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Overview Of Local Government Surface Water Rights In North Carolina

Municipal Attorneys' Conference

August 2009

Presented by Glenn Dunn

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Introduction

> Regulation of water use, conservation of this invaluable natural resource, and abatement of water pollution are subject to common law rules as well as local, state, and federal regulation. The common law developed intricate rules protecting private landowner rights to the use and quality of waters…. The North Carolina General Assembly has enacted comprehensive and sophisticated legislation regulating water use, conservation, and pollution control.

Biddix v. Henredon Furniture Industries, Inc., 76 N.C. App. 30, 34-35, 331 S.E.2d 717, 720-721 (1985).

The current legal landscape regarding the right to use surface water in North Carolina has become an even more complex combination of court decisions establishing rights of riparian owners to reasonably use surface waters and defining public trust and prescriptive rights interacting with statutes creating the right of municipalities to excess water they impound and establishing important regulatory programs. This paper provides an overview of the common law rules governing surface water rights. Other speakers will address in more detail local governments' rights to impounded surface waters and the regulatory programs applicable to surface waters.

I. Common Law - Riparian Rights, and the Reasonable Use

A "riparian" right is a right "[b]elonging or relating to the bank of a river or stream…" *Weeks v. North Carolina Dept. of Natural Resources and Community Development*, 97 N.C. App. 215, 388 S.E.2d 228, 229 n.1, (1990). Such rights can include rights to have access to water, wharf out to navigable water, keep accretions, and use water; *see also Dunlap v. Carolina Power & Light Co.*, 212 N.C. 814, 819, 195 S.E. 43, 46 (1938) (every riparian owner has a property right to reasonable use of running water). *See, e.g., Matter of Mason ex rel. Huber*, 78 N.C. App. 16, 18-19, 337 S.E.2d 99, 104 (1985); *see also, Biddix v. Henredon Furniture*

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Industries, Inc., 76 N.C. App. 30, 34-35, 331 S.E.2d 717, 720-721 (1985). A "use" of water generally refers to the diversion of water flow from a stream when that water is not returned to the natural flow for the use of downstream riparian landowners. *Sherill v. N.C. State Highway Commission*, 264 N.C. 643, 648, 142 S.E.2d 653, 657 (1965).

These rights to various uses of the water are vested rights, but the uses must be reasonable. In sum, every riparian landowner has a right to use the "natural flow" of the surface water body, subject to the same right of reasonable use that is vested in all other riparian landowners.

> [A] riparian proprietor has the right of their flow past his lands for ordinary domestic, manufacturing, and other lawful purposes, without injurious or prejudicial interference by an upper proprietor. (citation omitted) … [A] riparian proprietor is entitled to the natural flow of a stream running through or along his land in its accustomed channel, undiminished in quantity and unimpaired in quality, except as may be occasioned by the reasonable use of the water by other like proprietors….

Smith v. Town of Morganton, 187 N.C. 801, 802-803,123 S.E. 88, 89 (1924); *see also, Dunlap v. Carolina Power & Light Co.*, 212 N.C. 814, 195 S.E. 43 (1938). This principle has been applied continuously in N.C. courts, and as recently as 2004. *Coastal Plains Utils., Inc. v. New Hanover County*, 166 N.C. App. 333, 601 S.E.2d 915 (2004).

Because of its foundation on the doctrines of "reasonable uses", the principle of riparian rights obviously is very flexible and, consequently, vague and unpredictable. However, there are certain bedrock principles that apply to the origin and use of these rights.

A. The land must be in actual contact with the water. Consequently, a riparian right is inseparably annexed to the riparian land, and not to the use or appropriation of the water itself. *Smith v. Morganton*, 187 N.C. at 801, 123 S.E. at 89. In *Young v. City of Asheville*, 241 N.C. 618, 86 S.E.2d 408 (1955), a lessee irrigated a 12-acre farm field that was separated from the source stream by a strip of land on which a railroad was operated. Since the irrigated field did

not actually contact the stream, it was not riparian, and the lessee had no right to recover for crop damage caused by a sewage spill into the stream.

B. A riparian owner may make any "beneficial use of water." Legitimate uses include "any purpose to which it can be beneficially applied." *Harris v. Norfolk & Western Railway Company*, 153 N.C. 542, 544, 69 S.E. 623, 624 (1910). The beneficial use must be "reasonable," depending upon its impact on other uses. *Id.* There are, however, at least suggestions in some cases that a narrow set of "domestic" uses might be reasonable per se, regardless of impact on other users. *See, e.g., Pernell v. Henderson,* 220 N.C. 79, 16 S.E.2d 449 (1941) (rejecting town's argument that it can divert entire flow of stream because its use is domestic). Uses that have been found reasonable include industrial, domestic and agricultural uses. *See e.g. Williamson v. Lock's Creek Canal Co.*, 78 N.C. 156 (1878) (listing reasonable uses and including industrial, domestic, and agricultural uses). N.C. courts have rejected the idea that there exists any rigid hierarchy among "reasonable uses," and that any use found to be reasonable could be any more reasonable than another, thus taking precedence. No reasonable use is granted any greater deference than another. *Pernell*, 220 N.C. at 82, 16 S.E.2d at 451 (holding that an upstream owner using the stream for drinking water did not take precedence over a downstream manufacturer). However, see following section relating to "balancing of harms," *infra*.

C. Riparian Rights are Not Transferable.

In *Young v. Asheville*, the Court cited the "indispensable requisite of… actual contact of land with water," *Young*, 241 N.C. at 622, 86 S.E.2d at 411, that would appear to rule out transfer of riparian rights other than with the land. *But see Gaither v. Albemarle Hospital*, 235

N.C. 431, 445, 70 S.E.2d 680, 691 (1952) (riparian landowner can grant right of *access* to others).

D. Reasonable Use Requires Balancing of Harms

A central component of the reasonable use rule is a balancing of harms among users, which in North Carolina cases, is often expressed in terms of "material damage." *Williamson v. Lock's Creek Canal Co.,* 78 N.C. 156 (1878). Thus, a riparian right does not include a right to be free of any and all injury to use of water. However, a right of action accrues from the taking of it in such unreasonable quantity as to materially, substantially injure the lower proprietor in some legitimate use he is making of the water.

Further, the material damage principle is used to determine reasonableness in relation to the characteristics of the water resource subject to competing uses. *Harris v. Norfolk & Western Railway Company,* 153 N.C. 542, 69 S.E. 623 (1910).

E. Relationship to Public Trust Rights

Public trust rights in waters of the State exist in concert with the rights of riparian property owners. Surface waters are typically subject to exercise of public trust rights, such as fishing and navigation. Riparian rights can usually be exercised consistently with public trust rights, however, statutes are sufficiently clear that a conflict between the two should be resolved in favor of the public trust rights.

II. Local Governments Do Not Have Unique Riparian Rights.

In the case of *Pernell v. Henderson*, 220 N.C. 79, 16 S.E.2d 449 (1941), the Supreme Court upheld the trial court's denial of a motion to dismiss where the plaintiff mill owner alleged that the City of Henderson's water supply impoundment and intake had substantially reduced the flow to a downstream mill and the City's sewers had filled his millpond with sewage. Regarding its water withdrawal, the City argued that, as a riparian owner, the City had a right to divert "for

domestic purposes" the entire flow of the stream "without accountability to plaintiff, so long as its use for such purpose is reasonable," *Pernell*, 16 S.E.2d at 451, 220 N.C. at 80-81, and that the plaintiff had thus failed to state a cause of action. The Court rejected that argument, as follows:

> It has been held with practical unanimity that a municipal corporation, in its construction and operation of a water supply system, by which it impounds the water of a private stream and distributes such water to its inhabitants, receiving compensation therefore, is not in the exercise of the traditional right of a riparian owner to make a reasonable domestic use of the water without accountability to other riparian owners who may be injured by its diversion or diminution. The use of the waters of a stream to supply the inhabitants of a municipality with water for domestic purposes is not a riparian right." 67 C.J. 1120. "The weight of authority *** holds a municipal corporation civilly liable for diverting the waters of a private watercourse for the purposes of a public water supply, either with or without legislative authority." 19 R.C.L. 1096. "A municipal corporation will be liable for diverting the waters of a stream or watercourse and depriving lower riparian owners of the use thereof." McQuillin, Municipal Corporations, Vol. 6, pp. 1251, 1252.
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> The precise question raised by defendant is dealt with by a leading authority as follows: "The rule giving an individual the right to consume water for his domestic needs is founded upon the needs of the single individual and the possible effect which his use will have on the rights of others, and cannot be expanded so as to render a collection of persons numbering thousands, and perhaps hundreds of thousands, organized into a political unit, a riparian owner, and give this unit the right of the natural unit. The rule, therefore, is firmly established that a municipal corporation can not, as riparian owner, claim the right to supply the needs of its inhabitants from the stream." Farnham, Water and Water Rights, Vol. 1, p. 611.

Pernell, 220 N.C. at 81, 16 S.E.2d at 451.

Pernell v. Henderson has understandably caused some anxiety and even triggered legislation. The case can be read at least three ways: (1) rejecting any municipal ownership of riparian rights, despite municipal ownership of riparian land (e.g., land where impoundments, pumping stations, and other water diversion facilities are located); (2) rejecting the application to municipal use of a purported rule that makes domestic use "reasonable" regardless of the consequences to downstream riparians; or (3) rejecting the expansion of the concept of "reasonable use" to permit greater harm to downstream riparians based on the fact that a

municipality serves a large population. The first would appear to be inconsistent with the underlying rationale for the riparian doctrine: river bank ownership. Both the second and third seem consistent with riparian doctrine generally, and are consistent with the earlier case of *Harris v. Norfolk & Western Railway Company*, 153 N.C. 542, 69 S.E. 623 (1910).

III. Eminent Domain, Condemnation, and the Reasonable Use Rule

The Supreme Court formally adopted the reasonable use rule as between private parties in *Pendergrast v. Aiken,* 293 N.C. 201, 236 S.E.2d 787 (1977), where the plaintiff complained of an increase in flow that caused actual, physical damage to plaintiff's upland. However, a few years later, the Supreme Court decided that the reasonable use rule does not apply in a condemnation proceeding where land is similarly damaged by a condemnor. *Board of Transportation v. Terminal Warehouse Corp.,* 300 N.C. 700, 268 S.E.2d 180 , (1980). The Court first explained *Pendergrast*, as follows:

> Specifically, the doctrine of reasonable use adopted in *Pendergrast* defines the extent to which a private landowner may interfere with the flow of surface water on the property of another. This doctrine presupposes that all private landowners must accept a reasonable amount of interference with the flow of surface water by other private landowners if a fair and economical allocation of water resources is to be achieved. The conclusion reached in *Pendergrast* is that a rule of reasonable use with respect to water rights is the best way to promote the orderly utilization of water resources by private landowners.

Terminal Warehouse Corp., 300 N.C. at 705, 268 S.E.2d at 184 (1980). The Court went on to distinguish cases involving condemnors, as follows:

> In the instant case, however, the interference with the drainage of surface waters is attributed not to a private landowner but to an entity possessing the power to appropriate private property for public use. Where the interference with surface waters is effected by such an entity, the principle of reasonable use articulated in *Pendergrast* is superseded by the constitutional mandate that "(w)hen private property is taken for public use, just compensation must be paid."

Terminal Warehouse Corp., 300 N.C. at 705-706, 268 S.E.2d at 184-5 (*Quoting Eller v. Board of Education*, 242 N.C. 584, 89 S.E.2d 144 (1955)). The court continued, stating that

> It follows, therefore, "that a body possessing the right to exercise the power of eminent domain is required to make compensation for damages to land not taken resulting from the obstruction or diversion of, or other interference with, the natural flow of surface water, by a public improvement, although a private landowner would not be liable in damages under the same circumstances, upon the ground that such obstruction, diversion, or interference is a taking or damaging of such land within the meaning of a constitutional provision requiring compensation to be made on the taking or damaging of private property for public use."

Terminal Warehouse Corp., , 300 N.C. at 706, 268 S.E.2d at 184-5 (*Quoting* 26 Am. Jur. 2d, Eminent Domain § 195 at 877). Thus, the reasonable use rule does not apply as a defense to paying damages where a condemnor "reasonably" diverts additional water onto and causes physical damage to a private party's upland. In addition, the broad language of *Terminal Warehouse* at least opens the door to applying its decision to water use, as well to land damage caused by increasing or re-directing flow.

Although *Pendergrast* and *Terminal Warehouse* did not involve a diversion that decreased stream flow, and thus injured a water use, riparian rights are "vested property rights," *Matter of Mason ex rel. Huber*, 78 N.C. App. 16, 337 S.E.2d 99 (1985), and can thus be taken through eminent domain. Thus, it is conceivable that the *Terminal Warehouse* rule for condemnors might be extended to flow reduction cases, where only a riparian right to reasonable use of water is affected. N.C. courts have established that the taking of riparian rights can trigger the requirement of just compensation, if taken by a governmental entity and put to public use. Because of the basis of riparian doctrine on the concept of reasonable use, it could be presumed that the *unreasonable* use of water, resulting in diminished flow to downstream riparian owners, would result in a "taking" requiring condemnor to render compensation.

That riparian rights are subject to condemnation is also clear from the statutes. N.C. Gen. Stat. § 40A-2(7) includes "water rights" in its definition of that property which may be taken by local governments through the use of eminent domain. The right to condemn these rights has

also been extended to various statutorily authorized utilities and private entities, as recognized by the N.C. Supreme Court in *Carolina-Tennessee Power Co. v. Hiawasee River Power Co.*, 188 N.C. 128, 123 S.E. 312 (1924). However, *Terminal Warehouse* explained that the case on which it relied for its conclusion, *Dunlap v. Carolina Power & Light Company*, 212 N.C. 814, 195 S.E. 43 (1938), involved "two distinct causes of action... (1) unreasonable interference with his riparian rights [and] (2) appropriation or taking of his property without just compensation." *Terminal Warehouse*, 300 N.C. at 707, 268 S.E.2d at 184. The Court in *Dunlap* decided that the first cause of action did not survive nonsuit even though the plaintiff alleged that because of CP&L's "operation of the plant ...the water of the Yadkin river is at times impounded to such an extent as to cause the Pee Dee river to become dry and without water...." *Dunlap*, 212 N.C. 814, 195 S.E. 43. The Court in *Dunlap*, however, decided that the allegations that CP&L's releases of walls of water several feet high were eroding away plaintiff's river banks had sufficiently stated a claim for compensation for the taking of plaintiff's land. *Also see Harris v. Norfolk & Western Railway Company*, 153 N.C. 542, 69 S.E. 623 (1910) (applying reasonable use rule to water use by condemnor).

While the rights of private riparian owners are determined comparatively, under the rule of reasonable use, the rights of condemnors vis-à-vis each other are determined by the rule of first in time, first in right. *See Carolina-Tennessee Power Co. v. Hiawasee River Power Co.*, 188 N.C. 128, 123 S.E. 312 (1924); *cf. Southern Ry. Co. v. City Of Greensboro*, 247 N.C. 321, 101 S.E.2d 347 (1957). "The authorities are to the effect that a general authorization to exercise the power of eminent domain will not suffice in a case where property already dedicated to a public use is sought to be condemned for a public use which is totally inconsistent with the first or former use." *Southern Ry. Co.*, 247 N.C. at 329, 101 S.E.2d at 355 *quoting North Carolina R &*

D Railroad Co. v. Carolina Central Railroad Co., 83 N.C. 489 (1880). Regarding water rights, the *Hiawasee* court stated "defendant (second in time) may not acquire a water power within the water power already marked out by the petitioner (first in time)." *Hiawasee*, 188 N.C. at 130, 123 S.E. at 313.

VI. Prescriptive Rights

Prescriptive water rights is one form of recognized non-riparian property rights in water. A riparian landowner or a non-riparian water user can obtain a prescriptive right to reduce flow (perhaps even "unreasonably") to downstream users.

The North Carolina Supreme Court has applied the law of prescriptive easements in a case involving Durham's water supply withdrawals:

> While, perhaps, the taking of the water is not, in its strictest sense, an easement, which implies rather a use than a total conversion of a thing, it is so nearly in the nature of an easement as to be governed by the same general principles. This court has repeatedly held that it requires the continuous and adverse use of an easement for 20 years to raise the presumption of a grant, and that even then the presumption extends only to the "state and extent" of such user during said period.

Geer v. Durham Water Company, 127 N.C. 349, 353-354, 37 S.E. 474, 475-476 (1900). The same general principles to which the Court alludes are that the adverse use be visible, notorious, continuous, adverse and under a claim of right for the period required. *Young v. City of Asheville*, 241 N.C. 618, 626, 86 S.E.2d 408, 414-15 (1995).

V. Statutory Rights of Municipalities to Impounded Water

Partly as a response to the uncertainty surrounding *Pernell v. Henderson* and its effect on the water rights of municipalities, and coming shortly after the enactment of the N.C. Federal Water Resources Development Law of 1969, the N.C. General Assembly developed legislation that established certain water rights for municipalities. N.C. Gen. Stat. § 143-215, provides for a statutory "right of withdrawal," which the statute defines as "an interest which establishes a right

to withdraw an excess volume of water superior to other interests in the water." This "excess volume of water" is that amount of water that is attributable to the impoundment. Simply put, the entity that has created the impoundment has a statutory right to withdraw the amount of water that would not exist but for the impoundment, measured in amount of flow. Thus, a municipality that lawfully impounds water may divert water according to its needs, provided that doing so does not foreseeably reduce the amount of flow that would be present if the impoundment did not exist. *Id.* This right of withdrawal is superior to any other downstream right, and is authorized by N.C. Gen. Stat. § 143-215.49 for local water supply or distribution systems. The right of withdrawal is also transferrable and assignable, as established by N.C. Gen. Stat. § 143-215.45.