Riparian Rights Upland Owners Beware: Protecting Your Rights May Have Gotten More Difficult

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Riparian Rights in Florida are some of the most coveted, yet misunderstood, rights a property owner has. Riparian Rights are a special bundle of property rights attached to a property which borders on "navigable waters." The land beneath "navigable" waters may be owned by the State of Florida Board of Trustees for the Internal Improvement Trust Fund (the "State") or privately owned. The important piece is that for a person to enjoy Riparian Rights, they *must* own the upland (dry land) which touches these navigable waters. We refer to this boundary line as either the "Ordinary High-Water Mark" or the "Mean High-Water Line."

The "bundle of rights" enjoyed by riparian owners are now codified in section 253.141, Florida Statutes. They include the right of ingress, egress, boating, bathing, and fishing. They also include the right to "wharf out," or to have a dock. Additionally, rights such as the right to an unobstructed view within one's "riparian area" are recognized in the "common law." These rights are to use the water within one's riparian area. These rights are subject to, but also superior to, the rights of the general public. This means that while a riparian owner has the right to build a dock (superior to the general public), that right is qualified to ensure the general rights of the public are not unduly infringed.

The leading case interpreting how a riparian area is determined is the case of *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957). This case stands for the proposition that in determining a riparian area, a Circuit Court must balance all of the equities and define the riparian area in a manner that is most equitable to the parties involved. Since *Bowman* was decided, if a dispute over a riparian boundary arose between two riparian owners, they would bring their grievance to the Circuit Court under a "declaratory judgment" action pursuant to Chapter 86, Florida Statutes. In the State of Florida, only a Circuit Court may adjudicate riparian boundaries pursuant to Article V § 5 of the Florida Constitution and section 26.012, Florida Statutes.

As a riparian rights case was a case in equity and determining property rights, there was historically no contractual right to seek attorneys' fees as a prevailing party in such declaratory judgment cases. Similarly, there was no statutory right to recover attorneys' fees. These cases followed the "American Rule" which provides that "in the absence of legislation providing otherwise, litigants must pay their own attorneys' fees."[1] This means that where property owners had a genuine dispute over the location of their common riparian boundary, a Circuit Court would determine that boundary. The parties were responsible for their own attorney's fees regardless of who "won" the case. However, the "victor" could then seek the costs expended in the litigation from the other side.[2]

Over time, a nuance arose within these riparian boundary disputes. The Florida Department of Environmental Protection is charged with the duty and authority to evaluate plans to install docking structures within certain water bodies. The Department issues permits and also provides proprietary authorization to use sovereign submerged lands where applicable. Although the Department is charged with this duty and authority, the Department's purpose is to ensure that the installation of a docking structure does not have significant adverse impacts on the environment, or in certain instances, that the

installation of the structure is not contrary to the public interest.[3] The Department; however, has no authority to adjudicate riparian rights.[4]

The regulatory framework today essentially requires an applicant for a permit or authorization to provide some evidence delineating their riparian area and demonstrating that the docking structure they seek is entirely within that riparian area. So long as the delineation is "reasonable," the Department will accept the application and, assuming all other criteria are met, will issue the permit. This can occur even over objection by the neighbor because the Department does not and cannot determine which riparian boundary opinion is proper. When the Department issues a permit that a neighboring property owner objects to on riparian rights grounds, the recourse for that property owner is to initiate a declaratory judgment action in the Circuit Court where the real property is located.

A riparian owner may obtain a permit, actually build their docking structure and after that structure is in place, still have their structure challenged by a neighbor on the grounds that the dock encroaches upon the neighbor's riparian rights. The neighbor may seek to have the Circuit Court adjudicate the riparian line and if the determination demonstrates there is an encroachment, then the Circuit Court is vested with the authority to order the docking structure removed at the expense of the riparian owner. On the other hand, if the riparian owner demonstrated their docking structure was in an appropriate location, the riparian owner could seek reimbursement for costs associated with the litigation and then the parties simply go their separate ways. That was the process … until July 1, 2024.

Recent legislation signed into law that took effect on July 1, 2024, provides that a property owner whose property improvements - which were supported by necessary authorizations - were unsuccessfully challenged by another party, is entitled to recovery of their attorneys' fees and costs pursuant to section 57.106, Florida Statutes. The text of the statutes is as follows:

1. For the purposes of this section, the term "property rights" includes, but is not limited to, use rights, ingress and egress rights, and those rights incident to land bordering upon navigable waters as described in s. 253.141.
2. In a civil action brought against the owner of a parcel of real property to resolve a dispute concerning property rights, the court must award reasonable attorney fees and costs to the prevailing defendant if the improvements made to the property by the defendant property owner were made in substantial compliance with, or in reliance on, environmental or regulatory approvals or permits issued by a political subdivision of the state or a state agency.

Section 57.106, Florida Statutes is unique in a number of ways. First, the statute *requires* a Court to award attorney's fees, but only to the "prevailing defendant." A party which successfully challenges activity authorized by a state agency, or political subdivision of the state, on the grounds that it infringes upon the party's riparian rights, is not likewise able to recover their attorneys' fees.[5] Second, the statute appears to apply to lawsuits which are not filed directly against improvements made to real property. As mentioned above, typically challenges to dock structures are actually lawsuits to establish the riparian line and are not claims against the dock permit itself. Finally, the statute appears to apply only to those property rights challenges involving improvements already made.

Statutes regarding attorney's fees are strictly construed.[6] So take for example, a riparian owner who obtains a "self-certification" from the Florida Department of Environmental Protection, and based on

that self-certification constructs a dock. Sometime after the dock is constructed, their neighbor files a lawsuit to determine the riparian line, arguing that the dock structure intrudes upon the neighbor's riparian area. The statute would require a Circuit Court Judge to award the defendant their attorney's fees if the defendant prevailed over the neighbor in the lawsuit. However, if the neighbor filed the lawsuit *before* the dock was constructed, a strict construction of the statute would not require a Circuit Court Judge to award a defendant their attorney's fee if they prevailed because the improvements had not yet been "made."

The implementation of this statute is curious in that it only provides fees for a prevailing defendant. The policy reason for awarding a prevailing defendant is rather clear. A riparian owner who obtains all the necessary authorizations and then spends significant sums of money constructing improvements based on those authorizations only to subsequently find themselves in a lawsuit is a fair basis to award fees and incentivize that party to defend their project. Being a defendant, that party has little choice but to defend their actions.

However, the same can be said for an impacted neighbor. If a riparian owner obtains a permit and constructs a dock that clearly invades the neighbor's riparian area, that neighbor only has one option and that is to file a lawsuit with the Circuit Court and have the riparian line established. Now, with the implementation of this statute, impacted neighbors are chilled from protecting their rights for fear of being on the hook for fees with no similar recourse for themselves. If the purpose of the statute was to protect property rights, the statute should be reciprocal.

This statute is potentially unconstitutional. As noted, the Florida Constitution vests the sole authority to adjudicate property rights in the Circuit Courts of the state. This statute, however, provides that state agencies or political subdivisions of the state may have authority to adjudicate property rights. Being that state agencies or political subdivisions issue permits for improvements to real property *based on* a party's depiction of property boundaries, the state agencies' acceptance of these determinations and issuance of permits has the effect of removing the jurisdiction of the Circuit Court and placing it in a state agency. Powers constitutionally bestowed upon the courts may not be exercised by the Legislature or executive branches.[7] The effect of this statute is to place a presumption of accuracy to a state-issued permit where boundary lines or property rights are involved. The neighboring property owner must overcome that presumption of accuracy, not only to establish their property boundary, but also to defeat a claim of attorneys' fees.

Nevertheless, this statute presents a clear deadline for riparian owners whose neighbor intends to improve their property by building docks and other structures. That deadline is ***before the improvement is constructed***. By bringing suit before the improvement is made, you keep yourself on equal footing with the neighbor and proceed before the Circuit Court to find the most equitable distribution without the influence of an attorney's fees award.

The area of riparian rights is a unique area of law. If you notice that your neighbor or another party is taking action to disrupt or interfere with your riparian rights, you will need to act fast and contact the right professionals experienced in defending riparian rights as soon as possible.

[1] *Talbott v. American Isuzu Motors, Inc.*, 934 So.2d 643, 650 (Fla. 2d DCA 2006).
[2] Section 86.081, Florida Statutes ("The court may award costs as are equitable").
[3] *See* Chapter 373, Florida Statutes; *See also* Chapter 403, Florida Statutes.
[4] *See Secret Oaks Owner's Association, Inc. v. Department of Environmental Protection*, 704 So. 2d 702 (Fla. 5th DCA 1998).
[5] Section 57.105(7), Florida Statutes, often referred to as the reciprocal fee provision, only applies to contracts which have a unilateral attorney's fees provision. This section does not apply to statutes which have unilateral application.
[6] *See Hilyer Sod, Inc. v. Willis Shaw Express, Inc.*, 817 So. 2d 1050, 1054 (Fla. 1st DCA 2002).
[7] *See* Article II §3 Florida Constitution.

About the Author

Richard P. Green, Esq. is Senior Attorney at the St. Petersburg office of Lewis, Longman & Walker, P.A. He has extensive litigation experience in a variety of areas such as real property, commercial, riparian rights, and environmental matters. He represents various public and private entities in litigation in both federal, state, and administrative forums. Green was included in Tampa Magazine's 2024 Top Lawyers List in the areas of Administrative/Regulatory Law and Environmental Litigation. He was also included in the 2024 and 2025 Best Lawyers in America "Ones to Watch List" for Environmental Litigation and Real Estate Law and has been on Super Lawyers' "Florida Rising Stars" list since 2020, a peer designation awarded to only 2.5% of Florida lawyers.