

Navigation Law, Environmental Conservation Law and the Relationship with Municipal Codes

By Robert R. Dooley

The Appellate Division reviewed the relationship of the state's interest in navigable waterways and the statutory interplay with local codes in *North Elba v. Grinditch*, 2012 NY Slip Op 5215, (3d Dept. June 28, 2012).

The state's sovereign ownership of underwater land originates in the English common law. Tidal waters were considered navigable and, thus, the land under these waters were deemed owned by the crown. *Id.* at **4. Non-tidal waters were

considered not to be navigable with the underwater land being owned by the adjacent riparian owner. Because of the abundance of lakes, streams and rivers, this distinction was abandoned in New York. The state's ownership extends to a line three miles from the coast along with many inland lakes. The test to determine whether an inland lake is owned by the state in its sovereign capacity is a practical one set forth in *Granger v. City of Canandaigua*, 257 N.Y. 126 (1931).

As a general principle, local zoning codes do not apply to the lands of the state, including navigable waters when

used in the common law sense. See *Erbstrand v. Vecchiolla*, 35 A.D.2d 564, 313 N.Y.S.2d 576 (2d Dept. 1970) (zoning power of city of Rye did not extend into a Long Island harbor). The Appellate Division held that in order for this preemptive principle to apply, the state must own the underwater land in its sovereign capacity — as opposed to a proprietary ownership as a riparian owner.

Despite rejecting North Elba's argument that the state transferred its ownership in

its sovereign capacity under the Macomb patent of 1972, the Appellate Division still held that the state did not own the land under the water in its sovereign capacity. at **7.

In not owning the lake in its sovereign capacity, the state would also not have exclusive

jurisdiction over every form of regulation in the public interest. *Id.* While the Supreme Court determined that Navigation Law §§ 30 and 32 regulated the construction of the boathouses and excluded the land use code basing its conclusion on the determination that the lake was a navigable water as defined by Navigation Law § 2(4), the Appellate



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Division disagreed. The Appellate Division pointed out that Navigation Law §§ 30 and 32 provide that the DEC would have jurisdiction over the waters as related to navigation yet does not authorize the infringement of local laws or regulations. Further, Navigation Law § 46-a provides examples where the state delegates authority over its underwater land held in its sovereign capacity authorizing the regulation of construction and location of boathouses, moorings and docks. The state's delegation granted authority to the local municipalities that would otherwise not exist. There would be no limitation on regulating waters not owned by the state in its sovereign capacity by the referenced statutes. Thus, the Navigation Law would not preempt the local zoning.

From a local perspective, the interesting portion of *North Elba* is the citation to the *Erbstrand* decision. For context, Navigation Law § 2(4) defines navigable waterways as specifically excluding tide-waters of Nassau and Suffolk counties. The Honorable Justice Leon Lazer in *Islip v. Powell*, 358 N.Y.S.2d 985 (Suffolk Cnty, Supr. Crt. 1974) clarified that the rationale from *Erbstrand* involved moorings

attached to the underwater land of the Long Island Sound rather than docks which float but are physically attached to the shore directly or indirectly. Judge Lazer's interpretation further shows the interrelationship between the Navigation Law and the Environmental Conservation Law. The relationship is set forth in ECL § 15-1503(1)(b), requiring that a permit be obtained from the DEC where "a lease or other appropriate conveyance of an interest authorizing the use and occupancy of state-owned lands underwater" has not been obtained.

The relationship between the state's interest in navigation and the riparian owners' right to access navigable waterways is a relationship that is not short of conflict. An understanding of the goals and purpose behind the conflicts of past will inevitably lead to a more constructive dialogue between riparian owners, local municipalities and the state when work modifying the land adjoining the water ways is desired.

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