

**City of Birchwood Village**  
**November 17, 2009 Special City Council Meeting**

Mayor Wingfield called to order the November 17, 2009 Special City Council meeting at 7:00 pm. Council Members present: Jay Brunner, Barb Carson, Jane Harper, and David Jann. Council Members absent: None. City Staff present: Clerk Ry-Chel Gaustad.

1. Pledge of Allegiance

2. Approval of Agenda

Councilmember Carson asked to add Item 7A, Update on Warming House, Hockey Rink Hours, and Staffing.

MOTION by Mayor Wingfield, seconded by Carson, to approve the agenda as revised above.  
MOTION carried.

**DOCK ASSOCIATION APPLICATION CONSIDERATION**

3. Consider Kay Beach Association Application

Because Debbie Harrod was not yet in attendance, Item 4 was considered.

4. Consider Elm Beach Association Application (Boat Hoist Storage)

Alan Mitchell, Elm Beach Association (EBA) President, presented their 2010 dock application, noting it is identical to the last few years. He reported they were only able to get two boats into the water in 2009 due to low water levels. If lake levels come up so they can use six boats, there will be two openings to fill from the waiting list. If lake levels stay low, they may request future approval for two small fishing boats on short slips. Mr. Mitchell stated they are also asking for approval to store four boatlifts on the easement over the winter, noting the lifts do not block access to lake, have no canopies, and they are willing to pay \$100 per lift for the right to store over the winter months. Mr. Mitchell advised of the EBA's discussion regarding its organization, need to improve communication between Dock Associations and residents, how boat slips are assigned, and desire to expand boating opportunities, perhaps through joint boat ownership or sharing slips over the course of the summer. They have also discussed that for the past 15 years, the Birchwood Dock Association has handled insurance for all Dock Associations and the possibility of increasing the management of that Association to include the waiting lists. Mr. Mitchell commented on actions the City can take to impose a fee for dock access and address City-wide runoff issues.

Mr. Mitchell answered questions of the Council regarding the Association membership process, how to obtain voting status, requirement for insurance documentation to assure all boats are insured should there be joint slip usage, the Elm Beach dock is well maintained, and ownership of the four lifts currently stored on the easement.

Councilmember Jann asked if the EBA had a permit from the City to place its personal property on the easement at the time the items were placed there. Mr. Mitchell stated in February of 2009, when the Council approved the dock permits, it was indicated they would address storage in July. However, that did not occur and the City has not told them to remove the lifts. Mr. Mitchell stated if permission is not given tonight, they will remove the lifts. He suggested their "permit" was as stated in the dock permit submitted a year ago, in February, that the Council approved. Councilmember Jann stated he does not believe an indication it would be discussed in the future results in granting permission to store private property on the City's easement.

Councilmember Jann commented on the EBA membership and waiting lists and asked Mr. Mitchell how it is fair and equitable that Gene Ruehle has had a slip almost 40 years while Mike Evangelist has been waiting almost 10 years. Mr. Mitchell explained that slips are assigned based on seniority, as dictated since the By Laws were drafted. Councilmember Jann stated reason he does not believe a seniority system is fair or equitable. Discussion ensued regarding other municipal dock programs and marina fees. Councilmember Carson referenced the 2008 park survey that asked if the present seniority system should continue, noting that 59 agreed it should proceed and 56 said it should not proceed.

3. Consider Kay Beach Association Application – (continued)

Debbie Harrod, 483 Lake Avenue, stated she is new to this position but did fill out the application and is available to answer questions of the Council. Mayor Wingfield asked if they have tackled the issue of insurance and whether swimmers need to be covered. Ms. Harrod stated Kay Beach pays a joint premium that is higher due to swimming. Mayor Wingfield suggested they check to be sure they are not paying double.

5. Consider Dellwood Beach Association Application (Boat Hoist Storage)

Brian Lind, Dellwood Beach Association (DBA) President, presented their dock application and advised that their slips are assigned by seniority. If the water is low and a member's boat is too big for the slip, they go to the next name if they have a smaller boat. Mayor Wingfield asked if everyone that was signed up in 2009 was signed up again in 2010. Mr. Lind stated it is pretty much the same list.

Councilmember Jann commented on the DBA's membership and waiting lists and asked Mr. Lind how it is fair and equitable that Jim Simning has had a slip 39 years, Mary Sue Simons for 21 years, and Ron and Kathy Malles for 24 years while Joe and Julie Molitor have been waiting 11 years. Mr. Lind stated it is a seniority-based system based upon the time you enroll into the organization, the By Laws have been in place for decades, and you receive a copy of these By Laws when you join the DBA. Councilmember Harper noted Councilmember Jann is referring to the seniority list and the DBA does not have a waiting list for a boat slip. Mr. Lind stated that is correct and explained the Molitors did not sign up to be on the boat slip waiting list. Councilmember Harper stated it is the same for all Associations, people are calling the "seniority list" the "boat waiting list" yet they are distinctly different. Not all people on the seniority list are waiting for a boat slip. She suggested the information in the City's application be clarified to indicate the "boat waiting list."

6. Consider Birch Beach Association Application (Boat Hoist Storage)

John McCormick, Birch Beach Association (BBA) President, stated they are filing the same dock application as the past seven years for ten boats. He advised they have three openings but, due to low water levels, only one was filled. They expect one or two more resignations in 2010 so there has been movement on the waiting list. Mr. McCormick stated the BBA has six boat lifts on the easement until they learn whether the Council will allow storage for this winter and if not allowed will act accordingly. He stated the Association is willing to remove canopies, not block access, and pay a fee.

Councilmember Carson asked if there had been any injuries or police calls this year. Mr. McCormick stated he is aware of no injuries or police calls. Mr. McCormick answered questions of the Council regarding lift ownership.

Councilmember Jann commented on the BBA seniority membership list and asked Mr. McCormick to explain to Philip Sutherland, Christina Rauch, and Timothy Virant how it is fair for them to wait 5-6 years while Mark Cahill has had slip for 19 years, Dana and Lori Klimp for 14 years, Michael Scanlan

for 14 years, David and Mary Martinucci for 13 years, and Mr. McCormick for 8 years as of next year. Mr. McCormick stated he waited for 5 years to get his slip and everyone on the list enrolled when they moved into Birchwood or shortly thereafter, paid fees to be on the waiting list, showed up at meetings and clean up days, invested in lifts and boats, paid for insurance every year, have an investment in the easement, and waited like everyone else. Mr. McCormick stated most people on the waiting list understand that and are willing to wait 5-6 years to get the same deal. Then they can invest in a boat and lift and not have to worry about selling it the following year because by lottery someone else got the slip.

Mayor Wingfield stated the Birchwood area has two parcels and she has received comments that people want more swimming area. She asked if the dock can be moved over to free up more swim space and still allow boats to back out and remain on the parcel. Mr. McCormick stated that would make sense but he does not know if there would be objections.

7. Consider Ash Dock Association Application (Boat Hoist Storage)

Jason Tell, Ash Dock Association (ADA) President, stated their application remains unchanged from last year. They would like alternate boat placement but the neighbors did not agree so the ADA submitted the same placement as last year. He requested Council feedback on the ability to place the dock at the edge of the water line if the lake level is low. He stated they propose to store boat lifts on the easement and go along with Mr. Mitchell's comments and a fee of \$100.

Councilmember Brunner asked if the ADA wants to switch boats from the west to east side. Mr. Tell stated that is correct and would like to alternate year-to-year to be fair to both property owners on each side. Councilmember Brunner asked if 50% of the area is available for swimmers. Mr. Tell stated they are in compliance with 50% in terms of swimming area, but maybe not 50% of the linear beach area.

Mr. Tell answered questions of Councilmember Jann regarding ownership of lifts that are currently stored on the easement and indicated that besides himself, he did not know how long anyone has had a slip. Councilmember Harper stated she has had a slip 20 to 25 years. With regard to waiting list turnover, Mr. Tell advised that one person dropped off so that opening will be offered to the next person on the list based on seniority. Councilmember Carson asked if there were any injuries or police activity this year. Mr. Tell stated there were none that he was aware of.

8. Triangle Dock Association

James Nelson, Triangle Dock Association (TDA) President, 256 Wildwood, commented on his lawsuit and the Court's ruling indicating that the appellant's concern about fair treatment by the City was not without basis. Mr. Nelson challenged the Mayor and Council to take action, noting residents are waiting years and some drop off the list because there is no hope of having a boat slip. He questioned how the Council can grant the Birch Beach Association permit when it is clear that some people may have superior rights while others do not have deeded access in their property deed. He noted the District Court stated it was troubled by the preferred status of the Dock Associations and the City to look hard at the appearance of favoritism or prioritizing the desires of a few residents over the desires of all residents. Mr. Nelson agreed with the position of Councilmember Jann and asked why someone has a lifetime right slip while others do not. He felt anything would be better than having the Dock Association Presidents running the re-alignment because they are interested in protecting their own membership. He noted that Councilmember Carson worked hard to make changes in the Dellwood Beach Dock Association but it was found after their vote that a majority had been missed by 06%. so it did not go through.

Councilmember Jann noted Mr. Nelson had been on a waiting list since 2000, waiting 10 years at the next boating season, while the Ruehles, Schnellmans, Mitchells, and Kodadeks have had boat slips from 5-20 years. He asked Mr. Nelson what he thought about the fairness of this system. Mr. Nelson stated it would be great if you were part of the “scheme” and got in early, but it is not a fair system to use seniority. Mr. Nelson suggested that things have changed and more people have moved in and have boats. Councilmember Jann asked Mr. Nelson if he would have been less motivated to sue the City if he had not had to wait ten years with the Dock Association. Mr. Nelson stated if he had received a boat slip, he wouldn’t have done what he had done nor felt the need to create a new Dock Association. Mr. Nelson stated there are options for a new system, but what is available now is nowhere close to being fair.

In response to questions by Councilmember Harper, Mr. Nelson stated he did not get the application submitted in time, if approved several members of the Dellwood Beach Association plan to switch over because Elm Beach has a storm water runoff so the quality of soil is better at Birch Beach, and while they held one annual meeting in 2008 they did not meet in 2009. Councilmember Harper stated there is no indication of a desire to store the dock or lifts on the easement, if approved. Mr. Nelson stated it will have to be addressed if their application is approved. Councilmember Harper noted pieces of information are missing from this application.

Mayor Wingfield asked how the TDA implementation system is different than the seniority system used by other Associations. Mr. Nelson stated that they have language in their deed that is filed at the Washington County courthouse, and if you have that language in your deed, you are eligible. He stated he would be open to a five-year rotation. Mayor Wingfield asked if slips would be limited to those who have it in their deed. Mr. Nelson stated that is one solution or those with it in their deed will have the first right of refusal to have a slip. Mayor Wingfield asked Mr. Nelson if he is coming forward as an applicant to address a fairness issue or something in his deed. Mr. Nelson stated originally he wanted a boat because his kids wanted to ski. He felt there was a solution since some have it in their deed and there is room for the Birch Beach dock and still have another dock.

Councilmember Jann asked if a copy was given to the neighbors. Mr. Nelson stated he did not notify neighbors this time.

#### Public Hearing Comments

The floor was opened for public comment at 8:25 p.m.

Mary Hauser, 616 Hall Avenue, addressed the issue of fairness with the current insurance pool. She suggested that if the City has ordained Kay Beach will have no boats and is only swimming, the City has an obligation to insure it and provide a dock so all can swim and fish from a dock on Kay Beach. Ms. Hauser questioned whether the City had taken proper oversight in the permit process to determine whether the Dock Associations have appropriate insurance in case people swim from their dock. She noted the City is absorbing the largest liability and it would help if Dock Associations had proper insurance to cover liability issues.

Richard Galena, 217 Wildwood Avenue, stated he just learned about the TDA shortly before the meeting, did not believe it would work to have two docks on a public beach, and it would not be fair to people on other boat waiting lists to advance a few individuals on the TDA list. He believed it would have an adverse effect on the beach to have two docks and also prevent Birch Beach from having a

decent swimming beach. Mr. Galena stated he is not opposed to the BBA continuing as they have for dock placement but objects to allowing canopies on top of boats because they act as Chinese wall.

Mike Scanlan, 17 White Pine Lane, stated several reasons why “life is not fair” and suggested that a seniority system is an attempt at fairness. He noted the BBA had evolved over many years and can continue to evolve but it would not be prudent to “throw the baby out with the bathwater.”

Tom Delmont, 143 Wildwood Avenue, stated he has lived next to Ash Beach for 16 years and received no communications from Mr. Tell so it was a surprise to him that the “neighbors could not agree on boat placement.” He asked the Council to not take action on the ADA dock application until neighbors can talk with the Association. Mr. Delmont stated the boats have been on his side of the dock for 15 years, which is not fair, and he would like a chance to work it out, maybe have boats on both sides of the dock.

Jim Greeley, 407 Lake Avenue, addressed the visual blight caused by storage of boat lifts and canopies on the easement over the winter months, which is also a violation. He noted that Dellwood Beach is not hidden from view and this condition reflects badly on the City. Mr. Greeley stated mediation is scheduled on December 15<sup>th</sup> and suggested, in the interest of all involved, that action be held in abeyance until after mediation occurs.

Sterling McCusick, 404 Birchwood Avenue, provided the Council with a letter of his thoughts, as a private citizen, on the Dock Associations and asked that this information be made part of tonight’s record. He stated he does not live near the lake and has never requested a slip in 35 years, nor has any member of his family. Mr. McCusick suggested that use of the lake is an asset to all residents of the City and it was a great disservice to all to permit continuing fighting by the Dock Associations. He believed the City should have more gumption and assume control by creating a single waiting list for vacancies. He also supported enacting rules to prohibit any City official to cast votes in any Association or be on any waiting list. Mr. McCusick stated as residents age, they will be putting their house on the market to sell and it would be an advantage to assure a prospective buyer that they would have a chance to get a boat on the lake without waiting for 40 years. Mr. McCusick felt the current system was profoundly unfair. Upon questioning by Mayor Wingfield, Mr. McCusick clarified that the list of comments he provided were strictly his opinions, not that of the Park Committee.

John McCormick, Birch Beach Association (BBA) President, stated they were not aware the Council would consider an application from the Triangle Dock Association at the same site. He advised that if the TDA application is approved, the BBA would object if it limited their access or voided their waiting list.

Diane Ross-Hanson, 700 Hall Avenue, Dellwood Beach Association member since 2003, indicated why she believed in the need to continue to offer docks, boating, and swimming to the community and that access to boat slips was unfair at this point. Ms. Ross-Hanson suggested that investment in recreational equipment is irrelevant because it is always a risk and noted that the fee paid to municipal marinas is substantially more than paid for boat slips here. She stated it is no wonder that the argument continues since 24-30 Birchwood residents enjoy a long-term slip access and will fight any type of change. She commented on the effort of Dellwood Association members to change the allotment by seniority to an allotment by rotation beginning in 2010 summer that fell short of a majority vote by .16 even though the majority of the people at the meeting had voted in support. She felt that equal representation was needed, not just representation by Dock Association Presidents, and would like the DBA to honor that

good faith popular vote. Councilmember Jann asked how the vote failed by .16 vote. Ms. Ross-Hanson stated she does not know how that was determined since the majority voted for a rotation system.

Nancy Mueller, 263 Cedar St., stated she does not live on the lake or want a boat or slip. She commented why she felt the current system was not fair and that the City could do much better. Ms. Mueller suggested that property with deeded access should have the same taxation and valuation as properties that are on the lake since it was indicated with Jim Nelson's dock that it would increase the value of a home \$50-60,000 to have it on their deed. Then the extra tax dollars can be used to build fabulous docks and wonderful swim areas that all can enjoy. With regard to storage of private items on public property, Ms. Mueller noted all have items they would like to store for \$100.

Brian McGinnis, 194 Wildwood Avenue, a nonvoting member of the Birch Beach Association, stated he was disappointed to learn, at annual meeting this fall, that the Council had taken no action on the recommendations of the Dock Association and been remiss in not deciding nonphysical issues before the meeting tonight. He stated the issues of seniority and fairness are important but will not be solved tonight. Mr. McGinnis suggest the dock configurations be approved tonight except for the Dellwood Beach application, which is a special issue, and that other rules be determined and not go on for years.

Ron Malles, 420 Wildwood Avenue, a member of all Dock Associations except Elm Beach, agreed that access to the lake is desired by everyone who lives off the lake and something of value in the community. However, a year ago the Council took away 10% of the slips since it voted to not extend the docks. He felt it was common sense to allow docks to be placed at the water edge if the lake level goes down. Mr. Malles stated in 2009, they went through the entire list but not everyone with seniority wanted to use a slip, as is their prerogative. He felt a storage fee of \$100 was reasonable and agreed all canopies should be pulled off to address appearance issues on Dellwood. Mr. Malles stated he voted for all on the Council and asked how members were going to address this as an issue of access to the lake.

Councilmember Brunner clarified the City does not take boat slips away but Associations say they only have room for four or six boats. Mr. Malles stated the Council only approved four slips and modified the application after a private meeting between the past Association president and two property owners.

Bob Nicholson, 433 Lake Avenue, stated why he believed there had been a selective and discriminatory enforcement of the law in Birchwood. He noted that Councilmember Carson had asked and it was said there were no police reports but he knows the police have been called numerous times to Dellwood and done nothing. In addition, every beach with one exception has four to six boat hoists in direct violation of City ordinances. He questioned why it was okay for 20 people to violate the law and asserted enforcement is being done selectively and discriminatorily. Mr. Nicholson also asserted there has been a conflict of interest by people on the Council who will contemplate this serious issue yet have had a boat slip for 20 years for free. He noted a resident who has had a boat slip for 40 years, worth about \$2,000 per year, indicated tonight that he wants "everyone to get along." Mr. Nicholson stated if he had a boat slip, he would feel guilty with "raping the public for 40 years." He urged the Council to address these illegal issues, talk about fairness, and work to make Birchwood a better and fairer community.

Michael McKenzie, 509 Lake Avenue, a member of the Kay Beach Dock Association, suggested the Council research and obtain a legal opinion regarding ethical standards concerning recusal of voting by a public official and how that impacts this issue. He suggested that charging a fee that approaches market value for slips would result in a lot of issues going away. Mr. McKenzie felt the vast majority of

residents don't hold a grudge whether a lake owner or not but want it resolved so they no longer see negative articles about their town in the *White Bear Lake Press*.

Kathy Madore, 413 Lake Avenue, commented on Mahtomedi's yearly rotation system where people sign up at the end of the year and it rotates down so all have an opportunity for a boat slip. She stated it is a privilege to have the Associations and land to give access so there should be no fighting and the City should be able to figure out a process to rotate, charge a higher fee that the City can use to maintain docks, and have the City manage a main waiting list.

Mr. Sampair, 409 Lake Avenue commented that most neighbors said it would be a good idea for fairness to get along with neighbors next to the easement and that comment was also made by Mr. Delmont who indicated he was willing to talk to people. With regard to the mediation meeting, he agreed with Mr. Greeley that it is a good idea to wait until that outcome is known before taking action. He felt that Mr. McCusick and Mr. Nelson made great comments about the need to address fairness and find a way to give all access. He felt that process had to start with people who already have slips and suggested Mr. Malles offer the slip he has had for 20+ years to the next person on the waiting list. He advised that his wife caught another intruder trying to break into their car and they have witnessed numerous illegal activities. He felt if the City lets small things go, eventually it will let go of larger things and then all in Birchwood will be at risk, starting with allowing private property to be stored on public property.

Mayor Wingfield closed the public hearing at 9:04 p.m.

Councilmember Harper questioned discrepancies in the application form and deadline. City Clerk Gaustad explained she had requested the final two Dock Associations to submit the White Bear Lake Conservation District (WBLCD) application and those copies are available for Council review. She advised the dock applications will be considered by the WBLCD at their February 16, 2010 meeting and would like everything, including payment, two weeks prior to that meeting date.

Councilmember Jann stated Mr. McKenzie had suggested that City Council request research about potential conflicts of interest. He indicated that he does not know whether or how Councilmember Harper intends to vote but believes she is aware of his opinion that she has a conflict of interest and she has acknowledged she has been a member of one Association for 20 to 25 years, resulting in a direct pecuniary interest of \$65,000 if the slip is valued at \$2,500 per year. Councilmember Jann explained he has been troubled by members of the Council who have slips and vote on these matters because he believed it was an indisputable conflict of interest in the law by doing so. He read portions of several legal opinions that had been obtained by the City indicating that with licensing or permitting situations, the general rule is that a permit holder who is potentially affected by a decision should not vote, even if the person does not hold a permit but may be personally interested, citing the opinion of the Attorney General. In addition, decisions made where Councilmembers with conflict participated were void and had no legal affect. Councilmember Jann stated his opinion that if Councilmember Harper votes and has a legal conflict of interest and the permit is granted by the Council, the permit is void in the law according to the City Attorney. He felt where there was a risk of the public perceiving a conflict, the best course of action was to err on the side of caution and for the affected Councilmembers to refrain from participating. Councilmember Jann noted the City Attorney recommendation is that in order to avoid a perception of a conflict, Councilmembers who hold an interest in a dock slip should abstain from participating, discussing, and voting on the reorganization of dock licensing and permitting.

Councilmember Jann also quoted from a legal case involving a city on-sale liquor license and the Minnesota Supreme Court, addressing the conflict of interest issue, finding that voting on a license or permit is like voting on a contract in which someone has an interest. He felt the Minnesota Supreme Court had clearly stated that consideration of permits and licenses fall within the definition of a contract so a Councilmember voting on those types of permits and licenses in which he or she has a pecuniary interest does violate the law.

#### Consideration of Kay Beach Association Application

Mayor Wingfield asked Ms. Harrod if the Kay Beach Association has an opinion whether it is better as a private function or would not mind if the City took over the priority list, after investigation. She also asked Ms. Harrod if she would work with the City to analyze the insurance issues and assure it is the best situation. Ms. Harrod stated she does not know whether the Kay Beach Association would be in agreement but maybe she could work with others who are members of the Association.

Mr. Mitchell responded to questions by Mayor Wingfield by indicating no objection to maximizing opportunities during low water levels or the City being in charge of the waiting list, that no progress had been made to develop a rotation system, and while it was not easy to get in touch with all people on the waiting list he had sent them questions asking whether they had a boat, the size of boat, would they pay a fee, amount of appropriate fee, waiting time, etc.

Mayor Wingfield pointed out that the needs of only 20 have not been addressed. Mr. Mitchell stated that is correct and there are 15 on the Elm Beach Association list, which has two vacancies. Mayor Wingfield asked how they can accomplish increasing numbers next year. Mr. Mitchell stated he thinks seniority is the right way to allocate slips and likes the option of sharing boats but others have not agreed with that option.

Councilmember Brunner asked if he has a sense if seniority should continue to be an unlimited time to have the slip. Mr. Mitchell pointed out that not many people on the waiting list are here complaining but the Dock Association should be acting in the best interest of its members and figure out a way to give access to more members. Councilmember Brunner asked if a single Association would be a better means to accomplish getting more people on the lake. Mr. Mitchell noted the Ash Dock Association has invested lot of money into their dock and there are other implementation issues. He agreed it would be an option for the City to take over the dock operation, there could be one Dock Association, or one Association could act as an umbrella over the other Dock Associations.

Mayor Wingfield asked Mr. Mitchell if he would be willing to meet with all Associations and return in January with a proposal for sharing boat slips Mr. Mitchell stated they will keep meeting to try and figure out how to accommodate everyone in the fairest way.

Councilmember Harper asked Mr. McCormick about the July workshop where Al presented his report and made a comment that there had been meetings with all four Dock Associations; however, a resident stated that Mr. McCormick's Association had not been represented and that Mr. McCormick had not heard of anything in the report. Mr. McCormick clarified that he had not attended in July and Dick Galena called him in Boston and read a portion of the report which he (Mr. McCormick) said he hadn't heard of nor was in favor of it.

Mayor Wingfield declined Mr. Mitchell's offer to provide another lawyer's opinion regarding conflict of interest.



Councilmember Carson stated the City can do better with its regulations, noting the application information does not define the seniority system and the permit application form should be updated. She volunteered to work on those matters.

MOTION by Carson, seconded by Harper, to approve the Kay Beach Association dock application for submittal to the WBLCD, subject to using the approved Birchwood application form.

Councilmember Brunner stated his opinion the Council should table all applications and ask that the Associations and a Council volunteer to meet to try and create a single Association with a single set of By Laws, single membership and seniority lists, single membership fee, and single application. He noted the Council has heard great deal of discussion about fairness but has not tried to “hammer something out” that is a functional organization so all in the community know how it will work and is easily understood rather than the current disjointed method. He offered to work with the Dock Association Presidents to see if progress can be made.

Mayor Wingfield stated the applications are for the Birchwood Council and a secondary motion would be to appoint someone from the Associations or Council to represent the applications in front of the WBLCD. She suggested the applications not be forwarded to the WBLCD until the requested information is addressed at a subsequent meeting.

Councilmember Harper asked what is different in what Councilmember Brunner is proposing and the configuration of the docks. She noted that most of the items were addressed by the public tonight and items Councilmember Brunner is listing were addressed at the July workshop and are Birchwood policy issues, not WLBCD permitting issues.

Councilmember Brunner noted there is a scheduled mediation session so the Council loses nothing by waiting until January. Whereas, if the Council approves something in this form that becomes unworkable relative to the mediation, then the Council’s hands are tied and it will have to backtrack. Mayor Wingfield stated that is a separate issue. Councilmember Brunner noted it is tied to one Association under consideration tonight.

Councilmember Jann stated he is not a member of the Kay Beach Association. An audience member confirmed that Councilmember Jann has not paid dues and is not a member. Councilmember Carson stated she is an Association member.

Vote on motion: Councilmember Jann – Nay, Councilmember Harper – Aye, Councilmember Carson – Aye, Councilmember Brunner – Nay, Mayor Wingfield – Aye. MOTION carried.

#### Consideration of Elm Beach Association Application

MOTION by Jann, seconded by Brunner, to deny the Elm Beach Association dock application.

Councilmember Harper asked on what grounds it would be denied. Councilmember Jann stated on the grounds it is unfair to all of citizens of Birchwood that a tiny handful of people have essentially all use and control of an important public asset to essentially the complete exclusion of the public of this City. He noted that out of 335 households, 6 get almost the complete control and utilization of that piece of public property owned by all Birchwood residents. Councilmember Jann stated he is not advocating the complete elimination of this system; however, fairness and equality and access for everybody would

ensure that the control of this economic unit is enjoyed and spread around to more people than just 6 households.

Vote on motion to deny: Councilmember Jann – Aye, Councilmember Harper – Nay, Councilmember Carson – Nay, Councilmember Brunner – Aye, Mayor Wingfield – Nay. MOTION failed.

MOTION by Mayor Wingfield, seconded by Harper, that the Elm Beach Association dock application be approved with the understanding this deals with matters before us and asking the Dock Association members to come back with more information in January before the applications move forward to the WBLCD, and to deal with storage of boat lifts separately.

AMENDMENT MOTION by Jann, seconded by Brunner, to limit each member in the Elm Beach Association to a four-year term, then that member would drop to the bottom of the list and the next senior member would get a slip, for the City to take over the boat waiting list, to charge a fee of \$1,000 annually per slip payable 30 days after approval of the permit, that there be no canopies, and issuance of the permit is contingent upon the City amending its ordinances to permanently prohibit the placement of private property on public property.

Councilmember Harper noted that imposing a fee would require proper notice and holding a public hearing. Mayor Wingfield stated that is correct so, if approved, the fee would be unenforceable until a public hearing is held. She noted there are no canopies at Elm Beach.

Vote on amendment motion: Councilmember Jann – Aye, Councilmember Harper – Nay, Councilmember Carson – Nay, Councilmember Brunner – Aye, Mayor Wingfield – Nay. MOTION failed.

Vote on original motion: Councilmember Jann – Nay, Councilmember Harper – Aye, Councilmember Carson – Aye, Councilmember Brunner – Nay, Mayor Wingfield – Aye. MOTION carried.

#### Consideration of Dellwood Beach Association Application

MOTION by Jann, seconded by Brunner, to deny the Dellwood Beach Association dock application.

Mayor Wingfield asked for the rationale for denial. Councilmember Jann stated it is the same rationale as stated for the previous application. Councilmember Brunner stated he echoed the same sentiments. Mayor Wingfield stated she understands Councilmember Brunner's concern that this matter is in litigation; however, this is the same application as considered last year and does not impact the litigation. She noted that should something change with the mediation, the approval can be revised.

AMENDMENT MOTION by Mayor Wingfield, seconded by Carson, that the application be subject to any changes of the mediation session.

Councilmember Brunner indication the Council is charging ahead even though involved in litigation but should be building bridges and not walls. Mayor Wingfield stated that comment is well taken and appropriate but she thinks since the hearing tonight has run for about three hours, the Council has enough information to decide the issue and she is more than willing to abide by the mediation if something changes.

Councilmember Jann suggested the amendment motion is premature. City Clerk Gaustad confirmed the original motion is to deny the application and the amendment motion is to make the application subject to the mediation session.

Mayor Wingfield WITHDREW THE AMENDMENT MOTION and Councilmember Carson withdrew her second to the amendment motion.

Vote on motion to deny: Councilmember Jann – Aye, Councilmember Harper – Nay, Councilmember Carson – Nay, Councilmember Brunner – Aye, Mayor Wingfield – Nay. MOTION failed.

MOTION by Carson, seconded by Mayor Wingfield, to approve the Dellwood Beach Association dock application.

FIRST AMENDMENT MOTION by Mayor Wingfield, seconded by Carson, that the permit be subject to any mediation results, the permit is not for approval of boatlift storage, and permit is on its face approved but not with permission to proceed to the WBLCD until reviewed again in January, 2010, with regard to wait lists and rotations.

SECOND AMENDMENT MOTION by Brunner, seconded by Jann, to have no canopies permitted on the Dellwood Beach Association docks, to charge \$1,000 annually per slip, and to allow no after season storage of lifts on the easement.

Vote on the second amendment motion: Councilmember Jann – Aye, Councilmember Harper – Nay, Councilmember Carson – Nay, Councilmember Brunner – Aye, Mayor Wingfield – Nay. MOTION failed.

Vote on the first amendment motion: Councilmember Jann – Nay, Councilmember Harper – Aye, Councilmember Carson – Aye, Councilmember Brunner – Nay, Mayor Wingfield – Aye. MOTION carried.

Vote on motion as amended: Councilmember Jann – Nay, Councilmember Harper – Aye, Councilmember Carson – Aye, Councilmember Brunner – Nay, Mayor Wingfield – Aye. MOTION carried.

#### Consideration of Birch Beach Association Application

MOTION by Jann, seconded by Brunner, to deny the Birch Beach Association dock application.

Councilmember Brunner felt the Council was going about this in an ad hoc manner and inviting dissension rather than getting anything done.

Vote on motion to deny: Councilmember Jann – Aye, Councilmember Harper – Nay, Councilmember Carson – Nay, Councilmember Brunner – Aye, Mayor Wingfield – Nay. MOTION failed.

MOTION by Mayor Wingfield to approve the Birch Beach Association dock application but not approve to go forward to the WBLCD, to deal with the issue of lift storage separately, and the Birch Beach Association to further review a more central placement of the dock to allow a larger area for swimming, with their recommendation to come before the Council in January, 2010. MOTION failed for lack of a second.

MOTION by Carson, seconded by Mayor Wingfield, to approve the Birch Beach Association dock application.

FIRST AMENDMENT MOTION by Mayor Winfield, seconded by Carson, to not consider lift storage, to not grant permission to go before the WBLCD until after the Birch Beach Association meets again on this issue.

Vote on first amendment motion: Councilmember Jann – Nay, Councilmember Harper – Aye, Councilmember Carson – Aye, Councilmember Brunner – Nay, Mayor Wingfield – Aye. MOTION carried.

SECOND AMENDMENT MOTION by Jann, seconded by Brunner, to have a four-year limit per slip and then that person goes to the bottom of the waiting list and the next most senior person goes up, for the City to take over the boat waiting list, to charge a fee of \$1,000 annually per slip payable 30 days from approval of the permit, that there be no canopies, and issuance of the permit is contingent upon the City amending its ordinances to permanently prohibit the placement of property on public property.

Vote on second amendment motion: Councilmember Jann – Aye, Councilmember Harper – Nay, Councilmember Carson – Nay, Councilmember Brunner – Aye, Mayor Wingfield – Nay. MOTION failed.

Vote on amended (first amendment) motion: Councilmember Jann – Nay, Councilmember Harper – Aye, Councilmember Carson – Aye, Councilmember Brunner – Nay, Mayor Wingfield – Aye. MOTION carried.

#### Consideration of Ash Dock Association Application

MOTION by Jann, seconded by Brunner, to deny the Ash Dock Association dock application.

Councilmember Jann stated the basis for denial is identical to the previous finding.

Councilmember Harper stated she wanted to make the same statement as a year ago regarding the conflict of interest issue. She had researched with her attorney as it relates to the Minnesota Statutes, not a policy definition of a conflict of interest and concluded there is no conflict of interest under the statutory definition. Councilmember Harper noted the decision is not contractual in nature or a permitting issue. If it were a permitting issue, she could not vote on her own permit. But, in this case, the City is not voting on granting of a dock permit, the White Bear Lake Conservation District is voting on granting the dock permit. The City is only the applicant and deciding on forwarding the application to the permitting authority. Councilmember Harper stated this separation provides protection against a Councilmember acting arbitrarily to further their own selfish interests. A non-contractual conflict of interest can occur when interest is distinct from other members of the community. She explained that because of the City's action, she will not accrue a benefit not available to other residents of the City. So, voting on this matter does not secure for her a benefit that is not available to all other residents of the City. Councilmember Harper explained that under the principal of fair treatment for members of all Associations, if she would not vote on the Ash Dock Association application it would result in non-action. Therefore, she does intend to vote. She explained that by not voting she would be disenfranchising all members of the Ash Dock Association and deny them the same opportunity of water

access that residents in the other Dock Associations are provided. Councilmember Harper stated she chose to err on the side of voting.

Councilmember Jann asked the Clerk to note for the record that since Councilmember Harper is intending to vote on the matter, he will not participate in the vote because it will result in the action being void and he will not participate in a void vote.

Councilmember Jann WITHDREW THE MOTION and Councilmember Brunner withdrew his second to the motion.

MOTION by Carson, seconded by Mayor Wingfield, to approve the Ash Beach Dock Association dock application.

AMENDMENT MOTION by Mayor Wingfield, seconded by Carson, to not approve storage of the lifts, the Ash Beach Dock Association is to discuss with neighboring property owners the placement of docks and boats in alternating years prior to the Council's January, 2010, meeting.

Vote on the amendment motion: Councilmember Jann – Abstain, Councilmember Harper – Aye, Councilmember Carson – Aye, Councilmember Brunner – Nay, Mayor Wingfield – Aye. MOTION carried.

Councilmember Brunner stated for the record his disagreement with Councilmember Harper's analysis since approval includes the consent of the underlying terms and benefits of granting approval of the permit.

Mayor Wingfield stated she is willing to give the benefit of the doubt to the Dock Associations that they will discuss the sharing of slips, return with more details, and work towards resolution to show that Councilmember Harper is voting in the proper manner and not in her own interest.

Vote on motion as amended: Councilmember Jann – Abstain, Councilmember Harper – Aye, Councilmember Carson – Aye, Councilmember Brunner – Nay, Mayor Wingfield – Aye. MOTION carried.

#### Consideration of Triangle Dock Association Application

Mayor Wingfield called for a motion on the Triangle Dock Association application. Councilmember Harper suggested this application be considered in December or January after the Council has had an opportunity to study the information, noting it will have an impact on the Birch Beach dock.

Hearing no motion, Mayor Wingfield stated that given the late submittal of the Triangle Dock Association application, the Council has no choice but to not act on the application tonight.

#### Consideration of Boat Lift Storage on Easement

Councilmember Jann asked if the consideration is for the equipment illegally placed now or for 2010. He referenced Birchwood City Ordinance 607.340 stating there will be no storage of personal property on the public easement in the absence of a permit or a license. He stated that the law has been violated, brought to the Council's attention over a month ago, and the law needs to be enforced.

MOTION by Carson, seconded by Mayor Wingfield, to allow the storage of boat lifts on the City's easement for a fee of \$100 per lift for the year 2009-2010.

Mayor Wingfield asked Mr. Mitchell if he can incorporate a plan to phase out boat lift storage on the easement and provide a recommendation in January, 2010. Mr. Mitchell stated they can talk about this issue, but he does not have as much control as is being implied. Mayor Wingfield stated this storage is a bane to our existence because the lifts are unsightly and there are other alternatives such as a mooring whip. She asked the Dock Associations to look into options, noting time is of the essence.

FIRST AMENDMENT MOTION by Carson, seconded by Mayor Wingfield, to allow no storage of canopies on the easement and to put the matter on for public hearing at the next meeting to collect the fees.

Councilmember Jann asked if this permit would be retroactive to the date the law commenced being violated, October 15, 2009, and if that is the intent, is Councilmember Carson certain the law allows the creation of retroactive permits. Mayor Wingfield suggested that question be referred to the City Attorney. Councilmember Jann felt the motion was fatally vague.

Mayor Wingfield requested those who have lifts on the easement to work with neighboring property owners to assure they are in the best place.

Because of on-going disruptive comments by Mr. Greeley, Mayor Wingfield declared Mr. Greeley to be out of order and asked him to leave the Council Chambers.

SECOND AMENDMENT MOTION by Harper, seconded by Carson, that the storage be according to the diagrams submitted in the applications received from the Dock Associations.

Councilmember Brunner asked if that means they should not work with the neighbors. Councilmember Harper stated the City should have some control over where and how the lifts are stored and tying it to the application gives the City that control.

Vote on the second amendment motion: Councilmember Jann – Nay, Councilmember Harper – Aye, Councilmember Carson – Aye, Councilmember Brunner – Nay, Mayor Wingfield – Aye. MOTION carried.

Vote on the first amendment motion: Councilmember Jann – Nay, Councilmember Harper – Aye, Councilmember Carson – Aye, Councilmember Brunner – Nay, Mayor Wingfield – Aye. MOTION carried.

Councilmember Jann stated everyone in the room knows how this vote will go and he is deeply troubled. He suggested that a year ago, when Dock Associations submitted permits, they “rolled the dice” and hoped for an election that brought a majority of Dock Association members on the City Council, so they did not ask for winter storage in their permits a year ago. Councilmember Jann suggested that every person who has their property on the easement knows they are violating the law and each has consciously chosen to disregard and flaunt the law to all other residents of the City. He stated it is a perilous decision should this Council turn a “blind eye” to a flagrant violation of the law and all should be concerned because if this law does not matter, no law matters.

Mayor Wingfield stated she takes exception to Councilmember Jann's comments because if it is so clear there are other remedies to rectify the situation, they don't exist. She clarified she has never been a member of any Beach Association to take advantage of any dock boating opportunities. So, to characterize all of us, as Mr. Greeley has, is totally inappropriate and without regard to our individual judgment. She stated she has continually pushed the Dock Associations to come up with something other than status quo and it is on for hearing in January. She stated there is an expectation for better results and there is always room for improvement, it is not an easy decision, but all have done the best they can and as they see fit.

Councilmember Jann stated while the Dock Associations have always said they are going to do better they came back with a recommendation that changed only one-half of 1% of the system as it has existed for 30 years so there has been no good faith effort to change anything. Now the Council is considering giving them another couple of months, which will not result in a change. Councilmember Jann stated he is sorry if the Mayor takes exception of his characterization of the vote that will occur but the law has been violated and to disregard the law and not enforce it is a dangerous thing for this Council to do.

Councilmember Carson referenced the 2008 Park survey question about allowing storage of boat lifts on the public storage. Agree votes were 96 and disagree votes were 40. She stated that is important information because Birchwood residents took the time to fill out and return a four-page survey.

Vote on the motion as amended twice: Councilmember Jann – Nay, Councilmember Harper – Aye, Councilmember Carson – Aye, Councilmember Brunner – Nay, Mayor Wingfield – Aye. MOTION carried.

#### 9. Update on Warming House, Hockey Rink Hours, and Staffing

Councilmember Carson advised that the carpet in the warming house was wet and the walls were full of mold. The White Bear Lake Inspector recommended it not be used and found the electrical work is not up to Code. Councilmember Carson suggested having ice with no warming house.

Councilmember Jann left the meeting at 10:33 p.m.

Cynthia Tomlinson, Parks Committee Chair, presented their recommendation to hire Level 1 and Level 2 rink attendants and if the rink will operate without the warming house, then at least a Level 1 position be hired, or a volunteer found. Councilmember Carson recommended Level 1 and two Level 2 positions be hired so there is help with shoveling.

Ms. Harrod suggested the Council delay making a decision until it is known whether the warming house will be available. She noted that Arden Hills uses a temporary structure for their warming house so there are other options. Mayor Wingfield stated it is now known that the warming house is not "healthy" so the City Attorney may advise it is not permissible to have someone work in that environment.

The Council briefly discussed the budget for the ice rink, cost of rink attendants, and alternatives to a warming house. Mayor Wingfield requested a better cost estimate once the level of staffing is determined. It was noted that unless there are volunteers, ice may not be available by December 1<sup>st</sup>.

MOTION by Harper, seconded by Carson, for Councilmember Carson to solicit applications for Level 1 and Level 2 attendants and make a recommendation at the December meeting on how many attendants and who to hire. MOTION carried.

Council consensus was reached to defer action on the warming house to the December meeting, after the Inspector's report is received. Councilmember Carson indicated she would post a note on the warming house door that it is closed.

Mayor Wingfield announced that Mr. Hoffman is resigning as the City's WBLCD representative and asked staff to place an ad to solicit a replacement.

10. Adjourn

MOTION by Brunner, seconded by Carson, to adjourn at 10:55 p.m. MOTION carried.

Respectfully Submitted,

Ry-Chel Gaustad, CMC  
City Clerk