

**LAKE MINNETONKA CONSERVATION DISTRICT
BOARD OF DIRECTORS
AGENDA**

7:00 PM, Wednesday, March 23, 2005
Wayzata City Hall

CALL TO ORDER

Van Hercke called the meeting to order at 7:04 p.m.

ROLL CALL

Members present: Katy Van Hercke, Minnetonka; Doug Babcock, Tonka Bay (arrived late); John Berns, Wayzata; David Gross, Deephaven; Steve Johnson, Mound; Pete Nelson, Victoria; Tom Scanlon, Spring Park; Tom Seuntjens, Minnetonka Beach; Herb Suerth, Woodland; Cree Zischke, Greenwood. Also present: Charles LeFevere, LMCD Counsel; Greg Nybeck, Executive Director; Judd Harper, Administrative Technician.

Members absent: Paul Knudsen, Minnetrista; Tom Skramstad, Shorewood; Jose Valdesuso, Excelsior; the City of Orono has no appointed member.

CHAIR ANNOUNCEMENTS, Vice Chair Van Hercke

There were no Chair announcements.

READING OF MINUTES- 3/9/05 LMCD Regular Board Meeting

MOTION: Seuntjens moved, Johnson seconded to approve the minutes from the 3/9/05 LMCD Regular Board Meeting as submitted.

VOTE: Ayes (8), Abstained (1, Gross); motion carried.

PUBLIC COMMENTS - Persons in attendance, subjects not on agenda (5 min.)

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

CONSENT AGENDA- Consent agenda items identified with a (*) will be approved in one motion unless a Board member requests discussion of any item, in which case the item will be removed from the consent agenda.

Berms requested that agenda item 5A be removed from the consent agenda. Seuntjens moved, Nelson seconded to approved the consent agenda as amended, removing agenda item 5A. Motion carried unanimously. Items so approved include: **1F, 2005 Multiple Dock Licenses**, staff recommends Board approval of 2005 renewal, without change, multiple dock license applications as outlined in 3/17/05 staff memo, and **3A, Audit of vouchers (3/16/05 – 3/31/05)**.

PUBLIC HEARINGS

- **City of Wayzata**, new multiple dock license application to add one Boat Storage Unit (BSU) for the storage of a Wayzata Fire Department fire/rescue boat.

Van Hercke opened the public hearing at 7:09 p.m. and asked Harper for background.

Harper reviewed the staff memo, dated 3/17/05, which summarized the City of Wayzata new multiple dock license application. He recommended the Board approve the application for the 2005 season. He entertained questions or comments from the Board.

Zischke asked how the City of Wayzata dealt with a fire/rescue boat in 2004 and previous years.

Berns stated that he was on the fire department and also served on the Wayzata City Council. Wayzata has recently purchased a larger fire/rescue boat that was surplused through the federal government. Prior to this fire/rescue boat, Wayzata had a smaller boat that was trailered to the lake. The purpose for wanting to store this new fire/rescue boat on the lake is to improve response time.

Van Hercke stated that there were representatives from the City of Wayzata to address any comments or questions that the Board might have. There being no comments from either the applicant or the public, Van Hercke closed the public hearing at 7:11 p.m.

MOTION: Scanlon moved, Berns seconded to approve the City of Wayzata new multiple dock license application to add one BSU for the storage of a Wayzata Fire Department fire/rescue boat for the 2005 season.

VOTE: Motion carried unanimously.

- **Al and Alma's Supper Club (Site 2)**, new multiple dock license and special density license applications to reconfigure the storage of six charter boats at the multiple dock facility.

Van Hercke opened the public hearing at 7:14 p.m. and asked Nybeck for background.

Nybeck reviewed the staff memo, dated 3/18/05, which summarized the applications for Al and Alma's (Sites 1 and 2). This included a 2005 renewal, without change, multiple dock license application for Site 1 and new multiple dock and special density license applications for Site 2. He reviewed these applications for Site 1 and 2 during the public hearing, although a public hearing was only required for Site 2. He recommended the Board consider two actions for Site 2. These included: 1) to direct LMCD counsel to prepare Findings of Fact and Order for approval of the special density license application for the storage of six charter boats, subject to continuing the public amenities in the 6/27/84 Order and 2) carrying over any previous conditions in the 6/27/84 Order and multiple dock licenses. He suggested that the Board might want to consider publishing a second public hearing for the 4/13/05 LMCD Regular Board meeting because the original public hearing notice did not include the reference to the special density license application. He entertained questions or comments from the Board.

Babcock arrived at 7:20 p.m. during the background provided by Nybeck. Seuntjens asked for clarification of the beam of the two charter boats to be stored on the outside of the dock at Site 2.

Nybeck stated that he believed the beam of the two charter boats was 14'.

Zischke asked for clarification on length and side setback requirements at Site 2.

Nybeck stated that the dock and boat storage would comply with length and setback requirements, provided the charter boat to be stored at BSU 6 is pulled close to shore and stored within the first 50' of dock.

Berns asked for LeFevere to comment on the public hearing notice referenced by Nybeck and whether there is a need to publish for a second public hearing.

LeFevere stated that he believed that this is a judgement call. If the Board is uncomfortable with the original public hearing notice, it would be easy to correct this by continuing the public hearing to the next Board meeting on 4/13/05 and consider the application at that time. This would protect both the applicant and the Board if a complaint were received from the public in the future that challenged the Board's decision. He pointed out that staff corrected the public hearing notice after the oversight was noticed and that this notice was sent to all residents within a 350' radius from the site. He also questioned whether public amenities would be of concern to the public because the applicant has proposed continuing those included in the 6/27/84 Order.

Van Hercke stated that there were representatives from Al and Alma's to address questions or comments from the Board. She asked if there was anyone from the public in attendance to comment on the applications.

Ms. Shirley Gustafson, 5142 Tuxedo Blvd., stated that she resided eight houses away from Al and Alma's. She questioned what a public amenity was and who would police compliance with the amenities. She stated that she had a previous experience with dumping that neither the LMCD nor the City of Mound wanted to deal with.

Nybeck stated that there are a wide variety of public amenities that fall into either the public access, environmental protection, or public service categories. Approved public amenities are to be provided by the applicant annually and LMCD staff monitors to verify that they are being provided, primarily through the multiple dock license inspection process.

Zischke asked Ms. Gustafson to further elaborate on the dumping comment that she made during her testimony.

Gustafson stated that she had concern about the dumping of leaves near the Al and Alma's parking lot in 2004. These concerns were sent to both the LMCD and the City of Mound.

Nybeck stated that he recalled discussing this with Ms. Gustafson and this matter was referred to the City of Mound because it is outside of the LMCD's jurisdiction.

Mr. Shaun Tancheff, 5174 Tuxedo Blvd., stated that he owned the property to the east of Site 2 and that he has no problem with Al and Alma's. He recommended the Board approve the applications.

MOTION: Babcock moved, Johnson seconded to continue the public hearing to the 4/13/05 LMCD Regular Board Meeting and re-advertise.

VOTE: Motion carried unanimously.

MOTION: Babcock moved, Gross seconded to direct LMCD counsel to prepare Findings of Fact and Order for approval of the special density and new multiple dock license applications, subject to: 1) continuing of the public amenities in the 6/27/84 Order, and 2) the installation of a fence, with "No Parking" signs, on the last 50' of dock on the east-side of the finger between BSU's 5 and 6.

Zischke stated that she would like to ensure that the follow-up of the public amenities is conducted on an annual basis.

VOTE: Motion carried unanimously.

Mr. Jay Soule, Manager for Al and Alma's, addressed the fencing and "No Parking" signage requirement. This is already done on the west side of the transient docks at Site 1; however, he questioned whether it would be safe for staff when launching and landing charter boats. He stated that he believed signage would be more appropriate.

Babcock stated that he included the need for fencing and signage because there already is a pressure for the public to find docking space at Al and Alma's. He reminded the Board that parking a boat at the last 50' of dock behind the charter boat at BSU 6 is not within the authorized dock use area and that a barrier would prohibit the use of this part of the dock.

The Board discussed the comments made by Mr. Soule. The consensus of the Board was that Al and Alma's could bring back an alternative plan for consideration by the Board when the draft Findings are considered that would meet the objectives of the LMCD and Al and Alma's.

1. WATER STRUCTURES

A. Al and Alma's Supper Club (Site 1), consideration of 2005 renewal, without change, multiple dock license application.

Van Hercke asked Nybeck for background on this agenda item.

Nybeck stated that he provided the background for Al and Alma's (Site 1) during the public hearing for Site 2. He recommended the Board approve the 2005 renewal, without change, multiple dock license application for Site 1 for the 2005 season, grandfathering the 20 transient BSU's. This would change the status of this facility from a legal, conforming facility to a legal, non-conforming facility.

LeFevere stated that the 6/27/84 Order granted a special density license for both Sites 1 and 2. This included five additional BSU's at the 50' of lakeshore frontage at Lot 25. In 1984, two special density licenses should have been approved rather than one. He recommended that Site 1 could be approved yet maintaining the special density license.

MOTION: Babcock moved, Van Hercke seconded to approve the 2005 Al and Alma's renewal, without change, multiple dock license application for 20 transient BSU's, subject to: 1) carrying over any conditions from the 6/27/84 Order and previous multiple dock licenses, and 2) requiring the applicant to annually document public amenities provided

for Sites 1 and 2.

VOTE: Motion carried unanimously.

- B. Eagle Bluff HOA**, consideration of 2005 new multiple dock license application (Public hearing was conducted at the 2/23/05 Board Meeting).

Van Hercke asked Nybeck for background on this agenda item.

Nybeck reviewed the staff memo, dated 3/17/05, which summarized the Eagle Bluff HOA new multiple dock license application. He recommended the Board approve the 2005 new multiple dock license application, utilizing Plan A, with four conditions. These conditions included: 1) docking and boat storage at Outlot C must be consistent with the approved site plan, dated 2/1/05, 2) all shoreline at Outlot B has been transferred to Outlot C and no docking or watercraft storage is allowed at Outlot B, 3) Outlot B must be maintained in essentially a natural state and may not be used for residential dwelling units or commercial uses, and 4) a new multiple dock license application must be applied for and approved by the LMCD Board of Directors if five or more restricted watercraft are stored at Outlot A. He entertained questions or comments from the Board.

Babcock stated that he would like to have the setbacks documented from the extended side site lines at Outlot C.

Gross questioned whether the LMCD could dictate land use. He was concerned with condition 3, which states that Outlot B must be maintained in essentially a natural state and may not be used for residential dwelling units or commercial uses.

Babcock clarified that this restriction is part of code section 2.02 Subd. dealing with density shifting. He stated boat density shifting is an exception to the normal part of LMCD Code. He explained that the applicant has a choice of developing the property as they normally would be able to under city code and not shift boat storage density or if they want to shift density, the Board felt that there was some value in maintaining the property in a natural state where the boat storage density came from. He stated this is the applicant's choice.

MOTION: Gross moved, Babcock seconded to approve the Eagle Bluff HOA new multiple dock license application for 2005, subject to the four conditions recommended by Nybeck and requiring the applicant to document the setbacks from the extended side site lines at Outlot C.

VOTE: Motion carried unanimously.

- C. Dancing Waters DOA**, consideration of 2004 and 2005 renewal, without change, multiple dock license applications (Channel, North, Peninsula, and South sites).

Van Hercke asked for background from Nybeck on this agenda item.

Nybeck reviewed the staff memo, dated 3/16/05, which summarized the 2004 and 2005 Dancing Waters DOA renewal without change applications for the channel, north, peninsula, and south sites. He pointed out that the City of Minnetrista has expressed concern about the LMCD approving these applications because the Dancing Waters DOA planned unit development (PUD) does not exist any longer. He believed that there were two approaches for the Board to consider. First, the Board could approve the renewal applications for 2004 and 2005 as requested by Carlson Real Estate. This would not preclude Carlson Real Estate from getting the proper permits from the City of Minnetrista for the PUD and docking, and would require a subsequent review by the LMCD if docking configurations change in the future. Second, the Board could require Carlson Real Estate to submit a new multiple dock license application(s), which would require a public hearing, because Carlson Real Estate voluntarily abandoned these sites in 2004. He entertained questions or comments from the Board.

Gross asked for a legal clarification of the Dancing Waters DOA and to whom the permits would be issued.

Mr. Mike Byrd, representing Nautical Development, stated that Carlson Real Estate owns the property and that Nautical Development has an agreement to purchase this site from them. He assumed that Dancing Waters DOA is incorporated and associated with Carlson Real Estate.

Babcock asked Byrd if the purchase agreement gives Nautical Development either ownership or control at this time.

Byrd stated that the purchase agreement does not give Nautical Development either ownership or control at this time. Instead, it is an option to purchase agreement after exercising due diligence. However, he clarified that he was also in attendance representing Carlson Real Estate to get the permits issued in their name. The viability of this site is tied to the availability of docking permits and no changes are proposed from what was originally approved in 1995.

Van Hercke stated that she was more comfortable considering the request through a new multiple dock license application, with public hearing, rather than through renewal without change applications.

MOTION: Van Hercke moved, Babcock seconded to deny the 2004 and 2005 Dancing Waters DOA renewal, without change, multiple dock license applications (Channel, North, Peninsula, and South sites) because they are not renewal applications, subject to refunding the fees collected.

VOTE: Motion carried unanimously.

- D. **Bayview HOA**, new multiple dock license application submitted on 9/22/76 to back license 10 Boat Storage Units (BSU's) on a 100' wide outlot on Smithtown Bay (The applicant has amended its request to seven BSU's).

Van Hercke asked Nybeck for background on this agenda item.

Nybeck reviewed the staff memo, dated 12/1/04, which summarized the Bayview HOA new multiple dock license application. He recommended the Board direct LMCD legal counsel to prepare Findings of Fact and Order to deny the Bayview HOA new multiple dock license application because he believed the intent for docking is clear because of the Declaration of Covenants agreed to by the developer in 1977 and their inability to provide proof of what was legally in existence on 5/3/78. He stated that LeFevere would provide further background on this.

LeFevere made the following comments:

- Legal counsel for Bayview HOA, Thomas Radio, has submitted a packet of information by the date requested by the Board. He thanked Mr. Radio for complying with the LMCD's request because this has allowed the LMCD time to review this packet in advance of this meeting.
- As pointed out by Nybeck, the outlot in question has approximately 100' of lakeshore frontage. Thus, Bayview HOA can store two restricted watercraft at this site under current Code provisions. Bayview HOA asserts that there are some historical factors that change this storage result and that the association should qualify for a different treatment.
- Mr. Radio has raised three arguments for this different treatment. These included: 1) the facility qualifies for grandfathered status as allowed under LMCD Code, 2) approval of the application is mandated by state law under the 60-day rule, and 3) approval is mandated under the legal doctrine of estoppel.
- The different treatment of the application, as proposed by Bayview HOA, would be based on an application submitted in 1976 for 10 BSU's. A public hearing was scheduled in 1976; however, it was tabled at the request of Laketown Township. In 1977, the developer recorded covenants and an easement on the property providing that there would not be more than two watercraft stored at this outlot, with these two watercraft designated to two specific residences. Enforcement of these covenants is not the responsibility of the LMCD.
- In the early years of the LMCD, docking and boat storage was restricted only by what would fit within dock use areas. In 1978, the LMCD adopted the 1:50' General Rule, subject to certain exceptions, and existing facilities were grandfathered. Code Section 2.02, subd. 4 states that "Docks and mooring areas lawfully in existence on May 3, 1978 may continue". The Board back licensed these facilities that would have qualified for a license under all of the Code provisions prior to adoption of the 1:50' General Rule but were ignorant of the new law. The Board has never back licensed a facility that was not in existence on the grandfather date of an adopted ordinance.
- Mr. Radio has made three arguments relating to back licensing. First, the factual records regarding what was in existence in 1978 is "unclear". LeFevere stated that it might be more accurate to state that no evidence has been presented and no one has asserted that more than two boats were stored at the outlot in 1978. Mr. Radio has asserted that several docks may have been in existence in 1978. The Code states that "such licenses and permits for grandfathered facilities will be issued only after a public hearing and upon presentation of evidence deemed sufficient by the Board to prove the dock or mooring areas was in existence on May 3, 1978 and the number of restricted watercraft applied for were docked or moored at such facility as of such date". LeFevere has stated that it is not enough to say that the record is unclear and that several docks may have been in existence. The second argument made by Mr. Radio is that actual physical existence as of a grandfathered date is not required. LeFevere stated that he disagreed with this argument because the Code requires a physical presence and not merely the submittal of an application with a proposed

site plan for the storage of watercraft at such date. The third argument is that the Board used a similar analysis for Howards Point Marina. LeFevere did not believe that was an appropriate comparison or a legally binding precedent. In the Howards Point Marina case, the Board was licensing off-lake storage under Code Section 2.045 rather than back licensing boats and docks under Code Section 2.02, subd. 4. In the Howards Point Marina case, the Board was licensing off-lake storage on land and these grandfathered rights are different than those on public water. He reminded the Board that the Howards Point Marina parking lot was in existence on such grandfathered date, which Bayview HOA has been unable to establish. Therefore, LeFevere did not agree that the evidence presented to date demonstrates that the Bayview HOA application met the technical standards for grandfathering under Code Section 2.02, subd. 4.

- The second argument raised by Mr. Radio is that approval of the application is mandated by the 60-day rule. This statute was adopted by the legislature in 1995 and requires certain types of governmental bodies to act on certain applications within 60 days. As a matter of law, these certain applications are deemed approved by state law if not acted upon by these certain types of governmental bodies. Mr. Radio has argued that the 1976 application was approved by the 60-day rule. LeFevere stated that he disagreed with this for a number of reasons. First, LeFevere questioned whether the language of the 1995 statute would apply to this type of application. However, the LMCD has attempted to comply with this statute whenever possible. Second, when the 60-day rule was adopted, the Bayview HOA application was nearly 20 years old. There is no indication in the statute that it would apply to all applications submitted prior to adoption of this statute that have not been acted on. Third, the statute of limitations bars a claim based on the 60-day rule that is more than six years old and the original application was submitted 29 years ago in 1976. Fourth, the application submitted was made by the developer rather than the association or current homeowners. No evidence has been provided that the rights under the application were assigned to the association. In fact, evidence suggests that the developer had no such intent, and abandoned the application. LeFevere stated that he believed these reasons provide a significant gauntlet of legal reasons why the application is not deemed approved by the 60-day rule. Even if Bayview HOA could prevail on these legal arguments and the application were deemed approved by the 60-day rule, the application is for an annual license in 1977. No application was made for the any of the intervening 27 years. Simply having a permit is not enough to establish grandfathered rights on water any more than having a permit on land.
- The third argument raised by Mr. Radio is that approval is mandated under the legal doctrine of estoppel. Under certain circumstances, the courts will determine that a party has been estopped from doing something because of their own conduct. In this case, Mr. Radio has claimed that the conduct of the LMCD has estopped the LMCD from asserting that the Bayview HOA has no grandfathered rights. For most of the history of this law for the state, estoppel has not applied to governmental agencies acting under their governmental capacity. More recently, the courts have concluded that estoppel can apply to governmental agencies on a very limited basis. In fact, the courts concluded in two of the three cases cited by Mr. Radio that estoppel did not apply. In order for estoppel to apply, certain elements need to exist. First, there has to be a misrepresentation by government of a material fact, which he did not believe applied in this case. Some of the reasons presented by Mr. Radio, such as boats being in the water or misrepresentation of docking rights at the neighborhood level, is not misrepresentation by the LMCD. Second,

the representation made by the government has to be known by the government to be false. Third, the government has to have intended that its representation to be acted on. Fourth, the citizens to whom the representation was made must not know the facts. Fifth, the citizens have to rely on representations. Sixth, the reliance must have been detrimental to the citizens. In summary, LeFevere did not believe that there were facts necessary to establish estoppel.

- He entertained questions or comments from the Board.

Van Hercke asked Mr. Radio to comment on the application.

Mr. Tom Radio, Hinshaw and Culbertson, stated that he was legal counsel for Bayview HOA and that he would be speaking on its behalf. He believed that LeFevere laid out the legal arguments that he prepared; however, he did not agree with some of the comments made by LeFevere. Radio stated that this is a key issue for eight residents of Bayview HOA because of the loss of access to Lake Minnetonka, which is quite valuable. These residents purchased their properties assuming that they had lake access, which resulted in an increased valuation of the property and increased property taxes. He provided an overview of the three arguments he laid out in the correspondence. First, by operation of the law under the 60-day rule, the application has already been approved. The 60-day rule applies to all municipal bodies, including the LMCD, and LeFevere has provided good legal advice relating to this. Review of case law indicates that the 60-day rule applies to the LMCD and there is a need to strictly comply with the statute. There have been three instances where the LMCD has not complied with the 60-day rule. The first instance was when the law was adopted in 1995. The application was submitted in 1976 and the LMCD has not been able to document that the application was either abandoned or withdrawn. In order to establish abandonment, there is a need to establish a physical act and intent, neither of which has been done. Filing of the covenants in 1977 does not constitute an abandonment. Instead, it clarified docking rights for two properties in the development. Correspondence sent out by staff in July 1995 started the 60-day rule at that time and the Board did not either approve or deny the application. The second instance occurred when a letter was sent to Christopher Mach in March 2003 by Judd Harper. Mr. Mach then responded in April 2003, with two letters sent back to Bayview HOA in April and September 2003 by Nybeck. At that time, the Board did not act upon the 1976 application and it is approved based on the 60-day rule. The third instance occurred last March when Bayview HOA requested the Board to consider the application. In a letter from LeFevere to Nybeck, LeFevere recommended that the letter be treated as an application to assure that the LMCD does not run afoul with the 60-day rule. A letter was sent by Nybeck to Bayview HOA on 3/26/04 and its representative at that time, John Thomas, requesting a new application and not stating why the 1976 application was inadequate.

Babcock questioned how Bayview HOA could take the position in the third instance that the application was deemed approved by the 60-day rule. In the letter sent by Nybeck, dated 3/26/04, it clearly states that the purpose of this letter was to inform Bayview HOA that the application was not complete.

Radio stated that the deficiencies were not outlined in the letter prepared by Nybeck. The second legal argument is that the application meets the technical standards of the LMCD non-conforming use section as the docks were legally in existence on or before May 3, 1978. In the past, he believed that the Board has used the practice of what was physically in existence. He believed that

this made sense when an application was not submitted. In this case, an application has been submitted that has not been acted upon by the Board. In 1978, he believed that there were probably two or three boats in existence. The Code reads that docks need to be lawfully in existence and this would have been complied with if the Board acted upon the application in 1976. A similar analysis was recently used by the Board when it back licensed off-lake storage spaces at Howards Point Marina. The third argument is that approval of the application is mandated under legal doctrine of estoppel. He did not agree with the legal argument summarized by LeFevere. He believed that the wrongful conduct by the LMCD of failing to act on the 1976 application justifies estoppel. The abutting properties to this outlot, plus other residents in the development, have supported docking at the outlot in some form. He believed that these three legal arguments make a powerful argument for the equities and legalities of the situation. He entertained questions or comments from the Board.

Berns asked if it was fair to say that Bayview HOA cannot cite any case law or statutory authority that specifically states that the 60-day rule applies to dock license applications?

Radio stated that he had not seen any case law pertaining to dock license applications. However, he believed it applies on a broad basis to all governmental agencies, including the LMCD.

Berns asked if it was fair to say that Bayview HOA cannot cite any case law or statutory authority that required all pending applications on July 1, 1995 to be immediately subject to the 60-day rule?

Radio stated that he had not seen any case law. However, he believed that the courts have not cut governmental agencies any slack.

Berns asked if it was fair to say that Bayview HOA cannot cite any case law or statutory authority that defines existence as the mere right to create or build rather than physical existence?

Radio stated that he had not reviewed case law pertaining to this question. However, he asked the Board to use the same analysis used for Howards Point Marina.

Berns asked if it was fair to say that there was no written request made or application submitted by Bayview HOA in 1994, 1995, 2003, or 2004, and the application being considered by the Board was submitted in 1976?

Radio stated that there was a written request made by John Thomas on 3/8/04. The question is whether this letter constitutes a new application, a request to backlicense to 1976, or to bring forward the 1976 application.

Berns stated that if the Board were to grant the 1976 application, could Bayview HOA provide documentation that meets the LMCD standards for what was physically in existence on May 1, 1978?

Radio stated that he believed what was physically in existence in 1978 was not relevant because the application is deemed approved by the 60-day rule in 1976. There was a dock in existence in 1978; however, he stated that he could not provide written or photographic evidence.

Berns asked if it were fair to say that Bayview HOA has no evidence that the LMCD was wrongful in 1976 and it is possible that the developer chose to withdraw the application, which is supported by the real estate documents?

Radio stated that he did not believe that the real estate documents show the intent of the developer to abandon the 1976 application.

Gross asked for clarification of who the applicant was in 1976?

Radio stated he believed the applicant was the developer, which has subsequently gone out of business.

Gross asked if the 1976 application was deemed abandoned when the developer went out of business?

Radio stated that he did not believe so because he believed the rights to the application were passed on to the homeowners.

Babcock asked Radio if he had case law to support that?

Radio stated that he was not aware of any case law.

Scanlon asked if the Bayview HOA was a legal entity?

Radio stated that Bayview HOA was recently legally incorporated in the past couple of years. However, there has been an informal homeowners association at the Bayview development since the mid 1970's.

Scanlon asked for clarification on the deeds of the properties in the development?

Radio stated that all 10 properties were provided lakeshore rights through a 1/10th easement to the outlot.

Nybeck clarified that docking at the outlot, based on the covenants, was for the storage of two boats at one dock. The properties for these two boats were specified in the covenants. A second dock was allowed for ingress and egress, and the covenants allowed for the storage of ten canoes at this site.

Babcock stated that the application before the Board for consideration was the 1976 application. He asked LeFevere to provide clarification of this.

LeFevere stated that he believed the intent of Bayview HOA was to get approval of the 1976 application and licenses through to the current rather than just approval of the 1976 application for the 1977 season. The letter received from Mr. Thomas last March has been treated as an application to comply with the 60-day rule. He stated that Mr. Thomas provided additional information when Nybeck deemed the application incomplete last March. Some of this additional information included address labels within a 350' radius from this site, the names of the property

owners abutting the outlot, and an amended site plan. The application submitted in 1976 was likely complete at that time; however, it did not comply with the 2004 standards.

Radio stated that the intent of his clients to was to get approval of the current application by backlicensing from 1977 through the current.

Zischke stated that she would like to make a motion to deny the 1976 application submitted by Bayview HOA and all subsequent applications. The motion failed due to a lack of second.

Babcock stated that he would like to get advice from LeFevere on how to proceed prior to the Board making a motion. He did not believe that Bayview HOA has provided any evidence that supports back licensing to the 1976 application. In fact, he questioned whether the 1976 application was valid and whether there was a need to deny the 1976 application.

Zischke stated that she would like to deny the 1976 application to provide closure.

Babcock stated that with the creation of the covenants, he believed that the developer had no intent to proceed with the 1976 application. Additionally, he questioned whether the 60-day rule applied to an application submitted in 1976. Because of this, it is quite possible that the application was either abandoned or withdrawn.

LeFevere stated that if the Board was inclined to deny the 1976 application or the request made in 2004, he did not believe that the Board needed to clarify that at this time. He indicated that he would prepare draft Findings of Fact and Order and the Board could decide at that time what language to include to address the 1976 application and the request made by Mr. Thomas in 2004. He believed that the focus of the Board at this time should be whether Bayview HOA meets the requirements of the Code for licensing.

Gross questioned whether discussion of grandfathering by the Board was appropriate because the only application included in the packet was a 1976 application.

Nelson stated that he did not believe the Board had the legal proof to grandfather the facility and back license because Bayview HOA has not provided the proof of what was in existence in 1978.

Zischke asked Nybeck why he has referred to the 1976 application in the documents prepared.

Nybeck stated that the LMCD office received a request from Mr. Thomas on 3/10/04 for the LMCD to consider the application submitted in 1976. On 3/26/04, he stated that he sent a letter to Mr. Thomas stating the application was deemed incomplete. This letter was sent out on the 12th business day and 60-day statute required this letter to be sent by the 15th business day. After this letter was sent out, he stated that he had discussed with Mr. Thomas why the application was deemed incomplete and information needed. This included address labels, the names of the abutting property owners, and an assortment of other information required on a new multiple dock license application. On 4/26/04, Mr. Thomas submitted this information in response to the 3/26/04 letter deeming the request as incomplete. At that point, the request was deemed complete and the 60-day rule began. On 6/15/04, a letter was sent to Mr. Thomas requesting a 60-day extension.

Subsequent consent forms were received from Mr. Thomas on 7/28/04 and 12/2/04 to extend the 60-day period.

LeFevere stated that it is confusing on which application is being considered because of actions of Bayview HOA. The applicant would like the Board to grant a current multiple dock license by bringing back the 1976 application out of the file.

Nybeck read the first paragraph of the letter received from Mr. Thomas on 4/26/04. It states "We appreciate your on-going guidance regarding LMCD procedures as they apply to our request for a 2004 Renewal (based on back-licensing to the 1977 Dock Season) for a non-conforming multiple dock license on Smithtown Bay. The purpose of this letter is to provide the additional information requested in your letter of March 26 and also to reiterate Bayview's assessment of the status quo".

Radio stated that he believed the letter referred to by Nybeck was taken out of context and not an acknowledgement by Mr. Thomas that the request was incomplete.

Babcock asked Radio if it was his preference for the Board to act on the request made in 2004 or to act only on the 1976 application.

Radio stated that he agreed with the analysis provided earlier by LeFevere.

LeFevere stated that there was a need for Radio to clarify for the record if the Board should act only on the 1976 application, which was complete at that time. This feedback is necessary because the Board needs to know what they have been requested to act on.

Radio stated that the request has been made for the Board to act on the application from 1977 through 2005.

LeFevere asked Radio if the 2005 application was completed in 1976?

Radio stated that he believed the application was complete in 1976 and it carries forward to the 2005 application.

Babcock questioned whether it is appropriate for the applicant to determine when an application is complete. He believed that this is the responsibility of the LMCD and the applicant cannot have it both ways.

LeFevere stated that he did not want to have the Board get caught in a catch 22 where the Board is attempting to comply with two different standards. He believed that the applicant needs to clarify for the record whether the application is for the 2005 season and all prior years.

Radio stated that the application was submitted in 1976 for 1977 and all subsequent years.

Babcock questioned whether the Board could renew an application back to 1976 for a company that has become defunct.

Radio stated his clients have followed the process established by staff.

LeFevere questioned how the LMCD could comply with the 60-day rule when Radio has proposed that the application submitted in 1976 was complete for 1977 and all subsequent years, and also was nearly 28 years old when the LMCD received it in 2004.

Nelson stated that he did not believe that the LMCD had any legal basis to approve an application and back license until Bayview HOA provides proof of what physically existed in 1978. He questioned whether there was a correlation between the 1976 application and the request made in 2004 by Mr. Thomas.

MOTION: Zischke moved, Babcock seconded to direct LMCD counsel to prepare Findings of Fact and Order to deny the 1976 application submitted by Bayview HOA and all other requests made by Bayview HOA.

Babcock proposed a friendly amendment to have the draft Findings clarify that Bayview HOA has not submitted any compelling evidence to qualify for grandfathering and that the current request would not comply with LMCD Code requirements. Zischke agreed to this.

VOTE: Motion carried unanimously

- E. Discussion of potential changes to LMCD Code Section 2.09 relating to deicing installations and the public comment process.

Van Hercke asked Nybeck for background on this agenda item.

Nybeck recommended the Board table discussion of this agenda item to a future Board meeting.

MOTION: Zischke moved, Scanlon seconded to table discussion of this agenda item to a future LMCD Regular Board Meeting.

VOTE: Motion carried unanimously.

- G. **North Shore Marina East (Site 1)**, staff update of proposed site plan in conjunction with the reconfiguration of a non-conforming, multiple dock license application utilizing LMCD Code Section 2.015 (Public Hearing was conducted at the 3/9/05 Board Meeting).

Van Hercke asked for background from Harper on this agenda item.

Harper reviewed the memo, dated 3/18/05, which summarized the North Shore Marina East (Site 1) non-conforming multiple dock license application. This was approved by the Board at the 3/9/05 Board Meeting; however, parts of the site plan are not contained within the envelope established by the Board at that meeting. Thus, Mr. Anderson has proposed a revised site plan that is contained within the envelope for this site, based on the 2/23/81 approved site plan. This revised site plan complies with all requirements of LMCD Code Section 2.015 and he recommended Board approval for the 2005 season, with the conditions outlined in the staff memo.

Babcock questioned why this application was brought back to the Board for review.

Nybeck stated that this application needed to be revisited by the Board because the revised site plan includes the relocation of slips rather than just bringing the dock closer to shore.

MOTION: Babcock moved, Johnson seconded to confirm staff determination that the revised site plan complies with the previous motion made at the 3/9/05 Regular Board Meeting.

VOTE: Motion carried unanimously.

H. Additional Business.

There was no additional business.

2. LAKE USE & RECREATION

A. Chair update of 3/17/05 Lake Minnetonka Boat Density Sub-Committee Meeting;

Van Hercke provided an overview of the 3/17/05 Lake Minnetonka Boat Density Sub-Committee meeting. This discussion is outlined in the Meeting Report for this sub-committee meeting. The primary purpose of this meeting was to strategize how to receive feedback from the stakeholders. The next sub-committee meeting is scheduled for 4/7/05 and the purpose of this sub-committee meeting will be to refine the meeting notice and list of deliverables to receive feedback on. The stakeholders' meeting has tentatively been scheduled in place of the 5/11/05 LMCD Regular Board Meeting.

Babcock stated that he would have a time limit established at this public meeting, with a second meeting if needed.

B. Additional Business.

There was no additional business.

3. FINANCIAL

B. Additional Business.

There was no additional business.

4. EWM/EXOTICS TASK FORCE

A. Consideration of quotations for replacement motors for EWM Harvesting Program Equipment.

Van Hercke asked Nybeck for background on this agenda item.

Nybeck stated that there was a need to purchase replacement motors for the pontoon and transport barge. Based on state law, one quote was received for the pontoon motor and two quotes were received for the transport barge. For the pontoon, Tonka Bay Marina has submitted a quote for a 1999 40 horsepower Johnson motor. Total expenses for the purchase of the motor, labor, and sales tax were \$3,080.00.

MOTION: Seuntjens moved, Johnson seconded to authorize the purchase of the 1999 40 horsepower Johnson motor for the pontoon from Tonka Bay Marina, not to exceed \$3,080.00.

Babcock recommended a friendly amendment to the motion that this would include controls, labor and disposal of the existing motor on the pontoon. Seuntjens and Johnson agreed to this.

VOTE: Motion carried unanimously.

Nybeck stated that original and revised quotes were received from Tonka Bay Marina and Riverview Sports for the purchase of a 2005 150 horsepower Mercury Optimax motor. Total expenses for the purchase at Tonka Bay Marina was \$15,300.01, compared to \$14,212.55 at Riverview Sports. He stated that Riverview Sports has a new 2004 150 horsepower Mercury Optimax motor and the LMCD could deduct an additional \$1,100 from the quote for the 2005 motor. He entertained questions or comments from the Board.

MOTION: Seuntjens moved, Babcock seconded to authorize the purchase of a 2004 150 horsepower Mercury Optimax motor for the transport barge from Riverview Sports, not to exceed \$13,112.55.

VOTE: Motion carried unanimously.

B. Additional Business.

Herb stated that he and Nybeck had recently visited Heidi Wolf, Jay Rendall, and David Wright from the MN DNR to follow-up on how the costs break down for the public access inspection program the LMCD contracts with the MN DNR. He believed that this was a productive meeting and there was a letter, dated 3/23/05, which provides this breakdown. Suerth stated that the MN DNR has agreed to revisit some of these expenses at the conclusion of the season and he would keep the Board up to date on this. He updated the Board that approximately \$400 had been received from the zebra mussel mailing sent out to Woodland residents.

Nelson updated the Board that the TPT zebra mussel videos were recently sent out. He stated that Scanlon had communicated to him the idea of showing this zebra mussel video on LMCC cable television.

The Board discussed this and the consensus was for Nybeck to check on potential dates with the LMCC on broadcasting this video, promoting this through the LMCD website, local newspapers, and city newsletters.

5. ADMINISTRATION

A. LMCIT Liability Coverage- Waiver Form, staff recommends the Board approve a motion that the LMCD does not waive the monetary limits on municipal tort liability established by Minnesota Statutes Section 466.04.

Van Hercke asked Berns to comment further on why he requested this agenda item removed from

the consent agenda.

Berns asked LeFevere to provide some background on monetary tort liability established by Minnesota Statutes Section 466.04.

LeFevere stated that all but one of the public bodies that he represents do not waive the monetary limits on municipal tort liability. The primary purpose for this is that it saves the governmental bodies some money. There are those that believe that waiving municipal tort liability allows persons suing the government an opportunity for a more complete, or larger, recovery of damages.

MOTION: Berns moved, Seuntjens seconded to approve a motion that the LMCD does not waive monetary limits on municipal tort liability established by Minnesota Statutes 466.04.

VOTE: Motion carried unanimously

B. Additional Business.

There was no additional business.

6. SAVE THE LAKE

There was no discussion.

7. EXECUTIVE DIRECTOR REPORT

There was no discussion.

8. OLD BUSINESS

Zischke stated that she would like to have an update on the pending Canning civil lawsuit. The Board briefly discussed this and the consensus was to get a brief written update on this from George Hoff.

9. NEW BUSINESS

Babcock updated the Board on two items. First, he understood that the City of Minnetrista had recently adopted an ordinance to protect Six Mile Creek. He believed that Board member Knudsen would be able to better provide the details of this ordinance. Second, he stated that he would like to work with LeFevere on two Code amendments for future Board review, if the Board did not object. He believed that there was some need to further clarify length restrictions of the envelope for LMCD Code Section 2.015. He also believed that the Board might want to consider eliminating back licensing in the future based on recent requests.

The Board discussed this and there were no objections from Board members.

10. ADJOURNMENT

There being no further business, the meeting was adjourned at 11:04 p.m.

Katy Van Hercke, Vice Chair

Jose Valdesuso, Secretary