Boat Slip and Marina Development In North Carolina

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Any good understanding of the issues presented when dealing with water rights and particularly marinas and boat slips requires an understanding of the body of law that defines the rights of the riparian or littoral owner. With this in mind, this manuscript begins with a discussion of the public trust doctrine, the federal navigational servitude and other basics of water law prior to the discussion of marina and boat slip development.

Ownership of Submerged Lands

At common law, the English sovereign owned the sea and the lands over which the tide ebbed and flowed. The ownership of the sovereign was subject to the rights of the citizens to use the waters for fishing and navigation.[2] "The concept of the 'public trust' doctrine evolved from the theory that the English Crown held title to tidal lands and waters for the benefit of the public."[3] Upon the separation of the British Colonies in America from England, the states "succeeded as sovereign States to the title of the crown in the tide waters within their territorial limits."[4] Such ownership remained subject to the rights of the public in the use of the waters.

The Scope of the Public Trust Doctrine (aka - The Definition of Navigable Waters)

In order for the rights of the public to arise, the waters had to be "navigable waters". Under English law, the doctrine was limited in scope to tidal waters and did not extend upstream to fresh waters. Tidal waters are those that are subject to the "ebb and flow" of the tides (sometimes called the "lunar tides test"[5]). This rule operated very well in England, whose small size and low elevation confined actual navigation practically to such tidal waters.[6]

After the formation of the Union, the U.S. Supreme Court recognized the inadequacy of the "ebb and flow" test for determining navigable waters subject to the public trust. In *The*

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[2] State ex rel Rohrer v. Credle, 322 N.C. 522 (1988).

[3] Id.

[4] Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892).

[5] *See* State v. Glen, 52 N.C. 321 (1859).

[6] State v. Baum, 128 N.C. 600, (1901); *See also* The Daniel Ball, 77 U.S. 557 (1870). "[In England] no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing."

Daniel Ball, the Supreme Court recognized that many U.S. rivers are navigable for many hundreds of miles above the tide water and promulgated an entirely different test for determining those waters that are subject to the "public trust".

Under *The Daniel Ball*, the test for determining waters subject to the right of public use became the so-called "navigability test". Simply put, if body of water is "navigable in fact", then it is "navigable at law". This rule was recognized in North Carolina in State v. Baum:[7]

> The rule now most generally adopted…is that all watercourses are regarded as navigable in law that are navigable in fact. That is, that the public have the right to the unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, *that are, in their natural condition, capable of such use.* [emphasis added]

It is clear that it is the mere capability of such use that determines navigability, even if the waters have not been used for such purpose.[8]

The 1995 case of Gwathmey v. State of North Carolina, adopted the most far reaching version of the navigability test and the present rule for determining the extent of public trust waters. In Gwathmey, the court held that if waters are navigable for pleasure boating then those waters "must be regarded as navigable water, though no craft has ever been put upon [them] for the purpose of trade or navigation."[9] This so-called "pleasure craft test" is the most expansive test because any water capable of navigation by a kayak or canoe is now deemed to be navigable in fact and therefore, navigable at law.[10]

The "Floatability Cases"

There is a line of cases in which the right of navigation is determined by "floatability". These cases find that streams which are typically incapable of use for the purpose of delivering logs downstream, may still be subject to an easement in the general public so long as they become navigable "at periods recurring from year to year, and continuing for a sufficient length of time in each year to make it useful as a highway."[11] These cases are consistent with the holding in Gwathmey.

Lakes and Ponds

In order to determine the applicability of the public trust doctrine to lakes and ponds, one should look at the origin of the body of water in most cases. Many power generation lakes are wholly private, owned by the utility (or held via easement from the State) and therefore the bed is not subject to public trust. Large natural lakes are likely subject to public trust.

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[7] 128 N.C. 600 (1901) *citing* _____.
[8] Gwathmey v. State, 342 N.C. 287 (1995).
[9] Id.
[10] See 1998 N.C. Op. Att'y Gen. 346. "Thus, citizens have the right to travel by "useful vessels" such as canoes or kayaks, "in the usual and ordinary mode" on waters which are in their natural condition capable of such use."
[11] Commissioners of Burke Co. v. Catawba Lumber Co., 116 N.C. 731 (1895) citing Gould on Waters Sections 108 and 109.

Indeed the Legislature has decreed that it will not authorize conveyance of natural lakes in excess of 50 acres.[12] For smaller lakes and ponds the issue is more delicate. Certainly small ponds wholly within the boundaries of a single tract of land are capable of private ownership.[13] It is less clear when the small lake or pond, whether or not manmade, is directly connected to a navigable stream.

Lakes created by the Corps of Engineers (i.e. John H. Kerr Reservoir) are certainly not subject to the public trust of the State.

Limitations on Public Trust Waters

The right of navigation gives no license to go and come through and over the riparian owner's land without "let or hindrance". Similarly, those navigating a river have no right, as incident to the right of navigation, to land upon and use the bank at a place other than a public landing without the consent of the owner, for the banks of a navigable stream are private property. [14]

In State v. Baum, the court noted in dicta that "[w]e are not prepared to say that a land owner would be liable to criminal prosecution because he happened to put a watergate across a creek up which otherwise an idle hunter might be able to pole a canoe."[15] The North Carolina Attorney General has admitted that it is not possible to "say with confidence" how far up a body of water that public rights may reach. Assuredly, "at some point, navigability in the usual and ordinary course ceases, and public trust rights give way to those of private property."[16] The extent of the public's right then is a question of fact that would properly be determined by a jury.

In State ex rel Rohrer v. Credle,[17] the Supreme Court denied a plaintiff's claim to the exclusive right to harvest oysters in certain navigable waters based on prescription. Shortly thereafter, the State legislature enacted N.C.G.S. §1-45.1 (1985) barring claims of adverse possession against "property held by the State and subject to public trust rights."

Registration of Grants in Navigable Waters

In 1965 the legislature passed N.C.G.S. §113-205 requiring anyone claiming title to "any part of the bed lying under navigable waters of any coastal county of North Carolina…superior to that of the general public" to register a claim with the State by January 1, 1970.[18] All

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[12] N.C.G.S. §146-3. Applies to lakes owned by the State prior to January 1, 1959.

[13] *See* N.C.G.S. §113-129. Defining a private pond as a body of water within and lying wholly upon a single tract of privately owned land. This definition is for the purpose of determining the jurisdiction of the Fish and Wildlife agency.

[14] Gaither v. Albemarle Hospital, 235 NC 431.

[15] 128 N.C. 600 (1901). Note: The obstruction of a navigable stream is a public nuisance.

[16] 1998 N.C. Op. Att'y Gen. 346

[17] 322 NC 522 (1988). (Plaintiff also claimed the right to the submerged lands under a franchise purportedly granted in accord with a statute (1887 N.C. Session Laws ch. 119, §6) authorizing perpetual franchises for shell-fishing. However, the plaintiff was unable to produce the requisite certificate evidencing such a grant.)

[18] The coastal counties include: Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Currituck, Dare, Gates, Halifax, Hertford, Hyde, Martin, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Tyrell, and Washington.

rights or titles not so registered became "null and void." In excess of 10,000 claims were filed as a result.[19] Thereafter, the legislature attempted to resolve certain claims via additional legislation which validated so-called Board of Education deeds to marshland and swamplands.[20]

For submerged land claims not otherwise addressed, The Division of Marine Fisheries was assigned the dubious task of assessing the validity of such claims. Most, if not all, of these claims have now been administered. A title search may reveal a Declaration of Resolution of the Claim to Submerged Lands which was issued by Marine Fisheries for such a claim.

Limitations on the Sale of Public Trust Lands

As recently as 1995 the North Carolina Supreme Court has undertaken the question of whether the State has ability to convey lands subject to the Public Trust. The court had previously wrestled with the issue in a number of cases and had yet to formulate a consistent rule.[21] It is worth noting that few plaintiffs have been successful in asserting claim to title in submerged lands free of the rights of the public.[22] In Gwathmey, the court took great care in expressly overruling or limiting its prior findings in *Shepard's Point*, *Twiford*, *Credle* and *Way*. The rule under this case is as follows:

> ...[W]e conclude that the General Assembly is not prohibited by our laws or Constitution from conveying in fee simple lands underlying waters that are navigable in law without reserving public trust rights. The General Assembly has the power to convey such lands, but under the public trust doctrine it will be presumed not to have done so. That presumption is rebutted by a special grant of the General Assembly conveying the lands in question free of all public trust rights, but only if the special grant does so in the clearest and most express terms.[23]

Before Gwathmey, few claims to submerged lands were recognized as being free of public trust rights. Now, only the grant of the General Assembly can serve to divest the public of its rights to the submerged lands of the State.

Conveyances by State of Submerged Lands

The General Assembly has authorized certain grants of interests in the submerged lands of the State. Principal among these is the authorization contained in N.C.G.S. §146-3(1). "No

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[19] Kalo, Joseph J. & Monica Kivel Kalo, The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, private Claims to Estuarine Marshes, Denial of Permits to Fill and the Public Trust, 64 N.C.L. Rev. 565 (1986) *citing* Leiglative Research Commission Report.

[20] *See* N.C.G.S. 146-6(b) (regarding title to lands within the bounds of a Board of Education deed raised by acts of man above the mean high water); and N.C.G.S. 146-20.1(a) (validating title to marshlands and swamplands conveyed by State Board of Education deeds but reserving public trust rights).

[21] *See e.g.* Shepard's Point Land Co. v. Atlantic Hotel, 132 N.C. 517 (1903); Credle, 322 N.C. 522 (1988); State v. Twiford, 136 N.C. 603 (1904) and Atlantic & N.C. R.R. Co. v. Way, 172 N.C. 774 (1916).

[22] Note that certain riparian landowners have been able to acquire title to previously submerged lands in accord with N.C.G.S. §146-6 which provides for filling submerged lands.

[23] Gwathmey, at 294.

submerged lands may be conveyed in fee, but easements therein may be granted, as provided in this subchapter." The single exception in the statute provides that no natural lake greater than 50 acres in size and belonging to the State as of January 1, 1959 can be "in any manner disposed of…."[24]

NCGS 146-12 authorizes certain easements in favor of adjoining riparian or littoral owners over submerged lands lying between the high water mark and "deep water". The statute does not define "deep water" but it is commonly thought to be a depth of four feet at mean low tide. Such easements are valid for a term of 50 years and renewable for a single additional 50-year period. All such easements are subject to the public trust rights and are further subject to revocation for a violation of the conditions upon which it was granted.[25] Owners of structures built upon state-owned lands covered by navigable waters after August 31, 1998 are required, unless specifically exempted, to obtain an easement from the State.[26] The following structures are exempt from the easement requirement:

1. Piers, docks or similar structures for the *exclusive use of the adjacent riparian or littoral owner* which *generate no revenue* directly related to the structure and which accommodate no more than 10 vessels;
2. Structures constructed by any public utility that assist in the provision of utility service; or
3. Structures constructed or owned by the State or any political subdivision.[27]

The Rights of the Public in Public Trust Waters

The public trust doctrine was founded upon the need to protect waterways for their use by the public at large as highways in commerce. Thus the early uses on public trust waters included the rights to navigate, fish and carry on commerce. The right to hunt was later included.[28] In North Carolina, protected rights of the public in public trust waters include the right to navigate, swim, hunt, fish and enjoy all recreational activities in the watercourses of the State.[29]

<u>The Federal Navigational Servitude</u>

Much like the public trust doctrine, the navigational servitude arose under the English common law. While the crown held title to lands beneath navigable waters, the public at large maintained the right to use those waters for the purpose of navigation. The American colonies then assumed the Crown's interest but yielded the power to regulate commerce through the commerce clause of the Constitution.[30] Thus, while the states own the beds of

[24] N.C.G.S. §146-3(2).
[25] *See* N.C.G.S. §146-12(g) for a complete list of easement terms and conditions.
[26] N.C.G.S. §146-12(c). *See also* Walker v. North Carolina Coastal Resources Com'n, 433 S.E.2d 767 (1993).
[27] *See* N.C.G.S. §146-12(n).
[28] Swan Island Club v. White, 114 F.Supp. 95.
[29] N.C.G.S. §1-45.
[30] David H. Getches, Water Law 352-353 (3rd ed. 1997).

navigable waters, the federal government controls the navigable capacity of the waters to maintain their use in commerce. "The power to regulate commerce comprehends the control for that purpose, and, to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie."[31]

The "dominant power" of the federal government extends to the entire bed of a stream which includes lands below the ordinary high-water mark[32] and is applicable to all waters subject to the ebb and flow of the tides or susceptible for use in interstate or foreign commerce.[33] Once established, the servitude is not extinguished by later actions or events which impede or destroy navigability.[34] The federal government has authority to do as it sees fit within the bed of a navigable waterway for the purpose of maintaining the capacity of the waterway for navigation. "The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation." [35] The court has stated that "[w]hatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water." Rather, title to such submerged lands is "at all times subordinate to" the uses that "may be consistent with or demanded by the public right of navigation."[36]

The power of the federal government extends not only to keeping clear the channels of interstate navigation by the prohibition or removal of actual obstructions created by riparian owners (i.e. piers, docks, bridges, etc.) but also includes the power to improve and enlarge the navigability of the watercourse. In a long line of takings cases the U.S. Supreme Court has held that no compensation is required for loss of water power due to impairment of the navigable waters' flow;[37] for damage to structures erected between the low and high water marks;[38] for loss of access to navigable water caused by necessary improvements;[39] and for loss of value to adjoining fast lands based on potential use in navigational commerce.[40]

The U.S. Army Corps of Engineers is the federal agency that administers navigable waters subject to the navigational servitude. While a thorough discussion of permitting for development of structures beyond the mean high water mark is beyond the scope of this manuscript, it merits a brief discussion. Because any such structure is subject to the navigable servitude and therefore subject to removal for the protection of navigation, it is important to consider the impact to navigation prior to construction. In North Carolina a General Permit has been issued by the Corps "to perform work in or affecting navigable waters of the United States" including the construction, maintenance and repair of piers, docks, boathouses, mooring piles, dolphins and jetties in the navigable waters of the United

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[31] Gilman v. Philadelphia, 3 Wall 713, 724.
[32] U.S. v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 312 U.S. 592 (1941).
[33] 33 C.F.R. 329.4
[34] Id.
[35] 312 U.S. 592 (1941).
[36] Scranton v. Wheeler, 179 U.S. 141 (1900).
[37] U.S. v. Twin City Power Co. 350 U.S. 222 (1956).
[38] Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 312 U.S. 592
[39] U.S. v. Commodore Park, Inc. 324 U.S. 386 (1945).
[40] U.S. v. Rands, 389 U.S. 121 (1967).

States in the State of North Carolina.[41] A General Permit has also been issued authorizing similar activities on John H. Kerr Reservoir, Falls Lake, W. Kerr Scott Reservoir and B. Everett Jordan Lake.[42] Additional permits may be required in advance of waterfront development and that Corps of Engineers should be contacted prior to such development.

Lands Rendered Navigable by Private Effort

In Kaiser Aetna et al v. United States[43], the Supreme Court undertook the issue of whether waters of a private pond once connected to navigable waters by private dredging indeed became navigable waters of the United States. The developer owned Kuapa Pond, a pond that was private property under Hawaiian law. The pond was developed as a marina and linked to navigable waters by a channel dredged by the developer. In a 6-3 decision with a strong dissenting opinion, the court held that the "right to exclude" is such a fundamental property right that "it should fall within the category of interests that the government cannot take without compensation."[44]

Justice Blackmun, in his dissent urged that the breadth of the navigational servitude properly extends to all navigable waters of the United States. He contended that the majority "holds that it does not, at least where navigability is in whole or in part the work [45]of private hands."[46] He argued that the navigational servitude, with its origins in the commerce clause of the Constitution, should extend to the "limits of interstate commerce by water." Any other approach he argued would directly injure "the freedom of commerce that the navigational servitude is intended to safeguard."[47]

The Kaiser Aetna case only addresses the federal navigational servitude. It does not address the issue of the applicability of the public trust doctrine to lands submerged by private dredging which is left to the individual states. In North Carolina, there are a number of these developments but no cases on point to address ownership of the newly created submerged bed. The Marina at St. James Plantation in Brunswick County is an example.[48] There, the entire marina basin was dredged from dry upland and then connected to the Atlantic Intracoastal Waterway by a channel.

Riparian & Littoral Rights

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[41] Department of the Army General (Regional) Permit No. 197800056, Wilmington District, Corps of Engineers (March 16, 2005). (This permit is attached in the Appendix. Note that it expires December 31, 2010 but that such permits are commonly renewed at or prior to expiration.)
[42] Department of the Army General (Regional Permit No. 19820079, Wilmington District, Corps of Engineers (January 1, 2005). (This permit is attached as Appendix ____.)
[43] 444 U.S. 164, (1979).
[44] Id.
[45] Id. (Blackmun, dissenting).
[46] Id
[47] Id.
[48] The Brunswick County Registry is available online at www.rod.brunsco.net and the plat map of one phase of this development can be seen at Condominium Book 8, Page 10.

The terms riparian and littoral typically refer to certain rights accruing to owners of lands adjacent to water, either rivers or streams in the case of riparian ownership or lakes and oceans in the case of littoral. For this manuscript, the term "*riparian*" will be used interchangeably to describe either riparian or littoral rights.

In addition to the rights commonly associated with title to real property, a waterfront owner also has the following rights:

1. the right to be and remain a riparian proprietor and to enjoy the natural advantage thereby conferred upon the land by its adjacency to the water;
2. the right of access to the water, including a right of way to and from the navigable parts;
3. the right to build a pier or "wharf out" to the navigable water, subject to any regulations by the state;
4. the right to accretions or alluvion; and
5. the right to make reasonable use of the water as it flows past or laves the shore.[49]

Each of these property rights is conferred upon a waterfront property owner solely because the property is directly adjacent to the water. These same rights do not inure to an owner who is "close" to the water.

The Right of Access to the Water

The right of access to the water is perhaps most vital to riparian owners. Waterfront property often sells at a far greater price than property that is even a block from the water. There is great value in being able to moor a boat, swim, or just admire the view from your waterfront porch. The right of access for a riparian owner is exclusive and includes by implication the right to prevent others from crossing private land to reach navigable waters.[50]

The Right to "Wharf Out"

The right to "wharf out" to gain access to navigable water is a "qualified" right meaning the riparian owner has no absolute entitlement to build a pier or dock. This right has been described as "a qualified property in the water frontage belonging, by nature, to their land, the chief advantage growing out of the appurtenant estate in the submerged land being the right of access over an extension of their waterfronts to navigable water, and the right to construct wharfs, piers or landings…."[51]

The right to wharf out does not include the right to exclude others from the waters in and around their pier or dock. The North Carolina Supreme Court described this limitation thusly:

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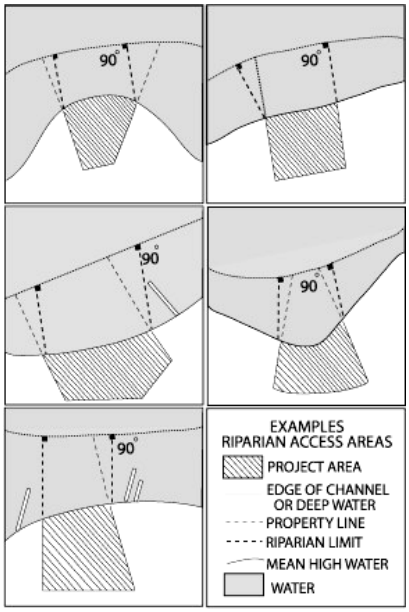
[49] *Re Protest of Mason ex rel. Huber*, 78 N.C. App. 16, 337 S.E.2d 99 (1985).
[50] See the discussion below of Prescriptive Easements which may entitle the public at large to use private property for access to the waterfront.
[51] Bond v. Wool, 107 N.C. 139 (1890).

> Although a littoral owner has the right to construct a pier in order to provide access to ocean waters of greater depth, the owner may not lawfully prohibit the use of the ocean waters beneath his pier as a means of passage by water craft in a manner that involves no contact with the pier itself….[52]

This limitation is rooted in the public's right to the waters of the state that is discussed above.

Yet another significant limitation on the right to wharf out involves the similar right of adjacent property owners. The rule for determining the corridors in which a riparian owner may build a pier or dock are well settled in North Carolina. To determine the proper corridor, do not simply extend the side property lines out to the channel. The correct rule is rather to begin where the side property line reaches the shoreline and then to proceed in a line perpendicular to the deep water channel outward to the channel.[53] The diagram to the right from the Division of Coastal Management[54] depicts how the riparian corridor is determined. It is of note that CAMA regulations recognize that the rules shown on the diagram will not be sufficient in all cases. "When shoreline configuration is such that a perpendicular alignment cannot be achieved, the pier shall be aligned to meet the intent of this Rule to the maximum extent practicable."[55] This rule is in alignment with case law which has long recognized that the right to build a dock or pier must be restricted so as not to unreasonably "interfere with the correlative rights of other [riparian] owners."[56]



Non-Severability of Riparian Rights

Riparian rights arise as a result of the proximity of land to a watercourse. It has long been held that riparian rights are appurtenant to the land abutting navigable water and cannot be conveyed without a conveyance of such land.[57] This is an important consideration to the discussion of how to properly develop docks and marinas. If the "owner" of a boat slip

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[52] *Capune v. Robbins*, 273 N.C. 581, 160 S.E.2d 881 (1968). (In this case the plaintiff had attempted to pass underneath the defendant's pier on a paddleboard. The defendant threw bottles at the plaintiff, causing bodily injury, and urged him to turn back. Plaintiff's cause of action for assault was upheld, there being no evidence of any right by the defendant to prohibit plaintiff from passing under the pier).

[53] *O'Neal v. Rollinson*, 212 N.C. 83, 192 S.E.2d 688 (1937).

[54] See CAMA Handbook for Development in Coastal North Carolina at www.nccoastalmanagement.net *and see* O'Neal v. Rollinson, 212 N.C. 83 (1937).

[55] 15A N.C.A.C. 7H.0208(b)(6)(L) (2004).

[56] Pine Knoll Association, Inc. v. Cardon, 126 N.C. App. 155 (1997) citing Heston v. Ousler, 119 N.H. 58 (1979).

[57] Zimmerman v. Robinson, 114 NC 39 (1894); Land Co. v Hotel, 134 NC 397 (1904).

does not have the rights of a riparian owner, then the obvious rhetorical question is "what does that owner really own?" This issue will be explored more fully below.

Littoral Rights in Lakes and Ponds

As with the discussion above regarding public trust, it is important to consider the origin of the water body in order to determine whether a lakeside property owner acquires any littoral rights in the lake. Beware of contour lines or flooding easements along the shores of many manmade lakes such as Lake Norman. Along such lakes, littoral rights of adjacent owners may be proscribed or limited. The rule is to not assume that because of its adjacency to water, that the waterfront tract has littoral rights in and to the waters of the lake.

Boat Slips and Boataminiums – All Marinas Are Not Created Equally!

So, your client has just told you that he wants to spend $200,000.00 on a 30' wet slip at Wrightsville Beach and he wants you to "make sure everything checks out". Now what do you do? A title search? Get him a title policy? What do you need to know to help the client make sure everything's okay? Better yet, what if your developer client comes to you with plans to build a 100-slip commercial marina and tells you that she plans to sell 75 slips to private owners? How do you advise her on the best way to accomplish her plans?

The first rule of thumb for dealing with boat slips is that there is no rule. No two are exactly the same. Marinas and so-called boataminiums are created in a myriad of ways and there is apparently no standard of practice in regard to their creation. Much of the confusion is derived from the fact that there is not much black letter law upon which to rely. The author is not aware of a case which has tested the validity of any particular scheme of marina or boat slip development. With that in mind, **it should be noted that much of the manuscript is the opinion of the author and, as such, should not be considered to be the rule of law!**

The second rule of thumb for dealing with boat slips is that you must read and understand the covenants, conditions and restrictions that establish the rights and responsibilities of the slip owners. If you are drafting such documents, the advice is similar. You should read and understand documents from other (preferably similar) developments prior to drafting new documents.

Dry Slips on Private Upland

As with wet slips, so-called "dry slips" can be created and sold in a variety of ways. Dry slips do not have the same challenges that wet slips do with the issue of public trust lands (discussed herein below). Dry slips are constructed on dry upland and can be subdivided into transferable units of real property. The common scheme of development for dry slips is to subdivide them as condominium units pursuant to Chapter 47C.

Be careful to review the organizational documents. Some dry slips are created and sold as membership interests that are discussed more thoroughly below. There is frequently not a

real property interest conveyed to the slip purchaser under this sort of development scheme and this raises significant issues for title insurers and lenders attempting to secure collateral.

Slips on Non-Public Trust Waters

The nature of water rights on non-public trust waters is significantly different from those along public trust waters. The simple reason is that non-public trust waters are necessarily privately held. Lands abutting non-public trust waters frequently do not have any rights in and to the waters or to the submerged lands beneath them. Thus, in order to construct a dock or pier on such waters, it is usually necessary to acquire some right either by easement, license or permit.

Common examples of non-public trust waters are those lakes created for power generation, water storage, flood control or lakes constructed by the Army Corps of Engineers (often for one of the above purposes).

Public utilities create large lakes for the purpose of hydro-generation of electricity. Such utilities are conferred the power of condemnation to take title to lands that they intend to flood for the purpose of generating electricity that will serve the general public.[58] The resulting lakes are owned and maintained by the utility. Private property rights of lakefront owners typically end at a contour line described in elevation above sea level. Lakefront owners are not typically littoral owners such that they would acquire any rights in and to the lake or its waters.

Utilities may also acquire flooding easements over land when creating these lakes. The North Carolina Case of Zagaroli v. Pollock examines real property issues along the shores of Lake Hickory which was created by Duke Power or its predecessors.[59] The relevant holding there was that Duke Power held only flooding easements and, although they did have the power to condemn, they were not permitted to grant an easement for a marina to a third party over lands subject only to the flooding easement.

Thus, when considering waterfront development of boat slips and marinas on lakes created by utilities for hydro-generation there are two primary concerns that must be addressed. First, one must understand the means utilized by the utility for creating the lake. The answer is either that the utility exercised its ability to condemn property and owns the lake bed or that the utility simply collected flooding easements from the various fee owners beneath the lake. One cannot assume that the utility is capable of conveying interests sufficient to allow the construction of a dock or pier.

One must also understand what sort of conveyance by the utility will be necessary to allow the construction of the dock. Commonly, utilities grant easements for the purpose of allowing the construction of docks and marinas. Obviously, the terms and conditions of such easements are an important concern as they typically limit the size and type of construction permitted within the easement.

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[58] 16 U.S.C. §814.

[59] Zagaroli v. Pollock, 94 N.C. App. 46, 379 S.E.2d 653 (1989).

On lakes created by the Army Corps of Engineers[60] development of all kinds is typically limited. There are several Corps lakes in North Carolina but extensive waterfront development of private boat docks and marinas is only present on John H. Kerr Reservoir. Falls Lake and Lake Jordan are operated as State Parks though they were created by a Corps dam. W. Kerr Scott Reservoir is operated by the Corps but development along its shores is very limited. It is sufficient to say that any development on a Corps operated lake must be permitted by the Corps itself.[61]

At John H. Kerr Reservoir, water dependent development is permitted in certain areas of the lakeshore by the Corps. Any party intending to build a boat dock or marina must obtain a Shoreline Use Permit from the local Corps office. Permits are valid for a period of five (5) years and must thereafter be renewed for a fee. All applicants must have deeded (deed, easement, or lease for a term of at least 5 years) access to within 500 feet of the proposed location of the private use. The Corps has established a very helpful website at which potential applicants can review the Corps Shoreline Management Plan and requirements for private development. The website is at: http://www.saw.usace.army.mil/jhkerr/index.htm.

Slips on Public Trust Waters - Marinas and Boataminiums

Type One – The Membership

The membership marina is one in which everything, the land (usually including the easement in submerged lands issued pursuant to NCGS §146-12), the docks, the clubhouse and equipment, is owned by some entity, usually a corporation or LLC. The buyer of one of these units receives a "membership certificate" that may look very much like a deed. Such certificates are frequently recorded like a deed. At best, though, the buyer receives some sort of personal property interest in an organization or perhaps a mere contract to provide a boat slip. The buyer typically does not get any real property interest in the form of an easement or undivided interest in the land and often the membership interest may be suspended for non-payment of dues or assessments.

A search of the public record may reveal what looks like a chain of title, but typically only the owner entity can issue the membership certificate. The assignability of such certificates is often limited so one would be advised to contact the owner entity prior to closing a transaction involving the membership certificate. Transfers of these interests often require joinder of the owner entity in order to be effective or the issuance of a new certificate in the purchaser's name, and often a transfer fee is required.

Because the interest conveyed is contractual in nature, it is doubtful that a note given to purchase such a slip can be secured by a deed of trust. The slip owner has no real property interest to convey. The maker of the note should be secured by retaining the original

[60] W.K. Scott, Falls and J.H Kerr Reservoirs are Corps of Engineers Lakes.

[61] See footnote 41, supra for reference to the General (Regional) Permit authorizing maintenance, repair and construction activities for lakes and reservoirs owned and/or operated by the Corps (Wilmington District).

certificate of membership (much as they would do with a motor vehicle title). It is also strongly advised that the lender secure the assurances of the owner entity that lender's security interest in the certificate will be recognized should the slip owner default. It is also advised that the marina entity should agree to notify the lender in the event that the membership is terminated or suspended in accordance with the terms and conditions contained in the certificate or other organizational documents. Additional security may be had by having the lender file a UCC financing statement in the county in which the marina lies.

Because title to the real property remains vested in the owner entity, the careful attorney will also consider whether the real property is encumbered. If the owner entity took a large development loan prior to marina construction, the deed of trust securing that loan should be of concern. That lender must acknowledge the contractual interests of the slip purchasers in much the same way one would have the lender acknowledge a lessee under a lease. Judgments, other liens and title matters that may result in a change in title to the fee must similarly be addressed.

A similar consideration is whether the membership certificate is an insurable real property interest. Pursuant to the authorizing statute, title insurers in North Carolina can only issue title policies to insure real estate.[62] If the slip owner holds no real property interest then it would be inappropriate for an insurer to insure the slip.

Type Two – Appurtenant Boat Slips

Here, the slips and the land adjacent to the water will be owned by the developer or owner's association. The client will get a deed that conveys a lot in the subdivision "together with the exclusive use of boat slip number X". The restrictive covenant may or may not provide an easement for access to and from the water and may provide that the marina area will be a part of the common areas of the subdivision.

This type of conveyance may give the slip owner some kind of real property interest. Much depends on the covenants establishing the subdivision and/or the marina. Sometimes the slip owners are grouped together in a marina owner's association that controls the slip assignments and is responsible for the maintenance of the marina. The marina owner's associations are typically established as either a separate owner's association or as a subgroup within the master HOA for the development.

The HOA or the marina association usually takes title to the riparian lands comprising the marina complex. The easement in submerged lands granted by the State is also commonly vested in one or the other of the associations.

Hey, did someone say 'appurtenance'?

In nearly all of the developments of this type considered, the slip is described as an appurtenant interest to the lot to which it is assigned. However, covenants frequently fail to consider when and how a slip can be transferred independently of the lot. It is advisable that

[62] See N.C.G.S §58-26-1(a).

the drafter consider whether slips which are described as appurtenances can be conveyed to persons who are not owners within the subdivision.

We all remember from law school that appurtenant easements transfer with title to the benefited property whether or not expressly conveyed. One would be wise not to make the leap of faith that the slip would convey similarly. Remember that there is still the question of whether the slip is actually a real property interest or just a contractual or personal property interest. Covenants frequently (and should) expressly address whether an "appurtenant" slip is conveyed, conveyed unless reserved, or not conveyed with the benefited lot. Remember also that slips are frequently "assigned" by an owner's association and whether or not they convey as appurtenances, one may have to secure an assignment of the slip from the HOA. The discussion of such assignments would be very much the same as the discussion above of membership certificates.

Insurability and securitization of the slip for the lender are two issues that must be considered on each development and should not be considered generally (remember, there are no rules!). Frequently, a deed of trust will not provide adequate security in the slip. As has been stressed, careful consideration of the covenants should be given when weighing such issues.

Editorial

I generally favor least of all the assignment of slips as appurtenances. So much is left to question and the status of the slip as either real or personal property is rarely clear even though the term "appurtenance" has the distinct ring of a term describing a real property interest. The recommendation for avoiding this issue is to choose one of two better alternatives. First, all slip assignments can be made by the association as member certificates (discussed herein above). Second, the marina and its accompanying real property can be set up as a condo or a PUD operating under the master HOA. Both arrangements have their weaknesses as discussed herein but either option is preferred to the transfer of slips under term "appurtenance".

Type Three – The Condominium of Water (and you thought only a boat was a hole in the water in which to throw money!)

The North Carolina condominium statute does state that "real estate" may include "spaces that may be filled with air or *water* [emphasis added]".[63] If there is a current trend in the design of marinas, it would be to make them condominiums in accord with Chapter 47C of the North Carolina Statutes. The unit in these condominiums is literally a column that is usually filled with water at the bottom and air at the top. The owner of a unit usually acquires an allocated real property interest in the lands adjacent to the water and thereby the important riparian or littoral rights that accompany such ownership. The finger piers are often designated as limited common elements for the benefit of the unit owners on either side.

[63] N.C.G.S. §47C-1-103(21).

The advantage here is that there is a deeded real property interest in the lands adjacent to the water. The State owns the bed of the marina as public trust land (although the State may have granted an easement in submerged lands) and the public maintains its right to swim, hunt and fish in the waters.[64] This fact is problematic for title insurers because there is no right to exclude the general public from the slip itself.[65] At a minimum, it is clear that the unit owner can get to and from the water and that he becomes, along with the other unit owners, a riparian owner.

NCGS 146-12 provides for the grant by the State of an easement in submerged lands. As discussed above, such an easement is now required for a major CAMA permit on coastal waters. The issue for the marina developer is that the easement in submerged lands may only be held by the riparian owner and the easement must be transferred to any successor within 12 months of the transfer of the upland property.[66] In a condominium, the upland typically becomes part of the common element owned in undivided interests by the unit owners. A strict reading of the statute would then require that the easement in submerged lands be transferred to the unit owners in their respective shares. To do so would render the Department of Administration as a register of deeds for thousands of partial shares of the easements that it has granted. The Department certainly does not have staff for this and it is doubtful that they would care to try and keep track of so many conveyances. The other possibility, though not in strict compliance with NCGS §146-12 is to transfer the easement in submerged lands to the condominium owner's association. The condominium association is a body composed of the various owners of the undivided interests and one can argue that it has sufficient nexus to the riparian owners to hold the easement on their behalf.

There is great debate as to what type of interest that the purchaser of a condominium boat slip created in public trust waters actually gets. By example, several major title insurers refuse to insure such slips because the feeling is that there is not an adequate real property interest to insure. The argument is that the slip owner does not own the ground under the water and has no right to exclude the public (remember this is public trust land). Further, nearly all title insurers take some exception to the rights of the State in public trust lands and the rights of the general public in and to the waters. Those companies who do not insure slips claim that a policy issued for such a slip, with such an exception, would give coverage in Schedule A of the policy but then remove that coverage in Schedule B. Of course, the courts generally frown upon such practices by title insurers and tend to side with the insureds when an issue arises.

At least some insurers feel that there are sufficient real property interests which may be insured. For example, if the slip owner is a riparian owner, as such, he is entitled to the rights of a riparian owner which include the right to "wharf out" as discussed above. Case law would indicate that this right is clearly a real property interest that benefits the riparian owner. But remember, that case law also indicates that this right is a qualified right, subject to the competing interests of public trust and navigation by the general public. Thus, some exception is necessary to the rights of the public in the waters.

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[64] N.C.G.S. §1-45.
[65] Id.
[66] N.C.G.S. § 146-12(l).

The nature of the interest acquired by the slip purchaser is also a matter of grave concern for the title attorney. One must feel assured that he can properly advise a lender and purchaser as to the nature of the interest that they are acquiring with all of its limitations. The fact that a slip may be "insurable" is not determinative.

Type Four – High Ground Basins

There exist in North Carolina a number of marina basins that have been dredged entirely from privately owned dry ground and then connected by a canal to public trust waters (See Figure 1, right). The nature of the land beneath the waters of such a high ground basin is not certain. However, if one considers the Kaiser Aetna case cited above, it seems that the public trust would not extend to lands submerged by private action for to do so would constitute a taking of private lands. If one assumes that lands submerged by private action indeed remain private, and not subject to public trust, then it would seem that such lands could be subdivided and devised as real property. Indeed this is the popular notion.


Figure 1

Where a dredged basin directly abuts public trust waters there may be some issue as to where the original property line was prior to the dredging activity (See Figure 2, right). This presents a difficult situation occasionally because a portion of the marina may actually lie upon public trust lands. If a portion of the marina does lie over public trust lands then the requirements set out above for marinas on public trust waters would apply to such portion. One is encouraged to have the dry ground surveyed prior to beginning a dredge project to prevent complications from such issues and to obtain an easement in submerged lands for public trust lands beyond the original mean high water mark.


Figure 2

While the popular notion is to consider these basins as private property, there remains some question as to the nature of the rights of the general public in the waters themselves. My own opinion is that the general public may well have the right to float a boat in the waters of the marina without committing a trespass. Admittedly, this may seem incongruous with the thought that the land beneath the basin is private. Perhaps this question goes to the heart of the matter and may someday result in the "test" case on the ownership of high ground basins.

A New Idea

If there is anything in the way of new thinking on the subject it is to attempt to come up with a scheme for development that more clearly defines the interests that can be acquired by a slip purchaser. The scheme of development described below represents an effort to

create an insurable real property interest together with some insurable interest below the high water mark. I am not aware that anyone has yet attempted such a development.

The idea is to create landside interests that are clearly capable of private ownership. The suggestion is to make units on land such as a parking space[67] or a dock box that are conveyed as the unit under Chapter 47C. Each unit would then have an appurtenant boat slip. Docks and marina grounds would be held in undivided shares. Finger piers would be limited common elements devoted to usage by the adjacent slip owners. The riparian land would be held by the unit owner's association as would any easement in submerged lands.

Slips created in this fashion would clearly have a real property interest capable of ownership in fee and without limitations resulting from pubic trust issues. They would be freely assignable and capable of being transferred of record by deeds and deeds of trust.

Title insurers would be able to insure the units which are vested real property interests. Title insurers can also insure the undivided interest in the docks, limited common elements in the finger piers and other appurtenances. Likely, all insurers would continue to except to public trust and to the rights of the public in the waters. However, under this scheme, such an exception would not remove all the coverage given in Schedule A because of the landside interest that is insured. In essence, everything would be insured except the box of water lying between the finger piers.

[67] NOTE: Many county and city zoning ordinances are now requiring that each slip have a designated parking space. Where this is the case, there must be at least one parking space for each slip, making it easy for the attorney to use spaces as units. Obviously, where this is not required, the developer may resist providing enough parking given the value of the land.