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## ZONING AND LAND USE PLANNING

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### *Riparian Rights Ruling Affects Landowners and Town Governments*

Riparian rights have played an important role in the history and development of Long Island. They also have a long legal history here and throughout New York State.

Under the common law, the owners of land along the border of a waterway enjoy certain rights that allow them to use the abutting waterway and the land beneath the waterway to gain reasonable access to navigable water. These rights, known as “riparian” or “littoral” rights,<sup>1</sup> are appurtenant to and arise from the proximity of the land to the water.<sup>2</sup> A riparian owner has no direct property interest in either the adjacent water or underwater lands, but merely the right to use such water and land.

As a general rule, a riparian owner has the right of access to navigable waters for navigation, fishing and other uses, exercised in a reasonable manner.<sup>3</sup> Where the upland property is commercial in nature, this right contemplates access to navigable waters for commercial purposes such as loading, unloading and transporting merchandise to and from the upland property.<sup>4</sup> A riparian owner also may undertake reasonable measures to render the rights of access and use practical. For instance, a riparian



owner may construct a structure, such as a wharf, pier or dock, to gain access to the navigable portion of the adjoining waters.<sup>5</sup>

A riparian owner's right of access to navigable waters has been recognized as being superior to the rights of the owner of the adjacent underwater lands.<sup>6</sup> Where title to the underwater land is in a party other than the upland owner, that interest is subject to the riparian owner's right to access navigable waters.<sup>7</sup> These superior rights are in the nature of an implied servitude or easement over the underwater land that permit a riparian owner to use or occupy that portion of the underwater land necessary to permit access to navigable water, without charge or the need for permission from the underwater landowner.<sup>8</sup> This is true even where title to such

lands is vested in New York State or a local government and held in trust for the public good.<sup>9</sup>

In Nassau and Suffolk Counties, title to the underwater lands beneath the harbors, coves and bays is largely vested in the townships by virtue of patents issued by colonial governors as representatives of the English crown.<sup>10</sup> Accordingly, on Long Island, a riparian owner need not obtain permission from a town, as the owner of the adjacent underwater land, prior to constructing a wharf, pier or dock over, on or in that underwater land, or undertaking other reasonable measures to obtain access to navigable waters. Such structures, however, are subject to federal and state regulation and may be subject to a town's regulatory authority.<sup>11</sup>

Several months ago, in a case that arose on Long Island,<sup>12</sup> the New York Court of Appeals revisited the subject of riparian rights and attempted, once again, to define the scope and limitations of this age-old concept. The Court's opinion, by Chief Judge Judith Kaye, is important for riparian owners as well as for town governments seeking to regulate those rights.

### **Public Underwater Land**

The case stemmed from an attempt by Commander Oil Corporation, which owns and operates a petroleum storage

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facility on the shore of Oyster Bay Harbor, to dredge a portion of the harbor without obtaining permission from the Town of Oyster Bay, which owns the underwater land beneath the harbor. Commander sought to dredge because both the east and west dock basins had become increasingly shallow from accumulated silt deposited, in part, by storm water runoff systems maintained by the Town of Oyster Bay and the State of New York.

Commander obtained the necessary approvals from the New York State Department of Environmental Conservation and the New York State Department of State. Although the Department of State's permit required Commander to obtain permission from the Town of Oyster Bay as the owner of the underwater lands, Commander did not seek such permission.

The town sued Commander in Supreme Court, Nassau County, seeking to enjoin it from dredging. The court denied the town's request for injunctive relief, finding that prior to the augmented deposit of silt attributable to the town and state storm water runoff systems, both dock basins had been usable for docking barges and off-loading oil. The Appellate Division reversed, granting the town a permanent injunction and finding that an upland owner "has no riparian right to dredge public underwater lands in the absence of the public owner's permission." The Court of Appeals granted Commander's application for leave to appeal.

The Court of Appeals began its analysis by acknowledging that Commander, like any riparian landowner, enjoyed a "full panoply of rights," which include a right of access to water for navigation, fishing and other uses, and a right to make that access a practical reality by building a pier or "wharfing out." While the Court acknowledged that

Commander's riparian right of access was not subordinate to the rights of the town, it also recognized that Commander did not have an unqualified right to expand its access in a manner that would seriously impair the town's rights. The Court concluded that neither a riparian owner nor an underwater landowner has an unfettered veto over reasonable land uses necessary to the other's acknowledged rights and made clear that where the rights conflict, it is for the courts to strike the proper balance.

Commander argued that dredging was necessary to preserve reasonable access to a navigable portion of Oyster Bay Harbor, and claimed that its access had been diminished over the years by silt deposited from the town's storm water runoff system. The town contended that dredging was simply an impermissible means by which a riparian owner may obtain access to navigable water and that, if the Court permitted Commander to dredge, it would represent an expansion of the rights of a riparian owner.

The Court disagreed with the town's position and found no reason to treat dredging differently from the other recognized means of exercising riparian rights of access. It did not, however, hold that Commander, as a riparian owner, had a general right to dredge or a right to dredge to maintain the depth of the basins that existed when it acquired the land or built its dock. Instead, it limited the right to dredge to instances where the riparian owner could demonstrate that dredging was necessary to preserve reasonable access to navigable water and could be exercised in a manner that did not unreasonably interfere with the town's rights.

The Court reversed the Appellate Division's order and remitted the case to the Supreme Court for further

proceedings, with instructions as to the proper standard by which that court is to determine whether and, to what extent, Commander can dredge.

The Court's conclusion that a riparian owner's right of reasonable access to navigable water includes the ability to dredge adjacent underwater land, if necessary to preserve such access, and if that activity does not unreasonably interfere with the rights of the owner of the underwater land, is a significant ruling on riparian rights. Although it did not in this instance end the litigation, it clearly set forth the rights of the interested parties, and is an important addition to the riparian rights case law.



(1) Although "riparian" rights are defined as rights incident to the ownership of lands that abut streams and rivers and "littoral" rights are those held by the owner of land bounded by lakes, ponds and tidal water bodies, New York courts have blended these definitions such that "riparian" is now used to describe waterfront landowners in general. See *Allan v. Potter*, 64 Misc.2d 938 (Sup. Ct., Yates Co. 1970), affirmed, 37 A.D.2d 691 (4th Dept. 1971).

(2) *Gould v. Hudson River R. Co.*, 6 N.Y. 522 (1852).

(3) See *Tiffany v. Town of Oyster Bay*, 234 N.Y. 15 (1922).

(4) See *City of New York v. Third Ave. R. Co.*, 294 N.Y. 238 (1945); *Town of Huntington v. W. Wilton Wood, Inc.*, 97 A.D.2d 781 (2d Dept. 1983).

(5) *Saunders v. New York C.&H. R. R. Co.*, 144 N.Y. 75 (1894).

(6) *Town of Brookhaven v. Smith*, 188 N.Y. 74 (1907).

(7) See e.g., *Tiffany v. Town of Oyster Bay*, supra; *Town of Brookhaven v. Smith*, supra.

(8) *Town of Hempstead v. Oceanside Yacht Harbor, Inc.*, 38 A.D.2d 263 (2d Dept. 1972), aff'd, 32 N.Y.2d 859 (1973).

(9) See *Tiffany v. Town of Oyster Bay*, supra.

(10) In 1691, the colonial legislature of New York ratified and confirmed all charters, patents and grants made under authority of "the kings of England" to cities, towns, manors and freeholders in the province of New York. 1 Colonial Laws of New York 224-225 (1896).

(11) See, e.g., *Town of Islip v. Powell*, 78 Misc.2d 1007 (Sup. Ct., Suffolk Co. 1974).

(12) *Town of Oyster Bay v. Commander Oil Corporation*, 96 N.Y.2d 566 (2001).