

**LAKE MINNETONKA CONSERVATION DISTRICT  
BOARD OF DIRECTORS**

7:00 PM, Wednesday, September 10, 2008  
Wayzata City Hall

**1. CALL TO ORDER**

Whalen called the meeting to order at 7:05 p.m.

**2. ROLL CALL**

**Members present:** Lisa Whalen, Minnetrista; Tom Tanner, Wayzata; Andrew McDermott, Orono; Tom Scanlon, Spring Park; Doug Babcock, Tonka Bay; David Gross, Deephaven; Steve Johnson, Mound; Dennis Klohs, Minnetonka Beach; Bill Olson, Victoria; Kelsey Page, Greenwood; Richard Siakel, Shorewood; Herb Suerth, Woodland. Also present: Charles LeFevere, LMCD Counsel; Greg Nybeck, Executive Director; Judd Harper, Administrative Technician; and Emily Herman, Administrative Assistant.

**Members absent:** Chris Jewett, Minnetonka; Jeff Morris, Excelsior.

**3. APPROVAL OF AGENDA**

Whalen stated that Seahorse Condominium Association had requested that agenda item 10E be tabled to a future Board meeting. Whalen stated that she had communicated to them that she could not remove the agenda item from the agenda herself and that this would need to be a Board decision.

The Board discussed this request, with a summary of the discussion detailed below:

- To move forward as scheduled because the Board has been fair with the applicant and some concerns have been raised by Seahorse residents.
- The rationale for this request, which included the lack of notification and the need for more time to present their plan to the homeowners.
- The 60-day rule, including the 60-day extension signed by the applicant, and whether tabling this agenda item to the October 22<sup>nd</sup> Board meeting would cause the LMCD problems. Whalen clarified that the latest Board meeting that the agenda item could be tabled to was October 8<sup>th</sup> because of the 60-day rule, although staff has recommended tabling this agenda item only until the September 24<sup>th</sup> Board meeting.
- The Board should take into consideration that a number of the residents at Seahorse leave for the winter and may not be present in late October.
- The Board discussed whether an additional extension to the 60-day rule was appropriate.
- Two new proposed site plans have been submitted today, although LMCD staff has not had the opportunity to review them in detail. However, it was clarified that it appeared both plans worked off the premise of 30,760 cumulative square feet as previously proposed by the applicant.

LeFevere commented on approval of agenda by the Board, which he stated was at the discretion by the Board. From a legal perspective, there is nothing to table at this time because a motion has not been made. However, the request to table by the applicant would essentially continue this agenda

item to a future LMCD Board meeting.

The consensus of the Board was that the Seahorse agenda item should stay on the agenda for discussion at this meeting

**MOTION:** McDermott moved, Babcock seconded to approve the agenda as presented.

**VOTE:** Motion carried unanimously.

**4. CHAIR ANNOUNCEMENTS, Chair Whalen**

Whalen made three Chair announcements. First, she stated that the LMCD office has relocated to Shorewood and invited Board members to stop in if they have not already. Second, she thanked Board members that attended the August 13<sup>th</sup> and 27<sup>th</sup> Workshop/Planning Sessions conducted on the lake. Third, she directed the Board to a letter in their handout folders from Tony Brough who has expressed his concern about being shown on a video at a recent LMCD Board meeting when Eric Lindberg was providing a mid-season update on the 2008 Internet Landing Installed Device Sensors (I-LIDS) project. A video identified by Lindberg implied that Brough had weeds hanging from his trailer, which was erroneous. Whalen extended an apology to Brough and stated that this discussion brings up concerns about the video resolution that the program is utilizing. Further discussion of these issues will be brought up when Lindberg provides the final Report to the LMCD Board sometime this fall.

**5. APPROVAL OF MINUTES- 7/9/08 LMCD Regular Board Meeting  
7/23/08 LMCD Regular Board Meeting**

**MOTION:** Siakel moved, Tanner seconded to approve the minutes from the 7/9/08 LMCD Regular Board Meeting as submitted.

**VOTE:** Motion carried unanimously.

**MOTION:** McDermott moved, Olson seconded to approve the minutes from the 7/23/08 LMCD Regular Board Meeting as submitted.

**VOTE:** Ayes (11), Abstained (1, Tanner); motion carried.

**6. APPROVAL OF CONSENT AGENDA**

Tanner moved, McDermott seconded to approve the consent agenda as submitted. Motion carried unanimously. Items so approved included **6A**, Audit of vouchers (8/1/08 - 8/15/08, 8/16/08 - 8/31/08, and 9/1/08 - 9/15/08); **6B**, July financial summary and balance sheet, and **6C**, 4/11/08 and 6/6/08 EWM/Exotics Task Force Meeting Minutes.

**7. ITEMS REMOVED FROM THE CONSENT AGENDA**

There were no items removed from the consent agenda.

**8. PUBLIC COMMENTS-** Persons in attendance, subjects not on the agenda (limited to 5 minutes)

There were no comments from the public on subjects not on the agenda.

**9. PUBLIC HEARINGS**

There were no public hearings scheduled.

**10. OTHER BUSINESS**

**A. Three Rivers Park District (TRPD),** special event application to close Arcola and Seton channels during painting and sandblasting of bridges this fall.

Whalen asked Nybeck to provide background on this agenda item.

Nybeck reviewed his staff memo, dated 9/4/08, which summarized a request from TRPD to temporarily close the Arcola and Seton channels while sandblasting and painting of the bridges take place later this fall. In 2007, the LMCD issued permits for the Arcola Rail, Seton Channel, and Tanager Lake bridges in conjunction with the Dakota Rail Regional Trail. Work has commenced and an informational meeting was facilitated by the TRPD at the Minnetonka Beach City Hall on August 28<sup>th</sup>. Primary discussion focused on sandblasting and painting of Arcola and Seton channel bridges; which included: 1) efforts to conduct the work during non-peak boating periods, 2) work planned for late September with conclusion by mid October, 3) TRPD's preference is to close each channel down while work is being completed, 4) work could possibly be done in phases (Arcola channel), and 5) the need for an educational campaign announcing this project (a couple weeks in advance of the work). The Executive Director does not have the authority to close these channels down and TRPD needed to get this authorization by the LMCD Board through a special event application. TRPD has proposed the following: 1) to conduct work on the bridges at the Arcola and Seton channels from September 29<sup>th</sup> through October 17<sup>th</sup>, 2) to close each channel down for one week while the sandblasting and painting is being conducted, and 3) to coordinate with Hennepin County (the Sheriff's Water Patrol and Environmental Services) during the closure of each channel. He stated that Alex Meyer from TRPD, and Stewart Crosby from SRF Consulting Group, Inc., were in attendance to comment on this project.

Mr. Alex Meyer, representing TRPD, provided the following update on the project: The trail is constructed and open from the St. Bonifacius trailhead to County Road 19 in Navarre, and from County Road 51 in Orono to the Wayzata trailhead. The Lafayette Club segment between County Roads 19 and 51 remains closed for bridge construction, although a temporary trail connection is still under construction. Bridge painting is scheduled for September and October, with Rainbow, Inc., the contractor. Representatives involved recently met to coordinate the painting project. It was determined that closing the channels was the most safe and efficient option, along with utilizing a barge for sand blasting and painting the steel structures. The schedule provided was as follows: Week of Sept 29<sup>th</sup>- close Arcola channel and work on Arcola Rail Bridge over main channel; Week of October 6<sup>th</sup>- work on east side of Arcola Rail Bridge structure and open main channel; and Week of October 15<sup>th</sup>- close Seton channel and work on Seton Channel Rail Bridge. A public education campaign will include advertising in the local newspapers, along with posting

notices at the Maxwell Bay and North Arm public accesses. He entertained questions and comments from the Board.

Whalen inquired about the effects of the weather on this project.

Meyer stated that the contractor has communicated that the weather needed to be within the 55 degree range. He anticipated heavier traffic on the weekends and suggested that the barge could be removed at that time.

Whalen asked Lt. Carver from the Hennepin County Sheriff's Water Patrol to address the Board.

Lt. Carver stated that he was first made aware of the project two weeks prior to the Memorial Day weekend. At that time, Carver stated that he stopped the project to allow for further logistic planning. He posed the question of painting only one-half of a channel at one time, leaving the remaining half open for traffic.

Meyer stated that the closing of one-half of the channel at a time was a possibility. However, it is not desirable because of the set-up time involved, in particular the scaffolding on the barge.

Babcock stated that he believed the project needed to be done for the safety of the contractor. However, he believed that the channels needed to remain open on the weekends and that only one channel be worked on at a time. Additionally, he believed that signage over the channels was appropriate, not just at the public accesses.

Mr. Tony Brough, Hennepin County Environmental Services, stated that the Zimmerman Pass channel was closed in recent years when the bridge leading to Enchanted Island was replaced. At that time, other options were provided to the public with the closure of this channel by going around Enchanted and Shady Islands. With the proposed closing of the Arcola and Seton channels for this project, he believed that the inconvenience for the public outweighs the contractor's needs and recommended that one-half of the channel remain open.

The Board discussed the TRPD in great length, with a summary of the discussion detailed below:

- Whether there were alternative options to paint and sandblast these bridges.
- The buoys installed by Hennepin County Environmental Services each boating season are contracted to be removed between October 15<sup>th</sup> and November 15<sup>th</sup>.
- A consensus that the bridge at the Seton channel should be painted first, with the closure of only one channel at a time.
- The working schedule of the contractor, which would most likely include eight hour working days on Mondays through Fridays.
- Clarification that the Sheriff's Water Patrol was not adequately staffed to monitor these channel areas.
- The need to ensure that these channels are re-opened by 12 NOON on Fridays.
- Whether the main channel at the Arcola Bridge could be painted one-half at a time, including whether this created a public safety situation.

Meyer requested that the Board leave the completion date on the back end of this project open-

ended.

**MOTION:** Tanner moved, Babcock seconded to approve the TRPD special event application, subject to the following conditions: 1) work on this project shall commence on the week of September 29<sup>th</sup>, 2) work on this project shall commence on the Seton channel bridge first, with each channel to be open at 12 Noon on Fridays through the weekend, 3) no more than one channel can be closed at a time, 4) the barge and channels to be closed shall be adequately indentified through lighting and buoys, and 5) each channel shall be closed while the painting and sandblasting is being conducted on the bridge.

**VOTE:** Motion carried unanimously.

**B. Lake Minnetonka Association (LMA), discussion of LMA Position Statement on Lake Minnetonka Milfoil Control.**

Whalen asked Nybeck to provide background on this agenda item.

Nybeck stated that the LMA had submitted a Position Statement this past spring relating to milfoil control on Lake Minnetonka. At that time, it was referred to the EWM/Exotics Task Force for their review and comments, with discussion taking place at the June 6<sup>th</sup> and August 22<sup>nd</sup> meetings. The consensus of the Task Force was that: 1) the analysis and recommendations of the LMA are premature at this time, and 2) further analysis of the 2008 coordinated herbicide treatment project should be available sometime later in 2008.

Suerth stated that further discussion on the 2008 coordinated herbicide treatment project was planned for the October 10<sup>th</sup> EWM/Exotics Task Force meeting, with a Report anticipated from John Skogerboe from the Army Corps of Engineers and some herbicide dosage recommendations from Se-PRO. He believed that there were some misconceptions of the success of the program between the residents on the three bays and the technical committee of this project, which is the EWM/Exotics Task Force. He hoped to have a Report available to the residents on these three bays so that miscommunication on the 2008 project will not be made.

Whalen stated that based on the October EWM/Exotics discussion, she believed that recommendations and a plan of action for 2009 will be created. This will include a Report, identifying what worked and what did not work, and what is proposed for 2009 to address what did not work in 2008. Firm recommendations will be made to provide the Board guidance on their participation of this project for 2009.

**C. Lake Minnetonka Charter Boat Association, staff update on proposed Quiet Water request at the Cedar Point East channel on Wayzata Bay.**

Whalen asked Nybeck to provide background on this agenda item.

Nybeck reviewed his staff memo, dated 9/4/08, which summarized a request from the Lake Minnetonka Charter Boat Association (LMCBA) for a Quiet Water designation at Cedar Point East

on Wayzata Bay. He reviewed: 1) observations made by the LMCBA at the March 12<sup>th</sup> Board meeting, 2) detailed and topographical maps delineating the channel, 3) a review of LMCD Code Section 3.02 and the 1986 Quiet Waters Policy Statement, 4) a review of LMCD staff observations of this channel on July 27<sup>th</sup> and August 1<sup>st</sup>, and 5) a review of four options that he believed the Board could consider. He believed that there was a lot of traffic that uses this channel, primarily because of the Grays Bay public access, and that it made sense to schedule a hearing this fall to gather public input on this channel, including feedback on the four options. If a public hearing is facilitated, representation from the Hennepin County Sheriff's Water Patrol and Environmental Services will be coordinated in conjunction with this hearing.

**MOTION:** Gross moved, Suerth seconded to direct staff to schedule a public hearing this fall relating to LMCBA Quiet Water request at the Cedar Point East channel on Wayzata Bay.

Suerth stated that he utilizes the channel on a regular basis and has been overtaken by other watercraft at full throttle within the channel.

Siakel stated that he would not like to see the channel closed. However, he would consider designating a Quiet Water designation at the channel, or installing additional buoys, for safe passage at high speed. He questioned whether the lack of an accident or citations means that the channel is safe.

**VOTE:** Motion carried unanimously.

**D. Al and Alma's**, discussion of 8/20/08 letter relating to LMCD Code and State of Minnesota regulations pertaining to charter boats.

Whalen asked Jay Soule from Al & Alma's to provide an overview of his 8/20/08 letter.

Soule made the following comments:

- Newly imposed and pending regulatory changes, compounded by dramatic increase in operating costs, have caused him to address the Board so that they may recognize critical differences between commercial passenger vessels and recreational vessels operating on Lake Minnetonka. The focus of this concern relates specifically to LMCD Code Section 3.01, subd. 22, which specifies the size of watercraft.
- Charter boats are regulated and licensed by three separate governmental agencies (the State of Minnesota, Hennepin County, and the LMCD). On behalf of Al & Alma's, he requested that Board consider updating the LMCD's rules and regulations to fairly recognize the need for charter boats to be increased in size to provide for the newly imposed and pending regulations.
- He provided a thorough review of Code Section 3.01, subd. 22, stating that it does not provide for a critical difference between commercial and recreational vessels. He outlined the license and inspection process of operating a commercial vessel, including recent and pending regulatory changes, which address passenger capacity.
- He reviewed Code Section 3.07, subd. 9, which does not address the newly imposed Code of Federal Regulations (CFR) 33 and 46 and supersedes LMCD Code for both

stability and capacity. He provided a thorough comparison of the new and old weight capacity regulations, which would result in a decrease in passenger capacity from 149 to 115, a 23 percent reduction. He further reviewed the regulations pertaining to commercial equipment, construction planning, and grey water storage, all of which increase the weight, space and electricity of the vessel, resulting in further reduction in passenger capacity.

- He requested that the Board consider the following: 1) that charter boats not be subject to same size restrictions as recreational boats, 2) that the LMCD Code incorporate equitable considerations for both size and capacity, 3) that AI & Alma's is sensitive to still having amended restrictions in place and that their goal is to maintain, not increase, fleet capacity, 4) that the regulations may reduce licensed charter boats in the AI & Alma fleet, and 5) that they would maintain their fleet within the licensed dock use area. All considerations are to maintain the prices that make Lake Minnetonka an obtainable venue to the public.
- He recommended that the Board direct staff to research this topic and work with AI & Alma's, along with the LMCBA, on updating LMCD Code for long term use. However, he requested that the Board provide a short-term provision for AI & Alma's to move forward with updating the 2009 fleet. AI & Alma's honors and respects the rules and regulations processes that are in place. He was not present to ask for a specific size boat, but to work with staff to come up with a vessel that can hold 149 passengers on a vessel, which was the former passenger capacity prior to the regulatory changes.
- He entertained questions and comments from the Board.

Tanner asked Soule if he knew the amount of revenue AI & Alma's would lose due to the new and pending regulations.

Soule stated he did not have an exact figure; however, he reiterated the 23 percent decrease in passenger capacity.

Siakel stated that one outcome of increasing the vessel size for charter boats would increase the beam of the boat. Prior to an ordinance change, the Board should take into consideration the channel widths on Lake Minnetonka.

Gross stated that the 23 percent reduction in passenger capacity does not directly relate to the stability calculation. He believed that they may be able to increase the weight of the boat and still maintain the stability requirements.

Soule stated that the boats are already certified at 140 pounds per passenger. To increase passenger capacity would result in a lengthy stability process.

Babcock stated the new regulations are addressing a top priority, public safety. He recommended that research be conducted on why Code Section 3.01, subd. 22 was originally adopted.

LeFevere stated there are some old CFR regulations that could be revised in the LMCD Code. The size of the boat referenced in LMCD Code was in response to a charter boat owner wanting to

build a new boat and the Board, at that time, determining how large of a boat they would like on Lake Minnetonka.

Tanner offered to work with LMCD staff on this matter.

LeFevere re-stated that if Al & Alma's had a size recommendation for a Code amendment that this might make it easier to react to a short-term provision.

Whalen stated that Tanner, LeFevere, and LMCD staff would research Al and Alma's request and report back to the Board. She thanked Soule for his time.

The meeting was recessed at 8:44 p.m. and reconvened at 8:49 p.m.

**E. Seahorse Condominium Association**, staff update of 2008 reconfiguration of a non-conforming multiple dock license application.

Whalen stated that Seahorse President Steve Carlson has asked that this agenda item be tabled to the October 22<sup>nd</sup> LMCD Board meeting. This will allow him to post the proposed site plans for a specific amount of time for the Association members. Due to the 60-day rule, Whalen did not believe that tabling the agenda item to the October 22<sup>nd</sup> Board meeting was an option. In fact, staff has recommended only tabling this agenda item to the September 24<sup>th</sup> LMCD Board meeting. She provided a historical review of Board action and discussion to date. She believed that the Board could: 1) table the agenda item as requested, 2) provide the applicant clearer direction on approved square footage, 3) approve the existing facility as is, 4) deny the application for lack of an application, or 5) deny the application as being presented at this meeting.

Nybeck stated the clearest Board direction to the applicant was in May when the Board stated that they would support 26,800 square feet for the overnight Boat Storage Units (BSUs) (67 BSUs that are 12.5' wide by 32' in length). This Board direction was based off a one inch equals 100' scale, which has recently been deemed to be incorrect. At the July 9<sup>th</sup> LMCD Board meeting, Carlson asked for 30,760 square feet for the 67 overnight BSUs. The Board had a motion on the floor to deny the application for 30,760 square feet; however, it was withdrawn to allow Carlson to work with the Association on whether they would compromise this position.

Gross asked for clarification on the 60-day rule pertaining to this application.

Whalen stated that the application was received and deemed complete on April 30<sup>th</sup>. A unilateral request was made by the LMCD for a 60-day extension to the 60-day rule, as allowed by state law, within the first 60 days. In July, the applicant signed a consent form for an additional 60 days to allow the Board to process the pending application. This brings the time clock for the LMCD to process the application to the latter part of October, 180 days from April 30<sup>th</sup>.

Lengthy discussion was held amongst the Board as to whether any further extensions should be provided. That discussion ranged from providing an extension, as long as progress was being made, to the Board already providing the applicant direction. A number of residents have requested closure on the matter and a number of Board members have questioned whether

progress has been made by the applicant towards the square footage direction already provided by the Board.

LeFevere stated that there was nothing to suggest from a legal perspective that there will be a compromise on approved square footage for the overnight BSUs. At some time, the Board will need to make a decision on the appropriate square footage based on the evidence that has been provided. To be legally defensible, it should be based on the best and most credible evidence. Basing a decision on compromising the evidence might make the decision more difficult to legally defend. One option for the Board to consider, which the applicant would need to agree to, would be to keep what currently exists through a back licensing process previously used by the LMCD. He reviewed the process, outlined in Code Section 2.02, subd. 4. However, he clarified that such an application had not been received.

McDermott stated that he believed the 26,800 square footage provided by the Board in May to the applicant was based off of credible evidence.

Harper stated further evidence documented by LMCD staff has shown that the one inch equals 100' scale on the 1984 approved site plan, which was used by the Board in May, was erroneous.

Nybeck provided the Board further details of why the one inch equals 100' scale on the approved 1984 site plan was erroneous. This is further explained in the second and third paragraphs on page two of a 9/5/08 staff memo.

Whalen asked Carlson to address the Board and asked him if a compromise of 26,800 square feet would be considered for the overnight BSUs.

Mr. Steve Carlson, 5450 Three Points Blvd. #611, apologized for not following through with the Board direction at the July 9<sup>th</sup> meeting. At that meeting, he was unclear of the Association by-laws. The next Association's Board meeting is September 24<sup>th</sup> and reiterated the need for a proposal to be presented at the October 22<sup>nd</sup> Board meeting. He offered to sign an additional extension to the 60-day rule.

Whalen re-asked Carlson whether Seahorse would be willing to compromise consistent with the Board's direction.

Mr. Jim Regan, 5430 Three Points Blvd. #135, stated he was a Seahorse member and was on the Mound City Council when site plan was originally approved. He spoke on behalf of the residents that want the dock plan to be left alone, although there is a need to replace the walkway and decking. He stated that these residents do not want to pay to install a marina. He personally knows the individual that installed the original docks and will attest they were not 32' in length.

Page asked Regan to clarify what is there now.

Regan stated that he believed the 24,418 square feet for the overnight BSUs, as documented by LMCD staff, existed in 1978.

Klohs asked Carlson what square footage he was going to communicate to the Association for the 67 overnight BSUs.

Carlson stated he would tell his Board that he believed that the 30,760 square footage was a supportable position. However, he will communicate that he has not been able to convince the LMCD Board of this and that 26,800 square feet might be supported by the Board.

**MOTION:** Page moved, Siakel seconded to table discussion of the pending 2008 Seahorse application until the October 22<sup>nd</sup> LMCD Board meeting, subject to signing an additional 60-day consent form to the 60-day rule.

**VOTE:** Ayes (11), Nays (1; Tanner); motion carried.

Whalen stated that she believed the Board should provide clear direction on the square footage that they would agree to for the overnight BSUs.

Babcock stated he has not had the ability to review LMCD staff's recommendation on an acceptable square footage based on the evidence provided. He recommended that this should be voted upon at the next Board meeting that this application was discussed.

Page stated that although he has been against the 26,800 square footage that the Board provided as direction to the applicant in May, he believed that it was quite clear that was the outer limit for square footage. He believed that the actual square footage for the overnight BSUs was more like 22,000 to 23,000. He questioned whether further Board direction was needed.

Regan asked what enforcement options the Board would have if the pending application were denied.

Nybeck stated possible enforcement options include criminal prosecution, the filing of a civil lawsuit, or the scheduling of a public hearing for possible license revocation.

Carlson requested that these possible enforcement options be outlined in writing.

The meeting was recessed at 9:55 p.m. and reconvened at 9:58 p.m. During this time, Carlson signed a 60-day extension to the 60-day rule.

- E. Update on pending litigation with Lisa Smith/William Hite relating to Minnetonka Beach (Dock Site 10).

Whalen asked for background on this agenda item from LeFevere.

LeFevere stated that the lawsuit had been dismissed by the plaintiffs, without prejudice.

- F. **WYC (Site 2-3) and WCSC (Site 4)**, discussion of approved special density license order.

Whalen stated that a special density license was approved for these three sites on July 23<sup>rd</sup>.

Since that time, information came to light that power boats were going to be stored at the various sites and that some Board members expressed concern that they were under the assumption that only sailboats would be stored based on the discussion. She stated that Bert Foster, representing both the WYC and the WCSC, was in attendance to answer any Board questions.

Babcock questioned what the purpose of this agenda item was at this meeting. The current Order allows for the storage of power boats at these sites, as well as the Board allowing for storage of power boats at these sites in other years.

Foster concurred with the comments made by Babcock. For over 40 years, the WYC has been able to rent slips out to all types of boat users. He reminded the Board that previous discussion was held during the recent special density license applications process about the eight slips at the sailing school maintaining power boats; along with the slides having coach boats. Most boats within the sailing school are motorized as the sailboats maintain motors.

Whalen thanked Foster for his time in clarifying the situation.

#### **11. EXECUTIVE DIRECTOR REPORT**

There was no Executive Director Report.

#### **12. ADJOURNMENT**

There being no further business, the meeting was adjourned at 10:12 p.m.

Lisa Whalen, Chair

Andrew McDermott, III, Secretary