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On the Waterfront

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ZONING & LAND USE

As a body of land surrounded by water and interspersed with several navigable rivers, Long Island has an extraordinary number of beautiful views and miles and miles of fabulous beachfront and waterfront property.

Over the years, it also has generated a good deal of litigation to settle disputes involving the ownership of littoral and riparian property—property that is adjacent to the water.

Deeds and a longstanding rule typically set the boundary of such property at the "high water mark."[1] In addition, as can be seen from the recent decision of the Appellate Division, Second Department, in *Trustees of Freeholders and Commonality of Town of Southampton v. Buoninfante*,[2] courts have developed a standard to use when there is some conflict among the governing documents or otherwise.

Buoninfante arose several years ago when Louis Buoninfante was shown a parcel of vacant waterfront property in the Village of West Hampton Dunes, on the shore of Moriches Bay. He purchased the property and received a bargain and sale deed that described it as running north from Dune Road "766.89 feet to the high water line of Moriches Bay; thence...along the high water line of Moriches Bay." However, Mr. Buoninfante's predecessor-in-interest had acquired title to the property under a deed that described it as running north from Dune Road, "190.20 feet to the mean high water mark of Moriches Bay; thence along said mean high water mark of Moriches Bay."

The Trustees of the Town of Southampton, which owns the land beneath Moriches Bay, brought suit, claiming title to that strip of land along Moriches Bay created by the discrepancy between the linear distances mentioned in the two deeds. After Suffolk Supreme Court denied Mr. Buoninfante's summary judgment motion, he appealed to the Second Department.

The appellate court ruled that Mr. Buoninfante was entitled to summary judgment. As it explained, "where there is a discrepancy in deeds, the rules of construction require that resort be had first to natural objects, second to artificial objects, third to adjacent boundaries, fourth to courses and distances, and last to quantity."

In this case, it continued, there was a discrepancy internally in the deeds by using both linear distances and the water line of Moriches Bay, and between the two linear distances referenced in the two deeds. Nevertheless, it emphasized, both deeds clearly referred to the mean high water mark of Moriches Bay or the high water line of Moriches Bay. Because the water line of Moriches Bay was "obviously a natural object," it should take precedence over either of the linear distances in the two deeds, the appellate court found.

In addition, it noted, deeds further back in the chain of title indicated that the property had traditionally been described in one way or another as extending to the shore of Moriches Bay or to the high water line of Moriches Bay and running along the shore. The Second Department observed that it was not until 1973 that linear distances were added, although even after this the property still was described as extending to the mean high water mark of Moriches Bay. Thus, it concluded, there was nothing in the chain of title to suggest it was the intention of any grantor to bound the property along the north side in any way other than by reference to the shoreline of Moriches Bay.

Accordingly, the Appellate Division ruled, Mr. Buoninfante was entitled to a judgment declaring that the northern boundary of his property was based on the high water mark of Moriches Bay.

Marking the Boundaries

Even though the high water mark may be recognized as a boundary, a dispute

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arising in a Long Island case as to how that should be determined reached the New York Court of Appeals a number of years ago.

The parties in this case, *Dolphin Lane Associates, Ltd. v. Town of Southampton*,[3] agreed that the northern boundary line of the plaintiff's property facing on Shinnecock Bay in Southampton was the high water line. The parties disagreed, however, as to the method or proof by which the high water mark should be located.

The plaintiff argued that the high water line should have been located by reference to the line of vegetation, and not by reference to the "type-of-grass test" introduced by the town.

The Court rejected the town's position. It found it was "misleadingly simplistic" to seek to rely on an "exhaustive scientific search for the precise line" of average high water, stating that there was "[n]o legal significance" to the exact identification of the high water mark but rather what was needed was a "more practical, less sophisticated determination."

In the Court's view, the boundary to the plaintiff's shore-side property depended on a combination of the verbal formulation of the boundary line—i.e., the high water line—and the application of the "traditional and customary method" by which that verbal formulation had been put in practice in the past to locate the boundary line along the shore.

The Court explained that it was the longstanding practice of surveyors in the Town of Southampton to locate shoreline boundaries by reference to the line of vegetation. It stated that to give effect to such uniform practice was not, as the town contended, to delegate arbitrary powers to surveyors to determine property lines; rather, it said, it was to recognize that property lines "are fixed by reference to longtime surveying practice."

If it were to employ an "entirely new technique, however intellectually fascinating," it would "do violence to the expectations of the parties and introduce factors never reasonably within their contemplation."

Moreover, the Court added, if it accepted the town's type-of-grass test for location of the high water mark, that test might "one day be replaced by an even more sophisticated and refined test" for determining the high water line, with a consequent shift again in the on-the-site location of a northern boundary line; which would introduce an element of "uncertainty and unpredictability" that the Court stated would be quite foreign to the law of conveyancing. Accordingly, it held that it was not appropriate to use the "independent, novel means" advocated by the town to locate the high water mark.

Accretion and Erosion

A high water mark can change from natural causes such as erosion and accretion, and New York courts often have resolved disputes over ownership of Long Island waterfront property following those events. In deciding these cases, courts apply the well established law that a riparian owner of upland property is entitled to any increase in his or her land due to the natural process of accretion, and is subject to any loss of land due to erosion.[4]

One such case is *Bayork Realty Corp. v. State of New York*,[5] which stemmed from the 1930 appropriation by the state of certain acres of a portion of Jones Beach known as Muncie Island, as described in the notices of appropriation as certain lots, giving block and number, as plotted on a revised map of Muncie Island made by a certain civil engineer and dated April 1, 1913.

Muncie Island, however, was enlarged through accretion after 1913 and before the appropriation by the state. After the appropriation had taken place, Bayork Realty Corp. was awarded a judgment against the state for trespass, having successfully argued that it was the owner of the increase in the size of the property that had occurred after the date of the map.

The Appellate Division reversed that ruling. It found that the increase in size of Muncie Island from 1913 on was "slow and almost imperceptible" and, as a result, it ruled that the land so gained belonged to the riparian or the littoral owner.

The appellate court added that the confirmatory deed given by the former property owner to the state recited that it conveyed all of the owner's real property on Muncie Island, including all its right, title and interest in such property. Under the circumstances, the appellate court stated, there remained no land on Muncie Island to which the former property owner had title. Therefore, the Appellate Division concluded, the state by its appropriations in 1930 had obtained not only the land appearing on the map of 1913 but also all the land owned by the former property owner "including that formed through accretion," and the judgment against the state for trespass had to be reversed.

As the cases here suggest, neighboring property owners do not argue only about the boundaries of their land; there also are disagreements about the ownership of property abutting the water. Courts have long been utilized to settle these disputes, and have well-established rules, yet these cases continue to arise. Interestingly, this also is an area of law where one can find references to Colonial patents and deeds issued well before the American Revolution.[6]

1. See, e.g., *Tiffany v. Town of Oyster Bay*, 209 N.Y. 1 (1913) ("In the absence of language clearly indicating a different intent, grants of land bounded by the sea or a navigable river where the tide ebbs and flows carry the title only to high-water mark.").

2. 303 A.D.2d 579 (2d Dep't 2003).

3. 37 N.Y.2d 292 (1975).

4. 303 A.D.2d 579 (2nd Dep't 2002); see also, *Trustees of Freeholders & Commonalty v. Heilner*, 84 Misc.2d 318 (Sup. Ct., Suffolk Co. 1975).

5. 251 A.D. 534 (3d Dep't 1937).

6. See, e.g., *Mulry v. Norton*, 100 N.Y. 424 (1885); *Town of Hempstead v. Lawrence*, 147 A.D. 624 (2d Dep't 1911).