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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Steven Schussler and Sunhi Ryan-Schussler,

Plaintiffs,

v.

City of the Village of Minnetonka Beach; Lake Minnetonka Conservation District; Dennis S. Klohs; and Dan Baasen,

Defendants.

Court File No. 27-CV-20-2647

ORDER GRANTING SUMMARY JUDGMENT

On April 30, 2020, the Court conducted a hearing on Plaintiffs' Motion for a Temporary Injunction and motions for summary judgment by all parties. The hearing was conducted by telephone, on the record, because of the pandemic. James Gilbert, Adam L. Sienkowski, and Jody E. Nahlovsky represent Plaintiffs Steven Schussler and Sunhi Ryan-Schussler. Paul D. Reuvers and Jason J. Kuboushek represent Defendant City of the Village of Minnetonka Beach; and Justin Templin represents Defendants Lake Minnetonka Conservation District, Dennis Klohs and Dan Baasen.

Based upon the record, the Court issues the following:

ORDER

1. Plaintiffs' Motion for Summary Judgment is GRANTED in part as follows by declaring:

   a. As abutting property owners, Plaintiffs own fee title to the Fire Lane.

b. The Fire Lane was statutorily dedicated to the public for use as an "Avenue" on the 1889 Plat.

c. The general public has an easement over the Fire Lane allowing it to be used as an "Avenue."

2. Plaintiffs' Motion for Summary Judgment is otherwise DENIED;

3. Except for the declarations in paragraph 1 above, Defendant City of the Village of Minnetonka Beach's Motion for Summary Judgment is GRANTED;

4. Except for the declarations in paragraph 1 above, Defendants Lake Minnetonka Conservation District, Dennis S. Klohs and Dan Bassen's Motion for Summary Judgment is GRANTED;

5. Plaintiffs' motion for a temporary injunction is DENIED as moot;

6. Except for the declarations set forth in paragraph 1 above, the Complaint is dismissed with prejudice;

7. Defendants are the prevailing parties and are entitled to recover their costs and disbursements; and

8. The attached Memorandum is part of this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

May 14, 2020

Thomas S. Fraser
Judge of District Court

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MEMORANDUM

Lakefront owners seek injunctive relief allowing them to install a dock and prohibiting a neighboring city dock that allegedly interferes with their view and riparian rights. In addition to the owners' motion for a temporary injunction, all parties move for summary judgment.

FACTS

The Parties

Plaintiffs Steven Schussler and his wife, Sunhi Ryan-Schussler, own and reside at 2217 Huntington Pt. Road East, Minnetonka Beach, which is lakefront property facing Lake Minnetonka to the east. On the southern edge of their property, extending to the lake, is a 30-foot-wide fire lane, called Cross Point Road, dedicated to Defendant City of the Village of Minnetonka Beach by an 1889 supplemental plat ("Fire Lane").

The Fire Lane is at the southern edge of the 1889 plat, which also contains Plaintiffs' property. The property on the south side of the Fire Lane is in a different plat. Since at least 1977, a seasonal dock (installed in the spring and removed in the fall) labelled City Dock #10 has been installed at the end of the Fire Lane. The City receives a license to allow this and other docks from Defendant Lake Minnetonka Conservation District ("LMCD"), a political subdivision of the State of Minnesota.

LMCD is charged with regulatory authority over the construction, installation, and maintenance of docks and moorings in Lake Minnetonka and other related matters. *See* Minn. Stat. § 103B.611, subd. 3. It has adopted rules and regulations under Minnesota Statutes section 103B.641 that are recorded in its Code of Ordinances ("LMCD Code").

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Defendants Dennis S. Klohs and Dan Baasen are two of the members of the board of directors of LMCD. Mr. Klohs is the City's representative on the LMCD Board.

Plaintiffs' Property

These dock disputes arise because of two unusual characteristics of Plaintiffs' property. First, their northerly and southerly lot lines are not parallel, which means their property is shaped like a wedge, or slice of pie, with the narrower end on the lake yielding about 110 feet of shoreline at the ordinary high-water mark of 929.4 feet. Second, the lake in front of their property is unusually shallow, reaching a depth of four feet about 100 feet from the shoreline and five feet, the navigable depth according to the LMCD Code, about 185 feet from shore.

The import of these abnormalities is fourfold. First, any dock for boats has to be lengthy to reach the navigable depth. Second, the right to use one's waterfront, commonly called riparian rights, is limited by the LMCD Code to the area bounded by an extension of lot lines into the lake, sometimes labelled the Rule of Straight Projection. Because Plaintiffs' lot lines are not parallel, their lot-line extensions converge about 215 feet from shore, creating a triangular waterfront, rather than the typical rectangular area in front of other properties. Plaintiffs' property is one of the minority of City parcels without parallel lot lines. Some properties in the City widen toward the lake while only a few narrow.

Third, Defendants LCMD and City use lot-line extensions to cabin the area in which a dock must be placed ("authorized dock use area"), which means that Plaintiffs' triangular area limits the placement of their dock, especially a long one.

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Fourth, because Plaintiffs' southerly lot line, on which the Fire Lane is located, actually angles toward the north, City Dock #10, which extends 158 feet parallel to the extension of that southerly lot line, ends up in front of Plaintiffs' property and is visible from Plaintiffs' house. City Dock #10 is at about a 50-degree angle from the shoreline, which runs somewhat northeast to southwest. A diagram of Plaintiffs' property, the Fire Lane, and City Dock #10, taken from Exhibit C to S. Schussler Affidavit signed 2/11/20, is attached as Appendix A.

City Dock #10

From Plaintiffs' perspective, the situation is exacerbated by the dimensions of City Dock #10. It is disproportionately long and wide for the 30-foot width of the Fire Lane which, because of its oblique lot lines, has a 41-foot shoreline. This means it is nonconforming to code density and setback requirements. The City and LMCD contend that these nonconformities were "grandparented" in but Plaintiffs dispute that and the legality of City Dock #10 generally. All parties agree that by law Plaintiffs are the fee owners of the Fire Lane because they are the adjacent owners of property in the same plat. The neighbors on the south side are in another plat and therefore have no fee interest in the Fire Lane. Plaintiffs contend that under the LMCD Code, their consent as fee owners is required for any application for City Dock #10, and they have not and will not consent.

City Dock #10 is one of 24 City docks. Originally, private parties would apply annually to the LMCD for licenses for docks on City-owned property or easements. More recently, LMCD issues a municipal multiple-dock license for the City to allow

installation of these seasonal docks on City property by residents who obtain a City permit. The purpose is to allow lake access and boat storage for City residents without lake frontage. Through this municipal multi-dock license from the LMCD, the City, which has 230 residences, now allows 86 boat slips on the 24 docks. (A boat slip is a place to park or store a boat, generally a rectangular structure consisting of a dock on three sides with entry and exit on the fourth.) Defendants' regulations refer to boat slips as "boat storage units" or "BSUs."

The City does not provide, install, or maintain these docks – the permittees are responsible. In recent years, not all of the slips have been used. For example, in 2019, six regular-sized slips were unused along with seven smaller, jet-ski sized slips. The unused slips have generally been in less desirable locations. The city docks in desirable locations, including City Dock #10, typically have a waiting list.

All parties agree that City Dock #10 is a nonconforming structure under the LMCD Code. As a result of a Code provision ratifying prior legal nonconforming docks as of May 3, 1978, the status of City Dock #10 on that date is important. The parties do not dispute that as of that date, or at least during the 1977 boating season, City Dock #10 was installed at the end of the Fire Lane and had six slips. From at least 1977 until 1984, LMCD accepted applications from the private users of docks on City properties. In 1980, the City forwarded to LMCD the application from private parties for what is now City Dock #10 and noted that it was approved by the City despite not meeting City zoning ordinances.

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In 1984, LMCD began requiring municipalities to submit applications for docks on municipal property. As part of that process, and to document what licenses it could issue for City docks, LMCD conducted a public hearing to determine what the status of City docks were as of the "grandparenting" date of May 3, 1978. LMCD found that the City had 86 BSUs on docks on City properties. At one point in the 1980's, LMCD licensed the City for 92 BSUs but more recently has approved 86 BSUs.

City Dock #10 has been limited to four slips in recent years and has never had more than six slips. These slips on this dock generally have boat lifts with canopies. One of the residents who has received a permit for years for a slip on City Dock #10 is Defendant Klohs or his wife, who live west of the Schusslers.

Prior Owners

The abnormal characteristics of Plaintiffs' property, together with the existence of City Dock #10, were problematic for Plaintiffs' predecessors in title. The owners thrice-removed purchased the property in 1997. They obtained a variance and installed a 100' dock to within five feet of the extension of their southerly lot line. Their dock was authorized to have a slip 12.5 feet wide, and 32 feet long on the north side, with an 11-foot x 24-foot boat lift on the north side of the slip, along with two smaller slips for personal watercraft. They kept a boat with a 10-foot beam on that dock.

When they purchased the property, City Dock #10 was angled to the south beyond the Fire Lane's lot extensions, into the authorized dock area of the neighbors to the south, who consented. Those neighbors withdrew consent after the 2007 season. The LMCD conducted a public hearing on May 23, 2008, considered safety and other issues, and

approved the realignment of City Dock #10 at the same location, despite its proximity to the dock existing at what is now Plaintiffs' property. Ever since 2008, City Dock #10 has been aligned parallel to and within the Fire Lane's lot-line extensions.

In 2008, frustrated by that realignment and the size of City Dock #10, Plaintiffs' predecessors filed a suit similar to this one against the City and LMCD, contending that City Dock #10 presented a safety hazard. Their request for a temporary order restraining the installation of City Dock #10 was denied by Judge Lloyd Zimmerman. The record does not disclose that the case proceeded to any further adjudication.

Those owners sold the property in 2014 primarily because of the relocation of City Dock #10. They estimate they took a market hit of $800,000 - $1,000,000 because of the City Dock's relocation in front of their property. Their successors, twice removed from Plaintiffs, owned the property for two and a half years. They too installed a dock with a single slip but were unable to moor their boat there because of the shallow water and the placement of City Dock #10. Unhappy about the placement of City Dock #10 and their inability to moor their boat at the dock allowed by the LMCD, they sought unsuccessfully to resolve the issues through discussion with neighbors, City officials, and the LMCD.

These owners sold the property in 2016 because they decided they lacked reasonable riparian rights and had generated animosity on the part of the City and neighbors by raising these issues. Plaintiffs purchased their property from a limited-liability company in December 2017. The record does not disclose information about this limited liability company, its principals, or its use of the property. A dock comporting with the variances granted existed at Plaintiffs' property from 2007-2017.

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Plaintiffs' Purchase and Watercraft

Plaintiffs are experienced boat owners. They purchased the property after looking at and inspecting it several times over the years. They knew about the Fire Lane, City Dock #10, and the issues with the converging lot lines before they purchased. Mr. Schussler was "willing to take the fight on." His position is that his proposed dock for his three boats could never co-exist with City Dock #10. Plaintiffs discarded the dock sections that came with the property.

On April 20, 2018, Plaintiffs submitted a variance application to the LMCD regarding dock length, dock use area and side setbacks, stating that the existing variance "does not serve [their] needs." Plaintiffs proposed a 175-foot dock with three canopied slips. At 175 feet, the width between Plaintiffs' lot line extensions is about 20 feet, which minimizes their authorized dock use area under the LMCD Code. The variances they sought included a deflection of the southerly lot-line extension by 19 degrees, with a parallel deflection of the Fire Lane's southerly extended lot line. They also sought a zero setback variance from the northerly lot-line extension. Even with that zero setback on the north, the southerly second and third slips would have extended across the width of the Fire Lane's lot-line extensions and into the authorized dock use area of the neighbor south of the Fire Lane.

The LMCD deemed the variance application incomplete for lack of certain required information and therefore did not approve or disapprove it. Plaintiffs filed a lawsuit against the LMCD on September 21, 2018 seeking a writ of mandamus, damages, injunctive relief and a declaratory judgment deeming the variance application approved

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by operation of law. Judge Edward Wahl issued an order on July 1, 2019 granting LMCD's motion for summary judgment, ruling that the application was indeed incomplete and did not become approved by operation of law. Order Regarding Cross Motions for Summary Judgment dated July 1, 2019 (Court File No. 27-CV-18-15974). Plaintiffs did not appeal.

Plaintiffs have three watercraft they wish to store at a dock in front of their house: a 15-foot jet ski ("jet ski on steroids," per Mr. Schussler at the first court hearing), a 31-foot Sea Ray Amberjack with a 12-foot beam, and a 42-foot cruiser with a 12-foot beam. The cruiser draws nearly five feet. The Schusslers claim that their neighbors to the north have a similar-sized cruiser docked at their property.

Mr. Schussler believes that he has "the right to have any size boat I want on the lake." Since Plaintiffs purchased their property in the City, they have continued to moor their watercraft at a home they own in Orono that has a dock and slips.

Plaintiffs contend that it is not safe to exercise their riparian rights because of the proximity of City Dock #10. Mr. Schussler acknowledges that he has gone swimming in front of his house and could kayak there if he wished. He also concedes that prior owners had docks on the property and stored boats there. Plaintiffs rely on the affidavit of former Hennepin County Sheriff Richard Stanek, who inspected the property twice during the winter of 2019-20. He opines that the "current placement and usage of City Dock #10 presents an immediate and significant safety hazard to children and adult swimmers, skiers, canoers, kayakers, and other boaters." He believes the safety risks are increased if Plaintiffs install a dock on their property.

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The Hennepin County Sheriff's Office Water Patrol advises, however, that no safety issues regarding City Dock #10 have been reported to it. In the suit by prior owners against the LMCD, Judge Lloyd Zimmerman found that previous owners of Plaintiffs' property had the ability to use the other side of their dock (away from City Dock #10) and the alleged "dangers are akin to the risks faced by hundreds if not thousands of boaters who use Lake Minnetonka and are required to navigate their boats into slips or docks." *Smith v. City of the Village of Minnetonka Beach*, No. 27-CV-08-14190, Amended Order filed June 17, 2008.

Current Lawsuit and Administrative Proceedings

On November 12, 2019, Plaintiffs and their new counsel attended a City Council meeting to address their concerns, having previously provided a packet of information to the City. On November 26 and December 6, 2019, Plaintiffs submitted written objections to both the City and the LMCD regarding the application to the LMCD that included City Dock #10. Plaintiffs attended a second City Council meeting on December 9 and made clear that they objected to City Dock #10. The City Council approved the application to LMCD, which included that dock.

Plaintiffs also appeared at LMCD Board of Directors meetings to state their objection to City Dock #10 and to request a public hearing. After a written objection to LMCD on December 10, Plaintiffs and their counsel addressed the LMCD Board at its December 11 meeting. At the January 8, 2020 LMCD Board meeting, Plaintiffs and their counsel appeared again, stated their objections to City Dock #10, requested a public hearing, and threatened litigation. The LMCD Board voted not to grant a public hearing

on the application for City Dock #10. In response to the litigation threats, the LMCD Board conducted a closed session on January 22, 2020 with insurance counsel appointed to represent it. LMCD determined that it would process the application as a renewal without change, which is handled administratively without a public hearing. Further details of the litigation threats and the decision to conduct a closed meeting are set forth in the discussion of Plaintiffs' Open Meeting Law claims in section VI below.

On February 12, 2020, Plaintiffs filed this lawsuit with a motion for a temporary restraining order. The suit seeks declaratory, injunctive, and monetary relief. Specifically, Plaintiffs seek more than $50,000 in damages and ask the Court to issue 19 declarations and bar Defendants from permitting or allowing the installation of City Dock # 10. One of Plaintiffs' main arguments is that under the LMCD Code, the City is not the fee owner of the Fire Lane because it merely has an easement. The parties agree that Plaintiffs are the fee owners of the Fire Lane but disagree as to whether that invalidates City Dock #10 without Plaintiffs' consent.

The Court held a hearing on Plaintiffs' motion for a temporary restraining order on February 14, 2020. As per the Status Quo and Scheduling Order issued on February 18, 2020, LMCD was allowed to issue its license for City docks but the City agreed not to issue permits for City Dock #10 until further order. In light of that agreement, the motion for a temporary restraining order was denied as moot. The Court and counsel contemplated expedited discovery and a hearing on motions for temporary injunction and summary judgment, which was originally scheduled for March 30-31, 2020 but delayed due to the pandemic until April 30, 2020.

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In the interim, Plaintiffs applied on March 2, 2020 to the LMCD for a variance allowing them to install a dock to the point of navigability with three slips for their three boats. The proposed dock would be shorter than their neighbors' docks to the north. On March 17, 2020, the LMCD sent a letter stating that "because your proposed dock crosses into the City's Authorized Dock Use Area, the City's consent is required for your application to be considered complete and eligible to be processed under the LMCD Code." The letter also stated that other information was missing.

At a meeting on March 11, 2020, the LMCD considered a proposed amendment to section 1-3.01 of its Code regarding the definition of "owner" as follows (amendment is underlined):

> "Owner" in the case of personal property . . . . In the case of real property, the term "owner" means the fee owner of land or the beneficial owner of land whose interest is primarily one of possession and enjoyment in contemplation of ultimate ownership. The term includes, but is not limited to, vendees under a contract for deed and mortgagors. <u>For the purposes of this Code, a municipality shall be considered the owner of public lands and right-of-way under its jurisdiction, and of all other properties held by the municipality in trust for the public, regardless of whether its interest is held in fee, easement, or by lease.</u>

Amendments to other sections of the Code consistent with this proposed amendment were also proposed. Some members of the public objected to the proposed amendments, which were tabled at the meeting.

The 2020 Municipal Multiple Dock Application filed by the City was approved by LMCD. By agreement of the parties and the order of this Court, the City is waiting on this ruling before issuing permits for at least City Dock #10.

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ANALYSIS

Plaintiffs seek a temporary injunction (1) restraining and enjoining the City from issuing permits to or allowing City residents' exclusive and private use of City Dock #10 on any date prior to the full adjudication of this matter and (2) allowing Plaintiffs to install a dock as they propose. In addition, they seek partial summary judgment on their request for the following eight declarations:

a. As abutting property owners, Plaintiffs own fee title to the Fire Lane.

b. The Fire Lane was statutorily dedicated to the public for use as an "Avenue" on the 1889 Plat.

c. The general public has an easement over the Fire Lane allowing it to be used as an "Avenue."

d. The Government Defendants permitting and licensing the exclusive use of City Dock #10 to individuals living or owning property within the City, to the exclusion of Plaintiffs and the general public, does not comply with the uses permitted in the 1889 Plat and violates Minnesota law.

e. The Government Defendants must void any permits and licenses issued to the City and individuals living or owning property within the City allowing exclusive and private use of the Fire Lane or City Dock #10.

f. The Government Defendants must not issue any permits or licenses in the future to the City or individuals living or owning property within the City allowing exclusive and private use of City Dock #10 or the Fire Lane.

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g. The 2020 Multiple Dock License Application with City Dock #10 does not comply with the LMCD Code and is void as a matter of law and no LMCD or City license for dock use at the Fire Lane can be issued without Plaintiffs' consent.

h. A dock cannot be placed at the end of the Fire Lane without the consent of Plaintiffs as fee owners to the Fire Lane as required by LMCD Code § 2-3.01, subd. 2.

Defendants oppose any injunction and five of the eight declarations sought. They also move for summary judgment. The Court will first consider the primary issues, most of which are common to all motions, and then address the disposition of each motion.

I. Are Plaintiffs' Claims Precluded by Their Prior Lawsuit?

LMCD argues that the Court need not reach the merits of at least some of Plaintiffs' claims because of Plaintiffs' prior suit against it. LMCD argues that the current claims are barred by the doctrine of res judicata, now known as claim preclusion. Claim preclusion "reflects courts' disfavor with multiple lawsuits for the same cause of action and wasteful litigation." *Wilson v. Comm'r of Revenue*, 619 N.W.2d 194 (Minn. 2000). It requires that parties "assert all alternative theories of recovery in the initial action." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004).

The doctrine bars a second claim "when (1) the earlier claim involved the same claim for relief; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter." *State v. Joseph*, 636 N.W.2d 322, 327 (Minn. 2001)

(footnote omitted). "When these four requirements have been satisfied, res judicata bars claims regarding matters actually litigated *and every matter that might have been litigated in the prior proceeding*." *Wilson*, 619 N.W.2d at 198 (emphasis added). Courts decide questions of res judicata as a matter of law. *Care Inst., Inc. – Roseville v. County of Ramsey*, 612 N.W.2d 443, 446 (Minn. 2000).

Plaintiffs' first lawsuit sought an order compelling LMCD to approve Plaintiffs' variance application, which would have allowed them to install a three-slip dock extending across the Fire Lane's lot-line extensions, where City Dock #10 is located, and into the area bounded by the lot-line extensions of the neighbor on the other side of the Fire Lane. LMCD had returned the application because it lacked certain information, including the consent of the City and the neighbors to the south, both of whose riparian rights would have been affected by the proposed placement of Plaintiffs' dock – City Dock #10 could not exist in its current location if Plaintiffs' dock plans were approved. Plaintiffs contended that LMCD's response was insufficient to stop the regulatory clock limiting the time for a State agency to respond to such an application and that the application must be deemed approved because it wasn't timely denied. Judge Wahl disagreed and granted LMCD summary judgment.

The same parties, with a few additional defendants now, are involved in the current suit. A final judgment was issued on the merits in the prior case after the Plaintiffs had a full and fair opportunity to litigate the matter. But the relief sought in this case is different from the first case. Plaintiffs now seek to invalidate City Dock #10 on a number of grounds. While most of those grounds existed in 2018, Plaintiffs did not

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explicitly sue then to declare City Dock #10 illegal (although the approval of their dock may well have precluded City Dock #10). Plaintiffs rely on a different nucleus of facts to eliminate the municipal dock. *See Demers v. City of Minneapolis*, 486 N.W.2d 828, 830-31 (Minn. Ct. App. 1992). Claim preclusion therefore does not bar this lawsuit.

II. Is Plaintiffs' Consent Necessary to Allow City Dock #10?

A key issue in all pending motions is whether Plaintiffs can block City Dock #10 by withholding their consent. The Fire Lane is included as an avenue in the following dedication in the plat: "The Avenues, Streets, Alleys, and Parks as shown on the annexed plat are hereby dedicated to the public for the uses contemplated therein."

A riparian owner's title extends to the low-water mark. *State by Head v. Slotness*, 185 N.W.2d 530, 532 (Minn. 1971). The state owns the bed of navigable waters below the low-water mark in trust for the public for public uses, including navigation, recreation, and other water-connected activities. *Id.* A riparian owner "has a right to make such use of the lake over its entire surface, in common with all other abutting owners, provided such use is reasonable and does not unduly interfere with the exercise of similar rights on the part of other abutting owners." *Johnson v. Seifert*, 100 N.W.2d 689, 697 (1960).

Riparian-rights holders have a right of access to the water in front of their land. *Lamprey v. Metcalf*, 51 N.W.1139, 1141 (Minn. 1893). Those rights holders may install docks to facilitate access to the water to the point of navigability. But all such rights in navigable waters are held subject to regulation and the exercise by the state or its

designee, here LMCD, of those public rights is not a taking of riparian property. *Slotness*, 185 N.W.2d at 533.

The dedication of the Fire Lane to the public conveys an easement to the City. Minn. Stat. § 505.01. The parties agree that the plat conveys the underlying fee interest in the Fire Lane to the owners of the adjacent property in the plat, here the Plaintiffs. The dedication of a roadway ending at a body of water includes attendant riparian rights. *Flynn v. Beisel*, 102 N.W.2d 284, 289 (Minn. 1960); *Troska v. Brecht*, 167 N.W. 1042, 1044 (1918); *Reads Landing Campers Ass'n, Inc. v. Township of Pepin*, 533 N.W.2d 45, 48 (Minn. Ct. App. 1995).

Riparian rights are the rights to use and enjoy the profits and advantages of the water, provided such use is reasonable and does not unduly interfere with the exercise of similar rights on the part of other abutting owners. *McLafferty v. St. Aubin*, 500 N.W.2d 165, 168 (Minn. Ct. App. 1993). All parties cite *McLafferty* as supporting their respective positions.

Because of its linchpin status, this case deserves extended analysis. The dispute in *McLafferty* arose over property owners' docks on a lake. Although their properties abutted the lake, their lakefront was subject to a street easement. Because the city had never improved or maintained the avenue, the property owners maintained the shoreline, mowed the grass, planted trees and shrubbery, constructed small beaches, and installed docks. The public, however, used the easement for walking and access to an adjacent county park. In the past, they had also used the easement for other recreational activities.

The property owners petitioned the city to vacate the avenue. The city decided the shoreline should return to its natural state and therefore denied the petition and ordered removal of the property owners' docks. The owners refused and brought a quiet-title action to clarify their rights. According to the Court of Appeals,

> The trial court found that both the city and the property owners hold riparian rights, but that the city's riparian rights are paramount. The court also found the property owners' docks, beaches, and removal of vegetation to be incompatible with the city's exercise of its riparian rights. The court ordered the property owners to refrain from any actions that would interfere with the public's right of access to the lake, to remove the existing docks and man-made beaches, and to refrain from any further exercise of any rights other than those granted them as members of the general public. The court also ordered the property owners to refrain in the future from interfering with the city's riparian rights, including the city's right to construct docks or beaches or to allow the shoreline to return to its natural state.

Id. at 166.

The Court of Appeals agreed with an alternative holding of the trial court that both the city as easement holder and the property owners as fee owners hold riparian rights, with neither exclusive. The appellate court found, however, that the city was not presently exercising its riparian rights, as it did not intend to build public facilities "or make any other use of the shoreline that will accommodate public access to or use of the lake." *Id.* at 168. Thus, it was not exercising its right to "foster[] use of the water for navigation, recreation, or harvest." *Id.* The court also determined that "the property owners' use of the avenue and shoreline does not unduly burden the present passive use by the public." *Id.* Through its lawsuit, the city was "attempting to impede the property

owner's exercise of traditional riparian rights, but not by purposeful use of its own valid riparian rights." *Id.*

On that basis, the court reversed the trial court's order requiring the property owners to remove their docks, among other things. To this extent, the case seems to support Plaintiffs.

But there is more. Defendants rely on a further statement by the Court of Appeals in that case: "If, in the future, the city decides to exercise its riparian rights purposefully, the property owners may be required to yield. At this point, however, the property owners may maintain their docks and other improvements without burdening the city." *Id.*

Although the statement about future conditions is undoubtedly dictum, it is consistent with the trial court's conclusion that the riparian rights of the public easement holder are paramount when in conflict with the fee owner's. The parties have not cited any other controlling law on this issue. *McLafferty* is therefore the best guidance available as to the relative rights of riparian owners. *See* Anthony Dan Tarlock, *L. of Water Rights and Resources*, § 3.49 (2019) (stating that under Minnesota law, riparian rights attach to easements and city's riparian rights are paramount when in conflict with rights of fee owner). This result is consistent with the law of easements. A fee owner may not interfere with an easement holder's rights. *See Minneapolis Athletic Club v. Cohler*, 177 N.W.2d 786, 789 (Minn. 1970).

The lesson *McLafferty* teaches for this case is clear. When a municipality exercises its riparian rights as an easement holder, the fee owner's rights must yield. *Lafferty*, 500

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N.W.2d at 168. Stated another way, the fee owner cannot exercise riparian rights in a manner that would impede the riparian rights of the City. This makes perfect sense in this particular case, where the easement does not mean that the Plaintiffs have no riparian rights. The *McLafferty* court actually described the situation here: "An ingress/egress easement (perpendicular to the shore) ordinarily does not have the potential to deprive a fee owner of all riparian rights because the fee owner owns adjoining property abutting the lake and providing separate riparian rights." *Id.* at 167.

For over 40 years, the City has been exercising its riparian rights in the form of City Dock #10, which is now wholly within the lot-line extensions of the Fire Lane. A municipality has the authority to authorize private parties to construct improvements in a dedicated easement area. *Bolen v. Glass*, 755 N.W.2d 1, 6 (Minn. 2008) (holding that Duluth had the authority to issue permits for construction of private improvements in a dedicated easement area). Installation of a dock pursuant to a municipal permit is a valid exercise of the City's authority. *See* Minn. Stat. § 412.221, subd. 12; City Code 906 (authorizing City to regulate installation of docks).

In a case involving City Dock #11, also located at the end of a fire lane, Judge Robert Lynn found that the City's "issuance of seasonal permits to its residents is a reasonable exercise of municipal authority. This policy is neither inconsistent with nor violative of the dedication of the Fire Lane to the public, pursuant to the 1880 plat." Findings of Fact, Conclusions of Law, and Order for Judgment filed Jan. 8, 1998, *Goodman v. City of the Village of Minnetonka Beach,* No. AP 97-807, at p. 7.

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Plaintiffs contend that City Dock #10 prevents them from exercising any riparian rights they have to the Fire Lane as fee owners. But it doesn't. The City and LMCD acknowledge that Plaintiffs are free, for example, to swim and launch a boat at the end of the Fire Lane. In the prior suit involving City Dock #11, Judge Lynn said that "[a]ny member of the general public, whether or not a city resident, who wants to use the fire zone may do so." *Id.* As noted in *McLafferty*, however, and consistent with the law of easements, Plaintiffs cannot exercise their riparian rights to interfere with the City's paramount rights. And, as the Supreme Court noted, this is not a hardship because abutting owners such as Plaintiffs already have riparian rights regarding the water in front of their property.

Plaintiffs contend, however, that the LMCD Code requires their consent to City Dock #10, which they have sworn they will never provide. The LMCD Code provides in section 2-3.01, subdivision 2 that "No person shall use any area of the Lake within any authorized dock use area for docks . . . without the consent of the riparian owner." Also, any application to the LMCD for a dock by someone other than the owner must have the consent of the owner. *Id.*, § 6-1.03, subd. 5. The LMCD Code defines "owner" as follows: "In the case of real property, the term 'owner' means the fee owner of land or the beneficial owner of land whose interest is primarily one of possession and enjoyment in contemplation of ultimate ownership. The term includes, but is not limited to, vendees under a contract for deed and mortgagors." *Id.*, § 1-3.01, subd. 67.

The Court agrees with Plaintiffs that a strict construction of these provisions leads to the conclusion that Plaintiffs, as the fee owner, must consent to an application by the

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City, an easement holder. Even though the City might be the beneficial owner of the Fire Lane, its property interest is not "in contemplation of ultimate ownership."

LMCD contends, however, that the Executive Director has the authority to take action under section 1-2.05, subdivision 1, even if it is not in strict conformance with the Code. But that authority is limited to "situations or conditions on the Lake that require an *immediate* decision or action in order to protect the environment, property, or public health, safety, or welfare. These situations cannot reasonably wait to be addressed until a Board meeting and do not rise to a level authorizing an emergency Board meeting." *Id.* (emphasis added). The routine, annual application for a municipal multiple-dock license lacks any immediate threat to any property or public interests necessary to trigger the Executive Director's intervention between Board meetings.

The fact that the LMCD Code purports to require the fee owner to consent to the City's application for a dock license does not end the analysis, however. A consent requirement in these circumstances cannot stand because it would contravene the common law of riparian rights and easements. If Plaintiffs' consent were needed, then they could, as they would here, interfere with the City's reasonable exercise of its riparian rights by dictating how the City could use the Fire Lane's waters. This right of interference would destroy the paramount nature of the City's riparian rights and violate the terms of the easement granted. The situation here is no different from requiring the consent of abutting fee owners to repave a public street. The law does not give abutting landowners the authority to interfere with the public's right of access by withholding consent to the City's management of its easement.

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With respect to the Fire Lane, the City's riparian rights come first if a conflict exists. Plaintiffs counter that the LMCD Code states that it can override state law: "Where this Code imposes a more stringent regulation than state law, rule, or regulation, it is the intent of the Board that the provisions of this Code prevail over the statute, rule, or regulation *to the extent permitted by law*." LMCD Code, § 1-1.07, subd. 2 (emphasis added).

A municipality "cannot enact a local regulation that conflicts with state law." *City of Morris v. Sax Investments, Inc.*, 749 N.W.2d 1, 6 (Minn. 2008). A valid municipal ordinance must comply with general principles of the common law in force in the state. 5 McQuillin Mun. Corp. § 15:14 (3d ed.). Unlike the legislature, LMCD has no authority to modify the common law.

As a matter of law, Plaintiffs' consent to City Dock #10 cannot be required by LMCD. To the extent the Code purports to require Plaintiffs' consent to the City's application for City Dock #10, it is unenforceable.

III. Does City Dock #10 Otherwise Comply with the LMCD Code?

Plaintiffs have fallback arguments regarding the viability of City Dock #10. They contend it is an illegal, nonconforming use that was not "grandparented" in by LMCD actions and even if it was legal originally, it lost that status.

City Dock #10 is licensed as a nonconforming structure. Such docks or other structures "which were legal structures immediately prior to the effective date of an ordinance with which the structures do not conform, and which are permitted to continue by the terms of such ordinances subject to limitations or restrictions contained therein."

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LMCD Code, § 1-301, subd. 61. Plaintiffs contend that, for various reasons, City Dock #10 was not "lawfully in existence on May 3, 1978," the date for determining which nonconforming docks could continue under the newly passed ordinances. LMCD Code 2-4.09, subd. 3.

First, Plaintiffs contend that the number of boats allowed, which is a function of the length of the applicant's shoreline, was incorrect because the City's shoreline was calculated improperly. The number of BSUs allowed at a dock now is a function of the shoreline owned by the applicant. This is known as a density requirement. *See, e.g.,* LMCD Code § 2-4.01. But, when LMCD evaluated the City docks for purposes of approving nonconforming uses, those docks did not violate any density requirement. On this record, the Court concludes that the City's docks were "grandparented" in as to any density requirements.

Second, Plaintiffs contend that the City's 2020 multi-dock application misrepresents that the City owns 2,370 feet of shoreline when some of that is actually easement interests as opposed to fee ownership. Plaintiffs contend that the entire license is therefore invalid but seek an injunction prohibiting only City Dock #10. The short answer to this argument is that, as discussed above, the City's easement rights entitle it to exercise its riparian rights, including the installation of docks, and to the extent any LMCD Code could be interpreted to deny that right, it is unenforceable as an unlawful interference with the City's common law rights.

Third, Plaintiffs claim that the 1984 license for 86 boats at 22 docks was "backdated" to 1977 to allow the "grandparenting" as a nonconforming structure. The

amorphous term "backdating" does not by itself signal any illegality. As a practical matter, however, the only change in 1984 was LMCD's decision to have the City, rather than the private slipholders, submit the applications. A change in the license holder (here, from individuals to the City) is a "minor change" in the license that can be processed administratively. LMCD Code § 6-1.17. The hearing and determination of the number of BSUs in existence at docks on City property as of May 3, 1978 was a reasonable exercise of LMCD authority. In actuality, no backdating occurred and LMCD's actions were not wrongful.

Fourth, Plaintiffs contend that in 1984 only 63 boats were authorized at the 22 City docks and therefore the 1984 license application contained a misrepresentation. They base this claim on a 1980 City resolution to have 63 boat storage spaces at City docks and on a list showing 42 permit holders in 1977. Plaintiffs claim that because the "grandparenting" provision of the Code does not allow an expansion of the number of BSUs, *see* LMCD Code § 2-4.09, subd. 3, all of the City's grandparent rights are "void from the inception." The City's 1984 application to the LMCD expressly identified 86 BSUs, which is what the LMCD license allowed after a determination by the LMCD as to what was in existence as of May 3, 1978.

Plaintiffs' challenge, however, is to City Dock #10. It is undisputed that the number of slips on this dock has not increased, but has instead decreased from six to four. City Dock #10 was a legal structure in 1978 and was "grandparented" in as of that year. LMCD Code 2-4.09, subd. 3 ("Docks . . . lawfully in existence on May 3, 1978 may

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continue provided the number of restricted watercraft . . . docked at such docks . . . does not exceed the number . . . docked on May 3, 1978").

Fifth, Plaintiffs argue that even if City Dock #10 was a legal, non-conforming structure, the LMCD Code prohibits its expansion. LMCD Code § 2-6.25 ("A use which is nonconforming under the terms of this Code shall not be expanded."). The decrease in the number of slips on City Dock #10 reduced the extent of the primary nonconforming feature. After the neighbors declined to continue consenting to allow the dock to traverse into their authorized dock area, the reconfiguration of City Dock #10 in 2008 did not extend it further into any side setback area and did not increase the nature or degree of nonconformity. It did increase in length, but that was not an increase in nonconformity. *See* LMCD Code 2-8.11 (listing changes in nonconforming structures). The changes placed no additional burden on what is now Plaintiffs' property even though it did protrude farther into the sightlines from Plaintiffs' property, an issue addressed below. No expansion of City Dock #10 occurred.

Sixth, Plaintiffs contend that the realignment of City Dock #10 into the Fire Lane's lot extensions in 2008 was an impermissible change of a nonconforming structure. But as LMCD correctly observes, Plaintiffs confuse the angle of installation of the dock with its location. The dock has always been located at the end of the Fire Lane, but was realigned when the neighbors to the south declined to continue to allow it to traverse into their authorized dock area. This realignment is not an impermissible change and it did not invade Plaintiffs' property, cabined as it was (and is) by the Fire Lane lot-line extensions.

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Seventh, Plaintiffs contend that the City docks do not qualify for a municipal license under the LMCD code, which defines a "municipal multiple dock" as "a dock constructed or maintained by a municipality for the storage of five or more restricted watercraft." LMCD Code, § 4-2.05, subd. 1. The City grants permits to residents to install docks under this license. Plaintiffs have not cited any authority that a City cannot delegate, through the permitting process, the responsibility to maintain the docks, even if it may remain responsible to LMCD for the actions of its permittees. LMCD was aware of the City's practices when it requested the City to submit an application on behalf of its permittees, who previously had applied directly to LMCD. As noted above, a change in the name of the licensee is not a material change that disrupts grandparenting rights.

Plaintiffs have made other arguments in an effort to undermine the legality of City Dock #10. The Court has considered them and finds them unavailing. City Dock #10 is not an illegal dock.

IV. Does the Rule of Straight Projection Violate Plaintiffs' Rights?

The LMCD Code adopts what is known as the Rule of Straight Projection to define a property owner's riparian rights and authorized dock use area. As noted above, this rule extends the lot lines into the lake to determine the physical boundaries within which a property owner may exercise riparian rights. Plaintiffs contend that application of this rule to their unique property is unfair and inequitable because of the proximity of City Dock #10 and the shallow water.

Plaintiffs rely on an unpublished Court of Appeals decision involving similar issues on the same lake. *Lake Minnetonka Conservation District v. Canning*, 2006 WL

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1738252 (Minn. Ct. App. June 27, 2006), review denied (Minn. Sept. 19, 2006). In that case, the property owners had 12 feet of shoreline and converging lot lines that placed the long-term dock on that property outside of LMCD's authorized dock area. The owners applied for a variance but withdrew the request before a formal vote at the LMCD and continued using their dock. LMCD began an enforcement action to require removal of the nonconforming dock. On appeal from the summary judgment granted to LMCD, the Court of Appeals decided that the LMCD's position may interfere with the owners' right to access navigable waters. The court reversed and remanded, instructing the district court to "determine the extent of appellants' riparian rights subject to reasonable enforcement of LMCD regulations against appellants' property in a manner that is fair and equitable, while still addressing public safety concerns." *Id.*, at *3. LMCD advises that the case was settled thereafter.

Although Plaintiffs' riparian rights, as determined by the LMCD, also involve converging lot-line extensions, other important factors are different from *Canning*. First, unlike *Canning*, Plaintiffs have a shoreline of over 100 feet. LMCD has not denied Plaintiffs a dock that can reach navigable depths nor has it taken any enforcement action against Plaintiffs.

Second, unlike in *Canning*, one of Plaintiffs' predecessors had a dock with a slip for a sizeable boat, all approved by LMCD. A dock with a slip existed at the property for ten years before Plaintiffs purchased. Plaintiffs chose to discard the dock that came with the property.

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Third, after this lawsuit began, Plaintiffs proposed a dock that would encroach upon the authorized dock area of the Fire Lane and preclude City Dock #10. Their application was again rejected because it lacked the consent of the City, whose riparian rights are paramount as to the Fire Lane. Plaintiffs could seek a reasonable variance that does not preclude City Dock #10. Their predecessor in title obtained a variance that allowed them to install a dock with a boat slip.

Fourth, although Plaintiffs assert they have "exclusive riparian rights" to house all three of their boats in front of their property, Plaintiffs are not necessarily entitled to simultaneous access by three boats to navigational depths. Their riparian rights are subject to reasonable regulation by LMCD, whose actions before this lawsuit were upheld by this Court in Plaintiffs' prior lawsuit. No appeal was taken.

In addition to obtaining a variance to have a dock to reach navigational depth, Plaintiffs may consider obtaining consent to encroach upon the authorized dock use area of the neighbors to the north, whose dock, Plaintiffs claim (without intending to cause these neighbors any enforcement difficulties) does not comply with the LMCD Code.

Plaintiffs knowingly bought a lot with certain limitations, especially given the number and size of the boats that Plaintiffs wish to dock in front of their property, and cannot assume that they can force regulators to ignore the limitations of their parcel and mandate encroachment upon the riparian rights of others.

In summary, Plaintiffs have not exhausted their administrative remedies and have not been the subject of any enforcement action. This means that LMCD has taken no action for this Court to review. LMCD is charged by law to weigh the competing

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interests in cases like this and Plaintiffs cannot circumvent its authority by asking the Court to assume LMCD's role. At this procedural stage, *Canning*, which is not binding on this Court, does not compel this Court to conduct a hearing on what is fair and equitable for Plaintiffs because LMCD has not made the requisite decision in the first instance. In legal terms, the dispute over a dock proposed by Plaintiff is not "ripe" for adjudication in this Court. At this stage, the Court will not step into this vacuum to declare the Rule of Straight Projection unreasonable as applied to Plaintiffs.

V. Were Plaintiffs Afforded Due Process?

Count VII of Plaintiffs' Complaint alleges procedural-due-process violations by LMCD and the City for their decisions or intentions to grant the license and permits for City Dock #10 without a public hearing.

Whether the government has violated a person's procedural due process rights is a matter of law. *See Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012). Minnesota courts conduct a two-step analysis: first, by identifying whether the government has deprived the individual of a protected life, liberty, or property interest and, second, if so, whether the procedures followed by the government were constitutionally sufficient. *Id.* In determining constitutional adequacy, courts consider a balancing test of the following three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

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Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Ultimately, the procedures afforded by the government must provide an individual with notice and an "opportunity to be heard at a meaningful time and in a meaningful manner." *Sawh*, 823 N.W.2d at 632 (citations omitted).

Plaintiffs identify their property interest as their fee ownership of the Fire Lane and the attendant riparian rights, which indeed are valuable property rights. *See Petraborg v. Zonelli*, 15 N.W.2d 174, 180 (Minn. 1944). The real question, however, is whether Plaintiffs have been deprived of this property interest. As the analysis above demonstrates, Plaintiffs' riparian rights related to the Fire Lane are subservient to those of the City and City Dock #10 does not deprive Plaintiffs of any of their property rights. Accordingly, in the absence of any deprivation of a property interest, Plaintiffs are not entitled to due process. The Court does find, however, that the submissions and appearances by the Plaintiffs and their counsel were sufficient to give them a meaningful opportunity to be heard at a meaningful time and no further process was due even if they were deprived of a property interest by the approval of the City multi-dock license.

VI. Did the LMCD Defendants Comply with the Open Meeting Law?

In Count VIII of their Complaint, Plaintiffs assert that the LMCD Defendants violated the Open Meeting Law in 2020 in two respects. They claim that the January 22, 2020 closed meeting of the LMCD Board for attorney-client discussions of the Plaintiffs' litigation threat did not comply with statutory requirements. They also claim that the two defendant board members violated the Open Meeting Law by engaging in serial, private,

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closed meetings to pressure and lobby other members of the Board to vote against Plaintiffs regarding City Dock #10.

A. The Attorney-Client Privilege Exception to the Open Meeting Law

The Open Meeting Law has an exception allowing closed meetings "permitted by the attorney-client privilege." Minn. Stat. §13D.05, subd. 3(b). Plaintiffs rely on *Prior Lake American v. Mader*, 642 N.W.2d 729 (Minn. 2002) and LMCD Defendants rely on a later case, *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435 (Minn. Ct. App. 2006).

Both cases emanate from *Minneapolis Star & Tribune Co. v. Housing & Redevelopment Authority*, 251 N.W.2d 620 (1976) ("*HRA*"), where the Minnesota Supreme Court determined that, under its authority to regulate the practice of law, an attorney-client exception must be made to the Open Meeting Law. The legislature codified the exception thereafter, which did not alter the exception recognized by *HRA*. *Prior Lake American*, 642 N.W.2d at 737. "Pursuant to the rule of *HRA*, the attorney-client privilege exception to the Open Meeting Law applies when the balancing of the purposes served by the attorney-client privilege against those served by the Open Meeting Law dictates the need for absolute confidentiality." *Id.* "'The exception . . . is to be employed or invoked cautiously and seldom in situations other than in relation to threatened or pending litigation.'" *Id.* (quoting *HRA*, 251 N.W.2d at 626).

In *Prior Lake American*, an applicant for a conditional use permit to extract gravel wished to avoid an Environmental Assessment Worksheet ("EAW"). It told the City that if its application were denied, or an EAW required, then it would revise its application to add more burdensome requests. It also provided the city with a letter saying it "may seek

legal action to ensure proper handling and compliance of this matter, as well as legal action to recover lost revenues and/or costs incurred as a result of actions by the City of Prior Lake."

The city went into executive session with its regular city attorney to discuss the potential litigation. As the Supreme Court observed, the threshold issue for the city was whether an EAW was required, which was a determination subject to many factors, but not an assessment of litigation risks. The Court observed that a closed session was not necessary to decide whether to require an EAW, a matter of substantial public interest and policy. The Court also noted that the threat of litigation was connected to potential improper handling of its application, which was not an issue of litigation strategy. Absent evidence of what was discussed, the Court found that invocation of an attorney-client privilege exception before the public policy issue is addressed "is fraught with peril." *Id.* at 741. The Court ruled that given the public interest in the environmental issues, and the stage of the proceeding, absolute confidentiality was not required and the Open Meeting Law was violated.

A different result occurred in *Brainerd Daily Dispatch*. Relying on *Prior Lake American* and *HRA*, the Court of Appeals ruled that the city there did not violate the Open Meeting Law when it met in closed-door session "for a confidential consultation with legal counsel appointed by its insurer concerning a threatened legal action." *Brainerd Daily Dispatch*, 693 N.W.2d at 437. A peace coalition applied for permission to march in the annual Fourth of July parade. The city denied permission, citing safety concerns. The peace coalition said that if the decision were not reversed, it "would

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seriously consider legal action." The city declined to reverse its decision. The Minnesota Civil Liberties Union offered to research whether a First Amendment violation had occurred. The MCLU made a data-practices request for information relating to past parade permits, city ordinances, and other data. Later, an MCLU panel recommended that it represent the peace coalition in a suit against the city.

The city's insurer retained special counsel to represent the city. This lawyer appeared at an open session of the city council and recommended that the council meet with him in closed session, and discussed and distinguished *Prior Lake American*, stating that he would not be discussing a matter pending before the council but instead would discuss a defense strategy or reconciliation to address the imminent lawsuit. He assured the council and members of the public that the discussion would be confined to litigation strategy and would not involve other public business.

The Brainerd Daily Dispatch objected, and later sued, losing in district court on summary judgment. On appeal, the court noted counsel's reasons for a closed session:

> (1) He needed a candid and open discussion regarding matters that could affect litigation, including defense strategy and possible areas of reconciliation;
> (2) The scope of representation was limited to claims by the peace coalition regarding denial of permission to march in the parade and no other business would be addressed;
> (3) Nothing was pending before the city council on the decision as to the parade;
> (4) The open session would be detrimental because it would take place in the presence of potential litigants; and
> (5) A closed session would benefit the public because any financial liability incurred would be taxpayer-funded.

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Id. at 441. The court also found it significant, as *HRA* did, that insurance counsel, not the city's regular counsel, would be participating in the executive session.

Here, Plaintiffs focus on the fact that, unlike *Brainerd Daily Dispatch*, insurance counsel in this case did not file an affidavit listing similar reasons. This is a distinction without a difference because similar information is actually contained in LMCD minutes. These minutes establish that on January 8, 2020, Plaintiffs and their litigation counsel appeared at the LMCD Board meeting and demanded a public hearing on City Dock #10, which they said "should not be there."

Plaintiffs' counsel, who had represented the plaintiff in the prior suit over City Dock #11, stated that if they are not allowed to present information, "his clients will take the issue to court." Mr. Schussler chimed in, explaining that he spent $275,000 to research and prepare, with legal assistance, the packet of information previously provided at the December 11 meeting, that "he will not stop and does have a lot of money that has been put aside solely for this issue, should it need to go forward to court." He stated that he had had packets of information hand-delivered to Board members the day before. "He repeated that he will not hesitate to spend the money necessary to take this forward to court," and that he "will pursue punitive damages and legal fees." LMCD Board Minutes, Jan. 8, 2020. At the same meeting, the LCMD Board voted to deny Plaintiffs' request for a public hearing. Ryan-Schussler Aff., ¶ 28.

In response to the litigation threats, however, LMCD's regular counsel submitted the matter to its insurer, which appointed counsel to represent LMCD in litigation. That insurance counsel, also counsel for LMCD in this case, requested a closed meeting with

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the Board under the attorney-client privilege exception to the Open Meeting Law. The Board Chair summarized the request and its rationale as follows:

> [Insurance counsel] has requested a closed meeting with the Board for an attorney-client privileged discussion. The discussion will relate to the Board's decision whether to grant the request for a public hearing, and the impact that decision is likely to have on litigation strategy given the explicit threats that have been issued to the Board. [Insurance counsel] has indicated that he needs to have a candid and open discussion with the Board about the potential litigation, including defense strategies and any possibility of resolution. If the discussion happened in open session, it would harm the Board's legal position because potential adverse parties could hear the Board's strategy options and its counsel's legal opinions about them. Having the discussion in closed session benefits the public because portions of the expense of litigation and any financial liability will be funded by the public. The scope of [insurance counsel's] representation is limited to the threat of litigation and no other business will be discussed.
>
> The need for absolute confidentiality in seeking and receiving legal advice in this matter outweigh the public's right to observe Board discussions of its business, as set forth in the Open Meeting Law[,] Minn. Stat. § 13D.05, subd. 3(b), which authorizes this discussion to be held in closed session.

LMCD Board Minutes, Jan. 22, 2020. The closed session lasted 40 minutes. The LMCD decided to process the application administratively, as was the normal process under the Code, without a public hearing.

It is apparent that LMCD and its counsel were mindful of *Brainerd Daily Dispatch*, as the reasons set forth there exist also in this case, as reflected in the LMCD minutes. Because the request for a public hearing had already been denied two weeks earlier, the LMCD Board had nothing pending before it regarding Plaintiffs.

As in *Brainerd Daily Dispatch*, the litigation threats here were serious and imminent, as confirmed by the filing of this multi-count Complaint just three weeks later.

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The closed discussion was focused on litigation and settlement strategy, and the effect on that strategy of the earlier decision not to grant a public hearing. The substantive policy decision of whether City Dock #10 merited approval was not on the table for this discussion.

Balancing the need for confidentiality against transparency in government, the Court determines that the need for absolute confidentiality prevails here as it did in *HRA* and *Brainerd Daily Dispatch*. This case is less like *Prior Lake American*, where the threshold issue of whether an EAW should be prepared was an appropriate matter for public discussion involving the regular city counsel, not insurance counsel appointed for purposes of litigation. Here, no such threshold issue remained pending at the time of the meeting discussing the litigation threats.

Ironically, one description of *Prior Lake American* is apt here:

> The record demonstrates that the privilege was invoked only in response to a specific, written threat of litigation that included a claim for damages. This minimal intrusion on the principle of open meetings is the responsible reaction to an increasingly litigious society in which city councils are brought into court on a regular basis to defend themselves and/or pay damages for wrongful conduct.

Prior Lake American, 642 N.W.2d at 743 (dissenting opinion).

The Court concludes that the attorney-client privilege exception to the Open Meeting Law was properly invoked.

B. Plaintiffs' Claims Against the Individual Defendants

The second Open Meeting Law violation asserted by Plaintiffs is that the two individual LMCD Board members "pressured, in private and behind the scenes,

numerous members of the LMCD Board of Directors" regarding Plaintiffs' demands for a public hearing. Complaint, ¶ 108. *See also* ¶¶ 183, 185-86. The Open Meeting Law may be violated by "[s]erial meetings in groups of less than a quorum for the purposes of avoiding public hearings or fashioning agreement on an issue." *Moberg v. Independent School District No. 281*, 336 N.W.2d 510, 518 (Minn. 1983).

Defendants contend that Plaintiffs have no competent evidence of such. Plaintiffs respond in two ways. First, Mr. Schussler testifies by affidavit as follows:

> On information and belief, numerous members of the LMCD Board of Directors violated the open meeting law by having numerous intense, private behind-the-scenes non-privileged discussions, communications and emails with other members of the LMCD Board of Directors and/or their counsel with the goal of lobbying and influencing other members to deny our request without a public hearing or discussion.

Schussler Aff. (filed 2/12/20), ¶ 40. Allegations on "information and belief" are permitted in a pleading, *see* Minn. R. Civ. P. 11.02, but they are not the competent evidence required in affidavits. *See* Minn. R. Civ. P. 56.03(d); *City of Duluth, St. Louis Cty. v. P.F.L., Inc.*, 431 N.W.2d 135, 137 (Minn. Ct. App. 1988) (stating affidavit of unsupported belief is insufficient to defeat summary judgment).

Plaintiffs seek to bolster their claim of inappropriate nonpublic meetings with deposition testimony of Mr. Schussler that conveys inadmissible hearsay about an alleged confrontation between two board members and a discussion he had with his lawyer, who ran into an LMCD member at a basketball game. Schussler Depo. at 6-8. This is not competent evidence either.

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Plaintiffs counter that the Court precluded early depositions of the two individual defendants and that summary judgment should be denied or deferred under Minn. R. Civ. P. 56 04 until those depositions can be taken. The Court did preclude those depositions because Plaintiffs had not make the requisite showing to allow depositions of public officials, which are not allowed as a matter of routine. After further discovery, Plaintiffs still have not made a sufficient showing. The request to deny or defer summary judgment on this issue under Rule 56.04 is denied. Having no competent evidence of meetings in violation of the Open Meeting Law, Plaintiffs will have summary judgment granted against them on this claim.

Plaintiffs also insert a claim that Defendant Klohs has a conflict of interest regarding City Dock #10 because he or his wife have had permits from the City for a slip on that dock. The LMCD Board is composed of representatives from each city within its jurisdiction. Plaintiffs cite no authority that prohibits or invalidates any action taken by Defendant Klohs in this case.

VII. Is City Dock #10 a Nuisance?

In Count V of their Complaint, Plaintiffs contend that the actions by LMCD and the City in allowing City Dock #10 constitute a nuisance under Minnesota Statutes section 561.01 *et seq*. Plaintiffs seek damages and an order enjoining or abating the alleged nuisance.

The statute defines a private nuisance as "[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Minn. Stat. §561.01.

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The interference must be "material and substantial." *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 803 (Minn. Ct. App. 2001) (citations omitted). Liability for nuisance is determined by balancing "the social utility of the defendants' actions with the harm to the plaintiff." *Johnson v. Paynesville Farmers Union Co-op. Oil Co.*, 817 N.W.2d 693, 712 (Minn. 2012) (internal quotation omitted).

LMCD contends that this claim is barred by vicarious official immunity, a common-law doctrine protecting government entities from suit for discretionary actions taken by their employees in the course of their official duties. *Sletten v. Ramsey County*, 675 N.W.2d 291, 299, 300 (Minn. 2004). The application of immunities is a question of law. *Id.* at 299. Plaintiffs counter that immunity is not available for failure to fulfill a ministerial duty. *See Briggs v. Rasicot*, 867 N.W.2d 217, 221 (Minn. Ct. App. 2015). According to Plaintiffs, LMCD's failure to obtain the consent of Plaintiffs, as the fee owner, to City Dock #10 is a ministerial duty not entitled to immunity. Having rejected the premise of this argument, the Court finds that vicarious official immunity bars this nuisance claim against LMCD because the decision to approve a license application is discretionary, not ministerial. The same would apply to the City's decision to issue permits for City Dock #10.

Even if immunity did not apply, the complaint fails to state a claim against LMCD because failure to enforce a regulation is not grounds for a nuisance action against the government. *See Sik v. Verhelst Bros.*, 2009 WL 4573827 (Minn. Ct. App. Dec. 8, 2009).

LMCD contended in its first brief that no Minnesota case has held that the mere existence and use of a neighboring dock constituted a private nuisance. LMCD cited

Dumm v. Dahl, 913 A.2d 863 (Penn. 2006), a case with strikingly similar facts. Finding the case to be one of first impression, the Pennsylvania Supreme Court said: "we have not found a single reported case in this Commonwealth that addresses whether the use of a dock accessed via a public easement (easement dock) poses a significant harm to an adjacent owner's land and thus constitutes a private nuisance." *Id.* at 867. After considering the matter, the court found that the easement dock was not a nuisance and that the dock's impairment of the adjacent owner's view was not "an appreciable invasion of her property interests sufficient to constitute a private nuisance." *Id.* at 869.

Plaintiffs counter with *H. Christiansen & Sons v. City of Duluth*, 31 N.W.2d 270 (Minn. 1948). In that case, the complaint alleged that a city dock was left to deteriorate to the point of dangerousness and actually crumbled onto the plaintiff's property, constituting both a trespass and an interference with navigation channels that substantially damaged plaintiff's fish business. The Minnesota Supreme Court found that this stated a cause of action in nuisance. But no trespass is present here, nor is there a claim of a deteriorating municipal structure.

Instead, Plaintiffs rely on safety concerns, mainly the proximity of boats to swimmers, as articulated in their own affidavits and that of ex-sheriff Stanek but contradicted by the absence of any incidents reported to authorities. Safety concerns are, of course, one of the considerations the public entities have to address when approving the installation of a municipal dock. In the similar case filed by Plaintiffs' predecessors-in-title complaining about City Dock #10, Judge Zimmerman found that LMCD

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addressed the safety issues at a public hearing and allowed the city dock to be installed in its current location.

City Dock #10 is within the authorized dock use area of the Fire Lane and does not encroach into Plaintiffs' authorized dock use area. The proximity of docks (and the boats docked there) to swimmers is neither novel nor unique to Plaintiffs' property. It is a common, everyday tension at popular lakes akin to that between pedestrians and motorized traffic on roadways. The goal is to avoid unwanted meetings of the two, but not by giving either exclusivity. Judge Zimmerman addressed this exact issue at Plaintiffs' property twelve years ago:

> While all waterways and swimming areas have potential dangers, there is nothing in the record to suggest that Plaintiffs, their two teenage daughters, and their guests either cannot use the large swimming area on the other side of their dock, or otherwise navigate safely. The existence of risk is not akin to irreparable harm, and what Plaintiffs pose as dangers are akin to the risks faced by hundreds if not thousands of boaters who use Lake Minnetonka and are required to navigate their bots into slips or docks.

Smith v. City of the Village of Minnetonka Beach, No. 27-CV-08-14190, Amended Order filed June 17, 2008 at 10-11.

The Court concludes that these potential safety issues caused by mere proximity are not a material and substantial interference with Plaintiffs' property interests. Even if LMCD and the City did not have immunity, Plaintiffs' nuisance claim fails on the merits.

VIII. Does City Dock #10 Interfere with an Implied Easement for Light, Air, and View?

Count VI of the Complaint alleges that City Dock #10 interferes with Plaintiff's implied easements for light, air, and view over the Fire Lane, specifically their "view of

Lake Minnetonka." Compl., ¶¶ 164-67. This is an unconstitutional taking of property rights, say Plaintiffs, which entitles them to an injunction, over $50,000 in damages, and attorneys' fees.

Minnesota does recognize that a landowner abutting a public street possesses implied easements for light, air, and view over the public street. *Haeussler v. Braun*, 314 N.W.2d 4, 7 (Minn. 1981). These easements are subservient to the "broad" public easement in a street, which means that any interference with light, air, and view that results from the public's use of the street for a proper street use "must be suffered by the abutting landowner without complaint to the courts." *Id.* at 7, 8. The abutting landowner is not entitled to "every particle of sunlight or air that passes over the street. Rather, he is only entitled to the air, light and view that are not obstructed by a proper street use." *Id.* at 8. "When the light, air and view over a public street are obstructed by improper street uses, an additional servitude is deemed to be placed on the property owner's implied easements and a taking can be found. Thus, whether any given use is proper . . . turns on the circumstances of each case." *Castor v. City of Minneapolis*, 429 N.W.2d 244, 246 (Minn. 1988).

Plaintiffs contend that City Dock #10 is not a proper use "as it is a private dock owned by private citizens that entirely excludes Plaintiffs and the general public." Memo. Opp. LMCD Defts' Motion for SJ at 43. The riparian rights discussed earlier entitle the City to place a dock in the Fire Lane. The narrow issue Plaintiffs raise here is whether it is a proper use of the public street, and associated riparian rights, to permit a private dock to be installed for use by City residents who obtain a City permit.

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This issue was already addressed in Section II above. As Judge Lynn found, it is not illegal or unreasonable for the City to allow residents who obtain a City permit to install a dock on public property. This is consistent with the City Charter, City Code 906, and state law and does not preclude other use of the Fire Lane, its shoreline, or adjacent waters by others, including Plaintiffs.

City Dock #10 does not violate Plaintiffs' implied easements. This is not an inequitable result as Plaintiffs bought their property knowing of City Dock #10 and its location. Their own submissions demonstrate that any associated reduction in the market value of their property was absorbed by the owners thrice-removed and therefore, by market forces, reflected in the price Plaintiffs paid.

IX. Disposition of Pending Motions

In light of the rulings above, the disposition of the competing summary-judgment motions will be addressed first, and then the motion for a temporary injunction.

A. Plaintiffs' Motion for Summary Declaratory Judgments

Plaintiffs seek partial summary judgment on eight proposed items of declaratory relief. Because Defendants do not dispute them, Plaintiffs' motion is granted as to the first three requests:

a. As abutting property owners, Plaintiffs own fee title to the Fire Lane.

b. The Fire Lane was statutorily dedicated to the public for use as an "Avenue" on the 1889 Plat.

c. The general public has an easement over the Fire Lane allowing it to be used as an "Avenue."

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The remaining five requests would have the Court declare that City Dock #10 is unlawful for various reasons, including the necessity of consent from Plaintiffs. Plaintiffs' motion for summary judgment on that declaratory relief is denied.

B. Defendants' Motions for Summary Judgment

Except for the three uncontested items of declaratory relief in Count I, Defendants' Motions for Summary Judgment are granted on all Counts as follows:

a. Count I -- Declaratory Judgment (Against the City and LMCD) (precluding City Dock #10);

b. Count II -- Declaratory Judgment (Against the City and LMCD) (ordering them to allow Plaintiffs to have a dock housing four watercraft extending to a depth of five feet);

c. Count III -- Violation of Minnesota law regarding use of statutorily dedicated Fire Lane (Against the City and LMCD);

d. Count IV -- Interference with Plaintiffs' Riparian Rights (Against the City and LMCD)

e. Count V -- Nuisance (Against the City and LMCD);

f. Count VI -- Interference with Plaintiffs' implied easement for view, air and light (Against the City and LMCD);

g. Count VII -- Violation of Due Process (Against the City and LMCD);

h. Count VIII -- Open Meeting Law Violation (Against LMCD and individual defendants); and

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i. Count IX -- Injunction (Against the City and LMCD) (enjoining installation of City Dock #10).

C. Plaintiffs' Motion for a Temporary Injunction

Plaintiffs seek a temporary injunction (1) restraining and enjoining the City from issuing permits to or allowing City residents' exclusive and private use of City Dock #10 on any date prior to the full adjudication of this matter and (2) allowing Plaintiffs to install a dock as they propose. Because Defendants are granted summary judgment on all counts of the complaint save for three uncontested propositions on which Plaintiffs are granted summary judgment, this lawsuit is fully and finally adjudicated. No temporary relief pending final adjudication is needed. Plaintiffs' motion for a temporary injunction is therefore denied as moot. In addition, the Court agrees with Defendants that the second branch of the temporary injunction would not be ripe for determination as it is beyond the scope of the Complaint.

TF

Appendix A