

### ZONING AND LAND USE PLANNING

# Court Reestablishes Local Control Over Navigable Waters

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A recent decision by the Appellate Division, Third Department, overturns prior decisions and affords local governments the general right to regulate structures built in navigable waters.

Almost a decade ago, the Appellate Division, Third Department, held that the state's Navigation Law provided New York State with exclusive jurisdiction over structures located in navigable waters.<sup>1</sup> Now, however, in a dispute over boathouses constructed in Lake Placid, the Third Department has rejected that rule and has concluded that the navigation law does not generally preempt the power of local municipalities to administer and enforce local land use laws. Instead, preemption is limited only to particular waters where the state, in its sovereign capacity, holds title to the land under those waters.

The appellate court's ruling, in *Town of North Elba v. Grimditch*,<sup>2</sup> reinstates a respect for local zoning control that is at the heart of New York's land use regulatory scheme. Local government officials should be encouraged by the decision and municipalities that believed that they had limited rights to regulate structures along their waterways may want to reevaluate those situations or, at the least, understand that the rules have now changed in their favor.

#### Background

The case arose after property owners began constructing boat-houses in the waters of Lake Placid adjacent to their lakefront properties without applying to the Town of North Elba for building permits. The Supreme Court, Essex County, issued a preliminary injunction that required the property owners to apply for building permits pursuant to the State Uniform Fire Prevention and Building Code (SBC) and to comply with the applicable Village of Lake Placid/Town of North Elba Land Use Code (the Land Use Code).<sup>3</sup> The town then sought a permanent injunction on the ground that the boathouses were in violation of the Land Use Code. The property owners counterclaimed for a



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One of the defendant's boathouses on Lake Placid sat unfinished last summer.

declaration that Navigation Law §30<sup>4</sup> preempted the town's enforcement of the Land Use Code, making it inapplicable to any construction in the waters of Lake Placid. A number of neighbors brought a separate suit seeking to enjoin the construction of the boathouses.

The Supreme Court ultimately granted summary judgment to the defendants and dismissed both actions. Based on the Third Department's 2003 decisions in *Higgins* and

Code did not apply to the construction of the boathouses. After finding that the boathouses were buildings subject to the SBC, and that they complied with the SBC, the court ordered the town to issue building permits. The town and the neighbors appealed.

#### Lake Placid

In New York, the Third Department explained, the state in its sovereign capacity owns, among

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*Mohawk Valley*, the court reasoned that Lake Placid met the definition of "navigable waters of the state" as set forth in Navigation Law §2(4)<sup>5</sup> and, therefore, that Navigation Law §§30 and 32 applied, conferring exclusive jurisdiction over structures in the lake on the state. The court, therefore, declared that the Land Use

other things, land under tidal waters; boundary waters; the Hudson, Mohawk, St. Lawrence, and Niagara Rivers; and certain major inland lakes, including Lake George, Cayuga Lake, Canandaigua Lake, Oneida Lake, and Keuka Lake. The court declared that, where the state holds title to land under navigable water in its sovereign capacity, its

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paramount authority is not limited to regulation in the interest of navigation but extends to “every form of regulation in the public interest”<sup>6</sup>—and that local zoning codes are preempted and do not apply.

The appellate court then examined whether the state owned Lake Placid in its sovereign capacity. As a general rule, it pointed out, non-tidal waters, with the exception of those that courts have deemed to be owned by the state in its sovereign capacity, were owned in a proprietary capacity by the riparian owners,<sup>7</sup> whether they were the state, individuals, or other entities. Title to the beds of these bodies of water passed into private ownership with a grant of riparian land, absent an express reservation. Applying this rule to Lake Placid, a non-tidal, inland lake, the Third Department found that the riparian owners had title to the bed of the lake. The appellate court observed that although the state might hold proprietary title to portions of the lake bed based on its ownership of riparian property on the lake, it did not own Lake Placid in a sovereign capacity and, accordingly, did not have “absolute control” over the lake.<sup>8</sup>

### Preemption

In examining the applicability of the Navigation Law to Lake Placid, the Third Department found that Navigation Law §§30 and 32 contained no express provision conferring exclusive jurisdiction over every form of regulation to the state. Rather, it continued, these sections were directed to maintaining the ability of the public to navigate or pass over the state’s navigable waters. The Third Department also pointed out that, Navigation Law §30 explicitly provided that “nothing authorized hereunder shall be construed to...authorize...any infringement of...local laws or regulations.” Thus, the Third Department found, by its plain language, Navigation Law §30 applied only to navigation and did not infringe on the application of the Land Use Code to structures built on the waters of Lake Placid.

The appellate court also explained that Navigation Law §32 likewise was not an exclusive statute controlling the placement of docks and other similar structures in the navigable waters of the state, and was not a “permitting” statute. Rather, it noted, the law was enacted in 1990 to provide for an administrative remedy under the auspices of the Commissioner of General Services if a structure placed in navigable waters of the state interfered with “free and direct access” to the water from any other person’s property, wharf, dock, or similar structure.<sup>9</sup> The Third Department then declared that, consistent with the limitation contained in Navigation Law §30, it did “not consider Navigation Law §32 to infringe” on the town’s use of the Land Use Code to regulate the construction of boathouses on the lake.

The Third Department also found that Navigation Law §46 and §46-a did not compel a different conclusion. In the appellate court’s view, these provisions of the Navigation Law allowed a local municipality to regulate the use of a lake or other body of water within its jurisdiction by setting speed limits for vessels or prohibiting personal watercraft within a designated “vessel

regulation zone” and allowed local legislative bodies in certain specified municipalities to regulate the manner of construction and location of boathouses, moorings, and docks.

In the court’s view, these provisions of §46 were “delegations of authority to municipalities” that bordered waters owned by the state in its sovereign capacity and were “merely examples” of the state’s delegation of its authority over its land under water held in its sovereign capacity and the regulation of vessels as provided in the Navigation Law.

As made clear by the Town of North Elba’s decision, property owners seeking to construct boathouses, docks, or the like on navigable water that is not owned by the state in its sovereign capacity must comply with local zoning and building codes.

Importantly, the Third Department stated, inasmuch as Navigation Law §46-a contained no express restriction on the exercise of this authority by municipalities in waters such as Lake Placid that were not owned by the state in its sovereign capacity, the Land Use Code was “neither inconsistent with this section nor preempted by it.” The court therefore concluded that, because Lake Placid was not owned by the state in its sovereign capacity and most of the lake was within the town’s boundaries, the town’s zoning authority included that portion of the lake, making the Land Use Code applicable to structures constructed therein.<sup>10</sup> Accordingly, it ruled that the Supreme Court should not have dismissed the actions against the property owners.<sup>11</sup>

### Conclusion

Toward the end of its decision, the Third Department referred to its 2003 decisions in *Higgins* and *Mohawk Valley*. It stated that it “readily acknowledge[d]” that the Supreme Court’s conclusion regarding the exclusivity of the Navigation Law was based in part on those decisions. It then simply declared that to the extent that those decisions might suggest that the Navigation Law displaced local land use laws on navigable waters that were not owned by the state in its sovereign capacity, “those cases should no longer be followed.”

The Third Department’s willingness to tackle—and to straightforwardly reject—decisions that had misinterpreted and misapplied the Navigation Law, to the detriment of local control, should be welcomed by municipalities. As made clear by the *Town of North Elba* decision, property owners seeking to construct boathouses, docks, or the like on navigable water that is not owned by the state in its sovereign capacity must comply with local zoning and building codes. Municipalities, therefore, may now wish to consider the adoption of local legislation to exercise their newly acknowledged regulatory rights over waterfront structures.

1. *Higgins v. Douglas*, 304 A.D.2d 1051 (3d Dept. 2003); *Mohawk Valley Ski Club v. Town of Duaneburg*, 304 A.D.2d 881 (3d Dept. 2003).

2. No. 513014 (3d Dept. June 28, 2012).

3. Pursuant to Executive Law §371 (2) (d) and §381 (2), the SBC is administered and enforced by local governments absent local legislation opting out of such enforcement. Thus, in the Town of North Elba, where the properties were located, the Land Use Code provided the means by which the SBC was administered and enforced.

4. Section 30 states: “The commissioner shall have jurisdiction over navigation on the navigable waters of the state and, except as otherwise provided, shall enforce the provisions of this chapter and the regulations established thereunder. As a guide to the interpretation and application of this article, nothing authorized hereunder shall be construed to convey any property rights, either in real estate or material, or any exclusive privilege; nor authorize any injury to private property or invasion of private rights or any infringement of federal, state or local laws or regulations, but shall express the assent of the state so far as it concerns the public rights of navigation. Nothing contained in this section shall be construed to limit, impair or affect the general powers and duties of the canal corporation relating to canals as set forth in section ten of the canal law.”

5. The definition is “all lakes, rivers, streams and waters within the boundaries of the state and not privately owned, which are navigable in fact.”

6. *People v. System Properties*, 281 App. Div. 433 (3d Dept. 1953), mod. on other grounds, 2 N.Y.2d 330 (1957).

7. Although a true “riparian owner” owns land along a river (see, *Town of Oyster Bay v. Commander Oil*, 96 N.Y.2d 566 (2001)), and the owner of property along a lake is more accurately described as a “littoral owner” (see, *Black’s Law Dictionary* 952 (8th ed. 2004)), the distinction between these terms is outmoded. See, *Town of Oyster Bay*, supra.

8. It is interesting to note that, when considering ownership of navigable waters, courts often turn to documents issued in colonial times or in our country’s early years. For example, in *Town of North Elba*, the Third Department referenced the 1792 “Macomb Patent,” which conveyed 1,920,000 acres to Alexander Macomb. Another document is the so-called “Dongan charter,” issued in 1686; here, the Crown granted to the City of New York all the land between the high and low water mark around Manhattan, with jurisdiction over that property and with the power “to take in, fill, and make up and lay out all and singular the lands and grounds in and about said city and island Manhattan, and the same to build upon, or make use of in any other manner or way as to them shall seem fit, as far into the rivers thereof and that encompass the same as low-water mark aforesaid.” See, *Langdon v. Mayor, Aldermen, and Commonalty of City of New York*, 93 N.Y. 129 (1883).

9. Navigation Law §32(1), (2).

10. Not surprisingly, the Third Department also ruled that the boathouses were structures subject to the SBC.

11. Earlier this year, the U.S. Supreme Court also was faced with the question of control over navigable waters. In that case, it rejected a decision by the Montana Supreme Court to the effect that Montana owned certain riverbeds and could charge for their use. *PPL Montana v. Montana*, 565 U.S. \_\_\_, 132 S.Ct. 1215 (2012).