

**LAKE MINNETONKA CONSERVATION DISTRICT
BOARD OF DIRECTORS**

7:00 PM, Wednesday, April 8, 2009
Wayzata City Hall

1. CALL TO ORDER

Whalen called the meeting to order at 7:00 p.m.

2. ROLL CALL

Members present: Lisa Whalen, Minnetrista; Tom Tanner, Wayzata; Tom Scanlon, Spring Park; Doug Babcock, Tonka Bay; Peter Hartwich, Excelsior; Chris Jewett, Minnetonka; Steve Johnson, Mound; Keith Kask, Deephaven; Dennis Klohs, Minnetonka Beach; Bill Olson, Victoria; Kelsey Page, Greenwood; Herb Suerth, Woodland; Dick Woodruff, Shorewood. Also present: Charles LeFevere, LMCD Counsel; Greg Nybeck, Executive Director; Judd Harper, Administrative Technician; and Emily Herman, Administrative Assistant.

Members absent: Andrew McDermott, Orono.

3. APPROVAL OF AGENDA

Whalen requested two changes. First, she asked that the LMA Report (agenda item 11) be moved in front of agenda item 10. Second, she asked that agenda item 6C be removed from the agenda to allow for discussion at the 4/10/09 EWM/Exotics Task Force Meeting. She anticipated that agenda item 6C would be back on the agenda for the 4/22/09 Regular LMCD Board Meeting.

MOTION: Tanner moved, Jewett seconded to approve the agenda as amended, with the two changes requested by Whalen.

VOTE: Motion carried unanimously.

4. CHAIR ANNOUNCEMENTS, Chair Whalen

Whalen stated that the next LMCD Strategic Planning Session was scheduled for April 15th at 5:30 p.m. in the LMCD office. She stated that Tonka Bay city council member Gerry De La Vega, who has been assisting the Board in this project, would not be able to make this meeting. She solicited the Board's availability on another meeting date. However, due to the Board's higher availability rate for April 15th, the meeting remained as scheduled.

5. APPROVAL OF MINUTES- 3/25/09 LMCD Regular Board Meeting

Whalen stated that under Chair Announcements on the top of page two, she would like the record to reflect that the LMA Report be presented by a "LMA representative" rather than a "LMA Board member". Additionally, she questioned the accuracy of the motion on page five for the purchase of a new copy machine. Specifically, the Board's approval of \$787.80 annually for a maintenance agreement, with the approval to adjust as needed.

Herman stated that the motion was accurate and that the Board approved a maintenance agreement on a per copy basis. The \$787.80 is an annual estimate charge of the office's current usage. The Board provided approval for staff to adjust that particular figure as deemed necessary.

MOTION: Jewett moved, Olson seconded to approve the minutes from the 3/25/09 LMCD Regular Board Meeting as amended, providing for the LMA report to be presented by an LMA representative.

VOTE: Motion carried unanimously.

Babcock arrived at 7:09 p.m.

6. APPROVAL OF CONSENT AGENDA

Babcock stated that the record should reflect that the draft grant agreements (agenda items 6B and 6C) are proposed to be funded by Save the Lake.

Whalen concurred and updated Babcock that agenda item 6C had been removed from the agenda.

Woodruff moved, Babcock seconded to approve the consent agenda as amended, with agenda item 6C already removed from the agenda. Motion carried unanimously. Items so approved included **6A**, Audit of vouchers (04/01/09 – 04/15/09); **6B, Lake Minnetonka Association**, 2009 Save the Lake Grant Agreement for the EWM Treatment Project on Carmans, Grays, and Phelps Bays; **6D, 2009 Multiple Dock Licenses**, staff recommends Board approval of renewal (without change) applications for Curlys Minnetonka Marina, Inc.; Minnetonka Edgewater Apartments; and Seton Village, Inc. that have been paid in full; and **6E, Reimbursement of Variance Deposits**, staff recommends Board approval of partial refund of the \$250 deposits, as outlined in 4/2/09 staff memo, for recently approved variances from LMCD Code.

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 public comments.

9. PUBLIC HEARING

- **Al & Alma's**, new on-sale intoxicating liquor license applications for the charter boats Allante and Bella Vista.

Whalen asked Harper for background on this agenda item.

Harper reviewed the staff memo, dated 4/01/09, which summarized a request for new on-sale intoxicating liquor licenses, with Sunday option, for the charter boats Allante and Bella Vista. He stated

that Allante had previously been issued non-intoxicating malt liquor and wine licenses. Bella Vista is a newly built boat that has replaced the formerly owned charter boat, Avalon. He recommended that the Board approve the following: 1) the new on-sale intoxicating liquor license applications, with Sunday option, for Allante and Bella Vista, 2) a full refund of the \$3,000 preliminary investigation deposit for the new intoxicating liquor license application for Bella Vista, 3) the approval of the Excelsior City Dock, Lafayette Club, Al and Alma's, and the Wayzata Depot Dock as authorized ports of call for Allante, and 4) the approval of Al and Alma's and the Wayzata Depot Dock as authorized ports of call for Bella Vista. He entertained questions and comments from the Board.

Whalen asked if any of the refundable funds were utilized.

Harper stated that expenses incurred by the Hennepin County Sheriff's Department for background checks have historically not been invoiced back to the LMCD. Thus, the entire \$3,000 preliminary investigation deposit for new intoxicating liquor license applications was routinely reimbursed upon approval by the Board. However, the Sheriff's Department has informed the LMCD that they are going to start billing the LMCD for their expenses incurred in background investigations. To date, the LMCD has not received an invoice delineating expenses incurred for the Al & Alma's background check.

Tanner asked if the applications were submitted prior to the Sheriff's notification to start invoicing expenses incurred for background investigations. Additionally, he asked for confirmation on whether the proposed ports of call were approved by the various cities.

Harper stated that the applications were submitted after receipt of notification to start invoicing for expenses incurred for background investigations. However, he believed that any expenses to be incurred would be paid for out of the applicant's non-reimbursable portion of the application fee. He pointed out that Al & Alma's have four other charter boats on Lake Minnetonka, with each of them having an intoxicating liquor license. It was his understanding that the \$3,000 deposit was for additional investigation fees (attorney fees for new applications vs. renewal applications). He stated that all municipalities have approved the ports of call.

Whalen asked if the applicant was present and if they had any comments to add.

Ms. Merritt Geyen, owner of Al & Alma's, stated that she was comfortable with Harper's presentation and did not have any further comments.

Woodruff asked if the LMCD was limited to the number of intoxicating liquor licenses that could be issued.

LeFevere stated the LMCD was originally authorized by State law the same number of intoxicating liquor licenses that could be issued by a City of a Third Class, 14. However, the State has expanded the definition of the type of licenses that count within the 14. Specifically a licensee that maintains a restaurant would not count as one of these 14 intoxicating liquor licenses. Because all of the intoxicating liquor licenses issued by the LMCD are to charter boat operations in which a restaurant is offered, the LMCD has not been subject to a limitation.

Whalen opened the public hearing at 7:16 p.m. There being no comments, she closed the public hearing at 7:17 p.m.

MOTION: Tanner moved, Johnson seconded to: 1) approve the 2009 AI & Alma's new on-sale intoxicating liquor license applications, with Sunday option, for the charter boats Allante and Bella Vista, 2) approve the Excelsior City Dock, Lafayette Club, AI and Alma's, and the Wayzata Depot Dock as authorized ports of call for Allante, and 3) approve AI and Alma's and Wayzata Depot Dock as authorized ports of call for Bella Vista.

VOTE: Motion carried unanimously.

The consensus of the Board was to hold off on the refunding of the \$3,000 preliminary investigation deposit until an invoice has been received from the Hennepin County Sheriff's Department.

11. LMA REPORT

Whalen stated that the Lake Minnetonka Association (LMA) has requested to have a standing agenda item at the first LMCD Board meeting of each month. Richard Glidewell was in attendance on behalf of the LMA and she welcomed him on behalf of the Board.

Mr. Richard Glidewell, representing the LMA, thanked the Board for this opportunity. He stated the purpose of this agenda item is to insure good communication and confirmation that the LMCD is aware of what the LMA is doing. He provided an overview of the LMA's current activities by highlighting the following:

- The spring LMA Newsletter was currently out to press and should be out within the next week.
- The LMA is currently receiving questions from residents on recent changes to MN DNR rules pertaining to what's allowed for herbicide treatments at residential properties.
- The LMA is currently involved in an upcoming policy statement from Minnesota Waters on aquatic invasive species (AIS). Specifically, this policy statement will evaluate how to deal with AIS on a statewide basis.
- A Minnesota Waters Conference is scheduled in Rochester on May 7th and 8th.
- The City of Greenwood has requested that a plant inventory survey be conducted on St. Albans Bay, which would be funded by the bay residents.
- Upcoming events sponsored by the LMA include: 1) the 8th Annual Clean the Lake Event at Bayview Event Center on June 13th, and 2) the 3rd Annual Golf Event at the Minnetonka Country Club on August 10th.
- An update on the 2009 Herbicide Treatment Program in which all three bays were confirmed for participation (Carmans, Grays, and Phelps Bays). The MN DNR Grant has been approved for this project and he expressed appreciation of the Board's approval of the 2009 Save the Lake Grant for this project.
- Prevention of new AIS, in particular zebra mussels, is planned for discussion at the upcoming EWM/Exotics Task Force meeting. He discussed the heightened awareness, concerns, and the active communication about the presence of zebra mussels in nearby bodies of water, specifically Lake Mille Lacs. He touched base on the MN DNR's concerns for Lake Mille Lacs and the impact the zebra mussels will have on that lake. He stated the LMA will be considering their involvement in

an adopt-an-access program for Lake Minnetonka in 2010 and believes, due to time constraints, their best time spent in 2009 is to help establish programs to increase the current inspections of incoming watercraft.

- He entertained questions and comments from the Board.

Tanner stated that he and Glidewell would be working together for the purpose of creating educational, volunteer, and other programs for the prevention of zebra mussels. This work will be done in coordination with the EWM/Exotics Task Force.

Whalen stated that there was an upcoming EWM/Exotics Task Force meeting scheduled for April 10th, which is chaired by Board member Suerth. This Task Force involves representatives from a number of governmental agencies and other organizations that share a common concern for the prevention of AIS and the need for public awareness. She stated that the LMCD has worked with the MN DNR on a watercraft inspection program since 2001. She thanked Glidewell for his Report.

10. OTHER BUSINESS

- **Charles and Shanda Shannon**, side setback and adjusted dock use area (DUA) variance application at 3800 Sunset Drive in a lagoon off of Coffee Cove Channel.

Whalen asked Nybeck for background on this agenda item.

Nybeck reviewed his staff memo, dated 4/3/09, which summarized the Shannon's request for a side setback and an adjusted DUA variance to clarify their docking rights at the subject site, with the hardships of converging lot lines and unusable water. He made the following comments:

- The site consists of approximately 79' of continuous 929.4' shoreline that is located within a lagoon area immediately to the west of Lord Fletchers of the Lake. The applicants have proposed the following: 1) a 13 degree deflection of the westerly and northerly extended side site lines, 2) a reduction of side setback requirements from the adjusted side site line extensions, and 3) the storage of two watercraft, with the watercraft to be stored on a lift in slip #1.
- He stated that the Board considered this application at the January 28th meeting in which a public hearing was conducted. At that time the Board tabled the request for the following reasons: 1) to allow staff to work with the applicant on water depth readings in the vicinity of the dock, and 2) to allow the applicants to work with representatives of Lord Fletchers, the City of Spring Park, and other local agencies on drainage issues.
- In follow-up to water depth readings, he and Mr. Shannon measured water depth readings at this site on February 4th. In general, it appears that water depth readings in the applicants DUA are quite shallow.
- A meeting was facilitated on March 9th with the applicants, Board member Scanlon, James Wisker from the MCWD, and representatives from Lord Fletchers and the City of Spring Park to discuss what may be contributing to the drainage issue in this area and the MCWD permitting process for a dredging permit. The consensus of those in attendance believed the drainage issues should remain separate from the docking issues.
- While the drainage issue is being resolved, the Board needs to provide the applicant's on what's allowed (and not allowed) relating to docking and boat storage in 2009, and possibly

longer. He believed that there were two approaches for the Board to consider. First, the Board could grant a temporary variance until dredging occurs. Second, the Board could grant a variance for the 2009 boating season and beyond.

- He believed that a hardship of converging lot lines clearly exists. However, there is a question of whether unusable water is a hardship because it appears to be a financial hardship rather than a hardship caused by LMCD Code. Water depths in this area are quite low and will most likely require some form of a dredge in the future.
- The applicants have requested to be allowed to continue the current dock structure. When considering this variance application, Nybeck recommended that the Board take into consideration the following: 1) to adjust the northerly extended side site line by 13 degrees as proposed; however, maintain the westerly extended side site line as it currently is, 2) to reduce side setback requirements within these extended side site lines (with the Board to deem what are reasonable side setbacks taking into consideration the canopy), 3) to restrict the number of restricted watercraft to one (slip #1), with consideration of size limitation due to the shallow water, and 4) to require LMCD staff to register any Variance Order against the title of the property, with fees incurred by the LMCD to be charged back against the Shannon's variance deposit.
- He entertained questions and comments from the Board.

Tanner asked what the time limitation might be for a temporary variance.

Nybeck stated that the time limitation could be until a dredge occurred.

Whalen expressed the need for a date to be set should the Board consider a temporary variance.

LeFevere stated that there is a hardship for shallow water that was caused, in part, by the runoff. The owner of the property may or may not want to dredge; noting that dredging is based on the approval of a permit not under the LMCD's control. If the Board granted a variance based solely on the hardship of the converging lot lines, than the Board could do so. However, if the Board granted a variance, or part of the variance, based on water depth and a dredging occurred, that hardship would cease to exist.

Tanner asked LeFevere if a time frame could be set for a temporary variance based on dredging.

LeFevere stated that the LMCD does not have control over the issuance of a dredging permit and believed it may not be reasonable for the owner to take on that type of a burden while the drainage issues have not been resolved.

Babcock asked if the adjustment of extended lot lines would improve access to deeper water. He believed the current dock needs to be relocated so that the exit of the dock is more parallel with the lagoon shape. In doing so, he questioned if moving out more to the north would provide relief with water levels.

Nybeck deferred that question to the applicants.

Scanlon stated that he had recently visited the site with the applicants. Along the east side of the lagoon there is a culvert that has drained into the area for over 30 years. He provided background on the

location of the drainage sentiment as it relates to the current placement of the dock structure. He stated that in talking with the local agencies involved, the MCWD does not like to provide dredging permits but will do so in some cases.

Nybeck directed the Board to a letter in their handout folder from the neighbors, Jason and Leah Maki, dated 4/8/09, outlining their requests for the Board's consideration.

Klohs stated that the dock structure was installed at the present location many years ago with the sediments building up over time. He believed that it is now impossible to move the dock structure to the north or east due to that build up.

Babcock stated that the dock structure was originally installed through mutual consent with the abutting neighbor. Now that the mutual consent has been removed, the dock structure becomes an illegal structure by LMCD Code and the applicants do not have the right to continue the use of the structure in the original position without continued consent.

Whalen believed a permanent situation needs to be resolved; with the possibility to provide temporary extensions based on results and time frames.

Babcock stated that the purpose of granting variances, with physical hardships, is to provide reasonable access to the lake, not to continue with placement of an illegal structure. He recommended that the Board solve the concerns presented on a permanent basis with the facts before them. If changes are made in the future, these should be considered by the Board through new applications.

Whalen invited the applicants to address the Board.

Mr. Charles Shannon, 3800 Sunset Drive, spoke on behalf of the applicants. The former property owners placed the dock structure in the current position due solely to shallow water depth levels starting at the property line. He stated their goal was to come to a simple and final resolution, and that they understood it may be a normal course of business to separate drainage from dock placement issues. However, they believed that in their situation, those matters could not be separated. He directed the Board to a letter in their packet from Northwest Associated Consultants, Inc., dated 1/20/95; specifically to the bottom of page two. He recognized everyone's involvement in the handling of the drainage issues and the opportunity that was missed by the City of Spring Park in 1995 to enforce their ordinances as it relates to this situation. He has offered a compromise to accept a zero foot side setback to the west, instead of the 13 degree deflection originally applied for. They will also commit to follow all LMCD regulations regarding the number of watercraft that can be stored and that no watercraft or dock structure is over the westerly extended side site line. Independent of the dredging possibility, the lack of maneuverability back in the cul-de-sac is another reason the applicants were asking for a zero foot side setback. He acknowledged Board member Scanlon's assistance in working to permanently fix the drainage issue. He stated that the compromise offers them the ability to move forward and that a temporary variance only extends the concerns they are dealing with. He stated that he has not had an opportunity to review the Maki's letter, dated 4/8/09. However, at a glance he did not believe that the two neighbors were that far apart. He entertained questions and comments from the Board.

Discussion was held amongst the Board for the consideration of a DUA only variance. This would provide for a zero foot side setback from the westerly extended side site line, with the applicants removing dock structures currently encroaching over the westerly extended side site line.

Whalen stated Mr. Maki was in attendance and invited him to address the Board.

Maki concurred with the applicants that a permanent variance is preferable to a temporary variance. He stated that he believed that a zero foot side setback from the westerly extended side site line is fair and reasonable. He requested clarification from the Board on whether the applicants would be required to comply with the required 20' side setback for canopies. If there is a reduction in setbacks for canopies, he believed that some sort of setback should be required. He stated that he did not have a concern with the storage of a watercraft in slip #2, provided the boat storage is maintained within the applicant's DUA.

Babcock stated that based on the testimony of the applicants that they would follow all LMCD regulations, the canopy at slip #1 would be required to meet a 20' setback from both extended side site lines.

Nybeck stated that if it were the Board's direction that the canopy would need to comply with 20' side setback requirements, the canopy would most likely need to be removed. However, this site has 79' of lakeshore frontage and would most likely be able to comply with the 20' side setback requirement for canopies if it had parallel extended side site lines.

Suerth stated that no matter which type of variance is approved, the drainage issue is an environmental concern and he urged Scanlon and all the local agencies involved to continue their discussions until a resolution is made.

Shannon stated that he and his wife purchased the home with full canopies. If he is required to remove the current canopy, he would prefer the Board reconsider a temporary variance, pending the ability to dredge, because the removal of the canopy will decrease the property value of the home.

Ms. Shanda Shannon stated that they are unable to meet a 20' setback due to the hardship of converging lot lines.

Lengthy discussion on the pros and cons of maintaining the canopy was held by the Board, staff, and the applicants. This included what it would take to maintain a 20' setback for the canopy structure, including a possible deflection of the westerly extended side site line, and what a hardship could be for a canopy side setback.

Nybeck stated that if it was the consensus of the Board for the applicant to maintain a 20' setback for the canopy structure, the length and size of the canopy will need to be reduced and pulled closer into shore. This will most likely trigger the need for a dredge. He was unsure, even then, that the canopy could meet a 20' setback.

LeFevere stated that the hardship has to be defined in terms of whether there are constraints imposed on the reasonable use of the DUA, not on what is being asked for. Hardships are hardships, and should not be tailored to a specific need. The Board should then decide what is a reasonable accommodation to that hardship, which would not have too much impact on the abutting neighbors. Under that analysis, the Board might conclude that even though there is a hardship, the canopy has an impact that is unreasonable given the fact that it is a luxury rather than a need. He did not preclude the Board from granting a variance with the allowance of the canopy.

MOTION: Babcock moved, Suerth seconded to direct LeFevere to prepare Findings of Fact and Order for approval of the Shannon variance application, subject to the following conditions: 1) to adjust the northerly extended side site line extension 13 degrees, with a required five foot side setback for docking and boat storage, 2) to maintain the existing westerly extended side site line, with a zero foot setback for docking and boat storage, and 3) a requirement that the applicants come into conformance with all other LMCD ordinances.

Kask requested clarification of whether the motion would require the applicants to provide for a 20' setback for the canopy structure.

Babcock stated that his motion would require a 20' setback for the canopy.

Kask and Klohs proposed reducing the side setback requirements for the canopy to 10' and five feet respectively. Babcock did not accept these friendly amendments, although he suggested that the Board could consider them through a formal motion to amend the motion.

MOTION TO AMEND: Scanlon moved, Klohs seconded to amend the motion to reduce side setback requirements for the canopy from 20' to five feet.

VOTE ON MOTION TO AMEND: Ayes (7), Nays (5; Babcock, Jewett, Page, Suerth, and Tanner), Abstained (1, Hartwich); motion carried.

VOTE ON ORIGINAL MOTION (AS AMENDED): Ayes (11), Nays (2; Jewett and Tanner); amended motion carries.

LeFevere stated that he would prepare draft Findings of Fact and Order that the variance would remain in place even if the applicant proceeds with dredging within their DUA.

12. EXECUTIVE DIRECTOR REPORT

There was no Executive Director Report.

13. ADJOURNMENT

There being no further business, the meeting was adjourned at 8:42 p.m.

Lisa Whalen, Chair

Tom Scanlon, Treasurer