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RECENT DECISIONS



**CASE NOTE: ZONING—RIPARIAN RIGHTS—
IMPROVED LANDS UNDER NAVIGABLE WATERS
SUBJECT TO LOCAL ORDINANCES.
HARBOR ISLAND MARINA v. BOARD OF COMMISSIONERS, 286 Md. 303, 407 A.2d 738 (1979)**

by Harold Norton

Baltimore City and most of Maryland's sixteen waterfront counties have enacted ordinances that in some way regulate the exercise of the common law right of a riparian property owner to "wharf out".¹ These ordinances are the tools that enable local decision makers to promote "the health, safety, morals (and) . . . general welfare"² along the 3,190 miles of shoreline bordering 2,429 square miles of navigable water in this state.³ By restricting the number, size and use of structures built onto

submerged land, a county may assure structural conformity with the general characteristics of the surrounding zone.⁴

The foregoing revelation hardly seems earthshaking when one considers the disruptive effect even a small commercial marina might have on a residentially-zoned neighborhood.⁵ Prohibition of unrestricted development onto underwater lands properly avoids permitting "a pig in the parlor instead of in the barnyard."⁶

Justification of these restrictive means requires more than merely pointing to the good result, however, when one considers that: no statute explicitly authorizes the zoning of underwater lands;⁷ the lands beneath our navigable waters do not belong to riparian owners or the counties, but to the state;⁸ and that without such explicit authorization state owned land is not subject to local zoning restrictions.⁹ Despite these apparent limitations, the Court of Appeals of Maryland, in *Harbor Island Marina v. Board of Commissioners*, 286 Md. 303, 407 A.2d 738 (1979), re-examined the state's long, unique historical treatment of riparian rights in order to ratify this exercise of local authority. While recognizing that all lands beneath navigable waters originally belong to the state, the court held that once a riparian property owner exercises his right to improve underwater lands bordering his property, his rights in those lands become "tantamount to complete ownership",¹⁰ and, like other property rights, may be subject to local zoning laws.¹¹

The dispute in *Harbor Island* centers on the authority of the Calvert County Commissioners to restrict development on lands beneath Solomons Harbor.¹² The trial court, through a declaratory judgment, characterized the restrictions as valid regulation of riparian rights under Article 66B of the Maryland Annotated Code. The Court of Special Appeals reversed, indicating that the circuit court lacked jurisdiction to hear the matter before the marina had exhausted its administrative appeal.¹³ The

¹E.g., ANNE ARUNDEL COUNTY CODE §§ 13-321 *et seq.* (1969); CALVERT COUNTY ZONING (1979); CHARLES COUNTY ZONING ORDINANCES art. III(a)(13)(1), art. IV(a)(1), art. V(a)(15)(1) (1974); DORCHESTER COUNTY ZONING ORDINANCES § 6.01, 57 (1977); KENT COUNTY ZONING ORDINANCES art. 4 §§ 7(2)(a) thru 8; art. 5 §§ 7.1 *et seq.* (1975); QUEEN ANNES COUNTY ZONING ORDINANCES § 2.10, § 17.13 (1974); SOMERSET COUNTY ORDINANCES § 5(7) (1976); TALBOT COUNTY CODE § 19-8(g) (1977); *c.f.*, BALTIMORE COUNTY BUILDING CODE §§ 5-8 (1978). At Common Law the right to construct a wharf to obtain access for navigation and travel was recognized as incident to the ownership of the riparian upland. *Railroad Co. v. Schurmeir*, 74 U.S. (7 Wall) 272, 289 (1868); *Balto. & O.R.R. Co. v. Chase*, 43 Md. 23, 35-36 (1875). This practice is now permitted by statute in most states. See 1 R. Clark, *Waters and Water Rights* § 43 (1967) [hereinafter 1 R. Clark]; MD. NAT. RES. CODE ANN. § 9-201 (1979 Cum. Supp.).

² These virtues, to which all zoning ordinances must purportedly aspire, are espoused in the grant of zoning power to the various political subdivisions by MD. ANN. CODE art. 66B, § 4.01 (non-charter counties); art. 25A, § 5(X) (1979 Cum. Supp.) (charter counties) and art. 66B, § 2.01 (1978) (Baltimore City).

³Md. Dept. of Gen. Services, *Maryland Manual* 1979-80, 1 (1979).

⁴ See e.g., the ordinances cited in note 1, *supra*.

⁵ See e.g., *Taxpayers' Ass'n. v. Bd. of Zoning Appeals*, 301 N.Y. 215, 93 N.E.2d 645 (1950). (Variance improperly granted where proposed marina would alter character of existing residential neighborhood); *c.f.*, *Long Island Court Homeowners' Ass'n. v. Methner*, 74 Mich. App. 383, 254 N.W.2d 57 (1977) (expansion of existing marina in residential district enjoined as a nuisance).

⁶ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

⁷ The zoning powers granted to political subdivisions by the legislature refer only to "land" or "lands". See statutes cited in note 2 *supra*.

⁸ MD. DECL. RTS. art. 5; *Caine v. Cantrell*, 279 Md. 392, 396; 369 A.2d 56, 58 (1977). See, *Shively v. Bowlby*, 152 U.S. 1, 14-21 (1894); Notes 19 and 25, *infra*.

⁹ *City of Baltimore v. State*, 281 Md. 217, 378 A.2d 1326 (1977).

¹⁰ *Harbor Island*, 286 Md. at 320, 407 A.2d at 747.

¹¹ *Id.*, 286 Md. at 322, 407 A.2d at 748.

¹² CALVERT COUNTY, MD., ZONING ORDINANCES, art. 15 (1976).

¹³ *Harbor Island Marina, Inc. v. Bd. County Comm'rs*, Md. App. (filed Dec. 14, 1978); see *Maryland — National Capital Park & Planning Commission v. Washington National Arena*, 282 Md. 588, 594-595, 386 A.2d 1216, 1222 (1978).

Court of Appeals ruled that a declaratory judgment was available to challenge the "power or authority" of the commissioners by "direct [constitutional] attack" and took the case to decide that challenge.¹⁴

Because the rights in navigable waters often vary from state to state it is difficult to generalize the effect that zoning laws may have on the lands beneath them.¹⁵ Courts that have considered whether tidal lands may be subject to local zoning have focused on the nature of ownership rights in both underwater land and the adjacent riparian upland.

Absent pre-emptive statutory restrictions, a political subdivision may regulate the use of privately owned underwater lands within its borders.¹⁶ A contrary rule would impair the legitimate purposes of zoning restrictions at the water's edge. Consider the paradigm commercial marina erected adjacent to a residential neighborhood. Such unrestricted offshore development would substantially alter the character and uniformity sought in the immediate upland zone. The exemption of private underwater lands has concerned other courts¹⁷ and was rejected in *Harbor Island*:

The purpose of the zoning law is to promote health, safety, and general welfare of the public . . . "The very essence of zoning is territorial division according to the character of the land and . . . their peculiar suitability for particular uses, and uniformity of use within the zone" . . . Thus, to limit the power to zone to only the dry land within a county places an unwarranted restriction on the exercise of the police power . . .¹⁸ (citations omitted)

For the most part, ownership in the soil under navigable waters is in the states for the benefit of their citizens.¹⁹ At the same time, the power of a political subdivi-

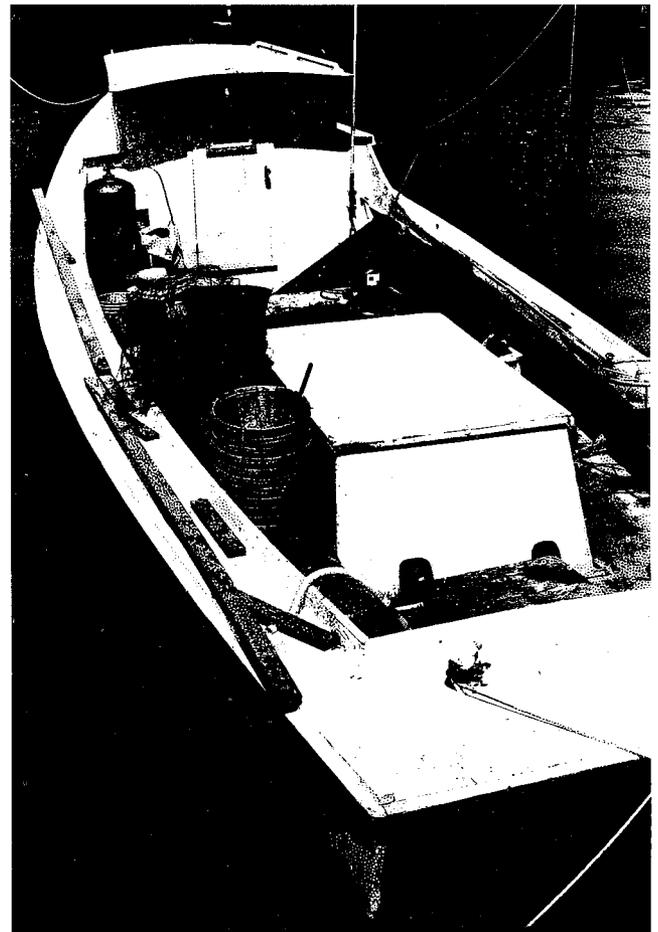
vision to restrict land use through zoning is granted by the state and unless the enabling legislation indicates otherwise, it is presumed that state owned land will not be subject to zoning restrictions.²⁰ Focusing only on the restriction of the underwater land itself, it becomes apparent that local restrictions on lands under navigable waters must be subject to the paramount authority of the land-owning state.²¹

By emphasizing the power of local authorities to restrict the use of land within its boundaries, including all of the rights that attach to that land, some courts have ignored the issue of "sovereign immunity" from zoning law. The decisions stress the right of access to navigable waters bounding property that riparian or littoral owners possess

federal government to regulate navigation. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824); see *Philadelphia Company v. Stimson*, 223 U.S. 605, 634-636 (1912).

²⁰ Eg., *Aviation Services, Inc. v. Board of Adjustment*, 20 N.J. 275, 282, 119 A.2d 761, 765 (1956); *City of Baltimore v. State*, 281 Md. 217, 378 A.2d 1326 (1977); c.f., *St. Louis County v. City of Manchester*, 360 S.W.2d 638 (Sup. Ct. Mo. 1962) (scope of city's authority is a significant factor to be considered where immunity from county zoning is sought).

²¹ *Erbstrand v. Vercchiola*, 35 App. Div. 564, 313 N.Y.S.2d 548 (1969), *aff'd after remand sub nom, Erbstrand v. Rubin*, 33 N.Y.2d 787, 350 N.Y.S.2d 653, 305 N.E.2d 775 (1970).



¹⁴ 286 Md. at 309, 407 A.2d at 741.

¹⁵ *Shively v. Bowlby*, 152 U.S. 1, 26 (1894); See generally, *Id.* at 14-21; 1 R. Clark, *supra*, § 40.2 at 248-49. Rights in navigable waters may also depend on more local matters. See, e.g., *Town of Islip v. Powell*, 78 Misc.2d 1007, 358 N.Y.S.2d 985 (1974). (Nassau and Suffolk counties immune from state navigation law); c.f., MASS. GEN. LAWS ANN. ch. 91 § 35 (1974) and N.H. REV. STATS. ANN. ch. 271 § 20 (1977 Cum. Supp.) (public ownership in ponds larger than 10 acres).

¹⁶ 2 Anderson, *American Law of Zoning* § 9.13 at 114 (2d ed. 1976); See *Penning v. Owens*, 340 Mich. 355, 65 N.W.2d 831 (1954); c.f., A.L.I. A Model Land Development Code § 1-201 (6) (April 1974 Draft) ("land includes the earth, water and air, above below or on the surface").

¹⁷ *Brady v. Board of Appeals of Westport*, 348 Mass. 515, 204 N.E.2d 513 (1965) (nonconforming use could not be enlarged by extending pier on privately owned land); *Wynn v. Margate City*, 9 N.J. Misc. 1324, 157 A. 565 (1931) (privately owned underwater land subject to building restrictions); *Town of Islip v. Powell*, 78 Misc.2d 1007, 358 N.Y.S.2d 985 (1974) (underwater lands exempt from state control may be subject to zoning).

¹⁸ 286 Md. at 312, 407 A.2d at 743.

¹⁹ 1 R. Clark, *supra*, § 36.4(A); See generally, *Shively v. Bowlby*, 152 U.S. 1, 14-21 (1894). This ownership is subject only to the right of the

as an interest incident to the upland.²² In this light, the building of an improvement is seen as an extension of the land that it serves and, like the exercise of other property rights, may be subject to valid zoning restrictions. Under this analysis, valid zoning restrictions cannot be defeated by the exercise of a right that, but for the upland property ownership, would have no independent existence.

The Court of Appeals in *Harbor Island* used a two part analysis in deciding that Calvert County was empowered to zone lands used for improvements into navigable waters. The first involved the construction of section 4.01 of Article 66B of the Maryland Annotated Code, which authorizes the zoning of "land or lands."²³ The Court noted that in view of the broad powers generally given to the county by the statute, a restriction of its meaning to encompass only dry land would be unwarranted and, like other courts, it recognized that "the reasons for zoning do not terminate at the shoreline. . . ."²⁴ This construction alone, was not found sufficient to uphold the county's power to zone lands under navigable waters in view of their ownership by the state.²⁵ Accordingly, the second part of the Court's analysis focused on the nature of the statutory right of Maryland riparian property owners to "wharf out."

In order to encourage commercial development of the port of Baltimore during Maryland's growth as a proprietary colony, Cecil Calvert, Lord Proprietor, in the Acts of 1745, provided that "[a]ll improvements" made into the water by riparian owners became the property of that upland owner.²⁶ A similar provision was enacted in 1862

to apply to the navigable waters of the entire state²⁷ and in 1973 was recodified in Section 9-201(a) of the National Resources Code: (a) A person who is the owner of land bounding on navigable water . . . may make improvements into the water in front of the land to preserve that person's access to the navigable water or protect the shore of that person against erosion. After an improvement has been constructed, it is the property of the owner of the land to which it is attached

Rather than focus on its previous recognition that riparian rights are "subject to general rules and regulations (properly) imposed by public authorities,"²⁸ the court went on to construe Section 9-201(a) as it had its predecessors.

Reverting to a consideration of the present case, what we have before us is a policy decision which has existed for over two centuries—when improvements are made into the navigable waters by a riparian proprietor, the land utilized in their construction, which prior to completion belonged to the State, for all practical purposes becomes a part of his fast land. Thus, any limitation upon the county's ability to zone which arises because the land in question belongs to the State does not apply to improvements attached to riparian land.²⁹

Therefore, the "lands" that may be subject to valid local zoning ordinances include those utilized in constructing improvements onto navigable waters. The statutory right to wharf out, "when exercised, is nothing more than extension of the shore land."³⁰

The result reached by the court in *Harbor Island* is consistent with the basic purposes of local zoning and land use control in allowing a political subdivision to regulate riparian activity that is intimately associated with the properly zoned upland. By construing section 9-201(a) as providing a statutory grant of the land utilized by the riparian owner in erecting an improvement, the court concluded that state lands are not affected by local restrictions on such improvements. While other avenues of analysis may lead to the same result,³¹ the decision is a necessary and reasonable interpretation of the general zoning authority granted to Maryland's political subdivisions.

²⁷ 1862 Laws of Maryland ch. 129.

²⁸ *Causey v. Gray*, 250 Md. 380, 387, 243 A.2d 575, 581 (1968).

²⁹ 286 Md. at 322, 407 A.2d at 748.

³⁰ 286 Md. at 323, 407 A.2d at 749.

³¹ Zoning restrictions on riparian improvements may be characterized as merely restricting the use of the upland property, see note 22 *supra*, and involving only private property. Argument may also be made that what the counties are attempting to control is not the state's use of the land but rather use by private upland owners. In this context, the issue of immunity from local zoning law does not arise. See, *Youngstown Cartage Co. v. North Point Peninsula Community Coordinating Council*, 24 Md. App. 624, 627-28, 332 A.2d 718, 719-20, cert. granted 275 Md. 758 (1975), appeal dismissed Aug. 1, 1975 (non-compliance with Md. Rule 830).

²² "To the extent that by zoning regulations a municipality may limit the uses to be made of property generally, it may also by zoning regulations limit the exercise of riparian rights." *Poneleit v. Dudas*, 141 Conn. 413, 106 A.2d 479, 481 (1954); accord *Brady v. Board of Appeals of Westport*, 384 Mass. 515, 204 N.E.2d 513, 519 (1965); *Wynn v. Margate City*, 9 N.J. Misc. 1324, 157 A. 565, 566-67 (1931).

²³ The sole reference concerning the territorial reach of the county's power may be found in the language which grants the authority "to regulate and restrict the . . . use of buildings, signs, structures and land" and the power "upon the zoning use of any land or lands . . . [to] impose such additional restrictions . . . as may be deemed appropriate to preserve . . . the general character and design of the lands and improvements being zoned . . . or of the surrounding or adjacent lands and improvements" Md. ANN. CODE art. 66B, § 4.01(a) - 4.01(b); 286 Md. at 312, 407 A.2d at 743.

²⁴ 286 Md. at 319, 407 A.2d at 747.

²⁵ Upon the birth of Maryland as a proprietary colony, lands under navigable waters were granted to Caecilius Calvert, Lord of Baltimore, as Lord Proprietor by King Charles I. Under Article V of the Constitution of Maryland, title to these lands vested in the state as a public trustee for the benefit of its citizens. *Kerpelman v. Board of Public Works*, 261 Md. 436, 445, 276 A.2d 57, 61, cert. denied, 404 U.S. 858 (1971). State owned lands are not subject to local zoning law. *City of Baltimore v. State*, 281 Md. 217, 378 A.2d 1326 (1977); accord, *Erbstrand v. Vecchiolla*, 313 N.Y.S.2d 548, 35 App. Div. 564, aff'd after remand sub nom *Erbstrand v. Rubin*, 33 N.Y.2d 787, 350 N.Y.S.2d 653, 305 N.E.2d 775 (1970) (state-owned lands under navigable waters).

²⁶ 1745 Laws of Maryland ch. 9.