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WATER,WATER, EVERY WHERE: THE PUBLIC TRUST DOCTRINE, COLONIAL PATENTS AND RIPARIAN RIGHTS

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I. INTRODUCTION

"Water, water, every where..."[1] The laws concerning water rights are as vast as the waters lapping the shores of New York State. For beneath these waters lie underwater lands granted by kings, dukes and royal governors that are subject to private riparian rights that arise from the ownership of land along a navigable waterway.

These rights are known as "riparian" and "littoral" rights. Technically, "riparian" rights are those rights enjoyed by the owner of land on the boundary of a river and "littoral" rights are those held by the owner of land on a sea or lake. However, this distinction is becoming obsolete and is often blurred by courts and practitioners alike. As a result, the term "riparian rights" encompasses both areas of shoreline.[2] For ease and simplicity, the term "riparian rights" will be used herein to discuss both.

As a result, the questions for the practitioner and the courts run the gamut from colonial grants and governmental approvals regarding the length and location of docks to disputes between private property owners. In addition, riparian owners are also subject to the capricious and sometime disastrous whims of the sea brought on by accretion and erosion.[3]

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II. COLONIAL GRANTS ESTABLISH RIPARIAN RIGHTS IN NEW YORK STATE

New York's laws of riparian rights of today were adopted from English common law as it existed well before the time New York became a state in 1777.[4] The historic development of riparian rights evolved over centuries and is a derivative of English common law that relates to the public's right to use waterways for commerce, food and natural resources.[5] Traditionally, the public right to the shoreline was grounded in the public right of navigation over navigable waters, the *jus publicum*. The doctrine of *jus publicum* generally provided the public with a right of passage over the foreshore, i.e., the land located between the high and low-water marks of tidal waters. This doctrine also grants to the public the right to use the water covering the foreshore for boating, bathing, fishing or other lawful activities, and to use the dry foreshore as a means of access to the water for the same purpose.[6]

Under the English common law, the Crown was the pre-eminent landowner and source of all titles to lands within the royal dominion, including the land under the navigable waters and the navigable waters themselves.[7] These navigable waters, however, were incapable of private ownership, for they were also subject to the public's right of access and use and held by the king in a representative capacity for the people. This waterfront land was also subject to the riparian owner's right of access and right to construct necessary improvements to reach navigable water.[8] Thus, implicit in every land grant made by the Crown of lands bound by navigable or tide waters was the reservation of the public's right of passage for fishing and navigation and the private riparian rights of waterfront land owners.[9]

After the Revolutionary War, the State of New York succeeded to the sovereign rights of the English crown with respect to the ownership and restrictions set forth by the original patents.[10] These patents conveyed title to all lands within the boundaries of the grant, including lands underwater.[11] The Constitution of the State of New York, as originally adopted, confirmed those patents, and with a few exceptions, courts have upheld these colonial grants and obligations for well over 100 years.[12]

Various municipalities throughout New York State trace their origin to pre-Revolutionary War royal grants.[13] Common to all these grants was a two-fold theme: (1) establishing a town; and (2) designating a governing body as trustees for the public. Nearly all the towns on Long Island were created by royal grant, which sets them apart from many other municipalities in the State when it comes to regulating riparian rights. For example, the Town of Southampton was created by royal charter, granted by Governor Andros in 1676, and ratified by Governor Dongan 10 years later.[14] The Town of East Hampton holds its underwater land title by virtue of the Dongan Patent of 1686. The Town of North Hempstead, as successor to the Town of Hempstead, owns the waters and bed of Manhasset Bay by virtue of a grant made by the Dutch Governor William Kieft in 1644 and a later grant made by the English Colonial Governor Dongan in 1685.[15] The Town of Oyster Bay, by virtue of the Andros Patent of 1677, holds title to underwater land in Cold Spring Harbor to the high water line of the Town of Huntington.[16] The Town of Huntington acquired title to its underwater lands described in a patent made in 1666 by Governor

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Nicholls.[17] The Town of Brookhaven owns its underwater lands, which include Conscience Bay, Setauket Harbor, Mount Sinai Harbor, Port Jefferson Harbor and the Great South Bay, by virtue of the Nicholls Patent of 1666 and the Dongan Patent of 1686.[18]

As a result of these towns acquiring title to their respective underwater land by grant from the Crown, they continue to be the sovereign steward of such lands administered for the public good and subject to the right of navigation and access enjoyed by the both the public and the upland owners.[19]

III. RIPARIAN LANDS

As stated in Navigation Law § 2(4), the "navigable waters" of the state are defined as "all lakes, rivers, streams and waters within the boundaries of the state and not privately owned, which are navigable in fact or upon which vessels are operated."[20] Riparian rights are essentially meant to encompass the private right of access to a navigable waterway, which is not dependent upon ownership of the underwater land.[21] This private "right of access" stems from the public's same right of access to the navigable portion of a waterway.[22] Such rights also include the reasonable, safe and convenient use of the water for general purposes such as boating, fishing, and other uses commonly belonging to riparian ownership.[23] However, the riparian owner has certain rights in the foreshore entirely different from the rights and privileges of the public. One of the most important differences between the public's right of access and the riparian owner's rights is that the private riparian landowner may construct necessary improvements to provide reasonable access to the navigable portion of the waterway.[24] Such improvements include, among other things, a dock, pier, wharf, bulkhead, channeling or other improvement to permit the safe harbor of a vessel with access to the navigable water.[25]

This right to place a pier is not absolute or unbridled, and it must stop at the navigable part of the water and go no further.[26] Such private riparian rights are also subject to the public's right of passage along the foreshore.[27] Thus, while an upland owner's riparian rights allow for the construction of piers and docks along the foreshore, an upland owner may not exercise these rights in a manner that will unreasonably interfere with the public's right of passage along the foreshore.[28]

A. RESTRICTIONS TO RIPARIAN ACCESS

In general, the courts have dealt quite favorably with riparian owners and their rights to reasonably access navigable waters.[29] In fact, riparian owners have even been granted the right to dredge to preserve such access.[30] However, as stated above, riparian rights are not absolute. Rather, the rights of riparian owners must also yield to the state's legitimate exercise of the police power.[31] Specifically, the right of access for navigation, and the concomitant right to construct a landing, wharf, or pier for one's own use are subject to such general rules and regulations as the state legislature or local municipalities may impose for the protection of the public rights to the shoreline and navigability.[32]

The severity of that police power was the focus of *Montero v. Babbit*, a federal case in Oyster Bay, New York. In 1968, the Town of Oyster Bay conveyed a portion of the underwater land in Oyster Bay to the United States for a wildlife refuge.[33] Several decades later, in 1996, two private riparian landowners, who had been using a dinghy launched from the shoreline to reach their moored vessels, applied to the United States Fish and Wildlife Service ("USFWS") for permission to construct a 180-foot dock. The USFWS denied the dock permit, due in part to concern about the possible cumulative effect of dock proliferation in a wildlife refuge. The riparian owners maintained that as waterfront owners they had a riparian right of access to navigable water and therefore a right to build a dock for that purpose. The USFWS argued that such rights are subject to reasonable governmental regulations. The court upheld the denial of the dock permit, finding that the riparian owners had not been denied their "riparian right of access" to navigable waters, although their "mode of access" had been limited to a dinghy.[34] Accordingly, the court found that there was no denial of the plaintiffs' riparian rights.[35]

This restriction of a riparian owner's right of access

to navigability by limiting the mode of access was reinforced in *Stuchin v. Town of Huntington*.[36] In that case, the court was faced with a municipal agency reducing a riparian owner's right of access to a navigable water through a local zoning ordinance. In *Stuchin,* the owners of upland property abutting Lloyd Harbor desired to construct a longer dock than the zoning code allowed, and challenged the ordinance in court. The riparian owners had originally moored their boat in Lloyd Harbor and traveled by dinghy to board their vessel. After receiving approval from the United States Army Corp of Engineers (ACOE), the Stuchins applied to the Village of Lloyd Harbor for a 115-foot dock to reach their vessel more easily. However, the Village of Lloyd Harbor had established a Coastal Overlay zoning district with standards designed to manage land and water uses within the harbor. Pursuant to the zoning district, dock length was limited to 75 feet from the high-water mark, or to a depth no greater than two feet at low tide at the seaward end of the dock, whichever produced the shortest dock, as a way to reduce encroachments into the navigable channel and minimize the effects of the dock's physical presence on the character of the area.[37] The Village denied the permit because the proposed dock did not comply with its zoning code.[38]

In making their claim, the plaintiffs asserted that the ordinances were invalid and did not promote the health, safety, welfare or morals of the general public and were not rationally related to achieving a permissible municipal goal.[39] Finding that the riparian owners had not been denied their right to access the waterway adjacent to their property, the court noted that, as in the case of *Montero v. Babbit,* merely their "mode of access" had been limited. The court went on to note that both the right of access and construction of a private dock remain subject to governmental regulations for the protection of the rights of the public.[40] In short, the court upheld the denial of the permit for the proposed dock and placed the *jus publicum* above the right of the riparian land owner right to construct a means of access to navigable water.

B. RIPARIAN EASEMENTS AND WATERFRONT LANDS

The courts have often likened the riparian right of access to navigability to that of an easement of passage between the waterfront land and the water.[41] As a general rule in New York, the touchstones of riparian rights has been title to the waterfront, so that the riparian rights arise from the ownership of rights in land touching a navigable waterway.[42] As a result, the partitioning of waterfront land will cause any resulting nonwaterfront property to lose its riparian rights unless they are expressly preserved in the deed.[43] However, there is a developing line of case law in the Second and Third Departments that suggests an easement which provides access to a navigable waterway provides the beneficiary of that easement with the riparian right to construct a dock equal to that of the actual waterfront owner.[44]

In *Briggs v. Donna*, the plaintiffs owned real property appurtenant to which was an easement over the defendants' property granting the plaintiffs access to Saratoga Lake. The Third Department held that although there was no language in any of the plaintiffs' deeds expressly granting them right to construct a dock on the land covered by the easement, the plaintiffs' dock on that land was a reasonable use of the easement and incidental to plaintiffs' access rights under the easement.[45] In short, the easement holders, nonwaterfront landowners, possessed the same riparian rights to build a dock to navigable water as the actual waterfront landowner.

Relying on this reasoning, the Second Department, in *Monohan v. Hampton Point*, reinforced the proposition that riparian rights extend from an easement to access navigable water.[46] In that case, the court held that, as a matter of law, an easement to access the water was sufficient to create the riparian right of wharfing out, and that the subject dock located at the end of an easement leading to a navigational portion of the waterway was a reasonable and incidental use of the easement.[47]

Under the circumstances of both of these cases, the courts reasoned that the existence of an easement to the water's edge would have been without purpose if it

did not provide for the construction of a dock or pier to provide access to the waterway. As a result, this line of cases seems to abrogate the need to actually own waterfront land in order to be vested with the riparian right to access navigable water by a dock or pier. Instead, an easement running to the shoreline includes the riparian right to construct a pier or dock to obtain access to navigable water.[48]

IV. NEW YORK'S NAVIGATION LAW—A QUESTION OF SOVEREIGNTY

New York's Navigation Law governs "navigation and the use" of the navigable waters of the State and generally provides for the State's control and jurisdiction of navigation and use of navigable waters of the state "except as otherwise provided."[49] As a general principle, local zoning codes do not apply to the lands of the State, and therefore the State has exclusive jurisdiction over the regulation of structures in navigable tidal waters where the state owns the submerged land.[50]

The definition of "navigable waters of the state" excludes all tidewaters lying within the boundaries of Nassau and Suffolk Counties.[51] This exemption of the navigable waters of Nassau and Suffolk Counties is to accommodate the colonial grants discussed above, and is an acknowledgment of the townships in Nassau and Suffolk Counties' pre-Revolutionary War history and creation. As a result, these towns are exempt from certain provisions of the Navigation Law, and therefore retain the power to enact and enforce zoning ordinances regulating the construction of docks, piers and wharves within their boundaries.[52]

A case that turned on the colonial towns' retaining their jurisdiction to regulate the underwater land is *Manorhaven v. Ventura Yacht Services, Inc.,* where the Second Department found that the Village of Manorhaven was not entitled to prevent a marina from utilizing certain floating piers that were constructed without a village building permit on navigable waters of Manhasset Bay, because the underwater land was under the control of the Town of North Hempstead.[53] The court reasoned that even though the marina itself was located within the Village and therefore subject to its zoning laws, because the floating piers were located outside the Village limits and upon the underwater land owned by the Town of North Hempstead, the Town, and not the Village, was vested with the approving authority under colonial land grants.[54] In short, the Town's sovereign ownership of the submerged lands gave it exclusive authority to regulate such waterways and underwater land.[55]

Whether the Navigation Law confers exclusive jurisdiction upon the State over the nontidal navigable waters was re-examined in *Town of North Elba v Grimditch,* where the Third Department retreated from its prior position that the Navigation Law preempts local land use laws on navigable waters of Lake Placid.[56] Specifically at issue in this case was the interplay between the Navigation Law and the authority of the Town of North Elba to regulate structures on Lake Placid under its zoning code.[57]

In reaction to new regulations recently issued by the Adirondack Park Agency, the defendants began construction of boathouses in the waters of Lake Placid adjacent to their lakefront property, without applying to the Town of North Elba for a building permit. As a consequence, the Town issued a stop work order and moved for a preliminary injunction to prevent further construction. The defendants counterclaimed for a declaration that Navigation Law § 30 preempted the Town's enforcement of its zoning code, making it inapplicable to any construction in the waters of Lake Placid.

The court agreed with the Town that although the Navigation Law applied to Lake Placid, the defendants' construction was also subject to the local zoning jurisdiction. In order to reach its conclusion that Lake Placid was regulated by local zoning, the court addressed the distinction between State-owned and privately owned navigable bodies of water. The Third Department explained that where the state holds title to land under navigable water in its sovereign capacity, its authority is paramount and preempts zoning. Since private riparian owners owned portions of the bed of Lake Placid, the lake was not held in the State's complete control or "sovereign capacity." As a result, the court concluded that the Navigation Law did not

suppress local land use law with respect to the construction of a boathouse on Lake Placid.[58]

The court next addressed whether, regardless of the State's sovereignty, Navigation Law § 30 could create exclusive State jurisdiction to preempt local zoning authority. The court concluded since Navigation Law § 30 only applied to navigation, it had no application to local zoning or the ability to regulate structures built on the waters of Lake Placid.[59] Reinforcing this position, the Third Department also relied on Navigation Law §§ 46 and 46-a, which granted local municipalities the right to regulate the use of a lake or other body of water within their jurisdiction. In the court's view, theses statutes expressly allowed local municipalities the ability to set speed limits for vessels and allowed specified municipalities to regulate the manner of construction and location of boathouses, moorings, and docks. As a result, these provisions were examples of the State's delegation of authority to local municipalities that bordered waters owned by the State and, therefore, the town's zoning authority was applicable to structures on the lake. Further emphasizing a local municipality's ability to regulate nontidal waters, the court cited to Town Law § 130, which authorizes local municipalities the ability to regulate "anchoring or mooring of vessels in any waters within or bounding the town to a distance of fifteen hundred feet."[60]

However, where the State does hold title to the land under a navigable water in its complete sovereign capacity, its authority is absolute and not limited to regulating navigation, but extends to every form of regulation.[61]

In summary, where the State does not own the submerged land in its compete sovereign capacity, the state Navigation law does not preempt local zoning laws regulating construction on the navigable waters.

V. DETERMINING RIPARIAN RIGHTS WHEN NEIGHBORS DISAGREE

In general, most docks and piers are placed perpendicular to the shoreline as the most efficient means to reach navigable water. However, when the shape of a shoreline is irregular, a riparian owner's dock may, if placed perpendicular to the shoreline, interfere with a neighbor's riparian right of access. Where such rights conflict, the courts must strike the correct balance, because neither riparian owner has an unfettered veto over the riparian rights of a neighbor.[62] As noted in the case of *Freeport Bay Marina, Inc. v. Grover*, one of the courts' paramount concerns is to protect a landowner's right of direct access from its entire shoreline frontage.[63]

The court in *Freeport Bay Marina* identified the two principal ways to resolve riparian disputes and establish lateral boundaries depending on the nature of the shoreline and waters. The first is known as the "perpendicular method," and is the simple and most often-cited general rule for fixing the boundaries of a landowner's riparian rights by extending the lateral onshore boundaries of the property out into the navigable body of water perpendicular to the general course of the shoreline.[64]

The other principal rule is known as the "proportional method," and is designed to provide a path between the onshore property boundaries to the navigable channel that is proportionate to the amount of frontage the landowner enjoys.[65] The proportional method has been recognized in New York since 1852[66] and is often employed to better address circumstances involving irregular shorelines. The proportional method has been described in the following step by step application:

> Measure the length of the shore and ascertain the portion thereof to which each riparian proprietor is entitled; next measure the length of the line of navigability, give to each proprietor the same proportion of it that he is entitled to of the shoreline; and then draw straight lines from the points of division so marked for each proprietor on the line of navigability to the extremities of his lines to the shore. Each proprietor will be entitled to the portion of the line of navigability thus apportioned to him, and also to the portion of the flats,' or land under the water, within the lines so drawn from the extremities of his portion of the said line to the extremities of his part of the shore.[67]

When determining which general rule to apply, if any, or whether and in what manner to modify either such rule, a court's paramount concern is to protect a

landowner's right of direct access from his entire shoreline frontage to his equitable share of the line of navigability.[68] Accordingly, in order to maintain the underlying purpose of riparian access—reasonable access to navigable water—the courts, when called upon, extended the property lines in such a way as to provide a reasonably sized watercraft access to the water so that all parties are not unfairly encroached upon.[69]

VI. THE RISING TIDE OF ACCRETION AND EROSION—AN AMBULATORY LINE

Since a shoreline is constantly fluctuating because of natural conditions, a riparian owner whose boundary line is described to include the "shoreline" or the "high water line" is entitled to any increase in her waterfront land due to accretion, and must suffer any decrease due to erosion.[70] This ever-changing high-water mark is known as an "ambulatory" property line.[71]

The capricious of interaction between water and land has led to the development of three common-law concepts generally known as accretion, erosion and avulsion. "Accretion" is the term which applies to the gradual increase or acquisition of land by the imperceptible action of natural forces washing up sand, soil, or silt from the water course or seashore. "Erosion," the opposite of accretion, is the gradual washing away of land along the shoreline. However, a sudden and often very perceptible change to a shoreline by natural forces is referred to as "avulsion."[72] Under New York law, boundaries do not change when a loss of land is sudden or violent.[73]

When dry land is increased by accretion, that "new" land becomes the possession of the riparian land owner, while any removal of land due to the gradual effects of erosion or sea level rising is lost by the waterfront owner.[74] Unlike losses caused by erosion, land lost by avulsion remains the property of the landowner as if the water's edge had not been moved. Thus, the landowner has the right to reclaim and replenish this now underwater area without suffering the loss of title. Similarly, when land is created by avulsion, the landowner has no right to that newly created dry land. Shoreline lands increased by beach renourishing projects have been found to be a form of avulsion and therefore do not belong to the landowner, and often remain in the realm of the public trust doctrine.[75]

When the location of a property boundary is described with reference to a fluctuating natural shoreline, the boundary is inherently subject to the vagaries of the shoreline as a matter of law.[76] This ever-changing natural shoreline process has significant legal ramifications in New York, because under the common law, a riparian landowner whose boundary line is inherently the waterfront automatically takes title to any new land added, so as to continue to provide access to navigable water.[77] Interestingly, the common-law treatment of accretion through natural causes makes no distinction between the increase in land through natural or manmade causes (i.e., jetties). The result as to the ownership in either case is the same; the riparian owner continues to own to the waterfront even though the shoreline has changed.[78]

One such case dealing with dramatic changes in shoreline caused by accretion along artificial structures is *Long Island Lighting Co. v. People*, which stemmed from an action brought by the Long Island Lighting Company (LILCO) against the State by the owner of waterfront property to determine title to 11.36 acres of land that were formerly underwater. In that case, LILCO was the owner of waterfront property in Suffolk County. Its predecessor in title acquired title to land fronting on Long Island Sound in 1928. The following year, letters patent were granted by the State to underwater land extended along the mean high-water mark of about 502 feet and into the Sound about 1,500 feet. As a condition of the grant, it was required that a channel be dredged to a sheltered basin or harbor and that breakwaters be constructed on both sides of the channel. In 1934, the channel and the breakwaters were constructed. After the breakwaters were erected the shoreline changed dramatically, but imperceptibly on a daily basis. By the time LILCO commenced the action to quite title in 1960, 3,287 acres of land, to the west of the breakwaters were covered by water, but to the east 12.25 acres of land had been added to the shoreline. Of the 12.25 acres to the east, the ownership of 11.36 acres was in dispute.[79]

LILCO contended that there was a gradual increase of earth on the shore east of the easterly breakwater caused by the force of the wind, waves or accretion. The State asserted that the increase in land was the result of the placement of certain barges on the east side of the channel, and that the barges interfered with the natural and normal action of the wind, waves and current. The court held that the accumulated land was a gradual imperceptible change caused by the wind, waves and tides and, as a result, ruled that the land so gained belonged to the riparian owner.[80]

The court ruled that, when determining whether an upland owner should be denied ownership of accumulated land because its predecessor in title erected the breakwater, a different rule of law was not required where the accretion was incidental to a manmade development. Therefore the court concluded that LILCO had obtained all the land owned by the former property owner, including that formed through accretion resulting from artificial structures.[81]

CONCLUSION

The question of waterfront boundary lines and ownership remain as ever-changing as the landscape they describe and in New York State, with its miles of shoreline, much can be lost or gained by the smallest movements of these little grains of sand. The public interest and private landowner's rights demand the enforcement of protective measures to prevent infringement by private or governmental entities to the navigable waters and the lands under them.

ENDNOTES:

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[1]Samuel Taylor Coleridge, The Rime of the Ancient Mariner.

[2]Town of Oyster Bay v. Commander Oil Corp., 96 N.Y.2d 566, 734 N.Y.S.2d 108, 759 N.E.2d 1233 (2001).

[3]Halsey v. McCormick, 18 N.Y. 147, 1858 WL 7449 (1858).

[4]7 Warren's Weed New York Real Property, Land Under Water § 6.05[1] (4th ed).

[5]Town of Southampton v. Mecox Bay Oyster Co., 116 N.Y. 1, 22 N.E. 387 (1889).

[6]Trustees, etc., of Town of Brookhaven v. Smith, 188 N.Y. 74, 80 N.E. 665 (1907).

[7]Lewis Blue Point Oyster Cultivation Co. v. Briggs, 198 N.Y. 287, 91 N.E. 846 (1910).

[8]Town of Oyster Bay v. Commander Oil Corp., supra n. 2.

[9]Brookhaven Baymen's Ass'n, Inc. v. Town of Southampton, 85 A.D.3d 1074, 926 N.Y.S.2d 594 (2d Dep't 2011).

[10]People ex rel. Howell v. Jessup, 160 N.Y. 249, 54 N.E. 682 (1899).

[11]Knapp v. Fasbender, 1 N.Y.2d 212, 151 N.Y.S.2d 668, 134 N.E.2d 482 (1956).

[12]People ex rel. Howell v Jessup, supra n. 10.

[13]7 Warren's Weed New York Real Property, 4th ed., Land Under Water § 6.05[1].

[14]Town of East Hampton v. Bowman, 136 N.Y. 521, 32 N.E. 987 (1893).

[15]Grace v. Town of North Hempstead, 220 N.Y. 628, 115 N.E. 1040 (1917).

[16]Tiffany v. Town of Oyster Bay, 209 N.Y. 1, 102 N.E. 585 (1913).

[17]Knapp v. Fasbender, supra n. 11.

[18]Brookhaven v. Strong, 60 N.Y. 56, 1875 WL 10611 (1875).

[19]Lewis Blue Point Oyster Cultivation Co. v. Briggs, supra n. 7.

[20]Navigation Law § 2(4).

[21]Hinkley v. State, 234 N.Y. 309, 137 N.E. 599 (1922).

[22]Trustees, etc., of Town of Brookhaven v. Smith, supra n. 6.

[23]Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 136 N.E. 224, 24 A.L.R. 1267 (1922).

[24]Tiffany v Town of Oyster Bay, supra n. 23.

[25]Tiffany v Town of Oyster Bay, supra n. 23.

[26]Town of Hempstead v. Oceanside Yacht Harbor, 32 N.Y.2d 859, 346 N.Y.S.2d 529, 299 N.E.2d 895 (1973).

[27]Allen v. Potter, 64 Misc. 2d 938, 316 N.Y.S.2d

790 (Sup 1970).

[28]See Barnes v. Midland R. Terminal Co., 193 N.Y. 378, 85 N.E. 1093 (1908).

[29]Town of Oyster Bay v. Commander Oil Corp., supra n.2.

[30]Town of Oyster Bay v. Commander Oil Corp., supra n. 2.

[31]Haher's Sodus Point Bait Shop, Inc. v. Wigle, 139 A.D.2d 950, 528 N.Y.S.2d 244 (4th Dep't 1988); New York State Water Resources Commission v. Liberman, 37 A.D.2d 484, 326 N.Y.S.2d 284 (3d Dep't 1971).

[32]Thousand Island Steamboat Co. v. Visger, 179 N.Y. 206, 71 N.E. 764 (1904).

[33]Montero v. Babbitt, 921 F. Supp. 134 (E.D. N.Y. 1996).

[34]Montero v. Babbit, supra n. 33.

[35]Montero v. Babbit, supra n. 33.

[36]Stutchin v. Town of Huntington, 71 F. Supp. 2d 76 (E.D. N.Y. 1999).

[37]Stuchin v. Town of Huntington, supra n. 36.

[38]Stuchin v. Town of Huntington, supra n. 36.

[39]Stuchin v. Town of Huntington, supra n. 36.

[40]Stuchin v. Town of Huntington, supra n. 36.

[41]In re City of New York, 168 N.Y. 134, 61 N.E. 158 (1901).

[42]15 Warren's Weed New York Real Property, Water § 2.02[2] at 15 (4th ed).

[43]Durham v. Ingrassia, 105 Misc. 2d 191, 431 N.Y.S.2d 917 (Sup 1980).

[44]Briggs v. DiDonna, 176 A.D.2d 1105, 575 N.Y.S.2d 407 (3d Dep't 1991).

[45]Briggs v. DiDonna, supra n. 44.

[46]Monahan v. Hampton Point Ass'n, Inc., 264 A.D.2d 764, 695 N.Y.S.2d 385 (2d Dep't 1999).

[47]Monahan v. Hampton Point Ass'n, Inc., supra n. 46.

[48]Stewart v. Turney, 203 A.D. 486, 197 N.Y.S. 81 (4th Dep't 1922).

[49]Navigation Law § 30.

[50]Town of Carmel v. Melchner, 105 A.D.3d 82, 962 N.Y.S.2d 205 (2d Dep't 2013).

[51]Navigation Law § 2(4).

[52]Navigation Law § 2(4).

[53]Incorporated Village of Manorhaven v. Ventura Yacht Services, Inc., 166 A.D.2d 685, 561 N.Y.S.2d 277 (2d Dep't 1990).

[54]Incorporated Village of Manorhaven v. Ventura Yacht Services, Inc., supra n. 53.

[55]Incorporated Village of Manorhaven v. Ventura Yacht Services, Inc., supra n. 53.

[56]Town of North Elba v. Grimditch, 98 A.D.3d 183, 948 N.Y.S.2d 137 (3d Dep't 2012).

[57]Town of N. Elba v Grimditch, supra n. 56.

[58]Town of N. Elba v Grimditch, supra n. 56.

[59]Town of N. Elba v Grimditch, supra n. 56.

[60]Town Law § 130(17)(1)(b).

[61]Town of Carmel v. Melchner, supra n. 50.

[62]Muraca v. Meyerowitz, 13 Misc. 3d 348, 354-356, 818 N.Y.S.2d 450 (Sup 2006).

[63]Freeport Bay Marina, Inc. v. Grover, 149 A.D.2d 660, 540 N.Y.S.2d 471 (2d Dep't 1989).

[64]Muraca v. Meyerowitz, supra n. 62, 13 Misc. 3d at 355.

[65]Muraca v. Meyerowitz, supra n. 62, 13 Misc. 3d at 355.

[66]Freeport Bay Marina, Inc. v. Grover, supra n. 63.

[67]Freeport Bay Marina, Inc. v. Grover, supra n. 63.

[68]Freeport Bay Marina, Inc. v. Grover, supra n. 63, 149 A.D.2d at 662.

[69]Muraca v. Meyerowitz, supra n. 62.

[70]Halsey v McCormick, supra n. 3.

[71]Trustees of Freeholders and Commonality of Town of Southampton v. Buoninfante, 303 A.D.2d 579, 756 N.Y.S.2d 629 (2d Dep't 2003).

[72]Trustees of Freeholders and Commonality of Town of Southampton v. Buoninfante, supra n. 71.

[73]In re City of Buffalo, 206 N.Y. 319, 99 N.E. 850 (1912).

[74]Mulry v. Norton, supra n. 3.

[75]See Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 560 U.S. 702, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010).

[76]Mulry v Norton, supra n. 3.

[77]Trustees of Freeholders and Commonality of Town of Southampton v. Buoninfante, supra n. 71.

[78]In re Hutchinson River Parkway Extension in City of New York, 14 N.Y.S.2d 692 (Sup 1939).

[79]Long Island Lighting Co. v. People, 22 Misc. 2d 979, 196 N.Y.S.2d 756 (Sup 1960).

[80]Long Island Lighting Co. v. People, supra n. 79.

[81]Long Island Lighting Co. v. People, supra n. 79.

RECENT CASES

Appellate Division, Third Department, holds that Town of Lake George had no authority to rule on landowner's application to construct dock on Lake George.

The Hart Family, LLC, (the landowner) owned lakefront property (Lot No. 9) on Lake George. Owners of numerous other lots in the vicinity held easements permitting them to launch and store boats and to swim on Lot No. 9's shorefront. After the original dock on Lot No. 9 was destroyed by storms, the landowner sought to replace it. Although the proposed dock was granted a permit by the Lake George Park Commission, the Lake George Town Planning Board denied site plan approval for the dock. The landowner brought an Article 78 proceeding to annul the denial, arguing that the Board lacked jurisdiction to review or deny the proposed site plan. Supreme Court ruled in favor of the landowner.

On appeal, the Appellate Division, Third Department, affirmed. The court noted that the State of New York holds title to the lands under Lake George in its sovereign capacity, and therefore has sole jurisdiction over construction in the lake's navigable waters unless it has delegated that authority to a local government. The court found no such delegation in this case. The Town of Lake George was not among the local governments enumerated in Navigation Law § 46-a(2). Town Law § 130(17)(1)(b), the court noted, pertains to anchoring or mooring of vessels and does not address the construction of docks, boathouses or other structures covered by Navigation Law § 46-a. Although the statutory authority of towns to enforce the State Uniform Fire Prevention and Building Code includes structures in navigable waters, the Town never claimed that petitioner's dock system violated the Code and in any event had delegated Code enforcement to Warren County. The Adirondack Park Agency did not delegate the requisite authority by adopting a land use plan for the Adirondack Park and approving the Town's local land use plan, as state-owned lands are exempt from the agency's land use program. Finally, language in the permit granted by the Lake George Park Commission stating that petitioner was "not relieve[d] . . . of the responsibility of obtaining any other . . . permit . . . from [a] local government which may be required" did not constitute a clear and explicit delegation of regulatory authority to the Town. *Hart Family, LLC v. Town of Lake George,* 110 A.D.3d 1278, 974 N.Y.S.2d 154 (3d Dep't 2013).

Appellate Division, Second Department, holds that landowner's contention that alternative sites would better serve city's purpose of constructing firehouse could not block city's condemnation of property.

The Common Council of the City of Peekskill, New York determined that it was necessary for the City to acquire a portion of commercial property owned by Peekskill Heights, Inc. for the purpose of constructing a central firehouse. The owner brought an action under the Eminent Domain Procedure Law for judicial review of the determination.

The Appellate Division, Second Department, denied relief. The court noted that the record showed that the decision to condemn a portion of the owner's property was rationally related to the stated public purpose and that such public purpose was dominant. The owner's assertion that that alternate sites would better serve the City's purposes was not a basis for relief. The court rejected the assertion that the taking was excessive, noting that a condemnor has broad discretion to decide what land is necessary to fulfill its stated purpose. Moreover, the petitioner's unsubstantiated allegations fell far short of the clear showing necessary to establish that the condemnor acted in bad faith. *Peekskill Heights, Inc. v. City of Peekskill Common Council,* 110 A.D.3d 1079, 974 N.Y.S.2d 501 (2d Dep't 2013).

Appellate Division, First Department, holds that New York City Department of Buildings, before revoking landowner's sign permits, had to consider landowner's good faith reliance on prior ruling of building commissioner.

Perlbinder Holdings, LLC, owned property on which it had placed a large outdoor advertising sign. The New York City Department of Buildings (DOB) revoked its permits for the sign. The decision was upheld administratively by the Board of Standards and Appeals (BSA), and by Supreme Court in an Article 78 proceeding.

On appeal, the Appellate Division, First Department, reversed and directed the DOB to reinstate the sign permits and vacate the fines it had imposed in connection with the sign. The revocation of the permits, said the court, was improper because the owner had constructed the sign in good faith reliance on a 2008 determination of the Manhattan Borough Building Commissioner that the sign was a permissible replacement for a similar sign that was removed when a building on the property was demolished. The court cited language in § 666(7) of the New York City Charter, which addresses the appellate jurisdiction of the BSA and which the court characterized as "[v]irtually identical" to language in New York City Zoning Resolution 72-21, governing variances and authorizing the BSA to grant variances in view of practical difficulty or unnecessary hardship. *Perlbinder Holdings, LLC v. Srinivasan,* 110 A.D.3d 611, 973 N.Y.S.2d 622 (1st Dep't 2013).

Supreme Court, Queens County, holds that tenant on condemned property could not delay issuance of writ of assistance for New York City's possession of property.

The City of New York condemned, and became vested with title to, a parcel of property where Fine Foods Wholesale Distributors, Inc. operated a poultry and meat processing business as a tenant. The City applied in Supreme Court, Queens County, for a writ of assistance directing Fine Foods to vacate the premises, and directing the Sheriff of the City of New York to put the City into possession of the premises.

Supreme Court granted the application. Although Fine Foods argued that the City had no need of immediate possession of the property, the court noted that a showing of necessity for possession of property by a condemnor is not required before a writ of assistance may be granted. The only prerequisite to such relief is the payment by the condemnor to the condemnee of the advance payment, and the City had made such a payment available to Fine Foods.

The court rejected Fine Foods' contention that the City had not complied with the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. The 90-day notice to vacate required by the Act had been given by the City; the Act and its implementing regulations included no requirement that the City delay the service of the 90-day notice until after advance payment was made. The City demonstrated that it provided assistance to Fine Foods in an effort to find a new location for Fine Foods' business, and in an effort to estimate moving costs and coordinate the filing of requests for re-establishment payments. Finally, the court rejected Fine Foods' request for a trial on the adequacy of the advance payment, stating that a dispute on that question was not a basis for delaying issuance of the writ. *In re City of New York,* 41 Misc. 3d 818, 975 N.Y.S.2d 578 (Sup 2013).

