

6. APPROVAL OF CONSENT AGENDA

Roy moved, Shuff seconded to approve the consent agenda as submitted. Motion carried unanimously. Items so approved included: **6A)** Audit of vouchers (4/16/15 - 4/30/15); **6B)** February and March financial summary and balance sheets; **6C) City of Wayzata**, draft Findings of Fact and Order approving 2015 new multiple dock and special density license applications; and **6D) Bayshore II HOA**, staff recommends Board approval of 2015 new multiple dock (minor change) license application as outlined in 4/17/15 staff memo.

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. Craig Rapp, LLC, Chair update on LMCD Strategic Plan Facilitator Proposal

Baasen asked Zorn to provide an update on this agenda item.

Zorn stated that the Strategic Planning Committee will be meeting with Mr. Rapp early next week, in which she was confirming the date and time. She believed the meeting would provide for an overview of the currently submitted proposal and the drafting of a service agreement. She stated that the Board previously agreed to dedicate the first meeting of each month working with the facilitator; with the second meeting providing for regularly scheduled agenda items. With that said, Mr. Rapp has confirmed the first meeting of every month worked within his schedule.

Nybeck requested she communicate the scheduled date and time with staff for posting purposes (to ensure compliance with the Open Meeting Law).

Baasen asked if Rapp continues to anticipate a June start date.

Zorn confirmed Rapp intends to start in June. She stated that Rapp believed that time frame would coincide with the completion of the Carlson School of Management survey, as well as some of the Board members not being able to attend some of the scheduled May meetings.

B. 2015 EWM Harvesting Program, consideration of awarding Truck Hauling Bids

Baasen asked Harper for an overview of this agenda item.

Harper directed the Board to his staff memo, dated 4/21/15. He provided a detailed overview of the trucking bids that were recently submitted. He stated that staff identified irregularities with the C & C Lawns, Inc. bid. Specifically, they did not provide the required bid information as outlined within the Instructions to Bidders and that the trucks proposed did not meet specification (providing photographs of how the transport barge off loads

into a correctly specified truck). To this end, he recommended the Board reject the bid from C & C Lawns, Inc. and award the contract to Curfman Trucking & Repair, Inc. at the 2015 rates outlined within the staff memo. Upon approval, a contract will be executed after all the necessary documents have been received. He entertained questions and comments from the Board.

Baasen questioned how many years the LMCD has contracted with Curfman Trucking & Repair, Inc. for this service, including whether or not the LMCD has been satisfied with their work.

Harper confirmed the LMCD has contracted with Curfman Trucking & Repair, Inc. for an estimated 13 years and that staff has been satisfied with their work.

MOTION: Green moved, Jabbour seconded to award the bid to Curfman Trucking and Repair, Inc. for the trucking of EWM and other lake vegetation for the 2015 EWM Harvesting Program.

Shuff questioned if the LMCD's use of two or three harvesters has an impact on this type of trucking service the LMCD solicits bids for (referencing a comment made by Green at the Special LMCD Board meeting earlier this evening).

Green stated that his comment pertained to the fact that the LMCD has to harvest so many acres in order to receive sufficient grant funds from the MN DNR to cover the program's expenses, as well as the acknowledgement that there are less off load sites on the east side of the Lake vs. west side.

Harper confirmed that having two harvesters rather than three would not impact the trucking contract as you need to have the truck there to off load the harvesters. In referencing Green's comments, he stated it really plays into how quickly the harvesters can off load as it is more efficient to have closer compost sites to alleviate the truck's travel time.

VOTE: Motion carried unanimously.

C. Shorewood Yacht Club (Site 1), consideration of overpayment of fees from 2009 through 2015

Jabbour, owner of Shorewood Yacht Club (SYC), recused himself from this agenda item.

Baasen asked Nybeck for an overview of this agenda item.

Nybeck directed the Board to his staff memo, dated 4/15/15. He provided the following comments:

- Background Information:
 1. The mailing of 2015 renewal (without change) multiple dock license applications on 10/30/14.
 2. Subsequently, a representative of the SYC communicated that their proposed 2015 application fee for Site 1 did not seem accurate.
 3. Staff worked with that representative to determine the accurate slip sizes (based off of physical measurements of the dock) and ascertained the respective fees (including overpayment of past boating seasons).
- Overpayment Assessment:
 1. The application fee includes a \$50 base fee plus \$7.50 for each watercraft storage unit (WSU),

which is based off of the size of each boat storage unit (BSU). Based on this application fee and the field assessment of the BSUs, it was determined that the annual overpayment was 70.5 WSU (\$528.75).

2. LeFevere has communicated to staff that the statute of limitations for overpayment of fees is six years. Based on this matter being brought to the LMCD's attention last November, the LMCD could not legally consider overpayment of fees prior to November of 2008.
 3. He directed the Board to a spreadsheet within their packet that outlined the receipt of \$3,191.25 in overpayment of annual multiple dock license fees from 2009 to 2015 (2009 – 2014 annual overpayment of \$528.75 and \$18.75 for 2015).
- Recommendation: Staff recommended the Board approve a refund of \$3,191.25 in overpayment of application fees from the General Reserve Fund to SYC. He acknowledged that fees for SYC's Site 1 will be corrected for the 2016 boating season.
 - He entertained questions and comments from the Board.

Green asked if staff was reviewing other applications to confirm this matter did not exist with other licensed holders, to which Nybeck stated yes. Green further questioned the above interpretation of the six year statute of limitations (he believed that date did not start until a respective offense stops), as well as how far back the overpayment existed.

LeFevere stated that the six year statute of limitations starts to run when the cause of action accrues (the date on which a suit could first be brought). There is an exception for specific continuing courses of conduct; however, he stated that would not apply in this situation as each payment is a discrete and separate obligation like an installment payment. He further explained that each overpayment was its own event and that could have been sued upon within the six year period of time. The rationale for the LMCD considering extending that time frame a little past six years was that the owner brought the overpayment to the LMCD's attention last fall so staff is recommending refunds for the six year period before it was first brought to staff's attention, even though the licensee did not commence a lawsuit at that time. The six year period is a general statute of limitation that is most likely to apply in this case rather than any of the shorter statute of limitations. The idea behind declining to pay for the period outside of the statute of limitations is that a public body may not use public funds to make a payment for a claim that it is not legally obligated to pay.

Zorn referenced Green's question as to how far back the overpayment existed.

Harper stated the WSU concept was adopted by the LMCD in 1987. From 1987 to 1997, SYC wrote in 237 WSUs on the applications. In 1997, LMCD staff simplified the application process by populating (established database mail merge) the WSU count into the renewal without change application for the applicants' review and approval. That populated WSU number was signed off on SYC's applications from 1997 through 2005. In 2006, a new application was submitted due to a change in the ownership of the facility (SYC). A representative of the SYC manually wrote in the changed WSU count of 240 (from 237). This new WSU number of 240 was entered into the LMCD's database and renewal without change applications were generated to the applicant for their review from 2007 to 2010. In 2011, another new application was submitted by the same owner, in which the same WSU number of 240 was manually entered. This number continued to be documented on the renewal without change applications until this matter was brought to the LMCD's attention.

Green believed that had there not been a statute of limitations, the overpayment could have been substantially much larger.

Baasen reminded the Board that there is the statute of limitations in place.

LeFevere stated a Minnesota court had recently renewed a doctrine of law whereby if a payment is required by public body, even if it is an illegal requirement, one can decline to pay it but one cannot get it back after it is paid. He recognized that is a harsh result; however, if push came to shove, he believed that law would be utilized as the legal argument. He further stated the public body is not profiting from such payments and that funds received affect how the budget is adjusted the following year.

Zorn questioned if staff was setting a precedent via their efforts to simplify the application process by populating the documented WSUs directly into the application (comparing the LMCD process to an invoice vs. application in which non-payment would prevent a stakeholder from operating on the Lake). She struggled with this matter based on: 1) not knowing who provided the documented WSU number of 240 and 2) the overpayment was made by a stakeholder within her represented city which was brought to her attention by other avenues than staff (expressing concern for lack of communication). In closing, she asked who is responsible for determining the accuracy of the applications and if the other applications are currently being reviewed for accuracy.

Nybeck directed the Board to the fee assessment spreadsheet provided by staff in the packet. The breakdown of 240 WSUs on the renewal (without change) applications from 2009 through 2014 was provided by staff based on information offered by SYC in 2006.

Rob asked if staff verified the WSU number.

Nybeck confirmed that number was not verified in 2006. He reiterated that the WSU number was provided by the applicant. Therefore, when the current applicant brought this matter to the LMCD's attention, staff believed a valid point was made and the LMCD, in consultation with LeFevere, offered the above noted correction for overpayment. He believed this unique matter was not the fault of either party and that the staff is requesting approval of this matter so that all parties can move forward.

Roy stated that approval of staff's recommendation would move this matter forward; however, he expressed concern that staff is not verifying the accuracy of the applications submitted.

Nybeck stated that prior to 2006, SYC (Site 1) did not have a breakdown of the BSUs and WSUs. In 2006, the representative provided the breakdown of the WSUs (offering the 240 number). The matter of asking the applicant to validate the number of WSUs dates back prior to 1990.

Baasen asked if there was a possibility that someone would submit a documented number on the application and staff would then just accept that number.

Harper stated that this particular site plan goes back to the 1980s and is of poor quality and does not have dimensions. In most cases, when sites make changes to their facility, the LMCD requires an

updated site plan which documents the dimensions of all BSUs and other dock dimensions.

Baasen asked if there have been any adjustments to SYC's (Site 1) licenses, in which Harper stated that there had not.

Thomas believed staff's recommended resolution of this matter was a good one; acknowledging this is offered on the advice of LeFevere. He asked if the annual renewal notice highlighted the calculations of how the WSU and BSUs are determined.

Harper confirmed the renewal application does calculate the documented WSU and BSU numbers.

Thomas stated that the applicant then had the ability to review and change the end numbers should they feel they were incorrectly offered.

Baasen questioned if it was a courtesy or an obligation for the LMCD to go back six years when determining the assessment of the application fee was incorrect.

LeFevere stated that decision would depend on how hard of a line the LMCD would like to take. If the LMCD were not a governmental body, it could pay amounts overpaid more than six years ago; however, because the LMCD is governmental, it does not have the ability to give away more money than it is legally required to pay. In his opinion it does not matter who is at fault as the applicant would not be entitled to any more funds either way.

Baasen invited Jabbour to address the Board.

Jabbour stated that he does not want the LMCD's money but their accountability. He resented the use of the word overpayment in addressing this matter as he believed it should be represented as an overcharge. The LMCD was in receipt of a letter from a respected stakeholder who formerly owned SYC and filed the original multiple dock license application, in which the stakeholder documented that he did not know how the LMCD concluded their fees. He challenged the Board by asking how many knew what a BSU was. He reiterated that the money is not the issue as he would donate ten times that amount to benefit Lake Minnetonka. His goal in pursuing this matter is to bring accountability and fairness to the LMCD. He also believed the LMCD has a lot of housekeeping that needed to be performed. The matter of who is responsible is irrelevant. He stated that his legal counsel advised him that he could collect for 28 years (plus interest). As he is a member of the Board, he is trying to work with the LMCD and communicated that he would forego any and all interest. He recognized this matter is not worth the time in pursuing; however, he believed that when the LMCD steps on someone's toes, they should offer an apology. In closing, he stated that he knows more about marinas and docks than most people on this Lake. However, he relied 100% on staff to assess the application fees. He referenced the example of how many people know where their taxes are going but everyone had the option to go to tax court and receive a refund if warranted.

MOTION: Green moved, Shuff seconded to approve the reimbursement of \$3,191.25 in overpayment of SYC (Site 1) renewal without change application fees from 2009 to 2015.

MOTION TO AMEND: Zorn moved, Caron seconded to change the word “overcharge” vs. “overpayment” within the motion.

Baasen asked LeFevere if that request could be considered.

LeFevere stated it is a decision for the Board.

Hughes questioned what word was utilized on the application.

Nybeck confirmed that the renewal without change application that referenced the fee structure documents the word “payment.”

Caron stated, to Jabbour’s point, that he would like the LMCD to acknowledge that a significant error occurred. She believed that his comment to recognize this as an overcharge vs. overpayment was a way for the LMCD to acknowledge that point.

VOTE ON MOTION TO AMEND: Ayes (9), Nays (1; Shuff), motion to amend original motion approved.

Caron questioned if the LMCD was reviewing all renewal without change applications relative to this matter and if so, what was the process for such and when will the Board be apprised of the outcome.

Nybeck stated he would initiate that exercise if it is the direction of the Board. He directed the Board back to the attached spreadsheet within the packet. He stated that SYC (Site 1) is unique in that it is the only facility on the Lake that, for years, did not have the breakdown of BSUs and WSUs (referencing the left side of the spreadsheet which is also documented within the renewal without change application). Prior to 2006, the LMCD only had the BSUs of “82” and WSUs of “240.” He further stated that the breakdown listed on the renewal without change application is what is offered in the application. In closing, he was open to reviewing all applications if that was the Board’s direction.

Caron believed a process issue existed in which the LMCD did not have a check and balance system with the applicants in place. She asked if the LMCD was counting boats on the Lake then why was staff not verifying the site plans.

Thomas suggested that the bill that outlined the calculations of the WSUs and BSUs could provide the checks and balances, in addition to the original numbers that were offered by the applicant.

Caron concurred that process offers one procedure of checks and balances; however, she believed the LMCD should be reviewing those numbers for accuracy.

Zorn concurred with Caron’s comment. She further stated that the LMCD could build on that process by

sending out the applications earlier than usual and documenting within a cover letter that if the applicant believes their numbers should be verified to call the LMCD office (offering further education). She did not believe the LMCD was giving the applicant the ability to re-verify their numbers.

Baasen stated that prior to the Board directing staff to review each application; a process should be in place.

Zorn stated that staff documented SYC (Site 1) was a unique application (offering the lack of detail) and questioned why that detail was not addressed sooner than later.

Nybeck stated that the LMCD has a very specific cover letter that is offered with the renewal without change application (reiterating this is an application and not an invoice or bill). Within that letter, staff offers, in bold, the ability for the applicant to make any changes to the application that they deem not correct and staff would work with the applicant to update the database. This matter also pertained to the calculation of the BSUs and WSUs (reiterating this letter goes out on an annual basis). He believed the Board was speculating on this matter; therefore, he will bring back detailed documentation of the cover letter, renewal without change application, and staff's process that is in place to process such.

Zorn believed that information would have been helpful in considering this agenda item.

VOTE ON Motion carried unanimously.
ORIGINAL
MOTION (AS
AMENDED):

10. UPDATE FROM STANDING LMCD COMMITTEES

Harper stated Ordinance Review Committee chair Dennis Klohs would like to schedule a committee meeting prior to the May 13th Regular LMCD Board Meeting.

Nybeck reminded the Board that it has already scheduled a Special LMCD Board Meeting for 5:30 p.m. on May 13th to further review the draft 2016 LMCD Budget. The Board recommended Harper contacting Klohs; offering to schedule the ORC meeting after the May 13th Regular LMCD Board Meeting.

Green stated the next Aquatic Invasive Species (AIS) Task Force is scheduled for May 8th at the LMCD office. Additionally, the West Metro AIS Committee held a workshop on April 10th, in which Nybeck and Jabbour were in attendance. He asked for an update on that meeting.

Nybeck stated the workshop was well attended and offered a variety of information (offering AIS high profile guest speakers). He believed the workshop was well received. An update of this session will be provided at the May 8th AIS Task Force meeting.

Baasen asked if the recent newspaper articles relative to zebra mussel treatments on Christmas Lake will have any implications on Lake Minnetonka.

Green did not believe so based on the logistics of Christmas Lake, single access, etc. Additionally, he stated he and Jabbour met with Drs. Sorensen and McCartney relative to the consideration of different AIS transportation risk factors offered with various types of watercraft. Specifically, addressing a common comment that a specific boat is at high risk of carrying AIS; however, there is not research to back the comment up. Their goal is to develop a program and request funding to obtain more concrete data.

Jabbour stated this project will tie in to his work with American Boat and Yacht Council (ABYC) on developing new manufacturing specifications for watercraft, which will be 100% privately funded.

Hughes stated that he will work with Nybeck on the continued consideration of amendments to the High Water ordinance. He did not believe it was necessary to send this matter back to the Public Safety Committee.

Nybeck stressed the importance of this matter remaining at the Board level.

Baasen stated the Save the Lake (STL) Committee will be meeting on April 28th at 7:30 a.m. to discuss: 1) the STL solicitation letter, 2) the recently held STL banquet, and 3) the last two Boater Safety Education Program sessions scheduled for June. Additionally, the Executive Committee will also be meeting that date at 5:00 p.m. in follow-up to discussions held with the yacht clubs, as well as discussing the Executive Director's performance review.

11. EXECUTIVE DIRECTOR REPORT

Nybeck directed the Board to his Executive Director Report, dated 4/22/15, within their handout folders. This report offered a list of past and upcoming meetings, as well as this date's Lake level reading of 928.55'. He reminded the Board that the Minnehaha Creek Watershed District keeps the dam closed when the water level is below 928.60'. Additionally, he stated a few telephone calls came in relative to low water and that historical Lake levels were listed within his report.

12. OLD BUSINESS

There was no old business.

13. NEW BUSINESS

Jabbour recommended the Board invite a representative from the Lake Minnetonka Association (LMA) to present an update on, possibly, a monthly basis.

Zorn asked if there were other agencies that should be offered the same invitation.

Baasen believed the Minnehaha Creek Watershed District (MCWD) and Three Rivers Park District typically have a full plate; however, he recognized the LMA has members that are direct residents of the Lake.

Jabbour recommended the LMCD reinstate the Lake outings that were previously held with the MCWD.

Meyer questioned what whole bay treatments were planned for 2015.

Rob confirmed that all eight bays (St. Louis and Carson's combined) will be treated this year. He acknowledged that St. Albans and Grays Bay were not treated in 2014 due to the historic high water levels. He further stated that the Cities of Excelsior and Greenwood have appointed board members to the St. Albans Bay Lake Improvement District (LID). He anticipated the first meeting to be held in late May.

14. PERFORMANCE EVALUATION- 2014 Performance Evaluation of the Executive Director

LeFevere stated that the Open Meeting law (Section 13D.05, Subd. 3) provides an exception for the Board to close a meeting for the purpose of personnel evaluations or personnel subject to its control (the Executive Director). Prior to closing the meeting, the Board must identify the individual(s) being evaluated, which is the only topic allowed to be discussed. If the Board moves to close the meeting, a summary of the results of that personnel evaluation must be provided at the following open Board meeting. Additionally, if the Board is not going back into an open meeting, the Board is required to announce the meeting will be adjourned upon completion of the executive session.

MOTION: Jabbour moved, Thomas seconded to: 1) go into Executive Session at 8:00 p.m. to discuss the Executive Director's personnel evaluation, as allowed by Open Meeting Law and 2) adjourn the meeting upon completion of the executive session.

VOTE: Motion carried unanimously.

Dan Baasen Chair

Gregg Thomas, Secretary