

ZONING **PRACTICE**

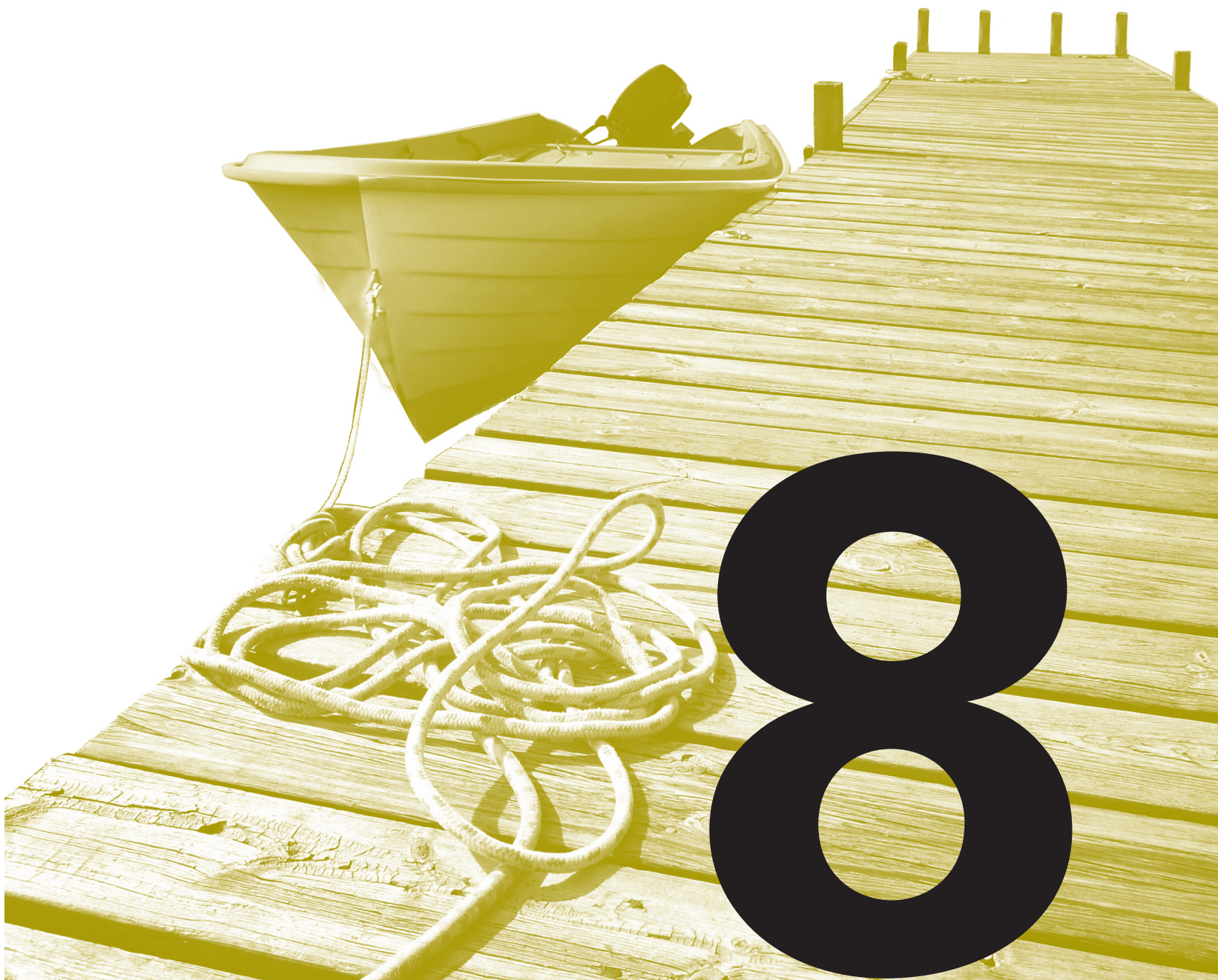
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PRACTICE WATER RIGHTS



Local Zoning and Water Rights

By Scott L. Reichle

In 2001, as a result of a dispute as to whether a neighbor had the right to build a pier and use the water on Watauga Lake in Tennessee, a man took a chainsaw onto the neighbor's property, cut off the stairway to the neighbor's dock, and then towed the dock away.

In 2004, in Severna Park, Maryland, three residents wished to build piers extending into a cove adjoining their properties. A local association that owned most of the land surrounding the cove objected to the permits. Four years later, in 2008, the dispute had not ended. More than 100 people attended the permitting meeting in 2008; most of them opposed the pier construction. Two of the owners seeking the permits characterized themselves as “outcasts” in the neighborhood as a result of the ongoing dispute.

These types of heated disputes between neighbors over riparian rights are so common in coastal areas that one regulating agency has called them “dock wars.” These conflicts em-

phasize the importance of zoning ordinances in attempting to regulate the use of waterways in a way that balances the rights of landowners with those of neighbors and the public at large. Local zoning officials are accustomed to finding themselves involved in heated disputes between neighbors, but issues related to the construction of piers and other structures on waterways often present unique and challenging questions.

Some of the issues that must be considered include whether a locality has the authority to implement and enforce zoning standards on navigable and non-navigable waterways. Does state ownership of the waterway or adjoining land affect the analysis? Where does

the land end and the water begin for zoning purposes? How do a landowner's riparian rights fit into the picture, and what is their impact on zoning regulations?

OWNERSHIP OF SUBMERGED LANDS

In order to analyze these issues, one must first consider who owns the waterways and who has the authority to regulate them. The federal government claims 12 nautical miles of submerged land seaward of the coastline as its “territorial waters.” However, in accordance with the Submerged Lands Act, the United States government gave certain rights to states located along the coastline. Under this act, signed by President Eisenhower in 1953, the federal



Pierre Henkart

➡ Homes with private piers grace the shoreline of the Severn River, which has been the scene of disputes involving landowners' rights to build piers over a tidal pond and wetlands at Sullivan Cove.

ASK THE AUTHOR JOIN US ONLINE!

Go online from September 14 to 25 to participate in our “Ask the Author” forum, an interactive feature of Zoning Practice. Scott Reichle will be available to answer questions about his article. Go to the APA website at www.planning.org and follow the links to the Ask the Author section. From there, just submit your questions about the article using the e-mail link. The author will reply, and Zoning Practice will post the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of Zoning Practice at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA Zoning Practice webpages.

About the Author

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government granted title to all submerged land three miles seaward from the low-water mark to states that border the Atlantic and Pacific oceans. The rights are slightly different for those states bordering the Gulf of Mexico. In addition, the states were granted ownership to all their bays and inland navigable waterways. (Non-navigable waterways are generally owned by private parties.) Furthermore, there are cases where states have sold navigable waters, thereby placing these waterways and their submerged lands under private ownership.

Finally, a private landowner in one of the 13 original colonies may be able to show ownership of submerged lands even without having acquired title from a state if he can establish that the property was granted to him or his predecessor in title by the crown in England. The Virginia Supreme Court recognized these rights in *Commonwealth v. Morgan*, 225 Va. 517 (1983), holding that private citizens can actually own the riverbed if they can establish ownership stemming from a king's grant. From this discussion, it becomes clear that a determination of ownership of subaqueous land can be a complex matter and requires careful analysis.

WHERE DOES THE LAND END AND THE WATER BEGIN?

Another issue that must be considered in establishing zoning regulations directed to the construction of piers and other structures over waterways concerns the area of property affected by tides (the land located between mean high tide and mean low tide). Many localities have setback requirements in their zoning code that restrict the building of any structure within a set distance of any adjoining property owner. However, when a boundary line is defined by a

body of water, the locality must define where the setback commences. Furthermore, this definition should consider the effects of tidal action on the boundary. Inasmuch as navigable bodies of water are owned by the states, one must again look to various state laws to determine the appropriate demarcation. For example, localities in some states will regulate construction to the mean low-water mark based

derive their authority to implement zoning restrictions as part of their police powers. As a result, they almost universally have the authority to place reasonable restrictions on buildings and structures within their territory. As explained earlier, however, many waterways are actually owned by the states and could be considered outside the territorial area of a locality. This raises the issue of whether locali-

If a private individual owns a tidal region of property, the state may have the right to place restrictions on its use under the Public Trust Doctrine.

upon the position that the upland land owner owns the land between the high-tide mark and low-tide mark and that the state owns the property seaward of the low-tide mark. As a result, many localities will implement zoning requirements for upland areas as well as for the lands falling between the high-tide and low-tide marks. Note that, even if a private individual owns a tidal region of property, the state may have the right to place restrictions on its use under the Public Trust Doctrine. Under this doctrine, the general public is granted use of waterways for navigation, recreation, and similar uses.

DO LOCALITIES HAVE THE AUTHORITY TO IMPLEMENT ZONING RESTRICTIONS ON STATE-OWNED PROPERTY?

Some localities implement zoning regulations to restrict the construction of piers and other structures located over waterways. Localities

ties have the authority to implement zoning restrictions that apply to property owned by the state. The answer can be determined by investigating what powers the state has granted to local governments. For example, this issue was analyzed by the courts in the State of Maryland in *Harbor Island Marina v. Calvert Co.*, 286 Md. 303, 407 A.2d 738 (1979). The court initially reasoned that navigable waters were not subject to zoning restrictions implemented by a local government inasmuch as these waterways were owned by the state for the benefit of its citizens. However, the court went further in its analysis and reasoned that piers, wharves, landings, and other structures that are actually attached to the land could be regulated by local zoning because they actually become extensions of the land.

The Michigan Supreme Court performed a similar analysis in *Hess v. West Bloomfield Township*, 439 Mich. 550 (1992), ruling that a

In jurisdictions where the prior appropriation doctrine is applied, ownership of the real property adjoining the water body carries no right to use the water.

township had the authority to regulate dockage for boats and similar uses of the waterways. In *Hess*, the court noted that the authority granted by the state included the authority to regulate activities to promote the general welfare of the public and promote the character and natural resources of the township. The court went on to emphasize that regulation of riparian rights was necessary to ensure that the land uses were compatible with surrounding properties and to conserve water resources. However, the crux of these determinations centered upon the grant of authority from the state, and, as a result, each locality must look carefully at its own state statutes and cases to determine its rights in this regard. This analysis typically applies as it relates to local government's ability to regulate houseboats, live-aboard sailboats, and similar vessels.

RIPARIAN RIGHTS AND WATER RIGHTS UNDER PRIOR APPROPRIATION

The riparian rights of a landowner or rights acquired through prior appropriation must also be considered in any zoning ordinance that regulates the construction of piers and other structures located over waterways. West of the Mississippi, most states apply rules of prior appropriation in determining water rights between parties. Under this doctrine, all persons have the right to use the water for beneficial purposes; however, no party may actually own the waterway. In essence, the first party to use the water is given superior position to those that come to use the water at a later date. An appropriation under this doctrine requires that the first user of water being used or diverted for a beneficial use be superior to subsequent parties who seek to gain rights to use the water. In contrast to riparian rights discussed below, the parties' rights are not predicated upon the ownership of land adjoining the waterway at issue. In fact, in jurisdictions where the prior appropriation doctrine is applied, ownership of the real property adjoining the water body carries no right to use the water. Instead, appropriation is required to obtain rights.

Riparian rights, on the other hand, are rights to water use that are appurtenant to property that abuts a waterway. This doctrine is generally applied east of the Mississippi River. Riparian rights are derived from common law originating in England. In this respect, these rights were initially judge-made laws in the United States; however, these rights are obviously subject to modification through legislative action. The riparian rights are derived by the landowner as a result of the ownership of property adjoining the water. A riparian owner has the right of access from the waterfront of

ment method. For a circular lake, the riparian rights are generally defined in a pie-shaped division that will define each landowner's rights, as shown on Figure 1. As the shape of the waterway becomes more complex, so does the determination of the riparian rights. The apportionment method is generally required for elongated lakes or creeks in the eastern United States. In essence, each person who owns property that abuts the water is entitled to his pro-rata proportion of the waterway's navigable channel. To make this determination, one must measure the length of the shoreline and determine the portion that each landowner has of the total shoreline. Next, the line of navigability of the channel must be determined. This can be the most difficult and subjective part of the determination because the centerline of navigability is often not well defined. Once the line of navigability is determined, the length of the line of navigability is determined. Each landowner

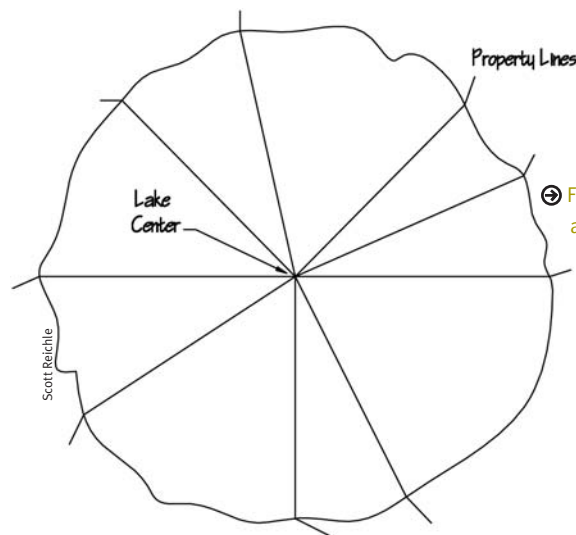


Figure 1. The riparian rights for a roughly circular body of water can be determined by dividing up the the total area into pie-shaped sections.

his property to the navigable part of the waterway, and also the right to use the soil under the water between his land and the centerline of navigability of the watercourse. A riparian owner may generally erect wharves, piers, or bulkheads for his own use, or the use of the public, subject to such rules and regulations as a state may impose for the public's protection. See *Evelyn v. Commonwealth*, 621 S.E.2d 120, 135 (Va. App., 2005). However, courts have recognized that the landowner's right to use the land and the water below the watermark as a "valuable" property right.

In most states, a property owner's riparian rights are determined by an apportion-

ment method. For a circular lake, the riparian rights are generally defined in a pie-shaped division that will define each landowner's rights, as shown on Figure 1. As the shape of the waterway becomes more complex, so does the determination of the riparian rights. The apportionment method is generally required for elongated lakes or creeks in the eastern United States. In essence, each person who owns property that abuts the water is entitled to his pro-rata proportion of the waterway's navigable channel. To make this determination, one must measure the length of the shoreline and determine the portion that each landowner has of the total shoreline. Next, the line of navigability of the channel must be determined. This can be the most difficult and subjective part of the determination because the centerline of navigability is often not well defined. Once the line of navigability is determined, the length of the line of navigability is determined. Each landowner

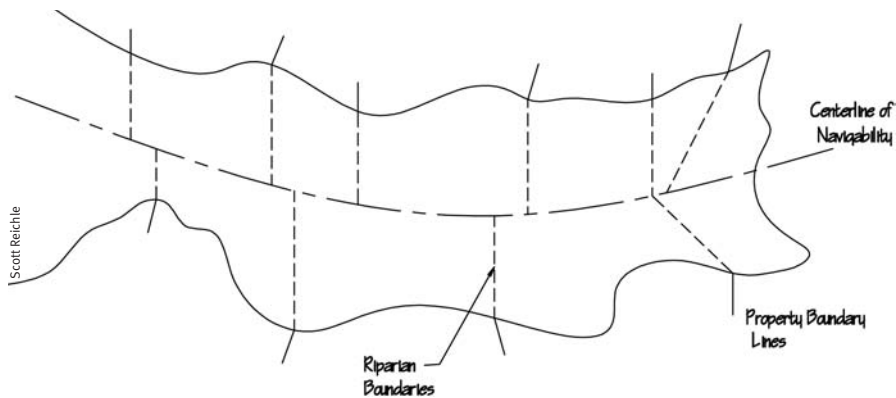


Figure 2. The riparian rights for a cove or other irregularly shaped body of water can be determined by giving each surrounding landowner a pro-rata portion of the waterway's navigable channel.

a riparian rights determination using the apportionment method for the navigable portion of a creek and a pie method for the end of the creek.

POTENTIAL CONFLICTS BETWEEN LOCAL ZONING AND RIPARIAN RIGHTS

A poorly designed or poorly worded local zoning ordinance may result in an arbitrary termination of the riparian rights of a property owner. As noted, riparian rights determined under the apportionment methods are defined by allocating each owner of property abutting a waterway the pro-rata share of the navigable portion of a waterway. As a result, lines extended out into the waterway for this determination are not necessarily extended in the same direction as boundary lines on the shore.

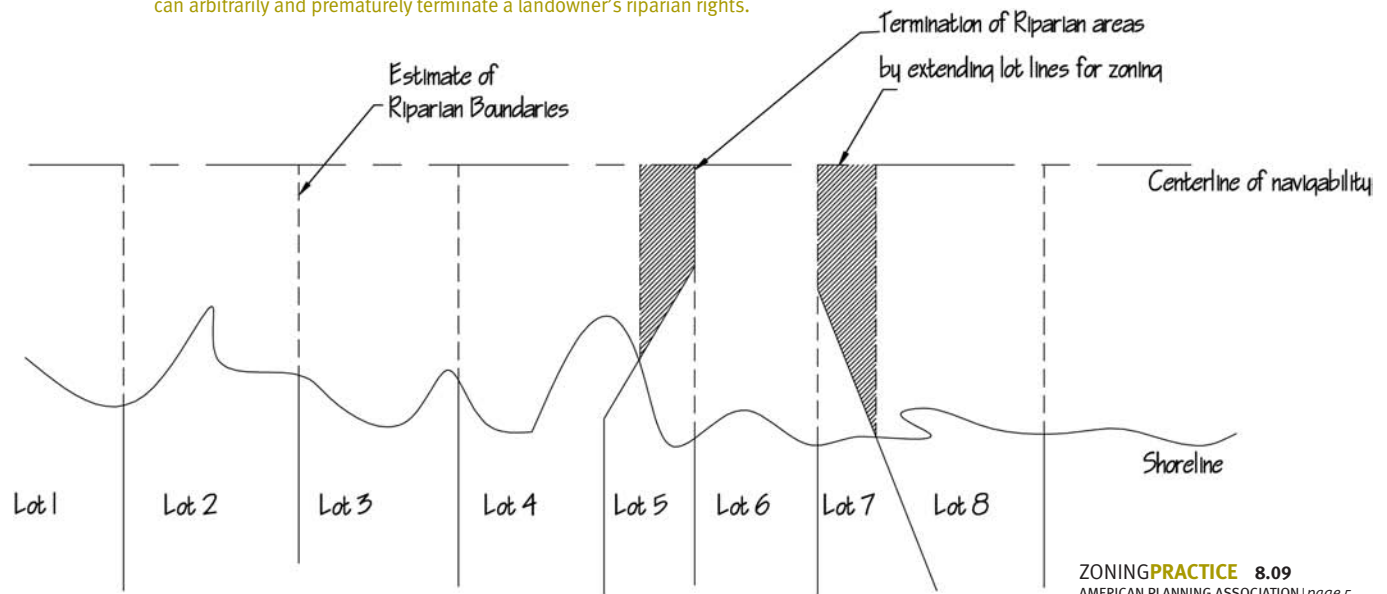
If a zoning ordinance defines construction setbacks by extending the lot lines into the water in the same direction as those on the land, the result can be an arbitrary termination of the riparian rights. Arguably, a locality could enforce an ordinance that does this, but it makes little sense. This approach can arbitrarily "take" all riparian rights of a landowner, depending upon the direction of the lot lines on the shore. If, for example, the last two feet of property line turned suddenly "outward," the riparian rights would not be terminated.

On the other hand, even if a landowner owned a large parcel with an extensive waterline and ancillary riparian rights, a sudden turn of the property line "inward" at the water's edge could completely terminate the owner's riparian rights. See Figure 3 for an

illustration. In fact, a strong argument exists that a regulatory taking can occur through excessive regulation of riparian rights. As part of its police powers to protect the public's health, safety, and general welfare, a locality may prohibit or promote particular contemplated uses of land. As a result, the courts have repeatedly upheld zoning and other land-use regulations that adversely affected real property values. However, when excessive regulation terminates property interests, it is possible to argue that a "taking" has occurred if the ordinance does not substantially advance legitimate state interests. In the example discussed above (where the lot lines are "angled in" in the seaward direction), there is a strong argument that simply extending the lot lines into the water can arbitrarily terminate riparian rights and, hence, no legitimate state interest is served by this approach.

This being said, it can be very difficult for a locality to get involved with the actual determination of riparian rights. As a result, it may not be practical for it to implement and enforce an ordinance that requires a party to limit construction to that area within its riparian rights. The delineation of riparian rights can be a time-consuming and lengthy process. Furthermore, only a limited number of experts are qualified to make this determination. Indeed, most localities are not in a position to do so. The burden of a riparian survey will most likely fall on the landowner seeking the permit. Should this survey be required for all permits seeking to build over the waterway or only for those where poten-

Figure 3. A zoning ordinance that extends building setback lines into the waterway can arbitrarily and prematurely terminate a landowner's riparian rights.



A locality should not authorize construction until it is certain the structure is being built in the correct location so as not to impose upon the surrounding property owners and the general public.

tial conflicts with neighboring parcels are obvious? Often, the potential conflicts are discovered when a permit application is filed and notice is given to surrounding property owners. If a neighbor disputes the placement of the pier or structure, should the locality deny the building permit even though it is not in a position to determine whether the pier or structure is within or outside the applicant's riparian rights? One can argue that a permit application should not be denied based upon speculation. Following this school of thought, you can argue that the neighbor's recourse is to seek relief in a court of law, where a final determination of riparian rights can be made. The contrary argument is that a locality should not authorize construction until it is certain the structure is being built in the correct location so as not to impose upon the surrounding property owners and the general public. This is the purpose of a zoning regulation. These conflicting arguments illustrate the difficulties in implementing zoning restrictions where the boundaries and parameters are difficult to define.

FEDERAL ISSUES

The majority of the discussion thus far has focused on the balancing of rights between the landowners and local and state governments. However, in some cases, federal law may also become an issue. For example, Congress has authority over navigable waters in the United States as a result of the Commerce Clause of the U.S. Constitution. Congress has delegated to the U.S. Army Corps of Engineers the authority to regulate issues related to navigability. Accordingly, most district offices of the Corps have developed guidelines for the construction of docks, piers, and other water structures. These guidelines are designed to ensure that the construction of these structures does not interfere with the ability of boats to navigate on the waterway. Some of the more pertinent guidelines can be summarized as follows:

- A dock or pier should generally not extend more than 20 to 25 percent across the width of a waterway, resulting in the maintenance of at least 50 to 60 percent of the channel width for navigation.
- Piers and docks should be built to maintain a minimum separation of 50 feet between adjacent structures. The purpose is to allow boats to navigate, turn, and dock at a structure without interference from an adjoining structure.
- Piers and docks should not be extended into a navigable channel, turning basin, or mooring field.

Any local zoning ordinance that seeks to regulate these types of water-based structures should consider these requirements and be consistent with federal standards.

EXAMPLES OF ZONING ORDINANCES REGULATING DOCKS AND PIERS

It is illustrative to look at some examples of how some states and localities have addressed some of the issues described above. In Wisconsin, the state has authorized local governments to adopt zoning ordinances that regulate pier placement as well as size and number. As a result, several counties in the state have adopted ordinances that regulate pier and dock construction. For example, one ordinance provides that "[p]iers may only be placed by the riparian owner in the riparian zone." The ordinance sets a maximum pier width of six feet and states that the pier "shall not enclose any portion of the water and shall not have decks, platforms, or other construction not essential to the berthing of boats." Note that the owner is required to establish that the pier is constructed within the owner's "riparian zone." As discussed earlier, this can be a potentially difficult and expensive feature to define. It appears that, under this ordinance, if there is a question on this issue, the property owner must establish that the location is proper.

One local ordinance from Virginia provides:

There shall be no rear yard [setback] requirement for docks, piers, or boathouses; how-

ever, a setback of ten feet (10') from side lot lines, or extensions thereof into the bodies of water, shall be observed. All such uses shall be subject to the permitting requirements of the Virginia Marine Resource Commission and the United States Army Corps of Engineers.

In this case, the municipality has added language to ensure that its zoning requirements are consistent with state and federal requirements. However, the language related to the setback requirements is problematic. The ordinance states that the 10-foot setback requirements include a setback from lot lines extended into the waterway. The ordinance does not define how the lines are extended into the waterway. As a result, you would presumptively assume that the lot lines would be extended in the same direction as on the shoreline. As discussed above, however, this may be inconsistent with the landowner's riparian rights.

CONCLUDING THOUGHTS

The discussion presented above demonstrates that local zoning officials must consider multiple factors in attempting to draft a zoning ordinance regulating docks, piers, or other water-based structures. First, look at state law to determine if the authority has been granted to regulate these structures. Second, if so, ensure that any zoning regulation is consistent with any state or federal regulations that may supersede local authority. Finally, draft the ordinance to be consistent with a landowner's riparian rights, and be certain that the ordinance does not arbitrarily terminate these rights.

NEWS BRIEF

THE RIGHT TO DRY

By Dwight Merriam, FAICP

That clothes dryer down in your basement is sucking you dry—to the tune of \$1,530 over its 18-year lifespan (www.consumerenergycenter.org/home/appliances/dryers.html). Appliances use 17 percent of household energy, and clothes dryers are among the prime culprits (www1.eere.energy.gov/consumer/tips/appliances.html).

In round numbers, that's a ton of CO₂ per household per year. Nationwide, call it 30 million tons of coal or 33,000 rail cars full of West Virginian mountain-tops. Jeezum (as they say in Vermont—more on that later), we should all feel guilty.



Dwight Merriam

➡ In an overt act of covenant disobedience, Lucy Merriam hangs out the family wash.

Worse yet, from 2003 to 2006 there were 15,350 residential fires caused by washers and dryers (92 percent from dryers), with 16 deaths, 433 injuries, and \$201 million in property damage (www.nfpa.org/assets/files//PDF/DryerFactSheet.pdf).

So what can you do? Simple—hang your clothes outside, like your grandmother used to do.

But wait. It may be against the law. First, there are a few municipalities that prohibit clotheslines—for example, Palm Beach, Florida, does not permit exterior clotheslines for multifamily dwellings (City Code Section 134-1872). Meanwhile, many other local governments ban clotheslines in front and side yards and require them to be screened from view.

Second, one out of five Americans, 57 million people, live under the regimes of home owners associations—many of which expressly prohibit hanging clothes outside to dry. Take, for example, the covenants on my own single-family detached lot:

“No clotheslines or wash lines shall be erected or used on any lot.” And, in an overt act of civil or at least covenant disobedience, here is our daughter, Lucy, hanging clothes out on our line.

But take heart. Change is blowing in the wind. As of last year, only Florida, Colorado, and Utah had state laws specifically protecting the rights of home owners to dry their clothes outside. This year, Vermont and Maine joined the

list of Right to Dry states, and Hawaii, for the second year in a row, enacted full protection with legislation intended “to prohibit real estate contracts, agreements, and rules from precluding or rendering ineffective the use of clotheslines on the premises of single-family dwellings or townhouses” (Senate Bill 1338, found at www.capitol.hawaii.gov/session2009/bills/SB1338_CD1_.pdf).

In 1992 Vermont became one of the first states to introduce right-to-dry legislation, but it took the Green Mountain State more than 15 years to get it enacted. As they say in Vermont—slower than cold molasses running up a steep hill in the middle of winter.

Vermont’s new law, with classic Yankee frugality, simply states that municipalities, deed restrictions, and the like cannot “prohibit or have the effect of prohibiting solar collectors, clotheslines, or other energy devices based on renewable energy resources from being installed . . .” This language follows Florida’s (www.leg.state.vt.us/docs/2010/Acts/ACT045.pdf).

A flap over aesthetics in Virginia defeated attempts to get legislation there; Maryland also saw two competing bills defeated this year. Legislation in Connecticut got nowhere this session, but the fight goes on in Oregon. For information about what’s happening in your state, check out <http://right2dry.org> and the leader in the field, Project Laundry List, at www.laundrylist.org.

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Cover photo: Private docks and boat use can pose zoning issues.
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HOW DO YOU ZONE WHAT
LIES BENEATH?

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