Water Ownership by N. C. Local Governments

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Introduction

It is no simple task to determine who owns, or rather who does not own, the water in North Carolina's lakes, streams, and ponds. Those included in water use conflicts invariably risk entanglement in a web of common law riparian rights and public trust assets loosely bound together by centuries old court decisions and complex state and federal statutes and regulations. The authors provide their research as a launching point for others called upon to advise on the difficult questions that can arise in connection with water rights issues.[2] It is clearly an area of increasing importance as North Carolina now sees an end to what once seemed its inexhaustible water bounty. The paper focuses on two issues of interest:

(1) What ownership rights do local governments have in waters used for water supply?

(2) Can a local government, as a riparian owner, protect its interests in a waterfront park via exercise of riparian rights?

Especially with regard to the first question, the answers appear substantially different depending on whether the water is flowing in a stream, impounded behind a dam, or percolating under foot.

Pending Legislation

Legislation currently pending before the General Assembly has the potential to resolve a number of the uncertainties in North Carolina water law. Senate Bill 907 (HB 1101), currently with the Senate Committee on Agriculture, Environment, and Natural Resources, provides:

> **(1) Water is a public trust resource. – The waters of the State are a natural resource owned by the State in trust for the public and subject to the sovereign power of the State to plan, regulate, and control the withdrawal and use of those waters**,

[1] John Maddux, a 3L at Campbell Law School, provided substantial assistance in the research and preparation of this paper.

[2] An excellent starting point for understanding this body of the law is a 1967 article by Professor William Aycock, *Introduction to Water Use Law in North Carolina*, 46 N.C. Law Review 1.

> under law, in order to protect the public health, safety, and welfare by promoting economic growth, mitigating the harmful effects of drought, resolving conflicts among competing water users, achieving balance between consumptive and non-consumptive uses of water encouraging conservation, protecting ecological integrity, and enhancing the productivity of water-related activities.
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> (2) Water should be used efficiently and productively. – Pursuant to this Article, **the State undertakes, by permits and other steps authorized by law, to allocate the waters of the State among users in a manner that fosters efficient and productive use of the water supply of the State** in a sustainable manner in the satisfaction of economic, environmental, and other social goals, whether public or private, with the availability and utility of water being extended with a view to preventing water from becoming a limiting factor in the general improvement of social welfare."

Senate Bill 907, 2009 Session, "Water Policy Act of 2009" Section 1 [Emphasis supplied].

As already noted, the impact on local governments' ownership rights in waters varies depending on the nature of the source of the water. The next section of this paper examines the law upon which a claim of ownership to water can be founded. If ownership now exists, then this legislation raises important questions concerning property rights in existing local government water supplies. For example, can the State divest previously conferred rights?

A. LAW OF OWNERSHIP

Public Waters Legislation

The North Carolina Constitution, Article XIV, § 5 (1972)[3] provides:

> It shall be the policy of this State to conserve and protect its lands and waters for the benefit of its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, . . ."

"Waters" is defined as ". . . any, stream . . . , reservoir, waterway or other body or accumulation of water, whether surface or underground, public or private, or natural or artificial . . . ." N.C. Gen. Stat. § 143-212(6) (1951). These waters "belong to the people" and the State has "the ultimate responsibility for the preservation and development of these resources in the best interest of all its citizens." *See* N.C. Gen.

[3] The date the provision was first enacted is shown following citations throughout this paper.

Stat. § 143-211 (1967). Public trust rights exist in the watercourses of the State. *See* N.C. Gen. Stat. § 1-45.1 (1985). Additionally, in the statutes protecting wildlife, inland fishing and coastal fishing, the scope of declared public ownership expands to encompass "the entire ecology supporting such" marine and estuarine wildlife living in the public trust waters. *See* N.C. Gen. Stat. § 113-131(a) (1965) ("The marine and estuarine and wildlife resources of the State belong to the people of the State as a whole."); N.C. Gen. Stat. § 113-129(11) (1965) (Wildlife Resources defined as "[a]ll . . . fish found in inland fishing waters . . . and the entire ecology supporting such . . . fish, plant and animal life, and creatures.").[4]

Common Law, Flowing Water

The public trust exists in concert with the rights of riparian property owners, who by virtue of owning land abutting a water body, possess a bundle of rights typically articulated as:

(1) The right to enjoy the advantage of adjacency to the water;

(2) The right of access to the navigable parts of the waterbody;

(3) Subject to state regulations, the right to pier out;

(4) The right to keep accretions or alluvium; and

(5) The right to make reasonable use of the water as it flows past or leaves the shore.

See Matter of Mason ex rel. Huber, 78 N.C. App. 16, 18-19, 337 S.E.2d 99, 104 (1985). These rights come with the caveat that riparian rights must be exercised so as not to unreasonably infringe upon the rights of other like riparian owners. *See Dunlap v. Carolina Power and Light Co.*, 212 N.C. 814, 195 S.E. 43, 46 (1938); *Smith v. Morganton*, 187 N.C. 801, 802-803, 123 S.E. 88, 89 (1924). Riparian proprietors do not own the water in the channel or pond; rather they "own" the right to use the water for beneficial purposes, so long as that use does not unreasonably injure other riparian owners. *See Harris v. Norfolk & Western Railway Co.*, 153 N.C. 542, 544, 69 S.E. 623, 624 (1910) ("A riparian owner may use water for any purpose to which it can be beneficially applied, provided he does not inflict substantial injury upon those below him."). "The several proprietors along the course of a stream have no property in the flowing water itself but each proprietor has certain rights with respect to the water." *Durham v. Cotton Mills*, 141 N.C. 615, 624, 54 S.E. 453 (1924). Reasonable uses normally include manufacturing purposes as well as domestic and agricultural purposes connected to the riparian parcel. *Dunlap*, 212 N.C. at 819.

[4] "Private ponds" are excluded from the definition of public fishing waters. *See* N.C. Gen. Stat. § 113-129(13) (1965).

In *Pernell v. Henderson*, the North Carolina Supreme Court quashed the contention that a city, by its riparian rights, could divert water to sell to its citizenry as drinking water. "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." *Pernell v. Henderson,* 220 N.C. 79, 81, 16 S.E.2d. 449, 451 (1941). In *Pernell*, the City of Henderson withdrew substantial amounts of water from a stream for drinking by its citizens. After a downstream grist mill owner brought suit claiming damage from this use, the city demurred on the ground that its withdrawal of water for domestic purposes by its citizens was a reasonable exercise of its riparian rights and therefore not actionable—even if the city took the entire flow. The city also claimed that its use of the water for drinking purposes was preferable over the mill owner's manufacturing use of the water. The Court's decision for the mill owner was grounded in the idea that while a local government's citizens might purchase water supplied by that government for domestic uses, the individual citizens could not organize themselves into a larger body that held riparian land nor establish by riparian right the authority to divert waters so as to supply non-riparian individuals to the detriment of all other users. The Court also rejected the idea of a hierarchy of reasonable uses by striking down the City's argument that diverting water to supply its populace takes preference over another riparian owner desiring to use the water for manufacturing purposes.

The *Pernell* decision remains the controlling law on the ability of a local government to supply citizens with drinking water based on traditional common law riparian rights. *Durham v. Cotton Mills* continues to be the controlling law on the ownership of flowing waters—even riparian owners have "no property in the flowing water itself." *Durham*, 141 N.C. at 624.

Groundwater

North Carolina subscribes to the "American" rule that allows groundwater pumping for reasonable uses. *Rouse v. Kinston*, 188 N.C. 1, 123 S.E. 482, 493 (1924). No duty to share with others exists so long as the use is reasonable. The water must be used on the land overlying the water source; i.e., the groundwater may not be extracted and then transported elsewhere for use. Use on overlying land is thus considered reasonable, but use of groundwater on non-overlying ground is *per se* unreasonable. *Id.*

The underlying limitation is similar to that described above for the exercise of riparian rights. The unrestricted draw down of groundwater by a local government for the purpose of supplying its citizens with water is not a "reasonable use" of groundwater.

> . . . to fit [land] with wells and pumps of such pervasive and potential reach that from their base that [landowner] can tap the waters stored in the lands of others, and thus lead them to his own land, and by merchandizing it prevent its return, to the injury of adjoining landowners, is an unreasonable use of the soil, and in such event the injured neighbor may bring his action for damages.

Rouse, 188 N.C. at 493. Therefore, a local government's right to use groundwater does not include offsite consumption.

Common Law, Impounded Water

In 1986, the Court of Appeals recognized that the owner of the bed of an impounded waterbody " . . . like the owner of dry land, owns also to the sky and to the depths: *Cujus est solum, ejus est usque ad coelum et ad inferos."* *Steel Creek Development Corp. v. James*, 58 N.C. App. 506, 512, 294 S.E.2d 23, 27, *rev. denied*, 306 N.C. 740, 295 S.E. 2d 762 (1982). The case concerned the ability to regulate the attachment of pilings to the bed of Lake Wylie. The authors found no case that directly addresses ownership of the bed as a means by which a right to withdraw water from impounded waters might arise or by which ownership of the water itself can be established.

From *Pernell,* an implication can be drawn that a municipality impounding water behind a dam for drinking water purposes would not have any type of exclusive right to that water or be free from damages caused by the impoundment under a reasonable use riparian theory. Under the *Pernell* rationale, the impoundment would be maintained for the non-riparian citizens, and not the riparian parcel. *Pernell,* 220 N.C. at 81; *see also Geer v. Durham Water Co.*, 127 N.C. 349, 37 S.E. 474 (1900). In the 1938 case *Dunlap v. Carolina Light and Power Co.,* the Court held that an upper riparian owner could erect a dam and alter the natural flow to generate power; however, the riparian right of use did not allow for diversion of the water.

> The mere erection of a dam and the use of the water in driving wheels or providing power must necessarily derange its steady, constant, and natural flow and substitute a different manner as to the time and mode of holding it up and letting it down, but the water can be retained for the purpose of the upper mill if it is not diverted from the stream and the storing of water in a pond or reservoir for power purposes is not actionable if it is retained no longer than is reasonably necessary. The upper proprietor may hold back the water a reasonable time to raise a pond or reservoir, although the effect is to deprive the lower owner of the use of the water to a certain extent. He may hold the water back and let it down in such manner as is necessary for the use of this manufacturing enterprises if the enterprise is adapted to the character of the stream and the use is reasonable and the lower proprietor will not be heard to complain on account of the incidental irregularity in the flow of the water.

Dunlap, 212 N.C. at 820. The same rationale applied to uphold easements by necessity to maintain impoundments for the purpose of powering riparian mills. *See, e.g., Latta v. Catawba Elec. & Power Co*., 146 N.C. 285, 59 S.E. 1028 (1907); *Bowling v. Burton*, 101 N.C. 176, 7 S.E. 701 (1888).

Statutory Right of Withdrawal

As discussed above, local governments cannot rely on riparian rights to supply inhabitants with potable water. However, the General Assembly has determined that local governments can gain the exclusive right to withdraw water held in certain reservoirs. Under the North Carolina Federal Water Resources Development Law of 1969 (as amended in 1971), any person who "lawfully impounds water for the purpose of withdrawal shall have a right of withdrawal of the excess volume of water attributable to the impoundment."[5] § 143-215.44(a) (1971). The impoundment statute includes entities that make financial contributions to the construction or operation of impoundments. *Id.* at § (d). The statute also provides for assignment or transfer of the right of withdrawal by the impounding entity. N.C. Gen. Stat. § 143-215.45 (1971). In a separate statute, the Environmental Management Commission (EMC) is authorized to assign or transfer to local governments any interest held by the State in federal projects, so long as the local government agrees to pay for that storage, although the EMC retains the right to reassign or transfer those interests based on the most "beneficial long-range conservation and use" of the State's water resources. N.C. Gen. Stat. § 143-354(a)(11) (1967).

As or more important to local government owners of the right to withdraw the impounded water are two other provisions in the North Carolina Federal Water Resources Development Law of 1969 that provide a means for protection of the water subject to ownership. "A person operating a municipal, county, community or other local water distribution or supply system and having a right of withdrawal may assert that right when its withdrawal is for use in any such water system as well as in other circumstances." N.C. Gen. Stat. § 143-215.49 (1971). "A person may exercise right of withdrawal by withdrawing directly from the impoundment, from a watercourse below the impoundment, or from both . . ." N.C. Gen. Stat. § 143-215.46 (1971).

Through these statutes, the General Assembly made clear that private ownership of impounded waters is authorized in North Carolina with the strongest protections afforded to local governments using the water for operation of water distribution or supply systems. This strengthens the position of a local government against withdrawals of water downstream of the impoundment, and protects against objections to the withdrawal.[6] Essentially, where the local government holds rights in impounded water under these statutes, it is entitled to assert rights of withdrawal as if its citizens were actual riparian owners with land bordering the excess water.

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[5] Excess volume is defined as "the volume which may be withdrawn . . . without foreseeably reducing the rate of flow of a watercourse below that which would obtain in that watercourse if the impoundment did not exist." N.C. Gen. Stat. § 143-215.44(c). The excess above the watercourse's natural flow is statutorily defined as anything greater than "the minimum average flow for a period of seven consecutive days that have an average recurrence of once in ten years," or the "7Q10" level. N.C. Gen. Stat. § 143-215.48(a).

[6] For an examination of issues related to the use of stream channels to deliver water stored in an impoundment, *see* Douglas Gill, *The Use of Stream Channels to Deliver Stored Water: The Possibility of Interference by Third Parties*, Water Resources Research Institute of the University of North Carolina, Report No. 32 (1969).

Allocation of the Public Trust

These statutory rights suggest that there may be a conflict between the broad legislative declarations of public rights in the waters of the State and impounded waters where rights of withdrawal and protection of "owned" waters have been legislatively conferred. However, our Supreme Court has examined when and under what circumstances public trust rights can be allocated.

Following Statehood, North Carolina became the owner of lands beneath navigable waters, but the General Assembly retained the power to dispose of such lands if it does so expressly by special grant. *See, e.g., Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 524, 44 S.E. 39, 41 (1903). The State's ability to part with title to lands submerged by navigable waters is qualified by a presumption that legislative enactments do not indicate a legislative intent to authorize the conveyance of submerged lands. *Atlantic & N.C. R.R. Co. v. Way*, 172 N.C. 774, 776-78, 90 S.E. 937, 938-40 (1916).[7] The State's ability to convey away public trust assets was further solidified by the 1995 decision *Gwathmey v. State*:

> . . . we 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.

Gwathmey v. State, 342 N.C. 287, 304, 464 S.E.2d 674, 684 (1995).

Impounded waters typically are subject to the exercise of public trust rights, such as the rights of navigation and fishing. However, the statutes are sufficiently clear that conflict between these statutory rights and other public trust rights in the waters should be resolved in favor of preserving the public trust rights.

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[7] *See* N.C. Gen. Stat. § 1-45.1 providing that public trust lands and rights cannot be acquired by adverse possession or prescription. *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 369 S.E.2d 825 (1988).

B. LOCAL GOVERNMENT RIPARIAN RIGHTS

Riparian Protection?

The remaining legal question is the scope of the riparian rights, if any, that a local government can assert against an upstream water user or diverter. Especially with regard to greenways and other public demands, many local governments own waterfront parks where access is provided to its citizens for boating or fishing as well as other recreational use of the waters.[8] As a riparian owner, the local government possesses the right to access the river from its property, to wharf out to deep water, to enjoy the natural advantage the water brings, and to make reasonable use of the water as it flows past and leaves the shore. *Matter of Mason ex rel. Huber,* 78 N.C. App. at 25.

A central question in the continued examination of this issue will be: "Can a local government, as a riparian owner, protect water flow as needed to support navigation and fishing by its park users?" The first issue to consider is whether a local government has standing to challenge the upstream use, especially if the use and impact on navigation and fishing at the park, has been authorized by a state or federal permit. An initial standing hurdle will be whether the riparian right at issue is within State's exclusive authority of regulation in public trust waters.

> The state's exclusive authority to regulate its public trust waters thus limits the private rights of riparian landowners bordering such waters, subjecting them "to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe for the protection of the public rights in rivers and navigable waters." *Jones v. Turlington,* 243 N.C. 681, 683, 92 S.E.2d 75, 77 (1956) (citation omitted).

Neuse River Foundation, Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 119, 574 S.E.2d 48 (2002).

The holding in *Smithfield Foods* as to the standing of nonprofit and riparian owners to sue hog farms alleged to be polluting the waters of the State makes clear that the showing of harm will be determinative of standing. The nonprofit was barred for lack of standing to protect the fish and the quality of the water, because "only the State can bring action for injury to public trust waters." *Neuse River Found. v. Smithfield Foods, Inc.*, 155 N.C. App. at 119. Another class of the plaintiffs in *Smithfield Foods* relied on their status as riparian owners, but they failed to allege "the existence of a special damage" separate from the damages of the general public. The Court of Appeals

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[8] Parks and recreational programs are an authorized activity for local governments which have a public purpose. N.C. Gen. Stat. § 160A-353(1) (1987*); Hickman by Womble v. Fuqua,* 108 N.C. App. 80, 422 S.E.2d 449 (1992).

recognized and applied the standard that a private party may bring an action for damages resulting from a public nuisance caused by water pollution. *Id.*, 155 N.C. App. at 115 (citing *Hampton v. Pulp Co.*, 223 N.C. 535, 27 S.E.2d 538 (1943)). However, the Court of Appeals rejected the complaint by the riparian plaintiffs because "none of these plaintiffs seeks individual compensation for the 'invasion of a more particular and more personal right' that cannot be considered 'merged in the general public right.'" *Id.* Local governments should have the same standing to assert riparian rights. In a case concerned with a water utility, the North Carolina Supreme Court held: "Municipal corporations have the same rights as individuals and private corporations to battle for justice and equality of opportunity . . . ." *Elizabeth City Water & Power Co. v. Elizabeth City*, 188 N.C. 278, 298, 124 S.E. 611 (1924). To make a viable showing, the park owner will need to allege special damages unique to its riparian property and show that the injury arises from a cognizable nuisance.

For any new intake upstream of the park, it must be presumed the intake facility was permitted by state and federal regulators. The regulatory programs will have examined the protection of the aquatic ecosystem and creatures that live there. It is less clear whether the regulatory scheme will examine the capacity of the waterbody to support navigation. Therefore a necessary showing for a viable complaint will be a showing that the challenged activity is a nuisance. North Carolina "is firmly committed to the proposition that the 'violation of a statute designed to protect persons or property is a negligent act, and if such negligence proximately causes injury, the violator is liable . . .' the statute or ordinance, serving as a legislative declaration of a standard of care, creates a private right not to be harmed by its violation." *Springer v. Joseph Schlitz Brewing Company*, 510 F.2d 468 (4th Cir. 1975); *see also Biddix v. Henredon Furniture Industries, Inc.*, 76 N.C. App. 30, 39, 331 S.E.2d 717, 724 (1985) (violation of NPDES permit equates to unreasonable use). Based on the holding in *Biddix*, a riparian owner's right to water quality is limited to violations of Clean Water Act permit issued for the offending discharge.

Unreasonable Use

North Carolina recognizes riparian rights as property rights that might be condemned or taken. "Riparian rights are vested property rights that cannot be taken for private purposes or taken for public purposes without compensating the owner, and they arise out of ownership of land bounded or traversed by navigable water." *Matter of Mason ex rel. Huber*, 78 N.C. App. at 24-25. The law regarding enforcement of riparian rights has focused exclusively on instances where local governments were deemed comdemnors. Under the "reasonable use" doctrine, an exception has long been recognized that local governments engage in eminent domain, and are thus strictly liable, when their use injures a downstream riparian proprietor.

Dicta in North Carolina courts suggests strongly that this rule extends to any entity possessing the power of eminent domain. *See Board of Transp. v. Terminal Warehouse Corp.*, 300 N.C. 700, 705, 268 S.E.2d 180, 184 (1980) ("Where the interference with surface waters is affected by such an entity [possessing the power to

appropriate private property], the principle of reasonable use . . . is superseded by the constitutional mandate that when private property is taken for public use, just compensation must be paid."). Implied by this rationale is the idea that an upstream riparian entity possessing the power of eminent domain, such as a private utility, using water for a beneficial purpose on its property would not enjoy the benefit of the reasonable use doctrine simply because it possesses the power of eminent domain. Of course, a utility divesting the water is engaged in an unreasonable use, *per se*. *See Geer v. Durham Water Co.*, 127 N.C. 349 (1900); *Cook v. Town of Mebane*, 191 N.C. 1, 131 S.E. 407 (1926).

C. CONCLUSION

Water rights and ownership are critical issues for North Carolina's local governments. The pending bills would greatly advance efforts to implement an effective and rational allocation system for increasingly scarce uncommitted water. The Neuse River may well be nearing the point of full allocation when all its users, including the fish and biota, are considered. In developing a new statutory scheme of this significance, it is important to recognize and reconcile existing water rights duly established by the General Assembly. It is equally important for local governments to understand their individual source of water rights. We commend the topic to you and hope this brief examination is helpful in understanding the water ownership and riparian rights of your local government.