
- If the use may be permitted, whether a Conditional Use Permit or other zoning permit is required to permit the use;
- Whether the use is only permitted in the IS District, and may not be permitted as an expansion of the use on the Veolia site.



**SOLID WASTE  
NORTH AMERICA**

November 28, 2011

Mr. Brian Anderson  
City Administrator  
City of Newport  
596 7<sup>th</sup> Avenue  
Newport, Minnesota 55055

Re: Aboveground Storage Tank Installation  
1545 – 7<sup>th</sup> Avenue  
Newport, Minnesota

Dear Mr. Anderson:

Veolia ES Solid Waste Midwest, LLC (Veolia) previously met with you the Newport City Administrator to discuss our intent to install a 10,000 gallon diesel fuel aboveground storage tank (AST) for consumption by our hauling company operating at the our property located at 1545 7<sup>th</sup> Avenue in Newport, MN. It is Veolia's opinion that local approval for the installation of this AST is already provided within the City of Newport Municipal Zoning Code. However, per our discussions, City administration does not agree with this interpretation and is directing Veolia Representatives to appear before the City's Planning Commission at the December meeting to discuss the proposed project.

With regard to Veolia and its predecessors' use of the property, the operation of a solid waste management fleet operation, the Principal Use, has been located at the property for over 20 years. This use predates any of the current City zoning codes which would regulate the parcel of land in question. Currently, the City of Newport zoning map indicates the property is zoned MX-1 or Downtown District.

Section 1330.04 provides a chart regarding the allowed and conditional "Uses" in the MX-1 zoning district. "Use" is defined in a number of ways in Section 1300.01 Definitions:

*Subd. 117 Use. "Use" shall mean the purpose for which land or premises or a building thereon is designated, arranged or intended, or for which it is or may be occupied or maintained.*

*Subd. 118 Use, Accessory. "Use, Accessory" shall mean a use subordinate to the principal use on a lot and exclusively used for purposes incidental to those of the principal use.*

*Subd. 120 Use, Permitted. "Use, Permitted" shall mean a use which may be lawfully established in a particular district, provided it conforms with all requirements, regulations, and performance standards of such district.*

*Subd. 121 Use, Principal. "Use, Principal" shall mean the main use of land for an activity which is an allowable use of the zoning district in which the land is located.*

Given these definitions, the correct application of the "Land Uses" column identified in the Chart are the definitions in Subd 120 and 121.

Based on our discussions, this Chart provides the basis for the City's position relative to the installation of an AST at the property. As you are aware, the table is a simple matrix listing the Land Use, Land Use Classification/Zoning District, and the level of approval for the "Principal Use" of the property. The approval levels in part consists of "Permitted" uses, those uses requiring "Special" or "Conditional" approval, as well as those "Not Permitted". City personnel have indicated that the designation of 'Storage and Distribution of Bulk Petroleum Products, Oil and Gasoline' not having a 'P' within the MX-1 Zoning District box of this chart provides justification for not permitting the installation of the AST.

This would be accurate provided that this was the "Principal Use" of the property. In that case, the "Principal Use" would provide the basis for the "Permitted Use". In this particular situation, the Use is an "Accessory Use" (as defined in Subd 118) to our "Principal/Permitted Use" which is the operation of the hauling company and the AST is simply necessary to support that "Principal Use". This would be comparable to convenience stores operated in conjunction with petroleum sales. In this particular situation, the Petroleum Storage Tanks are an accessory use to the principal use of the convenience store and would be a permitted use within this zoning designation. Additionally, auto services; automobile parts/accessories retail sales and installations; and gas, diesel or other motor fuel retail sales are all conditional uses within this district that may use AST for petroleum storage.

Veolia's proposed use is more closely aligned to retail sales than to storage and distribution of bulk petroleum. Veolia is neither storing nor distributing petroleum with the AST. Veolia will use the AST for consumption only by Veolia trucks. There is no distribution of petroleum occurring, nor is the intent to store for any significant period of time. The section of the zoning code related to bulk storage appears to be intended to limit expansion of the existing petroleum tank farms present within the City of Newport and/or adjacent municipalities.

Further review of the zoning code, specifically Section 1320, Non-Conforming Uses, Lots and Structures outlines the conditions under which non-conforming uses may continue and expand. The applicable sections are:

***1320.02 Continuance of Nonconforming Uses, Lots and Structures. Any legal structure, legal lot or legal use existing upon the effective date of the adoption of this ordinance or its amendment and which does not conform to the provisions of this Chapter may be continued subject to the following conditions:***

*A. The use or structure has existed in substantially its present form for at least 15 years.*

*B. No adverse impacts on the property or surrounding properties have been or are created by the nonconformity.*

*C. Continuation of the nonconformity will not hinder local plans for redevelopment or conflict with implementation of the Comprehensive Plan.*

**1320.03 Expansion.** *A nonconforming use, building or structure shall not be expanded, enlarged, or extended to occupy a greater height or area of land except if the conditions specified in section 1320.02 are satisfied a use may be expanded by 20% as follows;*

*A. If the non-conforming use or structure is a commercial use in a residential area 20% shall mean 10% of the Gross Leasable Area of the non-conforming use.*

*B. If the non-conforming use or structure is a residential use or home, 20% shall mean 20% of the foundation size of the existing structure (foundation size excludes the foundation of any attached garage).*

*C. The expansion meets all setback, lot coverage, building height, and lot dimension requirements of the respective zoning district.*

Veolia's current operation meets all of the conditions provided for within Section 1320.02. The property has been used as a solid waste management facility for more than 20 years. We do not adversely affect our property or the surrounding properties by our continued operation, and our long-term continued operation on this property in no way hinders redevelopment or conflicts with the Comprehensive Plan. Further, installation of the AST will in no way cause any of those conditions to change. It will not increase traffic or noise, nor will it otherwise adversely affect the property or the surrounding properties.

Additionally, the proposed AST installation meets all of the conditions outlined in Section 1320.03 for expansion. The installation of the AST will not expand actual area of the building or operations at all, thereby meeting the less than 20% requirement of the Section. Additionally, while not specifically a commercial use in a residential area, the proposed AST installation does not increase Gross Leasable Area.

Section 1320.09 Accessory Structures and Garages provides for the construction/installation of additional structures if they meet all requirements for setbacks, etc. Specifically,

**1320.09 Accessory Structures and Garages.** *Accessory structures and garages shall be permitted where non-conforming uses may be present provided that the new structure meets all the necessary standards of the appropriate district and that no accessory structure or garage already exists on the property.*

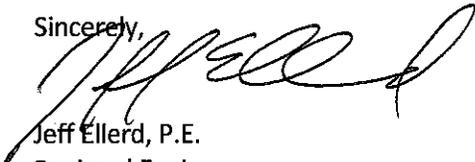
It can be argued that the installation of the AST is an accessory structure or use for the property and is thereby already permitted by the existing City Zoning Code.

Veolia believes that a review of the applicable code sections supports our position that the installation of the AST is already permitted under the existing code as applied to the property in question. We look forward to your prompt review of this issue and resolution allowing us to continue our operations in Newport. Veolia is a long-standing member of the Newport community and appreciates the partnership we have established with the City.

Please do not hesitate to contact me with any additional questions or concerns you might have at (651) 403.5705 or at [Jeffrey.ellerd@veoliaes.com](mailto:Jeffrey.ellerd@veoliaes.com).

Thank you in advance for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Eller", is written over the typed name.

Jeff Eller, P.E.

Regional Engineer

Veolia ES Solid Waste Midwest, LLC

CC: David Schneider, Veolia ES  
Jay Warzinski, Veolia ES  
Melissa Bachhuber, General Counsel, Veolia ES



January 30, 2012

Mr. Brian Anderson  
City Administrator/Zoning Administrator  
City of Newport  
596 – 7<sup>th</sup> Avenue  
Newport, Minnesota 55055

Re: Request for Building Permit – New Aboveground Storage Tank  
Veolia Newport Maintenance Facility  
1545 – 7<sup>th</sup> Avenue  
Newport, Minnesota

Dear Mr. Anderson:

Veolia ES Vasko Solid Waste Midwest, LLC is submitting this letter in support of the enclosed Application for Building Permit for the installation of a 15,000 gallon highway diesel fuel aboveground storage tank (AST) at our maintenance facility located at 1545 – 7<sup>th</sup> Avenue in Newport. This letter, the attached application, the attached site plan, and the attached drawings and specifications for the proposed AST comprise our building permit application for the AST installation. The estimated total project cost is \$100,000.

A site plan of our existing maintenance facility is included as Figure 1. A Detailed AST Installation Map is depicted in Figure 2. This figure shows the specific storage tank location, along with the fueling station and other ancillary equipment. This AST is essential for Veolia to keep its operations competitive within the industry. Fuel costs are one of the largest expenditures that we have as part of our operations. The use of a third party fueling vendor causes Veolia to incur significant additional expenses that are not sustainable.

The proposed AST is a Fireguard Fire-Rated Tank with a cylindrical design, and a capacity of 15,000 gallons. This tank is designed with secondary containment integral to the tank itself. The fueling system will include Dresser Wayne Fleet Dispensers and an OPW Fuel Management System designed to control access to the fuel and document individual user data of the fuel. Details and specifications regarding the tank, the dispensers and the fuel management system is provided as Attachment A to this application. This includes the structural design for the AST and the associated tank saddles. The proposed system is state-of-the-art and meets all applicable local, state, and federal requirements for an aboveground storage tank installation. As part of this application, our Contractor, Zahl Petroleum and Maintenance, will also be seeking necessary State and local fire marshal approvals for the tank installation.

Veolia's tank installation contractor, Zahl Petroleum Maintenance Company previously began the process of obtaining the necessary permits. Those permits or approvals were not issued by the City and the applications were withdrawn. These permits were not previously issued due to the City's earlier contention that the AST is not allowed within the current zoning (MX-1) for the site. Pursuant to Section 1300, Subdivision 118 of the City of Newport Zoning Code, the AST serves as an Accessory Use. A 'Use, Accessory' is defined in the City Code as 'a use subordinate to the principal use on a lot and exclusively used for purposes incidental to those of the principal use'. The principal use of the property has been and will continue to be the operation of a fleet maintenance facility with all of the activities necessary to conduct those operations.

The site is a legal non-conforming use within the City of Newport. The City of Newport zoning code has specific provisions (see Section 1320, specifically Section 1320.03 Expansion of a Non-Conforming Use) allowing for the expansion of a non-conforming use. Within this section, the code allows for an 'expansion of up to 20% (10% of gross leasable area of the non-conforming use when in a residential zoning district), as long as the proposed expansion meets all setback, lot coverage, building height, and lot dimension requirements of the respective zoning district'. As can be seen on the attached site plan, the existing building improvements cover 32,000 square feet and 13,000 square feet respectively, for a total of 45,000 square feet. The proposed AST expands the existing operation by less than 1,500 square feet, from the current square footage, an expansion of approximately 3% (3.3%). Moreover, Section 1320.09 expressly provides that: "Accessory structures and garages shall be permitted where non-conforming uses may be present provided that the new structure meets all the necessary standards of the appropriate district and that no accessory structure or garage already exists on the property." Further, the installation location is within our current operational area west of existing facilities and within the existing parking lot area. This entire area is fenced with screening minimizing any impacts to nearby or surrounding properties. The proposed AST location meets all applicable setback and coverage requirements of the City Zoning Code.

Veolia vigorously disagrees with the City's previous position on applicable zoning for the site. The proposed AST is an accessory use to the site; the primary use of the property is fleet maintenance. Therefore, the current MX-1 zoning requirements are not applicable.

Veolia is eager to continue our operations at our Newport facility, our strong employment base and our commitment to the Newport community. In order to do so, we need to install this AST as soon as possible. Please advise me as soon as the permit is ready for pickup and the fee associated with the permit. I will have a check hand delivered to your office. I appreciate anything you can do to expedite the issuance of this permit. Please do not hesitate to contact me with any additional questions or concerns you might have at (651) 403.5705 or at [Jeffrey.ellerd@veoliaes.com](mailto:Jeffrey.ellerd@veoliaes.com).

Thank you in advance for your time and consideration.

Sincerely,



Jeff Eller, P.E.

Regional Engineer

Veolia ES Solid Waste Midwest, LLC

CC: David Schneider, General Manager, Veolia St. Paul/Newport  
David Sonnentag, Regional Manager, Veolia ES Solid Waste Midwest  
Melissa Bachhuber, Assistant General Counsel, Veolia Environmental Services North America  
Tim Keane, Malkerson, Gunn, Martin, LLP



February 21, 2012

Mr. Brian Anderson  
City Administrator/Zoning Administrator  
City of Newport  
596 – 7<sup>th</sup> Avenue  
Newport, Minnesota 55055

Re: Appeal of Building Permit Request – New Aboveground Storage Tank  
Veolia Newport Maintenance Facility  
1545 – 7<sup>th</sup> Avenue  
Newport, Minnesota

RECEIVED  
FEB 07 2012  
BY: *[Signature]*

RECEIVED  
FEB 21 2012  
BY: *[Signature]*

Dear Mr. Anderson:

On January 30, 2012, Veolia ES Vasko Solid Waste Midwest, LLC submitted a building permit application to the City of Newport for the installation of a 15,000 gallon highway diesel fuel aboveground storage tank (AST) at our maintenance facility located at 1545 – 7<sup>th</sup> Avenue in Newport (the “Property”). In a letter dated January 31, 2012, the City denied this application. This letter is submitted taking an appeal of the determination of the Zoning Administration in the denial of the building permit referenced herein and request for a hearing before the Board of Appeals and Adjustments pursuant to Section 1310.03 and 1310.05 of the City of Newport Code.

Veolia disagrees that the proposed installation is an Accessory Use to the principle use of the Property. In the determination letter from the City, the denial is based on the interpretation that the proposed AST installation constitutes a change to the operation and is a new accessory use for the property. The Property is operated as a legal non-conforming use within the City of Newport. The City of Newport zoning code has specific provisions (see Section 1320.03 Expansion of a Non-Conforming Use) allowing for the expansion of a non-conforming use. Within this section, the code provides for an ‘expansion of up to 20% (10% of gross leasable area of the non-conforming use when in a residential zoning district), as long as the proposed expansion meets all setback, lot coverage, building height, and lot dimension requirements of the respective zoning district’. Further, Section 1320.09 expressly provides that: “Accessory structures and garages shall be permitted where non-conforming uses may be present provided that the new structure meets all the necessary standards of the appropriate district and that no accessory structure or garage already exists on the property.” Such an interpretation is consistent with and contemplated in the “Determination of Substantially Similar Use” provisions set forth in City Code Section 1310.13.

Based on this determination, the installation of the AST is permitted per the City code and furthermore does not require a Conditional Use Permit (CUP) or any other zoning approvals for installation, provided it meets the intent of the applicable district with regard to coverage and setbacks. Nowhere within the City code is there a reference of aboveground storage tanks and the applicability of a CUP to this evaluation. Because of the accessory use determination and the existing non-conforming use designation, neither the provisions of the CUP, nor the MX-1 zoning district, are applicable to this application.

To assist in the appeal process, I have included the original building permit application along with this letter. Please forward this appeal and any necessary paperwork to the appropriate parties within the City. Please advise if there is a filing fee for this appeal and if there is any other information you might need to process this request. Please do not hesitate to contact me with any additional questions or concerns you might have at (651) 403.5705 or at [Jeffrey.ellerd@veoliaes.com](mailto:Jeffrey.ellerd@veoliaes.com).

Thank you in advance for your time and consideration.

Sincerely,



Jeff Ellerd, P.E.

Central Region Engineer

Veolia ES Solid Waste Midwest, LLC

CC: David Schneider, General Manager, Veolia St. Paul/Newport  
David Sonntag, Regional Manager, Veolia ES Solid Waste Midwest  
Melissa Bachhuber, Assistant General Counsel, Veolia Environmental Services North America  
Tim Keane, Malkerson, Gunn, Martin LLP



## CITY OF NEWPORT

596 7th Avenue  
Newport, Minnesota 55055  
(651) 459-5677  
Fax: (651) 459-9883

January 31, 2012

Jeff Ellerd  
Regional Engineer  
Veolia Environmental Services  
1375 7<sup>th</sup> Avenue  
Newport, MN 55055

Re: Building Permit Application for Aboveground Storage Tank

Dear Mr. Ellerd:

Please find attached Veolia's recent request for a building permit to install a 15,000 gallon aboveground storage tank. The City is denying this request due to the fact that the proposed tank is not an allowable use in the MX-1 District. As the City has recently informed Veolia, the buildings located at 1375 and 1545 7<sup>th</sup> Avenue are currently nonconforming uses in the MX-1 District and expansion is only allowed for an existing use, building or structure. The City feels that the tank is a new accessory use since Veolia has operated without one for the past 20 years. Since it is considered a new use, the tank is not an allowable expansion of a nonconforming business.

At the December 8, 2011 Planning Commission meeting, the Planning Commission stated that Veolia's previous request to install a 10,000 gallon aboveground storage tank was not allowed per the Code and recommended that the City continue to work with Veolia regarding their request. The City met with you in January and informed you again that an aboveground storage tank of any size is considered a new accessory use and therefore is not allowed per the Code. The City informed you that the next step would be to apply for a Conditional Use Permit, which was not done. Please find attached the application for a Conditional Use Permit. Once the City receives the application from Veolia, it will move forward with scheduling a Public Hearing for the Planning Commission. The City will need to receive the application and payment of \$450 by February 9, 2012 in order for it to be on the March 8, 2012 Planning Commission agenda.

Please do not hesitate to contact me at (651) 556-4600 / [banderson@newportmn.com](mailto:banderson@newportmn.com) if you have additional questions.

Sincerely,

Brian Anderson  
City Administrator  
City of Newport



# City of NEWPORT Building Permit Application

Newport City Hall ♦ 596 7<sup>th</sup> Avenue ♦ Newport ♦ Minnesota ♦ 55055 ♦ Telephone 651-459-5677 ♦ Fax 651-459-9883

Application Date: 24 JAN 12

Permit No. \_\_\_\_\_

# DENIED

### Applicant Information

Contractor License Number MPCA # 37 (ZAHL)

Name: VEOLIA ES SOLID WASTE MIDWEST LLC

Telephone: 651.403.5705

Mailing Address: 1375 - 7<sup>th</sup> AVENUE

Telephone: 612.709.7906

City/State/Zip: NEWPORT MN 55055

JEFF ELLERD

### Property Owner Information

Name: VEOLIA ES SOLID WASTE MIDWEST LLC

Telephone: 651.403.5705

Mailing Address: 1375 - 7<sup>th</sup> AVE

Telephone: 612.709.7906

City/State/Zip: NEWPORT MN 55055

JEFF ELLERD

### Project Information

Site Address: 1545 - 7<sup>th</sup> AVENUE Subdivision: RIVERWOOD AC

Lot #: 1-14 Blk #: 3

PID# \_\_\_\_\_

#4

Type of Construction: \_\_\_\_\_ Use of Building: \_\_\_\_\_

Occupancy Group: \_\_\_\_\_ Occupancy Load: \_\_\_\_\_ Variance Granted, Date: \_\_\_\_\_ Zoning District: MX-1

Off Street Parking: Spaces Required 0 Spaces on Plan 0 Fire Sprinklers Required:  Yes  No

(NON-CONFORMING)

Type of Permit (Circle One): Residential / Non-Residential If not residential, specify: COMMERCIAL

Type of Work (Circle One): New / Addition / Repair / Remodel

Project Cost: \$95,000

- Other:  Fireplace  Mechanical  Plumbing  Sewer/Water  Finish Basement  Residing  Deck  Porch  Garage
- Business Sign  Swimming Pool  Storage Shed (Larger than 10'X12')
- Residential Demolition  Commercial Demolition
- Residential Reroofing  Commercial Reroofing  Commercial Fencing  Residential Retaining Wall (Over 4')
- Commercial Retaining Wall (Over 4')

Description of Proposed Project or Work to be Done: INSTALLATION OF 15,000 GALLON DIESEL ABOVEGROUND STORAGE TANK.

Size/Dimensions of Parcel: \_\_\_\_\_ Size/Dimensions of Structure: 30' x 60'

Is the property in the floodplain? No  Yes  : Circle: 100 year 500 year

\*If 100 year, regulatory Flood Protection Elevation must be determined and as-built elevations must be certified.

### Professionals Involved

General Contractor: ZAHL-PETROLEUM MAINTENANCE License Number: MPCA # 37 Telephone: JIM LARSON 612.331.8550

Plumbing: \_\_\_\_\_ License Number: \_\_\_\_\_ Telephone: \_\_\_\_\_

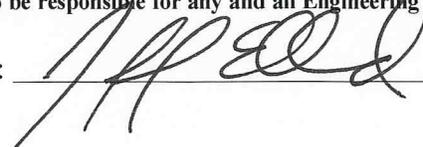
Mechanical Contractor: \_\_\_\_\_ License Number: \_\_\_\_\_ Telephone: \_\_\_\_\_

Electrical: \_\_\_\_\_ License Number: \_\_\_\_\_ Telephone: \_\_\_\_\_

Other: \_\_\_\_\_ License Number: \_\_\_\_\_ Telephone: \_\_\_\_\_

### Applicant Statement and Acknowledgements

I understand, that I am required to comply with City Ordinances, Minnesota State Building Code and all other applicable codes, and that this building permit will expire within 180 days if work is not commenced. I further understand, that before the "C of O" is issued the driveway must be completed and the "Certificate of Survey" Requirements must be met. I will also be responsible for any and all Engineering Services specifically required for this project.

Applicant/Agent Printed Name: JEFF ELLERD Signature: 

**Fees (To be filled in by City)**

Permit Fee \$ \_\_\_\_\_  
Plan Check Fee \$ \_\_\_\_\_  
Penalty Fee \$ \_\_\_\_\_  
State Surcharge Fee \$ \_\_\_\_\_  
MCES SAC Fee (\$2,100) \$ \_\_\_\_\_  
Plumbing Fee (See Schedule) \$ \_\_\_\_\_  
Mechanical Fee (See Schedule) \$ \_\_\_\_\_  
Sewer Hookup Fee (\$100) \$ \_\_\_\_\_  
Water Hookup Fee (\$100) \$ \_\_\_\_\_  
Water Tapping Fee (1" - 1 1/2" \$400) \$ \_\_\_\_\_  
(2" and Over) \$ Time and Material  
Main Trunk Fee: Water (\$1,500) \$ \_\_\_\_\_  
Sewer (\$1,500) \$ \_\_\_\_\_  
City SAC Fee (\$750) \$ \_\_\_\_\_  
City WAC Fee (\$750) \$ \_\_\_\_\_  
Utility Service Agmt. Deposit (\$300) \$ \_\_\_\_\_  
(If Applicable)  
Engineering Fee (\$150) \$ \_\_\_\_\_  
**TOTAL PERMIT FEES:** \$

Make Check Payable to: CITY OF NEWPORT

Payment made: \_\_\_\_\_, 20\_\_ Receipt # \_\_\_\_\_ Check # \_\_\_\_\_ or Cash \_\_\_\_\_

\*\*\*\*\* ITEMS BELOW ARE FOR CITY BUILDING OFFICIAL USE \*\*\*\*\*

**Submittals and Approvals Received by CITY Building Official / Date Application Received:** \_\_\_\_\_

\_\_\_\_\_ Environmental Health Approval      \_\_\_\_\_ Site Plan      \_\_\_\_\_ Energy Calculations      \_\_\_\_\_ Completed Application  
\_\_\_\_\_ Zoning Approval      \_\_\_\_\_ Construction Plans      \_\_\_\_\_ Applicable Waivers      \_\_\_\_\_ Other

Comments/Conditions: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Building Official Approval:** \_\_\_\_\_ **Date:** \_\_\_\_\_