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Revamping Dock Regulation in New Hampshire

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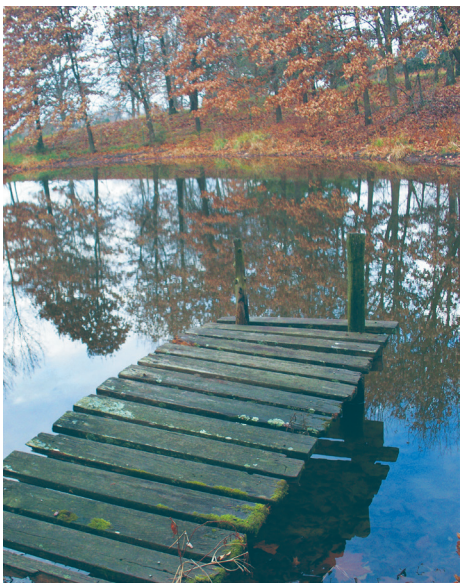

New Hampshire's lakes bring tourists, boating, summer camping – and disputes over docks.

State, local and private interests can collide in disputes over the location or size of a lakeside dock. Common law rights and state or local regulations can come into play, complicating decisions about venue and available remedies. Conflicts involving abutter rights are especially difficult to resolve because they involve private property interests.

Although the state holds the public waters and lakebeds in trust for the public, and has essentially preempted regulation of docking structures, the lack of adequate state resources available to monitor and enforce compliance with dock rules and permits often leaves litigation as the sole means of redress for abutting property owners. The resulting resource burden on property owners, state agencies and the courts raises a question as to whether the current scheme is fair and efficient, or whether it can be improved to create a better balance among private, state and local interests in regulating docks.

Dock disputes usually stem from competing private property interests between abutters. There is a public interest as well –involving the preservation of water resources for public use – in the state's comprehensive regulation of docks and related boating issues. The state is the exclusive steward of public trust rights, including the common law right to boat recreationally. Even though the state holds title to the bed of the great ponds, littoral owners have more extensive rights than the public generally, including the right to use and occupy the waters adjacent to their shore for a variety of recreational purposes. See *Sundell v. Town of New London*, 119 N.H. 839, 844 (1979). Such littoral rights, however, "are always subject to the paramount right of the State to control them reasonably in the interests of navigation …, health and other public purposes." See *Lakeside Lodge, Inc. v. Town of New London*, 158 N.H. 164, 170 (2008) quoting *State v. Stafford Company*, 99 N.H. 92, 97 (1954).

Local regulation of docks, other than public docks, has been preempted by state law, at least with regard to use of docks allowed by the state.

State control over dock and boating issues spans many statutes and agencies, but state wetlands laws and rules administered by the NH Department of Environmental Services comprehensively regulate the siting, construction and repair of docks. See RSA 482-A. Siting and construction is prohibited without a permit from the department, subject to certain exemptions and setback limitations, and detailed procedures and limitations are set forth in both the statute and in department rules. See RSA 482-A:3 and NH Code Admin. R. Chapter Env-Wt 400 et seq. Department rules allow for certain minimum-impact dock projects to qualify for a truncated application and permitting process, or "permit by notification," to provide for expedited construction or repair, as long as all necessary forms are submitted. See RSA 482-A:11, VI; Env-Wt 506.

The issuance of a dock permit, regardless of the process used, places the state's "imprimatur" upon the permittee's use of the dock. See *Lakeside Lodge*, supra, at 170.

Conflicts between abutters can arise when pre-existing, unpermitted docks are repaired or replaced under "grandfathering" principles implicit in the statute and expressly set forth in department rules. See, e.g., Env-Wt 303.04(v); Env-Wt 506.01(a)(5). For example, dock owners may replace a grandfathered dock without complying with statutory setback rules as long as they do not change the size or configuration of the dock, which would trigger current permitting requirements. Problems arise when the replacement dock is larger or clos-

er, from the abutter's perspective, which can raise issues of encroachment, trespass and private nuisance, among others. Claims regarding grandfathered rights and violation of wetlands laws can implicate state permitting and enforcement, as well as private property interests. See, e.g., RSA 482-A:11 and RSA 482-A:14-b. They are usually complex and may implicate private insurance policies. Proving facts is difficult, at best. Researching historical documents, aerial photos and other evidence of grandfathered status is resource-intensive and expensive. Defense of private property interests, including littoral rights, can trigger claims for injunctive relief and money damages, as well as claims related to property boundaries and easements.

Although the department is prohibited from issuing permits that "infringe on the property rights or unreasonably affect the value or enjoyment of property of abutting owners," this prohibition does not always address the issue of unpermitted expansion of grandfathered docks. Sometimes permits are, obtained through expedited permitting processes that do not allow for careful oversight. See RSA 482-A:11, II. The very issuance of a permit under expedited processes may complicate the venue in which an abutter can seek relief.

Only the superior courts have jurisdiction to resolve disputes between persons claiming an interest in real property. See *Gray v. Sidel*, 143 N.H. 327, 330 (1999), citing RSA 498:5; *Radkay v. Confalone*, 133 N.H. 294, 297 (1990). Any appeal of a department permitting decision must be filed with the department's wetlands council. See RSA 482-A:10; RSA 21-O. Filing a complaint with the department can provide a basis for permit suspension, revocation or modification of the permit, but is subject to challenge by the permittee. See Env-Wt 508.02.

Each potential avenue for abutter relief presents obstacles. Abutters whose property interests are allegedly harmed by unpermitted dock expansion may be placed in the position of having to prove, by a preponderance, that the department acted unlawfully in issuing a permit, even though the problem may lie in the dock owner's application. See RSA 482-A:10; Env-WtC 200 et seq.

The practical fact is that triggering resource-intensive agency permit revocation proceedings in a dispute over a small dock structure with little or no environmental impact is unlikely to occur. Filing private nuisance or other property-based civil claims, without the special status for obtaining injunctive relief that is provided to local conservation commissions, may involve equitable considerations that weigh in favor of the dock owner. See RSA 482-A:14-b, II.

The current statutory scheme and avenues for abutter relief do not necessarily represent the best approach for reaching a fair balance between public and private interests. While vigilant state oversight could resolve many abutter disputes by preventing potential violations, agency resources are limited. Two agency wetlands inspectors are available to investigate all alleged wetlands violations throughout the state, including large wetlands dredge and fill violations that can cause significant harm to the environment. As a result, the department's enforcement priorities usually do not include investigation and enforcement of dock complaints, unless a violation is a high priority for other reasons.

In public protection terms, docks present a challenge not only for abutters, but also for all citizens who seek to preserve the quality, aesthetics and public use of New Hampshire's great ponds. Docking structures, while arguably harmless to the environment, can impact the lakebed, create navigational hazards and adversely affect the landscape. From the perspective of abutters, the tension between private and public interests creates difficulties in seeking and obtaining remedies to address private property interests.

Possible options include increasing agency enforcement budgets, shifting responsibility to localities or removing all permitting authority from governmental entities, all of which would require a fundamental shift in legislative direction. At the very least, it might be time for some meaningful debate on whether there is any room for improvement.

This article was condensed. The complete article is published with the online version of Bar News. *Maureen D. Smith, practices with the Concord law firm of Orr & Reno, and is a member of its environmental, energy and legal ethics practice groups. Petar Leonard, a third-year law student at UNH School of Law, assisted in preparing this article.*