

**LAKE MINNETONKA CONSERVATION DISTRICT  
BOARD OF DIRECTORS**

7:00 PM, Wednesday, May 27, 2009  
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; Peter Hartwich, Excelsior; Chris Jewett, Minnetonka; Steve Johnson, Mound; Dennis Klohs, Minnetonka Beach; Bill Olson, Victoria; Kelsey Page, Greenwood; Herb Suerth, Woodland; Dick Woodruff, Shorewood. Also present: Charlie LeFevere, LMCD Counsel; Judd Harper, Administrative Technician; and Emily Herman, Administrative Assistant.

**Members absent:** Greg Nybeck, Executive Director

**3. APPROVAL OF AGENDA**

Whalen stated she would like to amend the agenda by adding discussion regarding the LMCD's summer meeting schedule at the end of the meeting and the tabling of item 10B, Discussion of Regulation of Sale of Alcoholic Beverages on the Ice, for consideration by the Board in June.

**MOTION:** Gross moved, McDermott 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 she and Tanner had recently met with representatives from the LMA in which there was discussion on the possibility of organizing an event on a boat for elected officials in July. This would be held to introduce state representatives and US senators to Lake Minnetonka and to initiate discussion on possible legislation for better protection of Lake Minnetonka and other lakes in Minnesota. She stated the cost to the LMCD would be minimal with coordinated efforts between both organizations. She stated the LMCD may have to send out the invitations and the LMA has committed to securing a boat. She solicited the Board's approval to proceed in the planning process.

Discussion was held amongst the Board and LeFevere as to the current state law regarding the funding of such events for state and federal legislators. It was discussed that these elected officials could pay their own way and would not run afoul of the public gift law. Further provisions being provided would need to be clarified. The Board provided Whalen with the approval to proceed in the planning process with confirmation of what is allowed under State law. Whalen stated she would bring more information back to the Board.

**5. APPROVAL OF MINUTES-** 5/13/09 LMCD Regular Board Meeting

**MOTION:** McDermott moved, Scanlon seconded to approve the minutes from the 5/13/09 LMCD Regular Board Meeting as submitted.

**VOTE:** Ayes (13), Abstained (1, Jewett); motion carried.

**6. APPROVAL OF CONSENT AGENDA**

Scanlon requested item 6B be removed from the consent agenda.

Babcock requested item 6D be removed from the consent agenda.

Page moved, Johnson seconded to approve the consent agenda as amended, removing items 6B and 6D. Motion carried unanimously. Items so approved included: **6A**, Audit of vouchers (05/16/09 – 05/31/09) and **6C, 2009 Multiple Dock Licenses**, staff recommends Board approval of renewal (without change) application for North Shore Marina that has been paid in full.

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

**6B**, April financial summary and balance sheet.

Whalen stated that item 6B needs further clarification by staff and will be brought back to the Board for approval at the next Board meeting.

**6D, Charles and Shanda Shannon**, draft Findings of Fact and Order approving an adjusted dock use area and side setback variance.

Babcock requested wording be amended on page 3, paragraph #9 of the draft Order; by adding the words "to the west" to better define the adjacent dock use area; however, after clarification from LeFevere that the requested wording is defined on page 1, paragraph 4, of the draft Order, Babcock withdrew his request.

**MOTION:** McDermott moved, Olson seconded to approve draft Findings of Fact and Order approving Charles and Shanda Shannon's adjusted dock use area and side setback variance.

**VOTE:** Motion carried unanimously.

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

There were no public comments.

**9. PUBLIC HEARING**

**A. Cardinal Cove Beach Association**, new multiple dock license application to reconfigure the conforming multiple dock facility.

Whalen asked Harper to provide background on this agenda item.

Harper reviewed his staff memo, dated 5/20/09, which summarized the request from Mr. Larry Pillar, representing Cardinal Cove Beach Association, to reconfigure the conforming multiple dock structure. The site is currently approved for five Boat Storage Units (BSUs) on 241' of non-continuous 929.4' shoreline. He reviewed the current configuration of the dock structures and stated that the applicant has proposed to increase the size of BSU #5 by making it a three sided slip with a platform. He highlighted two LMCD Code sections to evaluate the application. These included: 1) Code Section 2.03, subd. 7- outlines the multiple dock license process and 2) Code Section 2.01, subd. 1- outlines authorized dock use area requirements. He stated that the City of Minnetrista has requested that the applicant provide a copy of the approved site plan to the City prior to installation of the dock structure. He recommended Board approval of the application for 2009, subject to the construction of dock structures and location and number of moored watercraft be in strict conformance with the approved site plan. He entertained questions and comments from the Board.

Whalen asked the applicant if they had further comments that they would like to provide the Board. There being no further comments, Whalen opened the public hearing at 7:15 p.m. There being no comments from the public, she closed the public hearing at 7:16 p.m.

**MOTION:** McDermott moved, Page seconded to approve Cardinal Cove Beach Association new multiple dock license application for the 2009 boating season, subject to Harper's recommendation.

Woodruff proposed a friendly amendment to include the requirement that the applicant submit the approved site plan to the City of Minnetrista prior to the installation of the dock structure. McDermott and Page agreed to that amendment.

Scanlon requested clarification on the south lot line extended into the lake that is depicted on the proposed site plan but not the approved site plan. He further questioned if the owner of Lot 8, to the south, had any concerns with the proposed application.

Harper stated that the proposed site plan documented the 929.4' shoreline more accurately than the approved site plan. He further stated that there was a dock on Lot 8 to the southwest of the applicant's site and that the configuration seemed to work for both property owners.

Olson requested clarification on the 20' structure documented in BSU #3.

Harper stated that the structure was a small dock to access the boat lift in BSU #3. This is needed because there is a full canopy on the outside of the dock on BSU #2.

**VOTE:** Motion carried unanimously.

- B. Minnetonka Boat Rental**, new on-sale, non-intoxicating malt liquor license application for the charter boat Looneytoon.

Whalen asked Harper for background on this agenda item.

Harper reviewed the staff memo, dated 5/22/09, which summarized a request from Mr. Paul Bergquist, representing Minnetonka Boat Rental, for a new on-sale, non-intoxicating liquor license for the charter boat Looneytoon. He stated that Mr. Bergquist has purchased Looneytoon which had previously been owned by US Boat & Recreation, dba, Minnetonka Boat Club and Rental who had maintained the same liquor license being proposed by the new owner. The applicant had proposed Minnetonka Boat Rental as the authorized port of call in which the City of Mound had authorized its use. He highlighted two LMCD Code sections to evaluate the application. The Code sections reviewed included: 1) Code Section 5.25 - outlines the process for the granting of non-intoxicating malt liquor license applications, and 2) Code Section 5.26 – outlines the persons ineligible for a non-intoxicating malt liquor license. That review included discussion regarding documentation in the Board's packet from the Hennepin County Sheriff's Office, dated 5/5/09, which outlined findings of the applicant's background investigation and a written response by LeFevere, dated 5/21/09. Harper requested LeFevere provide an overview of his response.

LeFevere commented on two points that were documented within his memorandum. Those points included the following: 1) That the applicant provided a statement on the application that was not accurate. On the application, the applicant was asked if he had been convicted of any crimes, in which he had written "no". The background investigation documented that he had been convicted a number of times, and 2) That the state law and LMCD ordinances state that a person is ineligible for a liquor license if the applicant is not of good moral character. He stated it was rare for the Board to see liquor license applicants with criminal convictions. He wanted the Board to be aware of the convictions when considering the moral character of the applicant.

Harper stated the Board packet also includes a letter from the applicant addressing the findings of the Hennepin County Sheriff's Office. He stated that staff could not make a recommendation until the Board makes a determination on the applicant's moral character. If the Board deems that the applicant is of good moral character, he recommended that the Board approve the new on-sale, non-intoxicating malt liquor license application for the 2009 season for the charter boat Looneytoon (authorizing Minnetonka Boat Rental as the authorized port of call). If the Board deemed that the applicant is not of good moral character and wishes to deny the license, the Board should direct LeFevere to prepare Findings for denial of the new on-sale, non-intoxicating malt liquor license application.

Harper and LeFevere entertained questions and comments from the Board.

Tanner asked LeFevere if a statute of limitations existed from the last conviction in considering the applicant's moral character and questioned why the LMCD does not provide a definition of such.

LeFevere stated there is not a statute of limitations available by definition to determine moral character; however, the time frame between the last conviction, along with consideration of the seriousness of the crime, are reasonable items to consider in defining the applicant's moral character.

Harper stated police departments typically provide a definition or recommendation; however, the LMCD's enforcement agency is the Sheriff's office, in which their documentation did not specifically state rather the applicant was of good moral character or not. He stated that he has not encountered previous liquor licenses with convictions such as this.

Hartwich stated that he believed it would be difficult to provide a concrete definition of moral character. He asked LeFevere if there were procedures to have misdemeanors expunged from a public record.

LeFevere stated he personally does not practice in that area; however, ambiguity would exist with the effect of an expungement; questioning rather that allows for an applicant to document that a criminal conviction has not taken place when, in fact, it had.

Gross questioned the documentation of a 2004 conviction which outlines the failure to obtain a new "DL."

Page stated that a person can be charged for failing to provide a current drivers license, DL, if it was expired when asked by an enforcement agency. He further stated that there are procedures in place to expunge various records, similar to what is presented this evening; however, that does not mean that enforcement authorities performing background checks do not have access to that information. He was unsure if the enforcement agencies were required to report expunged convictions.

Woodruff stated he had higher concerns for the falsification of the application vs the historical convictions. He acknowledged the applicant's response to the background check provided in the Board's packet and asked if there are any pending matters.

LeFevere clarified that the spreadsheet within the Board packet was a list of convictions prepared by LMCD staff. This is in response to the MN Criminal Rehabilitation Act in which the Board is only allowed to consider convictions. Therefore arrests, charges, stops, inquiries or pending matters cannot be considered. For this reason, LMCD staff did not provide the entire criminal investigation results, but only summarized the convictions to prevent any appearance of impropriety or prejudice by the Board.

Scanlon questioned if there was a limitation on the number of liquor licenses issued by the LMCD or the requirement to maintain a specific level of food sales.

Harper stated there were no limitations on the number of liquor licenses issued by the LMCD because of legislative changes that occurred a few years ago. He stated that a watercraft for hire license is required when a captain is provided for the commercial use of a boat. With such a license some form of liquor license is required to have alcohol on the boat. He stated the liquor license historically issued, and currently being proposed, is a non-intoxicating malt liquor license with a consumption and display permit, and that both former and current owners did not, and will not, provide or serve the alcohol.

Gross requested more detailed information as to the company's background.

Whalen suggested the applicant address that question. Seeing no further comments for staff, she requested the applicant address the Board.

Mr. Paul Bergquest and Ms. Rebecca Kirk, representing Minnetonka Boat Rental, addressed the Board. Mr. Bergquest stated he was the individual that applied for the liquor license. He stated that this site has been operating as a business on Lake Minnetonka for at least 40 years, in which he has been in charge of the company for the last three years. He entertained questions and comments from the Board.

Gross asked if he was a proprietor or employee of the company.

Bergquest stated he has been a proprietor of the company over a two year period with acquisition of the property last year, at which time Kirk became involved with the company. He stated the company has one charter pontoon, Looneytoon, which provides the service of a captain and the ability for the customer to bring their own adult beverages on board. This service provides minimal funding for the marina and the ability to serve local agencies such as Midwest Services that work with handicapped individuals. He proceeded to respond to the following questions posed by the Board members: 1) the pontoon maintains a capacity of 24 passengers, 2) that the liquor on board is brought on by the customer renting the charter boat and that the company does not provide the liquor; however, the license being applied for is needed for the customer to do so, 3) that the only authorized port of call is the Minnetonka Boat Rental and that the company does not have the ability to stop at other port locations, 4) that the charter boat is rented an estimated four times a week during the months of July and August; reviewing the rental options available, and 5) that the captain is trained to maintain control of consumption of liquor by minors but does not serve or provide the liquor to the customers. He invited the Board to individually contact him with further questions regarding the operation of the company and/or his background investigation report.

Whalen opened the public hearing at 7:41 p.m. There being no comments from the public, she closed the public hearing at 7:42 p.m.

Babcock questioned if there was a provision to perform background checks on the annual renewal of the liquor licenses.

Harper stated that a background check is annually completed during the renewal process of the liquor licenses.

Babcock stated that he did not see any convictions that were current enough to disqualify the applicant for a liquor license. He stated the license is annually renewed; therefore, any new convictions would be discovered in the annual background investigation.

**MOTION:** Babcock moved, Tanner seconded to: 1) approve the 2009 Minnetonka Boat Rental new on-sale, non-intoxicating malt liquor license application for the charter boat Lonneytoon, and 2) approve Minnetonka Boat Rental as the port of call.

**VOTE:** Ayes (12), Nays (2, Gross and Page); motion carried.

## 10. OTHER BUSINESS

- A. **Excelsior HOA**, non-conforming, non-multiple dock permit application for the storage of four Boat Storage Units (BSUs) on 131.6' of shoreline at 120-126 West Lake Street on Gideon Bay.

Whalen provided a brief overview of this application request formerly considered by the Board. She asked LeFevere to provide further background on this agenda item.

LeFevere stated that the LMCD Board adopted the boat density regulations in 1978, which includes the general rule of dock or mooring one restricted watercraft per fifty feet of shoreline. He stated that legally existing boat density prior to the adoption of the density rules had the ability to be grandfathered in. Over the years, staff had addressed many grandfathered sites via the multiple dock license process (five or more restricted watercraft) after adequate proof was provided that the requested number of boats were legally docked or moored on May 3, 1978. He stated these sites were addressed by staff due to the need for a multiple dock license. He further stated it has been more difficult to identify sites that were out of compliance with density regulations when there are less than five restricted watercraft docked or moored at a site due to no licensing requirements for these sites. In regards to this agenda item, the applicant's site was identified under the Proactive Code Enforcement Program as storing four restricted watercraft without adequate shoreline to support such storage. For this reason, the applicant has applied for a non-conforming, non-multiple dock permit. The question for the Board to consider is whether there were four restricted watercraft, the amount the applicant has applied for, physically in existence at the site in the summer of 1977. He stated the Board had previously considered this application at the 9/24/08 and 10/22/08 Board meetings, at which times the Board did not feel the applicant had provided sufficient evidence to grant the permit; therefore, the agenda item was tabled. He stated the applicant is back before the Board with a signed Affidavit from an individual that has knowledge of four watercraft that were docked at the site during the summer of 1977. He entertained questions and comments from the Board.

Whalen questioned the difference between May 3, 1978 and the summer of 1977.

LeFevere stated that May 3, 1978 is the grandfathered date; however, residents typically do not have all of their boats docked by that time. The Board has historically accepted proof of boat storage during the summer of 1977.

Whalen asked Harper if he had more to add to LeFevere's update.

Harper reviewed his staff memo, dated 5/22/09, which summarized a request by Mr. Don Sealock for a non-conforming, non-multiple dock permit. The application has been submitted to dock or moor four restricted watercraft on approximately 131' of shoreline with four town homes. The site currently qualifies for three restricted watercraft. He reaffirmed LeFevere's comments that the site's boat storage was documented in 2007 under the Proactive Code Enforcement Program with the storage of four restricted watercraft.

Discussion was held amongst all present as to the neighboring property to the northeast, known as the Hennessy property, and their ability to dock three restricted watercraft. Documentation on this property was provided by the applicant at the 9/24/08 meeting in which the matter was discussed at length. Confirmation was provided that in 1974, the LMCD had ordinances in place to define a site's dock use area and side setbacks. However, the boat density restrictions were not adopted until 1978.

Harper continued his review by stating this application had previously been considered by the Board for a public hearing on 9/24/08 and continued discussion at the 10/22/08 Board meetings; both of which the Board tabled the agenda item so that the applicant, with assistance by staff, could continue their effort to search for additional evidence documenting the historical storage of four restricted watercraft. The application has returned at the request of the applicant for the Board's consideration based on the

addition of a signed affidavit by Ms. Lois Anselment, historical and current resident. This affidavit states there were four watercraft in existence during the summer of 1977. The applicant also provided a historical list of property owners living in the town homes. Harper reviewed information he solicited from the MN DNR as to the site's historical ownership of watercraft. He stated that he only received information on two boats registered to Lois Anselment from 1975 to 1977 which included a 12' Scamp and a 18' Folbot. Harper also provided aerial photos from 1983, 1977 and 1975. Upon review of staff's findings, Harper could not provide proof of the storage of four restricted watercraft in existence on May 3, 1978. He recommended the Board consider the following options:

- If the LMCD Board believed that the applicant had provided sufficient evidence to prove that four restricted watercraft were moored or docked at the site on May 3, 1978, the Board should direct LeFevere to prepare Findings of Fact and Order for approval of the non-confirming, non-multiple dock license application, with a condition that each town home is allowed to dock or moor one restricted watercraft and all restricted watercraft must be owned and registered to residents of those town homes.
- If the LMCD Board did not believe that there was sufficient evidence to prove that four restricted watercraft were moored at the site on May 3, 1978, the Board could either: a) take no action on the application to allow the applicant additional time to obtain more evidence (subject to the application being denied if not acted upon by 7/22/09 per LMCD Code Section 1.06, subd.13), or b) direct LeFevere to prepare Findings of Fact and Order for denial of the application.

Whalen asked the applicant to address the Board.

Mr. Don Sealock, 126 West Lake Street, entertained questions and comments from the Board.

Woodruff acknowledged the documentation issued by the City of Excelsior provided for three restricted watercraft at the Hennessy property next door; however, he asked Sealock if there were any conditional use permits or variances issued by the City of Excelsior that pertains to the subject property's boat density storage currently being discussed.

Sealock stated the City of Excelsior did not issue specific documentation concerning the storage of watercraft at the subject site. He stated one could only assume the subject site had the ability to store up to four watercraft, one for each town home, as the Hennessy property next door was given the ability to store three, one for each lake side town home of the five on their lot. He believed that the discussion should not be about who has jurisdiction but as to the number of boats that were historically stored. He stated that the signed affidavit from Ms. Anselment was provided to the Board in place of her ability to address the Board in person.

Page asked Sealock to confirm that he has gone to the City of Excelsior and has not found any official documents describing the number of boats allowed at the Excelsior Homeowners Association site.

Sealock confirmed there was not an official document from the City of Excelsior that outlines boat storage for the subject site; however, there is a letter from former Excelsior Planning Commissioner, Ms. Judy Mueller, documenting that it was the Village of Excelsior's intent to grant dock rights for each unit on the site and there was a letter from the City of Excelsior stating the site should be approved for four slips.

Discussion was held amongst all present as to the evidence provided and the Board's interpretation of utilizing the summer of 1977 or May 3, 1978 for proof of density storage. Some of the comments made include the following:

- Confirmation that the affidavit documented the summer of 1977 as one of the owners turned over and the new owner of the town home had two restricted watercraft resulting in the storage of four watercraft from that date forward. Furthermore, documentation was based off of LeFevere's comments that the summer of 1977 provided for the best evidence since boats may not have been docked or moored on May 3, 1978 and that historical applications considered by the Board have utilized the summer of 1977 evidence.
- That the current ordinance requires proof of what was in existence on May 3, 1978; however, it was a difficult date to use as ice out for that year was 4/17/1978; the reason why the Board has typically used the summer of 1977.
- The applicant was asked why there was such a discrepancy between the aerial photograph from 1977 and the affidavit stating there were four watercraft dock or moored at the site; noting the aerial photo that showed a straight dock that did not appear to have enough room to dock four boats, with the docking of one boat that took up one side of the dock structure. The applicant could not explain the disparity and stated he did not know when the photographs were taken in 1977. He could only rely on the testimony of Mrs. Anselment.
- Hartwich stated that he had investigated this application by talking with residents of the site, local neighboring properties, and former Planning Commissioner Judy Mueller, in which some of them verbally acknowledged the storage of four restricted watercraft in 1977, however, physical evidence was not obtainable.
- That the witness was not available to come before the Board due to her presence being too stressful of a situation was not an acceptable excuse.
- That some of the Board members considered the affidavit as sufficient evidence while others did not.
- That burden of proof is on the applicant to provide conclusive evidence. The LMCD had historically litigated on a similar situation with much stronger evidence than this application.

**MOTION:** Tanner moved, Olson seconded to direct LeFevere to prepare draft Findings of Fact and Order approving the Excelsior HOA, non-conforming, non-multiple permit application with the condition that each town home is allowed to store one restricted watercraft and all restricted watercraft must be owned and registered to residents of those town homes.

Babcock clarified that the current use of dock is not by all four town home residents and this motion would only allow one restricted watercraft per each unit and the watercraft must be owned and registered to the residents of each unit.

**VOTE:** Ayes (11), Nays (2, Babcock and Scanlon), Abstained (1, Gross); motion carried.

**MOTION:** Babcock moved, Woodruff seconded to direct LeFevere to prepare a proposed ordinance change that would not allow Code Section 2.02, subd. 4, to be invoked after a specific date of the attorney's choosing.

Whalen stated that she would rather see the Board direct staff to prepare an ordinance amendment for Board consideration at which time the Board could then make a motion to direct LeFevere to prepare the draft ordinance.

Babcock stated he would like to proceed in this manner to assure that the request is considered in a timely manner.

Tanner stated the Ordinance Review Committee could consider this matter at which time they would then direct the attorney to draft an ordinance amendment for Board consideration.

**VOTE:** Motion carried unanimously.

Whalen stated that this proposed ordinance amendment will be brought back to the Board in June or July.

Whalen stated that she would like to suggest the following revisions to the Board meeting schedule for June, July, and August: 1) the 6/10/09 Regular Board meeting be held as a Strategic Planning Work Session, at 5:30 p.m., at the LMCD office, with the approval of the LMCD 2010 draft budget, 2) cancel the 7/8/09 Regular Board meeting with consideration of a lake tour work session for the Board's consideration during the week of July 13<sup>th</sup>, and 3) cancel the 8/12/09 Regular Board meeting and hold a second lake tour work session. She stated both work sessions would be coordinated by staff.

**MOTION:** Babcock moved, McDermott seconded to accept the LMCD Board meeting revisions as noted by Whalen above.

**VOTE:** Motion carried unanimously.

## **11. EXECUTIVE DIRECTOR REPORT**

There was no Executive Director Report.

## **12. ADJOURNMENT**

There being no further business, the meeting was adjourned at 8:30 p.m.

Lisa Whalen, Chair

Andrew McDermott, III, Secretary