

TROUBLE IN RIVER CITY

By Judith I. Johannsen

"Hey, that's mine and you can't use it!" followed by the indignant, "I can, too. Knock it off, you're not the boss of me!" sounds like the universal song heard from the backseat of the American family on vacation, but it actually was the basis of a dispute over whether a property owner had a legal right to reasonable recreational use of an abutting manmade pond that covered land owned entirely by another.

Under Connecticut law, land that borders on a watercourse or lake is riparian land and the right to reasonably use that body of water for recreational purposes is a riparian right. Additionally, when a natural watercourse is intentionally dammed to create a pond or lake, permanently or for an extended period of time, the artificial pond or lake is treated as if it were natural and the property bounding that pond or lake enjoys riparian rights, unless contractually restricted.

At the center of this dispute is a pond formed by a manmade dam and spillway that impounded waters from a non-navigable stream. The original owner of all the land immediately surrounding and under the pond sold the dam and the downstream land to one party and the upstream land, plus part of the pond bed, to another for recreational fishing.

Trouble started when the downstream owner, essentially shouting, "It's mine and you can't use it!", erected a 12 foot high fence blocking the upstream owner from entering upon or using the pond and filed a suit to permanently deny the upstream owner any use of the pond, claiming that while abutters of natural bodies of water have riparian rights, abutters of artificial bodies of water have none.

The upstream owner fired back with the "No sir, it's not just yours, I can use it, too!" response by filing his own suit, asking the court to order the downstream owner to remove the fencing blocking his access and to declare that the upstream owner has a legal right to use the pond.

The trial court ruled that there was no distinction between a natural body of water and an artificial body of water with respect to riparian rights if the artificial body of water has existed for a long time, that the upstream owner had the right to reasonable recreational use of the pond, and that the downstream owner had to remove the fencing and stop interfering with the upstream owner's reasonable recreational use of the pond.

As in most back seat squabbles, one of the squabblers is unhappy with the resolution and aims to set it right, and so it was no surprise that the downstream owner appealed the trial court's decision. The appellate court agreed with the trial court's findings in favor of the upstream owner by affirming that there is no distinction between a natural and an artificial body of water with respect to riparian rights and that the upstream owner's recreational riparian rights were not obliterated simply because the pond was created artificially.

Resolutions to kids' squabbles over possession, use and control of toys are usually quick and generally turn on which kid is bigger or older or a parent's command. On the other hand, grown-ups' disputes over legal possession, control and use of real property, if not decided quickly between the parties, often wend their way through a glacial court process that cares not a whit who's taller or older and turn on impersonal legal concepts and robed authorities' rulings.

Judith I. Johannsen is Assistant Counsel for the Connecticut Association of REALTORS®, Inc.

Connecticut Association of REALTORS®, Inc. is Connecticut's largest professional trade association representing over 15,000 real estate professionals engaged in all aspects of the real estate business. Founded in 1920, the Connecticut Association of REALTORS®, Inc. is dedicated to enhancing the ability of its members to conduct their business successfully while maintaining the preservation of private property rights. Use of the term "REALTOR®" is exclusive to the members of the REALTOR® Association and signifies their allegiance to a strict Code of Ethics.