



## Water, Water, Everywhere: A Primer on Riparian Rights

The laws concerning riparian rights are as extensive as the waters lapping the shorelines of New York State. Beneath the waters of Long Island lie lands granted by kings, dukes, and royal governors, which are subject to riparian rights along navigable waterways.

Under the common law, the term “riparian” rights refers to land along a river, while “littoral” rights are found along a sea or lake. This distinction is fast becoming obsolete and often blurred by courts and practitioners alike. As a result, the term riparian rights encompasses all areas of shoreline in New York.<sup>1</sup> For ease and simplicity, the term “riparian rights” will be used herein to discuss both.

### Rights Recognized Since Colonial Days

New York’s laws of riparian rights were adopted from English common law that existed well before New York became a state in 1777.<sup>2</sup> After the Revolutionary War, New York succeeded to the sovereign rights of the English Crown regarding ownership and restrictions set forth by the original patents.<sup>3</sup> These patents conveyed title to all lands within the boundaries of the grant, including lands underwater.<sup>4</sup> New York’s Constitution confirmed those patents, and the courts have continually upheld these colonial grants.<sup>5</sup>

The historic development of riparian rights relates to the delicate balance between private and public rights of access to waterways for commerce, food and natural resources.<sup>6</sup> Traditionally, the public right to the shoreline was grounded in the right of navigation over a waterway, the *jus publicum*. The doctrine of *jus publicum* provided the public with the right of passage over the foreshore (the land located between the high and low-water marks of tidal waters) to navigable water. This doctrine also grants to the public the right to pass over private underwater land as a means of access to navigable water.<sup>7</sup>

Riparian rights are essentially meant to encompass a landowner’s right of access to a navigable waterway independent of the ownership of underwater land.<sup>8</sup> Under the English common law, the Crown was the preeminent landowner and source of all titles to lands within the royal dominion, including land under navigable waters.<sup>9</sup> These navigable waters were, however, subject to the public’s right of access. Private waterfront landowners were also granted the right to construct necessary improvements, such as a dock or wharf to reach navigable water.<sup>10</sup> Thus, the Crown’s grant of any land bounded by navigable waters implicitly reserved the public’s right of passage and the private riparian rights of waterfront land owners to construct docks.<sup>11</sup>

Descending from the English common law, riparian landowner owners have certain rights and privileges in the foreshore entirely different from that of the public. The private right of access includes the reasonable, safe and convenient use of the water for boating and fishing.<sup>12</sup> One of the most important differences between the public’s right of access and the private riparian landowner’s is the ability to construct necessary improvements to provide reasonable access to navigable portions of the waterway.<sup>13</sup> These improvements include, among other things, a dock, pier, wharf, bulkhead, dredging or other improvements to permit the safe harbor of a vessel with access to navigable water.<sup>14</sup>

The riparian landowner’s private right of access is directly related to depth of water. In other words, the riparian owner has the right of access to the navigable portion of a body of water as an incident to his ownership of the upland.<sup>15</sup> This ability to place a pier is not absolute and stops once navigable water depth has been reached.<sup>16</sup> Such private riparian rights are also subject to the public’s right of passage along the foreshore.<sup>17</sup> 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.<sup>18</sup>

### Ancient Rights, Modern Problems

In general, courts favored riparian owners and their rights to access navigable water.<sup>19</sup> In fact, riparian owners have been granted the right to dredge the underwater land to preserve such access.<sup>20</sup> But, as stated above, riparian rights are not absolute; rather, riparian owner’s rights must also yield to the state’s legitimate exercise of the police power.<sup>21</sup> Specifically, the right of access for navigation is subject to regulations promulgated by the state and local municipalities to protect the public’s right to the shoreline and its navigability.<sup>22</sup>

The severity of this police power was the focus of *Montero v. Babbitt*.<sup>23</sup> In 1968, the Town of Oyster Bay conveyed a portion of underwater land to the United States for a wildlife refuge. Several decades later, in 1996, two private riparian land owners, who previously launched a small boat from the shoreline to reach their moored vessels, applied to the United States Fish and Wildlife Service (“FWS”) for permission to construct a 180-foot dock.

The FWS denied the dock permit, due in part to a concern as to the possible cumulative effect of dock proliferation in a wildlife refuge. The plaintiffs argued that, as waterfront owners, their riparian right of access to navigable water gave



John C. Armentano

forced in *Stuchin v. Town of Huntington*.<sup>25</sup> 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.

The owner of upland property abutting Lloyd Harbor desired to construct a longer dock than zoning code allowed and challenged the ordinance in court. The riparian owners had originally moored their boat in Lloyd Harbor and travelled by dingy 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 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, so as to reduce encroachments into the navigable channel and minimize the effects of the dock’s physical presence on the character of the area. The village denied the permit because the proposed dock did not comply with its zoning code.

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. 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 *Babbitt*, 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 remains subject to governmental regulations for the protection of the rights of the public.

### Preserving Riparian Rights After Partition

In New York, the touchstone of private riparian rights requires the land to physically touch a navigable waterway.<sup>26</sup> As a result, unless expressly reserved by deed, partitioning land from the waterfront will cause the non-waterfront property to lose its riparian rights.<sup>27</sup> However, there is a developing line of case law in the Second and Third Departments, that an easement providing access to a navigable water in favor of the landward partitioned parcel provides the easement holder riparian rights to construct a dock equal to that of the actual waterfront owner.<sup>28</sup>

In *Briggs v. Donna*, the Third Department held that, although there is no express language in the deed granting a riparian right to construct a dock, the plaintiffs’ dock at the foot of an easement granting access to the water was a reasonable and incidental use of the easement.<sup>29</sup> In short, the easement holder—a non-waterfront landowner—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 *Monahan v. Hampton Point Assoc.*, reinforced that riparian rights extend from an easement to access navigable water.<sup>30</sup> In that case, the court held that an easement providing access to the water was sufficient to create the riparian right for a private waterfront community in East Quogue to construct a dock extending from private property because it was a reasonable and incidental use of the easement.<sup>31</sup> The court reasoned that the existence of an easement to the water’s edge would have been without purpose if it did not allow for the construction of a dock or pier to provide access to the waterway.<sup>32</sup>

Finally, New York’s Navigation Law provides for the state’s control and jurisdiction of over use of navigable waters “except as otherwise provided.”<sup>33</sup> Importantly, the definition of “navigable waters of the state” excludes tidewaters lying within the

boundaries of Nassau and Suffolk Counties.<sup>34</sup> This exemption of the navigable waters of Nassau and Suffolk Counties stems from colonial grants discussed above, and an acknowledgment of the townships in Nassau and Suffolk Counties pre-Revolutionary War history and creation. As a result, these towns retain the power to enact and enforce ordinances regulating the construction of docks, piers and wharves within their boundaries.<sup>35</sup>

For example, in *Manorhaven v. Ventura Yacht Services, Inc.*, the Second Department found that the Village of Manorhaven was not entitled to prevent a marina from utilizing certain floating piers which 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.<sup>36</sup> In that case, 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.<sup>37</sup> In short, the Town’s sovereign ownership of the submerged lands provides it with exclusive authority to regulate such waterways and underwater land.<sup>38</sup>

In conclusion, the question of waterfront boundary lines and ownership remain as ever changing as the shorelines of New York. The public’s interest and private landowner’s rights require a delicate balance protecting both the right of access to the navigable waters and the lands underneath them.

John C. Armentano, counsel to Farrell Fritz, P.C., practices land use and zoning law. He can be reached at [jcarmentano@farrellfritz.com](mailto:jcarmentano@farrellfritz.com).

1. *Town of Oyster Bay v. Commander Oil Corp.* 96 N.Y. 2d 566 (2001).  
2. 7 Warren’s *Weed New York Real Property*, 4th ed., *Land Under Water* §6.05[1].  
3. *People ex rel. Howell v. Jessup*, 160 N.Y. 249 (1899).  
4. *Knapp v. Fasbender*, 1 N.Y.2d 212 (1956).  
5. *People ex rel. Howell v. Jessup*, 160 N.Y. 249 (1899).  
6. *Trustees of the Town of Southampton v. Mecox Bay Oyster Co.* 116 N.Y. 1 (1889).  
7. *Town of Brookhaven v. Smith*, 188 N.Y. 74 (1907).  
8. *Hinkley v. State*, 234 N.Y. 309 (1922).  
9. *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 198 N.Y. 287 (1910).  
10. *Town of Oyster Bay v. Commander Oil Corp.* 96 N.Y. 2d 566 (2001).  
11. *Brookhaven Baymen Assoc. v. Town of Southampton*, 85 3d 1074 (2d Dep’t 2011).  
12. *Tiffany v. Town of Oyster Bay*, 234 N.Y. 15 (1922).  
13. *Id.*  
14. *Id.*  
15. *White, Gratwick Mitchell, Inc. v. Empire E. Co., Inc.*, 125 Misc. 47 (N.Y. Misc. 1923).  
16. *Town of Huguenot v. Ocean Side Small Craft Marina, Inc.* 32 N.Y. 2d 859 (1973).  
17. *Allen v. Potter*, 64 Misc.2d 938 (Sup.Ct., Yates Co. 1970), *aff’d*, 37 A.D.2d 691 (1971).  
18. *See Barnes v. The Midland R.R. Terminal Co.*, 193 N.Y. 378 (1903).  
19. *Town of Oyster Bay v. Commander Oil Corp.*, 96 N.Y. 2d 566 (2001).  
20. *Id.*  
21. *Matter of Maher’s Sodus Point Bait Shop, Inc. v. Wigle, supra*; *New York State Water Resources Commission v. Liberman*, 37 A.D.2d 484 (3d Dep’t 1971).  
22. *Thousand Island Steamboat Co. v. Visger*, 179 N.Y. 206 (1904).  
23. 921 F. Supp. 134 (E.D.N.Y. 1996).  
24. *Id.*  
25. *Stuchin v. Town of Huntington*, 71 F.Supp.2d 76 (E.D.N.Y. 1991).  
26. 15 Warren’s *Weed New York Real Property* Water §2.02[2] at 15 (4th ed. 20020).  
27. *Durham v. Ingrassia*, 105, Misc.2d 191, (Sup Ct., Nassau County 1980).  
28. *Briggs v. Donna*, 176 A.D.2d 1105 (3d Dep’t 1991).  
29. 176 A.D.2d 1105 (2d Dep’t 1991).  
30. *Monahan v. Hampton Point Ass’n, Inc.* 264 A.D.2d 764 (2d Dep’t 1999).  
31. *Id.*  
32. *Stewart v. Turney*, 203 App.Div. 486 (4th Dep’t 1922), *rev’d on other grounds*, 237 N.Y. 117 (1923).  
33. Navigation Law §30.  
34. Navigation Law, § 2(4); § 32.  
35. *Rottenberg v. Edwards*, 103 A.D.2d 138 (2d Dep’t 1984).  
36. *Manorhaven v. Ventura Yacht Svcs., Inc.* 166 A.D.2d 685 (2d Dep’t 1990).  
37. *Id.*  
38. *Id.*

John C. Armentano

Email: [jcarmentano@farrellfritz.com](mailto:jcarmentano@farrellfritz.com)

Phone: 631-367-0719