

**LAKE MINNETONKA CONSERVATION DISTRICT  
BOARD OF DIRECTORS**

7:00 P.M., Wednesday, February 27, 2013  
Wayzata City Hall

**1. CALL TO ORDER**

Babcock called the meeting to order at 7:02 p.m.

**2. ROLL CALL**

**Members present:** Doug Babcock, Tonka Bay; Dan Baasen, Wayzata; Andrew McDermott, Orono; Gary Hughes, Spring Park; James Doak, Woodland; Jay Green, Mound; Ann Hoelscher, Victoria; Anne Hunt, Minnetrista; Keith Kask, Deephaven; Dennis Klohs, Minnetonka Beach; Jeff Morris, Excelsior; Rob Roy, Greenwood; Sue Shuff, Minnetonka; and Mark Sylvester, Shorewood. Also present: Charlie LeFevere, LMCD Counsel; Greg Nybeck, Executive Director; Judd Harper, Administrative Technician; and Emily Herman, Administrative Assistant.

**Members absent:** None absent.

**3. APPROVAL OF AGENDA**

**MOTION:** McDermott moved, Hughes seconded to approve the agenda as submitted.

**VOTE:** Motion carried unanimously.

Shuff arrived at 7:04 p.m.

**4. CHAIR ANNOUNCEMENTS**, Chair Babcock

There were no Chair announcements.

**5. APPROVAL OF MINUTES – 01/23/13 LMCD Regular Board Meeting**

Green proposed changing the last sentence of the second paragraph on page three, which referenced the basic fee for the Texas test, to \$20. He stated the prior documentation of \$23 to \$150 was based on their watercraft licensing fees. To this end, the sentence would read, "He stated the basic fee for the Texas test is \$20 and that it was a lifetime license that could produce revenue for many things."

Klohs proposed changing the second bullet point sentence, under "A summary of the Board discussion....." on page six to read as follows: "Klohs requested clarification that (based on a trend chart offered) over the last five years, the LMCD staffs' salaries and benefits, as a percentage of the total levy, increased from 58% to 70%."

Hunt stated that she previously provided Herman wording to reflect her comment made relative to the City of Minnetrista's compensation adjustment. The fourth paragraph on page seven would read as follows, "The Board had a brief ..... for 2013 (including Hunt's comment that the City of Minnetrista is offering a 1% compensation adjustment; acknowledging this was not a reflection on the qualification of both the city and

LMCD staff).”

**MOTION:** McDermott moved, Hunt seconded to approve the minutes from the 02/13/13 Regular Board Meeting as amended, making the changes noted above.

**VOTE:** Ayes 11, Abstained (3; Baasen, Doak, and Sylvester); motion carried.

## 6. APPROVAL OF CONSENT AGENDA

Nybeck directed the Board to an amended Audit of vouchers in their handout folder; providing for the addition of check numbers 19612 and 19613 to Hennepin County Treasurer in the amount of \$200 (updated database) and Lafayette Club in the amount of \$3,507.90 (Save the Lake Recognition Banquet invoice), respectively.

Baasen moved, Hunt seconded to approve the amended Audit of vouchers (2/16/13 – 2/28/13). Motion carried unanimously.

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

There were no public comments.

## 8. PUBLIC HEARINGS

There were no public hearings.

## 9. OTHER BUSINESS

### A. Steve Tallen, update from LMCD prosecuting attorney.

Babcock welcomed Tallen and invited him to address the Board.

Tallen thanked the Board for this opportunity and made the following comments:

- He stated, on behalf of the new members, that his responsibility is to prosecute those that violate the LMCD ordinances in and around the Lake.
- A large percentage of his work is prosecuting Boating While Intoxicated (BWI) violations (working closely with the Sheriff's Department/Water Patrol on this and other safety violations). More recently, he has worked with LMCD staff relative to the Proactive Code Enforcement Program. He acknowledged positive progress relative to that program; although 2012 provided for repetitive prosecution in some cases (which will be treated differently this time around).
- Prosecutions provide for the maximum punishment of one year in jail (gross misdemeanor for drunken boating and snowmobile cases). He acknowledged that snowmobile cases are down due to the Sheriff not allowing officers on unsafe ice conditions.
- Fine revenue for 2012 totaled \$105,036.03. Fees and expenses total \$39,874.75. He commented that last year's totals are a little unusual as typically the revenue is one half the total offered. In fact, fine revenue for the least two years has exceeded attorney fees, prefacing that this is not typical.

- He provided an overview of how the Courts have changed their hearing schedule to a block system, in which the prior system provided for a faster outcome (BWI cases heard within six weeks).
- He provided a detailed update on the on-going litigation relative to the breathalyzer machine, in which the State of Minnesota has since changed the type of machine that is used.
- He acknowledged that the Lake area provides for a substantially different economic demographic; providing for more Lake offenders hiring private defenders. He offered the perspective of litigating twice as many cases for the LMCD as he does for Maple Grove's drunken driving cases, in which he serves as their prosecuting attorney.
- He entertained questions and comments from the Board.

Seeing no questions, Babcock thanked Tallen for his presentation.

**B. Discussion of LMCD Code relating to low-water conditions**

Babcock asked Nybeck for background on this agenda item.

Nybeck directed the Board to his staff memo, dated 2/21/13, which provided for a number of attachments that were considered during the Executive Committee's (committee) discussion relative to this matter. He stated that if the Board did not have any questions relative to those attachments, he recommended turning this matter over to LeFevere who will be leading the overview for this agenda item.

Hunt recommended that the fourth possible condition on the first page of LeFevere's memo be pulled for consideration. This condition would require that docks and related equipment associated with low water extension permits and variances could not be removed from the lakeshore until one year after it has been removed from the Lake to reduce the spread of aquatic invasive species (AIS). She believed that this is a huge topic that should be considered at another time for lake-wide use.

Babcock, from the committee (and his) standpoint, stated that recommendation was presented due to the additional dock sections under such conditions being more prevalent. The committee took into consideration the need not to prevent the sale of the dock structures but to prevent the sale and transportation of the dock structures to other bodies of water (i.e., Christmas Lake).

Hunt understood Babcock's comments but added this condition would also be extremely difficult to enforce.

Babcock believed that sometimes setting expectations with the public is better than the actual enforcement. He acknowledged that it may not be enforced proactively, which is considered with other LMCD ordinances.

Hunt recognized that this condition is based on the prevention of AIS and she believed it should be considered "across the board," and not just for the declaration of low water conditions.

Green stated the current State of Minnesota (state) law provides for the inability to transport a dock section off the Lake prior to 21 days. He asked why the LMCD should consider going from 21 days to one year. He believed that the above noted condition would create a conflicting message; whereby one neighboring property owner has to wait a full season and the other 21 days. He recommended the LMCD remain consistent with state law.

Babcock stated that historically the Board has not support this condition lake-wide. Therefore, he was attempting to bring this up as a condition on this topic (reiterating the need to lower the risk of spreading AIS with a potential sale of dock structures in the spring).

Baasen stated that enforcement, if needed, may be possible for low water extension permits and variances that are on record with the LMCD.

Babcock stated that he believed the concept was not to consider the sale of dock sections for 365 days but the same season the dock sections were purchased.

Baasen recommended the idea of labeling docks that are purchased for temporary extensions.

Green stated that the state also provides for the inability to transport the dock structures on the highway prior to 21 days.

Morris believed that a more uniform standard should be considered; not 21 days for one purpose and one year for the other. He stated that he would reluctantly consider a one year condition if there was a sunset condition/mechanism attached to re-consider the matter in the near future.

Babcock believed the condition provided for a slight economic impact to the Lake owners; recognizing a lake-wide condition would include all dock structures, trampolines, appurtenances, etc.

Nybeck stated that LeFevere is prepared to provide an overview on the subject noted above, as well as many other areas for the Board to discuss and consider. If agreeable to the Board, he recommended LeFevere present this overview to the Board.

LeFevere stated that Hunt's concern relative to the committee's recommendation, noted above, is not specifically addressed in the draft ordinance. A great deal of information was provided in the packet (which he listed) and offered the following comments (starting with the draft ordinance and circling back to his memorandum, which is based on the committee's discussion):

- The draft ordinance was ready to be moved forward; subject to the Board's review and approval.
- He provided an overview of two provisions that were not directly addressed in the draft ordinance:
  - 1) removal of structures from the Lake until the following year (to prevent the spread of AIS) and
  - 2) addressing problems that can be caused by rising water levels after low water dock extensions have been installed (visibility and navigational hazards). He stated that he will review the reasons behind this action after he provides the overview of the draft ordinance itself.
- Specific to the draft ordinance, he outlined the following amendments:  
LMCD Code Section 2.01, Subdivision 2 d)

- Currently, the Board can declare “Low Water” any time the water level falls below 928.0 feet. The Board has struggled with this condition at times when the water levels are just below such. Therefore, the committee recommended imposing the ability to declare “Low Water” when the levels are below 928.0 feet for five consecutive days (after ice out). He reiterated the continued use of the word “may” (within the draft ordinance) in declaring “Low Water” conditions; providing for more guidance to the Board.
- The Board may impose conditions on low water dock extensions in the resolution adopted by the Board for such (i.e., a timeline in the sale of dock extensions, etc.).
- When a declaration is made, the executive director (director) is authorized, under limited conditions (six outlined within the adopted ordinance), to issue permits for temporary dock extensions beyond the authorized dock use area (DUA). Although limited, this provides for not having Board approval for every application. Condition #4, within the draft ordinance, was amended to 1) clarify the language relative to reaching the water depth that exists at the end of a DUA (when at normal water levels of 929.4 feet) and 2) addressing the committee’s interest in not having to remove the dock extensions until the end of the boating season (based on fluctuating water levels).
- Applications submitted to the Board for consideration are those that do not meet the requirements outlined in the draft ordinance.
- The director may impose additional conditions on a temporary dock extension permit (i.e., addressing concerns of unusual dock configurations or nearby channels). The ordinance provides for the applicant’s ability to appeal the imposition of the condition or denial thereof. Additionally, an application would come to the Board if it did not meet all the requirements offered for a temporary dock extension (not within the discretion of the director).
- All applications that come before the Board for consideration would be processed under LMCD Code Section 1.07.
- Violation of a condition (imposed by the Board or the director) is grounds for prosecution for revocation of permit and denial for such in subsequent years.

LMCD Code Section 1.07, Subdivision 9

- This section of the current ordinance only references multiple dock licensees. The amendment would provide for the Board to issue temporary low water variances for all docks and moorings not otherwise allowed by Code; continuing with the Board’s ability to waive the application and public hearing requirements of Subdivisions 4 and 6, respectively.
  - The addition that the Board may, by resolution, authorize the director to issue renewal low water variances subject to such limitations specified in the resolution (providing examples of).
- He directed the Board back to page one of his memorandum, within the packet, and made the following comments relative to the seven committee recommendations for draft ordinance changes relative to low water conditions:
    - First, the Board may declare low water conditions after Lake elevations have been below 928.0 feet for five consecutive days (after ice out) was added within the draft ordinance.
    - Second, to increase the number of feet that a dock may be extended under the general permit (authorized by the director) for non-multiple docks from 20 feet (in place during

- 2012 declaration) to 30 feet was not added to the draft ordinance. This recommendation was not included in the draft ordinance based on the 2012 establishment of that process; providing for the ability to increase the requirement to 30 feet via the director himself or direction of the Board for such.
- Recommendations three, four, five, and six (staff to issue renewal multiple dock low water variances if there have no violations and no changes to the dock plan, the inability to remove docks and related equipment from the lakeshore for one year, and the inability to install the dock sections to cause visible or navigational hazards, respectively) were all indirectly addressed within the draft ordinance via the ability to impose conditions upon the adoption of a resolution (acknowledging that some of those recommendations could be considered lake-wide and not just for low water conditions).
  - Seventh, the applicant is not required to remove the dock sections if the Lake level rises during the same season was directly addressed within the draft ordinance.
  - He addressed the more difficult recommendations (as outlined in the third bullet point above) via the ability to impose specific conditions through a resolution process. He offered the Board the ability to move forward with the draft ordinance in preparing for the possibility of low water conditions yet this spring, which would allow time for consideration of the more complex matters that could be addressed at any time via resolution (through the adopted ordinance).
  - He entertained questions from the Board.

The Board and staff had a lengthy discussion relative to this agenda item. The following comments and responses were provided (offered via underlined subtitles):

**Variances Being Tied to Property**

LeFevere stated that variances typically approved by the Board are associated with the property. However, temporary dock extension variances are only good for one year (providing for the Board's ability to waive any public hearing requirements as deemed appropriate).

Babcock outlined the three variances, offered by Code, that have historically been administered relative to this subject matter. He suggested a process for one application that can be approved by the Board for multiple years (should the appropriate application be considered). This process would allow for his goal to let the dock installer and neighbors work out the extension details.

LeFevere stated that the draft ordinance provides for that process, as well as the ability to stipulate the director's approval of its renewal or any other conditions warranted, via resolution.

Babcock expressed concern that the resolution process would not provide for future Boards to understand what a past Board processed. His goal is to provide approval whereby a property owner does not have to come back to the Board, or the director, once the variance is approved. Additionally, he would like to see all conditions (including the general permit) spelled out in the ordinance; providing for one location of reference for dock extensions during low water conditions.

LeFevere clarified what Babcock is suggesting is a permanent variance for low water conditions.

Hunt stated that she believed making that condition part of the draft ordinance takes away the ability to be flexible, which is what LeFevere is offering via the resolution process.

Babcock believed what was learned last year could be conditions of the draft ordinance (including the sale of dock structures).

Baasen stated that he believed whatever is considered needs to be as simple as possible.

LeFevere stated the price one pays for simplicity provides for loss of control in regulations; providing for an overview of what was historically administered (the general permit operating with the authority of the director). The whole program can be placed in the draft ordinance; however, the removal of the flexibility makes it difficult to process future amendments of such. To this end, if the draft ordinance is changed to reflect such, it is the same as utilizing the resolution process.

Babcock stated that he believed what was historically administered was great and should now be placed within an ordinance itself.

**Committee Recommendations #1 and #4 (declaring low water after five consecutive days after ice out and the timeframe set forth in the sale of dock structures, respectively)**

Sylvester expressed concern about committee recommended changes #1 and #4. He reviewed historical water levels considered by the Board last year and believed that the establishment of the five consecutive days takes away the Board's use of common sense. In regards to #4, he believed consideration of such was more constitutional. He concurred more with the state's 21 day law vs. imposing the inability to sell/transport the structures until the end of the season; providing for unduly restricting the owners' ability to enter commerce.

Babcock concurred with Sylvester that it is a more restrictive, imposed condition. He believed the Board was creating an artificial situation relative to low water level conditions as the docks that are used regularly during normal water level conditions are more likely to be utilized annually and stay with the property. He believed that the state is reconsidering the 21 day restriction for something more restrictive.

Sylvester stated the volume of restriction does not matter if it is unconstitutional. He requested LeFevere's opinion in this regard.

LeFevere stated that he would not be too concerned about imposing a violation of the interstate commerce law. The challenge to the law would be based on whether the imposed condition would be reasonable; providing for the consideration of the current 21 days. He clarified that the idea behind the one year provision was, in reality, by the next boating season. Therefore, the Board would have to decide if that condition would be reasonable to impose. He stated that he would be more concerned with the preemption argument as the state has not necessarily preempted the field of establishing the 21 day law. If that law was challenged, the LMCD would be in a better position of having to prove the extended sale/transport time was more reasonable based on specific reasons.

Babcock stated the LMCD is allowing the owners to place additional dock structures in a public space, in which he would expect them to be responsible for that opportunity. Therefore, he did not believe the imposed condition would be unreasonable.

Sylvester concurred with the general thought but would like to know what is reasonable.

Hunt stated that setting the timeframe for the sale/transport of dock structures should be tabled for future consideration.

Green stated that he would be attending the state-wide AIS Advisory Committee Meeting the next day and would ask where they stood relative to the 21 day law. He asked all to keep in mind that owners buying dock extensions during low water conditions are most likely going to dispose of, and not sell, their older dock sections and keep the new.

Babcock stated that the timeframe for the sale of dock structures is not going to be settled by the end of March. He recommended continued debate but make an effort to encourage responsible behavior.

Hoelscher was unsure where she stood on setting a timeframe but recommended an educational component be worded within the draft ordinance to keep the subject on the forefront of the owners' minds, in which Sylvester questioned outlining state law.

Babcock stated that he was not against establishing the LMCD as a leader in considering many of the issues discussed above. He reiterated his goal of streamlining all the conditions within the ordinance to provide for one area the site residents would reference; providing for setting expectations of reasonable behavior in the prevention and spreading of AIS. He stated that that he was not concerned that all Code provisions would not be proactively enforced.

Nybeck stated that this was addressed as part of the process for general permits and approved temporary low-water variances in 2012. He read the following statement from the 2012 process "To prevent the spread of AIS, in particular Zebra mussels, the applicant agrees that no part of the dock or dock structure will be transported away from Lake Minnetonka until after December 31, 2012."

#### **Water Level Trigger Points in the Declaration and Removal of Low Water Conditions**

Babcock stated that he was less concerned about establishing the number of consecutive days needed when low water conditions could be declared vs. when it could be removed. He believed that if the water level is above a certain water level reading for more than five days, it should automatically go off and not require Board action (providing for staff's ability to stop giving out or accepting temporary permits). He recommended that trigger point be 928.6 feet, which is normal fall run out at the Grays Bay Dam.

LeFevre stated that the more automatic the declaration is removed, the less owners will know they cannot install dock extensions after an off date is established.

Babcock reiterated the establishment of the 928.6 foot trigger point; providing for the Board to have to re-declare low water conditions should the water level drop back down to 928.0 feet.

Nybeck outlined how this process was administered in 2012. The declaration was terminated in early June after a significant rainfall over the Memorial Day weekend, in which he estimated that the Lake level was 929.3 feet. If the Board decides that they would like an automatic trigger point when the "Low Water" declaration would be terminated, he recommended a higher level to terminate it because it does not take long for the Lake levels to fluctuate.

Babcock believed the LMCD needed to react to the Minnehaha Creek Watershed District's opening and closing of the dam as the normal range to consider.

Baasen stated that he believed it was the goal of the committee to delegate authority to the director in consideration of this matter; providing for a more simplistic process. He believed that the Board was losing their direction in considering this matter via getting hung up with discussions of specific water level trigger points.

Babcock stated his goal was to codify this ordinance; therefore, it needed to be concise. If that is not the Board's direction, then establish the declaration of low water conditions via resolution; providing for the director's ability to do so.

Sylvester directed the Board to LeFevere's memo (subparagraph a on page two) and recommended the removal of the words, "for five consecutive days," in which some Board members concurred.

**Continued Board Discussion on Remaining Committee Recommendations (#2, #3, #5, #6, and #7)**

**Recommendation #2 (increased footage for extension of dock structures under the general permit for non-multiple docks)**

Babcock stated that he would like to see this recommendation placed in the Code vs. in the general permit. He offered the use of absolute footages within the Code or resolution.

Baasen stated that it should not be an automatic allowance if water levels within one's DUA does not provide for that reading.

Babcock stated that if the Board considers extensions more problematic than not, then a need should be provided for such extension. Additionally, he questioned if the watercraft size and its draft should be considered an acceptable need. He believed there were arguments to both sides of this and solicited the Board's approval to have the general permit allow for a four foot water depth. If the property owner needs more, they have to provide for the need to the Board. No objections were offered by the Board.

**Recommendation #3 (staff to issue renewal multiple dock low water variances based on no violations or changes from a previously approved dock plan approved by the Board)**

Babcock stated that LeFevere previously made a good point that the issuance of a long-term variance that does not require regular Board review is considered a permanent variance. He stated he was okay

with that relative to the variance being issued for low water conditions; providing for a deviation from historical practices.

Nybeck stated a stipulation needs to be established for low-water variances, in which the director has the ability (when warranted) to refer them to the Board for approval. He believed that there were a couple sites from last year that would fall within that need.

Babcock also recommended that if navigability or other adverse situations are created/affected by continued low water, all variances are subject to Board review.

Baasen (in referencing the use of public waters being a privilege and not a right), stated that in some years, one could find that they just cannot dock a watercraft based on its size and draft.

LeFevere requested clarification on the following: 1) that the Board has interest in codifying the general permit requirements (as historically presented) and 2) what authority the Board would like the director to have (i.e., what does the Board want the director to look at).

Babcock stated that he was interested in codifying the general permit requirements. With regards to what authority he would like the director to have, he wanted the director to look at anything that does not meet the requirements of the general permit.

LeFevere stated the process noted above would contradict Babcock's interest in not requiring multiple steps to obtain their permit.

Babcock stated that he was comfortable, for the first year, in the director bringing forth one of the following two choices for the Board's consideration: 1) a minor exception to the general permit that is placed on the consent agenda for approval (providing for the lack of need to seek renewal) and 2) more detailed consideration of a request; providing for their approval or denial. He confirmed that if approval to the latter was provided, they would not have to seek renewal. He viewed the above situations as an exception to the general permit; however, once the exception has been established, it runs with the property.

Nybeck stated that the process set up in 2012 allowed the director to approve simplistic temporary low-water variances at residential sites. If these sites were not simplistic, the requests were referred to the Board for consideration and approval. He requested clarification whether those simplistic requests would continue to be addressed at staff level.

Babcock stated he was trying to roll the simplistic requests into the general permit. Neighborhood inquiries or conflicts relative to low-water variance requests should be taken into consideration by the Board.

Nybeck and LeFevere then questioned if staff is to notify the neighboring property owners of the request going before the Board.

Babcock stated that he did not want the LMCD or the public to incur expenses associated with a public hearing (i.e., the need for a survey and legal costs associated for publication and notification of neighboring property owners).

Hunt and McDermott suggested that a new ordinance should include a condition that if the neighbors protest or things change, any approved temporary low-water variance would need to be re-assessed by the Board.

Nybeck stated that he believed staff and LeFevere had general consensus and direction from the Board on this matter. He recommended that the Board allow staff to update the draft ordinance and memorandum from LeFevere and bring this back for Board discussion on March 13th. .

#### **10. Update from standing LMCD Committees:**

Babcock asked for an update from the Chair, or designated representative, of each committee (Save the Lake, AIS Task Force, Finance, Personnel, Public Safety, and Ordinance Review).

Morris stated that he and Babcock are to be getting together to finalize the draft Comprehensive Eurasian Watermilfoil and Curly-Leaf Pondweed Plan for Board consideration at their March 13<sup>th</sup> meeting, in which Babcock confirmed that timeframe.

Baasen stated that the Save the Lake Committee recently met in which the following three commitments were made: 1) the committee was going to meet more regularly throughout the year, 2) to continue to fund projects needed, within its charter, to the Lake community, and 3) to undertake the development of a certified boat operator training and handling program; incorporating safety, rules, and the environmental impacts. He believed the committee has a great deal of passion for the above noted commitments. Additionally, he noted that some funds have been secured for the safety program and that additional funds are being sought. He stated the next committee meeting will be held on March 19<sup>th</sup> (third Tuesday of every month), 8:30 a.m. at the LMCD Office.

McDermott asked if the Board needed to revisit the funding formula that was established for Save the Lake.

Baasen provided an overview of programs that have historically been funded; confirming the intent to increase solicited funds each year. However, the funding of projects is urged but not annually required.

Hughes stated the requested information from the member cities relative to bow fishing will be due in the near future, in which staff will compile the information for Board consideration on March 13<sup>th</sup>.

There was no Finance, Personnel, or Ordinance Review Committee reports.

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

There was no Executive Report.

Hunt solicited the Board's thoughts in consideration of holding one regular Board meeting a month.

Babcock confirmed that meetings are cancelled when light agenda topics warrant such; confirming most are cancelled during the summer months based on the Chair's approval.

## **12. ADJOURNMENT**

There being no further business, the meeting was adjourned at 9:20 p.m.

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Doug Babcock, Chair

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Andrew McDermott, Secretary