

*Revised and reprinted with permission from the Canandaigua Lake Watershed Alliance from its last issue of its newsletter, "The Lake Reporter." 8/16/07*

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***"This decision is a dangerous precedent for the Town of Canandaigua, for watershed residents, and for the health of Canandaigua Lake."***

In an interview with The Lake Reporter, Carol Maue, Canandaigua resident and lawyer representing the Canandaigua Lake Watershed Alliance and the Eastshore Association of Canandaigua Lake, explains why it's important to appeal decisions that would gut the Canandaigua Lake Uniform Docking and Mooring Law and further harm the waters of the Lake.

***The Lake Reporter:***

***Carol, in summer 2006, CLWA, together with East Shore Association (CLWA/ESA) and three private citizens, Oksana Fuller, Colonel Al Kraus and Priscilla Herbick, appealed a determination by the Town of Canandaigua Zoning Officer to the Zoning Board of Appeals that would have allowed RSM/Mancini Brothers to build a private marina with a 1,500 foot lakeshore clubhouse and up to 116 docks at the shoreline in the area now occupied by German Brother Marina. Can you walk us through that appeal and bring us up to date?***

***Maue:***

While we made many legal arguments, we appealed largely because the Canandaigua Town Zoning Officer's determination would set a terrible precedent. If upheld, it would gut the Canandaigua Lake Uniform Docking and Mooring Law, the "Dock Law."

One reason the Dock Law was adopted ten years ago was to prevent intensive development of a relatively small portion of lakefront for a relatively large number of upland residents and to prevent each upland resident from putting a boat on that small portion of shore.

The docks in the current version of the RSM/Mancini Bros. (RSM) conceptual plan would serve owners of approximately 70 upland homes and add 116 docks to 540 lineal feet of Canandaigua Lakeshore. However, the Canandaigua Town Zoning Officer actually determined that "the proposed project is permitted to have 220 boat slips and 195 moorings" under the 'All Other Land Use' category rather than the 'Residential Land Use' category of the Dock Law. That's a whopping, additional 415 boats on the Lake to serve 70 families.

In the 2006 appeal of the ZO's determinations to the Town Zoning Board (ZBA), we argued that:

- since the upland in RSM's development is to be used for the construction of 70 houses, (including 3 houses to be built on the existing German Bros. parcel) and the clubhouse,

docks and moorings located at the lakeshore are to be owned for the exclusive use of these homeowners, this development is a 'residential' project in a residentially zoned area of the Town.

- contrary to the Canandaigua Zoning Officer's determination, the lakeshore development on the German Bros. parcel may only legally occur under the "Residential Land Use" category of the Dock Law rather than the more expansive 'All Other Land Use' category. The difference in the number of boats, docks and moorings that would be legally permitted is significant: 415 as opposed to 22.

- the RSM clubhouse and related facilities could not properly be characterized as a "private water oriented recreational facility" under the Town of Canandaigua's Zoning Code which would require a special use permit. Under previous precedents, a private water-oriented recreational facility is only available for a water-dependent use. Since RSM's proposed lakefront structures (clubhouse, sundeck, pump house, storage facilities) are not water-dependent uses, this classification of special use permit is not available to RSM.

- the proposed 1500 square-foot sundeck to be built at the water's edge adjacent to the clubhouse was a sundeck, not a dock, and thus was a prohibited structure under the provisions of the Dock Law.

- the German Bros. use of its land for a commercial marina is a pre-existing nonconforming use of the parcel as the use of the land as a marina began prior to zoning. Since then, the German Bros. property has been zoned as Residential Lake District (RLD) property by the Town. The law is quite clear that once RSM knocks down the existing buildings on the German Brother's parcel, the parcel reverts to its RLD 'residential' zoning status consistent with the zoning of the surrounding neighborhood. The RSM development will therefore create a legal precedent for residentially-zoned lakefront in the Town; RSM's assertion that the existence of a commercial marina on this property is a sufficient legal basis to distinguish this project from similar projects in the future on residentially zoned lakefront property is meritless.

- CLWA/ESA was timely in filing its appeal to the ZBA and both Associations had legal "standing" to appeal the Zoning Officer's determinations with respect to both the Zoning Law and the Dock Law. There is well-established legal precedent in New York that grants to Associations standing to litigate on behalf of its members provided that the administrative determination appealed will have a harmful effect on the Association and its members that is different from the effect on the public at large and so long as the Associations and its membership are within the 'zone of interest' to be protected by the relevant law.

We argued that both the CLWA and ESA had legal standing because the Associations have a combined membership of over 1,100 people, consisting primarily of landowners living in the Canandaigua Lake Watershed, many of whom live in close proximity to the RSM development. We noted that CLWA's members include Putt Moore whose

lakefront home is sandwiched between the German Bros. parcel and the Johnson parcel that comprise RSM's development and Oksana Fuller, whose lake front property abuts the Johnson property.

We also argue that RSM's development would also have a serious, adverse impact not only on the water quality of Canandaigua Lake (that provides drinking water for over 60,000 people), but also on the western ridgeline view shed from the eastern shore of the Lake and the littoral aquatic habitat at the shoreline and that this development will also cause noise pollution, adverse traffic impacts and congestion, all of which are contrary to the Town's Comprehensive Plan.

Our standing arguments were in response to very technical arguments made by RSM and its lawyers based on their assertion that while the Town's ZBA had authority to hear appeals of the Zoning Officer's determinations with respect to RSM's development that required interpretation of the Town's Zoning Code, the ZBA did not have legal authority or "jurisdiction" to hear appeals of the Zoning Officer's determinations that required interpretation of the Dock Law. RSM argued that the Dock Law was not a "zoning statute" within the legal purview of the Town's ZBA.

Keep in mind that as part of this project and as indicated in its Conceptual Plan, RSM intends to subdivide the German Bros. parcel, artificially separating the German Bros. lakefront from its associated upland to create a separate parcel consisting of just the narrow strip of German Brothers lakefront land on the eastern side of West Lake Road on which RSM proposes to build its clubhouse (the "Clubhouse Lot"). RSM intends to incorporate the remainder of the German Bros. parcel on the other side of West Lake Road as part of another lot to be created within the Project. Also keep in mind that RSM's Conceptual Plan shows three houses and a 53 car parking lot on the existing German Brothers parcel on the western side of West Lake Road.

RSM argued to the ZBA that to determine who has standing under the Dock Law to appeal to the ZBA, the ZBA must necessarily assume that subdivision approval for separation of the German Bros. lakefront from its upland had been granted and then argued that the only 'parcel' relevant for determination of the standing issue was the new, artificially created, Clubhouse Lot consisting just of the lakeshore portion of the existing German Brothers parcel.

RSM then asserted that since this Clubhouse Lot was owned by German Bros Marina, Inc., that German Bros. Marina, Inc. was the sole, aggrieved "adjacent upland owner" who had standing under the Dock Law to appeal directly to the ZBA any of the Zoning Officer's determinations made with respect to the Dock Law. According to RSM, the only remedy available to anyone else in the community to redress the Zoning Officer's Dock Law determinations was a direct appeal to the New York Supreme Court under Article 78 of the NY Civil Practice Law and Rules, an expensive and time-consuming proceeding, bypassing completely the Town ZBA.

***Did the Canandaigua Zoning Board of Appeals agree with the basis of CLWA/ESA's appeal?***

**Maue:** Yes. At its November 14, 2006 meeting, in almost every case, the Canandaigua Zoning Board of Appeals rejected RSM's arguments and upheld the positions taken by the CLWA/ESA in our appeal.

Though all of the Canandaigua Zoning Board of Appeal's determinations announced on November 14, 2006 were important to our case, our focus was to preserve the integrity of the Dock Law. By granting the relief we requested and reversing the Zoning Officer, the Canandaigua ZBA defeated a plan to put an impossibly large number of boats on Canandaigua Lake that would create a precedent for similar developments, on residentially zoned property, all the way around the Lake.

***If the ZBA upheld our appeal, why are we still fighting this in the summer of 2007?***

**Maue:** On December 14, 2006, RSM filed an Article 78 proceeding challenging the Canandaigua Zoning Board of Appeals, charging that its decision was "arbitrary and capricious" and should be set aside. An Article 78 is a costly "special proceeding" designed for the appeal of decisions made by administrative bodies like a town zoning board of appeals. It is commenced by filing a Petition in New York State Supreme Court and the issues presented are then decided by a single, Supreme Court Judge, in our case, Acting State Supreme Court Judge William Kocher of Victor. The decision of the Court is based entirely on the record of the proceedings to date and the legal arguments made to the ZBA and allows for no public input.

A hearing was held before Judge Kocher on February 6, 2007. On June 15, 2007, Judge Kocher issued his Decision. It effectively reversed the Canandaigua Zoning Board of Appeals determination and paved the way for RSM to continue through the approvals process.

The Judge determined, among other things that :

- The Associations' and the Residents' appeals to the ZBA of the Zoning Officer's determinations were timely filed;
- While the Town of Canandaigua ZBA possesses the legal authority to consider appeals of any determinations made by the Zoning Officer that required interpretation of the Town's Zoning Code, the ZBA lacks the legal authority or "jurisdiction" to consider appeals of any determinations made by its Zoning Officer that require interpretation of the Dock Law, holding that the Dock Law is not a "zoning statute" within the meaning of Section 267 of the NY Town Law;
- While the Associations and the Residents who appealed the Zoning Officer's determinations to the ZBA had standing generally under New York law to appeal the Zoning Officer's determinations made under the Town's Zoning Code, only the Petitioner, German Brothers Marina, Inc., had standing to commence a direct appeal to the ZBA of the Zoning Officer's determinations under the Dock Law. The Court based

this holding on its assertion that German Brothers Marina, Inc. is the only aggrieved, “adjacent upland owner” under the Dock Law.

- Therefore, the Court held that the Associations’ and Residents’ only legal avenue to appeal the Town Zoning Officer’s determinations with respect to the Dock Law was to have commenced a direct, Article 78 proceeding to the NY Supreme Court, effectively bypassing the ZBA entirely and ignoring years of New York precedent that require a litigant to exhaust his or her administrative remedies in the Town before resorting to the Courts;

- The club house and related facilities to be built at the lakeshore of the German Bros. Clubhouse Lot constitute a “private water oriented recreational facility” for which RSM can apply for a special use permit in the Residential Lake District under the Town of Canandaigua Zoning Code. The Judge thus rejected the ZBA’s finding, based on prior Town precedent, that a private water oriented recreational facility is only available for water dependent uses, unlike the clubhouse and related facilities which are not water-dependent uses;

- The lakeshore development for this project to be constructed on the lakeside, German Bros. Clubhouse Lot can properly occur under the ‘All Other Land Use’ category of the Dock Law rather than the ‘Residential Land Use’ category notwithstanding that all of the land in the Project is zoned residential and the upland will be used primarily for the construction of 70 private residences.

The Court based this determination that RSM is entitled to “All Other Land Use” treatment under the Dock Law on its decision that ‘adjacent upland parcel’ as used in the Dock Law refers only to the requested but yet-to-be subdivided German Brothers Clubhouse Lot consisting of just the German Brothers lakefront property and not its associated upland. The Court then reasoned that since the sole use of this Clubhouse Lot is for the erection of the clubhouse and related facilities and not for residences in the conceptual plan, RSM was entitled to lakeshore build out under the All Other Land Use Category of the Dock Law, notwithstanding that the Conceptual Plan shows three houses proposed on the existing German Brothers parcel on the western side of West Lake Road and an additional 67 houses on the upland of the Johnson property, the other parcel of land included in the Project.

- While the Court acknowledged that the 1500 square foot sundeck proposed by RSM on the Clubhouse Lot is not properly characterized as a dock and is thus a prohibited structure under the Dock Law as a matter of law, because of its determination that the Associations and Residents lacked standing to appeal this Dock Law determination made by the Zoning Officer to the Town ZBA and the ZBA lacked jurisdiction to hear this appeal, the Court reinstated the Zoning Officer’s illegal determination that it was a dock and a permitted structure under the Dock Law.

***Were you surprised by the Judge's decision?***

**Maue:** Surprised and dismayed. There are several reasons this decision would set a bad precedent.

First, it effectively eviscerates the Canandaigua Lake Uniform Docking and Mooring Law and deprives a municipality of the right to home rule over matters that occur within its borders. This includes the right to interpret its own laws and to review the actions of its officers.

Next there is the issue of who has "standing." The decision deprives an aggrieved citizen of standing to challenge the official actions of a town official (the Zoning Officer in this case) by direct appeal to the Town's Zoning Board, a process that is much less costly than commencing a legal action in New York State Supreme Court under Article 78.

This decision also contradicts years of established precedent that state that an aggrieved citizen must first exhaust his administrative remedies in the municipality before commencing an action in Court against a municipal official.

The net effect of the decision is to deprive a citizen the right to appeal an adverse decision of a local official to that municipality's zoning board of appeals, requiring instead that a lawyer be hired and an expensive legal proceeding be commenced in Court. As a general proposition, the cost of an Article 78 proceeding can easily equal the sum of \$10,000.

This is a draconian result that deprives local communities of the ability to address legal matters within their borders and needlessly burdens the Courts of this state with resolution of purely local matters best left to local determination in accordance with established administrative procedure. Equally important is the chilling effect imposed on the average citizen's ability to challenge adverse determinations under the Dock Law. This is just not what was intended by the Dock Law and is contrary to years of precedent in New York State.

***What else is problematic?***

**Maue:**

The Judge refused to look at the project as a conceptual whole, instead assuming that the land in the Project had already been artificially subdivided into a number of distinct parcels as requested by RSM, separating the German Brothers lakefront from its associated upland and then applying the literal language of the definition of "adjacent upland parcel" to these artificially created parcels under the Dock Law. The Judge accordingly determined that the affected "adjacent upland parcel" consists solely of the lakeside portion of the German Brothers parcel, necessarily presuming that the subdivision of the German Brothers lakefront from the upland had been granted by the Town.

In making this determination, he discounted entirely the fact that the entire purpose of the lakefront clubhouse and related facilities is to serve the 70 upland residents that comprise

the bulk of the Project. Indeed, the club house and related facilities to be built at the lakeshore and all of the upland green space are to be owned by a Homeowner's Association in which the upland homeowners are the sole members.

The Judge also ignored the fact that on the Conceptual Plan, the German Brothers parcel (before the artificial subdivision) contains three houses, thus belying the characterization of the use of the upland of the German Brothers parcel as non-residential.

Most important, this decision imperils the health and well-being of Canandaigua Lake. It opens the door to widespread development around the lakeshore of Canandaigua Lake of private marinas with many hundreds of boats for the exclusive use of a large number of upland residents in areas that are zoned wholly residential. This is contrary to the intent of the Zoning Code adopted by virtually all of the communities around the Lake and is contrary to the intent of the Dock Law. Because of the Court's decision, RSM can theoretically install up to 415 boats at the lakeshore. This is more than eighteen times the number that would otherwise be permitted for residential property under the Dock Law.

Incredibly, because of this decision, developers can also now bifurcate the lakeshore portion of land from the upland where residences are to be located by the artifice of a subdivision, offering what is essentially a private marina at the lakeshore to large numbers of residences elsewhere in the Town with many more boats, docks and moorings than would otherwise be legally permitted under the 'All Other Land Use' category of the Dock Law.

Taking this decision to its logical conclusion, a developer may now purchase several hundred lineal feet of residentially-zoned lake front property in the Town of Canandaigua and develop it as a private marina under the 'All Other Land Use' category of the Dock Law for the exclusive use of a residential development located anywhere in the Town of Canandaigua, even if the property on which the residential development is located is not contiguous in any manner to the lakeshore at issue.

This decision, and the prospect of private lakefront marinas that it offers developers, will certainly create an economic incentive for the wholesale development of the steep slopes in the Southern Corridor for upscale residences. This will virtually insure the placement of many more boats on the Lake than anticipated under the Watershed Management Plan inventories taken in earlier years, causing further hydrocarbon pollution, exacerbating the existing erosion problem and further degrading lake water quality generally.

Let's not forget that Canandaigua Lake is our most precious natural resource. It provides drinking water for over 60,000 people. Its gorgeous vistas and clean water is also the source of millions of dollars in tourism revenue. This is all at risk.

***Is there a process to appeal the Judge's decision and if yes, should it be appealed?***

**Maue:**

Yes. For the health of the lake, for the sake of rational precedents that protect a municipality's right to interpret its own laws and its citizens' rights to appeal, this decision should be appealed. It is an ill-considered decision in every respect.

It is true that it is still theoretically possible that this lake front development could be stopped if the Town of Canandaigua Planning Board denies a special use permit for the private water oriented recreational facility.

Unfortunately, that will not address the case law created by this decision limiting the Town of Canandaigua's right to interpret and review its own laws and lakefront construction occurring within its borders or construing the Dock Law. As I've already said, it dangerously restricts standing to appeal and that opens the door wide for similar, massive residential developments at the lakeshore.

Everyone around the lake, but particularly the Town of Canandaigua and its residents, will be adversely affected by this decision if it is not appealed. If this decision stands unchallenged, anyone other than the applicant itself who wishes to object in the future to similar developments under the Dock Law will have to commence an Article 78 proceeding which costs thousands of dollars. As RSM is well aware, this is just beyond the means for the average person.

***Is there a loophole in the Zoning Code of the municipalities bordering Canandaigua Lake or in the Docking and Moorings Law that needs to be closed?***

**Maue:**

The most important step that the residents around the Lake can take is to contact their Town Boards to authorize an immediate review of the town's Zoning Code. A review must be undertaken of uses 'permitted as of right' and those 'special uses' only permitted with the issuance of a special use permit in residentially zoned lakefront districts to make certain that clubhouses, community centers, social clubs, restaurants, public and private yacht clubs, public and private marinas, and other similar uses (including "private water oriented recreational facilities") are prohibited in residentially zoned, lakefront districts. It is also imperative that the Zoning Code incorporate well-reasoned definitions that clearly reflect the Code's intentions.

If the Town of Canandaigua is not going to appeal this determination as was recently indicated in the local paper, then it should strongly consider implementing a moratorium immediately. Until dirt is moved, RSM has no vested interest in this project that would be recognized in a court of law. This will afford the Town the time it needs to review and revise its Zoning Code.

The Dock Law also needs to be revisited. It is very clear that its purpose was to prevent exactly the kind of development that is being proposed by RSM. It seems equally clear that it never occurred to the drafters of this legislation that the lakefront would be in any

manner artificially separated from the associated upland by the artifice of a subdivision to circumvent the intent of the Dock Law or that a Court would construe the statute's definition of aggrieved 'adjacent upland owner' or 'adjacent upland parcel' in such a way as to permit a developer to buy residential lake front that is not contiguous to any upland on which residences are to be built and then develop it under the 'All Other Land Use' category of the Dock Law as a private marina, with many more boats, docks and moorings that would otherwise be permitted for residential property, for the benefit of a residential development miles away.

***What else can be done?***

**Maue:** The communities around the lake can address deficiencies in the Dock Law. Unfortunately, this process can take up to two years and a lot of damage may be done in the interim. Each municipality's Zoning Law and zoning process should also be reviewed with respect to lakeshore development. The scope of authority of each municipality's zoning officer and code enforcement officer to review and interpret law, but particularly the Dock Law, without careful legal oversight should also be reviewed.

***Some have charged that the appellants are "anti-development" and want to slow the economic growth around the Lake. Is that the case?***

**Maue:** This appeal is anything but an attempt to slow the economic vitality of this area. It's just the opposite. People choose to live here, vacation here, and start businesses here because of the relative health of the Watershed compared to other areas. You don't see people clamoring to live in the watershed of Onondaga Lake which is practically a dead lake. This isn't about opposing development; it is about responsible development.

To ensure the long-term economic health of the area, we must preserve and enhance the resources that bring people here in the first place. You don't do that by gutting the laws that were created a decade ago to protect the precious resource that is the Canandaigua Lake Watershed.

***What can CLWA members do to support an appeal?***

**Maue:**

Make contributions to the legal fund. Write letters or e-mails to the editor of the local papers. Residents of the Town of Canandaigua (and the other communities around the Lake) can write to the Town Board and the Town Supervisor supporting a moratorium. Members can volunteer to work on committees in their local communities that address these matters. They can also get more active in the Watershed Alliance, the Eastshore Association and other community groups that are concerned with protection of Canandaigua Lake.

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**The Lake Reporter:**

***What exactly are the Canandaigua Lake Uniform Docking and Mooring Regulations?***

**Maue:**

These were crafted over a decade ago with great care by the Ontario County Planning Department with input from many groups and agencies, including the results of

community meetings held in every community around the Lake. The purpose was to provide a rational basis for access to Canandaigua Lake's shoreline. There were many reasons to do this -- Canandaigua Lake provides drinking water for more than 60,000 area residents so its purity must be maintained. Public access to the water and to the views is important as land values on and around the lake rise in value. Municipalities wanted to find common ground to control a growing water pollution and erosion problem.

Since the watershed has several municipalities, the idea was find a single standard all these municipalities could agree on and ratify. This was accomplished and then State Senator Randy Kuhl provided legislation that gave the municipalities – not the NYS Navigation Law – the authority to determine the number of docks and moorings allocated on Canandaigua Lake, according to a uniform formula of square footage of shoreline.

The Regulations work hand in hand with the Watershed Management Plan, also agreed to by the surrounding municipalities, to equitably place rational restrictions on practices and uses that could slow the deterioration of the water quality in the watershed.