

ZONING AND LAND USE PLANNING

Resolving Disputes Over Docks and Riparian Rights

By
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Good fences may make good neighbors,¹ but one person's dock can often lead to litigation with a neighbor, or with a local government. In fact, disputes over the right of a property owner to build a dock to access adjoining water—to exercise his or her “riparian rights”²—seem to be arising with more and more frequency, and in a wide variety of situations. Early last month, for example, the New York Court of Appeals, in *Estate of Becker v. Murtagh*,³ resolved an adverse possession dispute between neighboring property owners over the ownership of land upon which a dock had been constructed in 1963 on Oak Beach in the Long Island Town of Babylon.

There are two principal categories of court cases involving docks: cases arising from the decision of a municipal body to grant or deny permission to an applicant to build a dock, and cases arising when one property owner objects to another's existing or proposed dock. The recent decision by the Supreme Court, Suffolk County, in *Matter of MCBBLA Family Trust v. Incorporated Village of Poquott Planning Bd.*⁴ falls into the first group.

In this case, the court was asked to review a decision by the Incorporated Village of Poquott Planning Board denying an application for a permit to construct a dock on property with a single-family home that fronts on Port Jefferson Harbor. The property owner, seeking to construct a dock that would accommodate no more than two boats, applied to the planning board for a special use permit⁵ to construct the dock. After a public hearing, the planning board voted to deny the application, and the property owner commenced an Article 78 proceeding.

The property owner asserted that the planning board's decision was arbitrary and capricious, an abuse of discretion, and not supported by the substantial evidence on the record.

In its decision, the court explained that a local planning board had broad discretion in deciding



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applications, and that judicial review was limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion. The court continued by noting that a planning board's determination should be sustained upon judicial review if it was not illegal, had a rational basis, and was not arbitrary and capricious. Moreover, the court noted, when reviewing the determinations of a local planning board, courts consider substantial evidence only to determine whether the record contained sufficient evidence to support the rationality of the planning board's determination. The court pointed out that, in making a determination, a planning board may rely on the personal knowledge and familiarity with the area possessed by its members, but that a board generally could not base a decision on generalized or unsubstantiated complaints from neighbors, unsupported by empirical or expert evidence (although a board's reliance on specific, detailed testimony of neighbors based on personal knowledge did not render a determination the product of generalized and conclusory community opposition).

In this case, the court observed, the village engineer had determined in a memorandum to the village building department that the proposed dock was “adjacent to an existing jetty” and would “not obstruct passage of boats.” The court also noted that the village engineer had found that the landward edge of the proposed dock would start at the landward edge of the average high water mark, “allowing pedestrian traffic along the beach above” the average high water mark. Moreover, the court continued, the engineer also found that the location of the dock appeared to be “appropriate for minimizing obstructions, hazard to navigation, and would not appear to obstruct use of public land or water.”

In addition, the engineer also decided that the proposed dock would not obstruct the nearby harbor channel, and that its location would minimize habitat fragmentation, loss of habitat, interference with public access, and would not hinder access to public lands or the shoreline. Regarding possible cumulative adverse effects, the engineer expressly stated that there were currently no docks on adjacent properties and that the proposed dock location appeared appropriate.

In conclusion, the court said, the village engineer indicated that based on a review of the plans and material provided by the property owner, the proposed dock complied with the standards and review criteria outlined in the village code, subject to consideration of open grate decking due to

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adjoining vegetation wetlands and the engineer's specification of material and certification of the lifespan of these materials.

Given this report, the court found that the record did not support the community's or the planning board members' concerns over hazards to small vessels, hindering public access, creation of a public nuisance, and cumulative adverse effects, which were cited by the planning board as grounds for denying the property owner's application. In the court's view, there was no evidence demonstrating that small vessels currently navigating along the shoreline would be forced into the rock jetty or that the presence of the rock jetty would draw small vessels into shoals. It added that inasmuch as the proposed dock would extend approximately the same distance seaward from the shoreline as the rock jetty and run almost parallel to it, there was no evidence to support the planning board's finding that small vessels would enter the area between the jetty and the dock and become trapped or that they would be forced to travel in deeper water to avoid the combined rock jetty and proposed dock. In addition, the court found, the two existing docks located two and three residential lots away, respectively, from the applicant's lot could not be characterized as being located on adjacent properties and thus did not create a cumulative effect.

Moreover, according to the court, there was no evidentiary support for the planning board's finding that the proposed dock would hinder the public's access to surface waters around the jetty, obstruct fishing, and lead to potentially dangerous activities such as jumping from one structure to the other.

Accordingly, the court annulled the determination by the planning board and ordered that it approve the property owner's application.⁶

Neighbor vs. Neighbor

When one property owner's dock interferes with a neighbor's water rights, courts often will have to resolve the problem. The issue often arises when the shape of the shoreline means that extending the lateral boundaries of one landowner's riparian rights will affect a neighboring landowner's riparian rights.

The most commonly cited general rule for fixing the lateral boundaries of a landowner's riparian rights is to extend the lateral onshore boundaries of the property "out into the navigable body of water, by lines which are perpendicular to the general course of the shoreline."⁷ The more minor the shoreline irregularities, the more equitable the application of this rule.

The other principal rule is known as the proportional method and is designed to ascribe a path between the onshore property boundaries to the navigable channel that is proportionate to the amount of frontage the landowner enjoys. This method is often considered to better address circumstances involving the more irregular shoreline formed by a cove. As explained in *Freeport Bay Marina v. Grover*,⁸ application of this method involves following a step-by-step formula:

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, and give to each proprietor the same proportion of [the line of navigability that the proprietor] is entitled to of the shore line; 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 on 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.

Interestingly, courts typically do not apply what arguably is the simplest method of delineating offshore boundaries: continuing the direction of the onshore boundaries outward from the shoreline.⁹

A case decided several years ago by the Appellate Division, Second Department, reflects the difficulties of resolving these kinds of disputes.¹⁰ In this case, the plaintiffs and the defendant owned adjacent parcels of waterfront property in Bay Shore, Suffolk County, that abutted Orowoc Creek at their eastern boundaries. The plaintiffs' property included a boat basin at the northern boundary of its property, which led out to Orowoc Creek. The southern boundary of the defendant's property abutted the boat basin. Part of the defendant's property included a private marina, which also fronted the boat basin. Individuals seeking to use the marina had to navigate vessels across the boat basin to access the creek.

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The plaintiffs sued, claiming ownership to the boat basin and the submerged land thereunder. Thereafter, the plaintiffs moved for summary judgment, arguing that the boat basin was artificially created from upland property entirely within the confines of the plaintiffs' property. The defendant opposed the motion and cross-moved for summary judgment on the ground that it was entitled to riparian rights allowing it access to the creek by crossing the boat basin. The trial court denied the plaintiffs' motion but granted the defendant's cross motion.

The Second Department explained that among the rights of a riparian owner was the right of access to a navigable river or body of water that his or her land abutted, and that the right of access included the right of passage to and from the waterway with reasonable safety and convenience. It added that a riparian owner's right of access was "not absolute," but was "qualified by the rights of the owner of the submerged land over which the riparian owner must cross."

The appellate court then observed that the plaintiffs had made a prima facie showing of entitlement to judgment by demonstrating that the boat basin was artificially constructed, in which case the defendant would have no riparian rights, and that they sustained damages. However, it continued, the defendant raised triable issues of fact with respect to whether the boat basin was naturally made and whether the plaintiffs

sustained damages. Accordingly, it found, the trial court had properly denied the plaintiff's motion for summary judgment.

With respect to the cross motion for summary judgment, the appellate court found that the defendant had demonstrated, prima facie, entitlement to judgment by establishing that its property abutted a navigable waterway (Orowoc Creek), thereby entitling it to riparian rights allowing access to the abutting creek via the boat basin. However, the Second Department found, the plaintiffs raised triable issues of fact, including whether the defendant's property abutted a navigable body of water, whether the boat basin was natural or man-made, and whether the defendant's access to the creek by crossing the boat basin, rather than from the shoreline of its own property, was reasonable. Accordingly, it ruled that the trial court had erroneously granted the defendant's cross motion for summary judgment.

Conclusion

As property owners begin to consider taking their boats out of storage for the summer season, one can expect that questions over docks again will arise. Many local governments and waterfront property owners are likely to become enmeshed in dock and other waterfront disputes, which often involve complex legal issues and impassioned parties who are unwilling to compromise their positions. As a result, the resolution of these disputes is likely to require the involvement of the courts, including extensive motion practice and, frequently, trials.

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1. See Robert Frost, "Mending Wall."

2. Technically, the term "riparian rights" refers to the interests of land owners whose property abuts a river or stream and the term "littoral rights" refers to land adjacent to tidal navigable waters. 7 Warren's *Weed New York Real Property*, 5th Ed. §77.32(2). The terms, however, often are used interchangeably. See *Allen v. Potter*, 64 Misc. 2d 938 (Sup. Ct., Yates Co. 1970), aff'd, 37 A.D.2d 691 (App. Div., 4th Dept. 1971).

3. 2012 N.Y. Slip Op. 2417 (April 3, 2012).

4. 2012 N.Y. Slip Op. 30921U (Sup. Ct. Suffolk Co. March 27, 2012).

5. A special use permit authorizes the use of property in a manner expressly permitted by the applicable zoning ordinance under certain stated conditions. See *Matter of Retail Prop. Trust v. Board of Zoning Appeals of Town of Hempstead*, 98 N.Y.2d 190 (2002).

6. See also *Matter of the Application of Lynch v. Board of Trustees of the Freeholders & Commonalty of Town of Southampton*, 2009 N.Y. Slip Op. 31594U (Sup. Ct. Suffolk Co. July 16, 2009) (court finds denial of application for permit to construct a dock was "arbitrary and capricious and lacking a rational basis" and orders board to issue permit); cf. *Matter of Application of Town of Hempstead v. Board of Appeals of Town of Hempstead*, 2011 N.Y. Slip Op. 32538U (Sup. Ct. Nassau Co., Sept. 23, 2011) (upholds board's decision authorizing use of deck extending over town-owned water-submerged land for outdoor dining purposes).

7. *Zalay v. Huletts Island View Marina & Yacht Club*, 148 A.D.2d 772 (App. Div. 3d Dept. 1989) (citations omitted).

8. 149 A.D.2d 660 (App. Div. 2d Dept. 1989), citing *Groner v. Foster*, 94 Va. 650 (1897).

9. See Warren's *Weed* at §77.39(2); see *Muraca v. Meyerowitz*, 11 Misc. 3d 1061A (Sup. Ct. Nassau Co. 2006) (refusing to declare that parties' riparian rights should be determined by extending lateral on-shore property lines out into bay).

10. *Mascolo v. Romaz Properties*, 28 A.D.3d 617 (App. Div., 2d Dept. 2006).