

FEATURE  LEGAL

Know Your Water Rights

ATTORNEY JIM LANG HELPS INDIVIDUALS AND COMPANIES NAVIGATE LEGAL ISSUES RELATED TO WATERFRONT PROPERTY, PIER CONSTRUCTION, AQUACULTURE, SEA LEVEL RISE AND MORE

By Gail Kent

You just bought your dream home on the river and now you want to build a dock so your family can enjoy your new boat. All you need to do is call the contractors and sign the agreement, right?

Not so fast.

Just because you own the land in front of the water doesn't mean you have rights to the water, says James Lang, an environmental law attorney and sole practitioner with Jim Lang Waterfront Property Law.

After spending 25 years in the Navy, Lang obtained his law degree and worked for 35 years in small and large firms focusing on

waterfront, maritime and admiralty, and environmental law. A published author and sought-after speaker, he has since formed a solo practice.

Lang represents individuals and corporate entities on issues arising from waterfront property rights; climate change, sea level rise and other environmental changes; wetlands preservation; waterway dredging; oyster farming, hunting and fishing rights.

"Whether it's on a beach, a river or the bay, in almost all situations, the bottom land under the water is going to be owned by the Commonwealth of Virginia," he says.

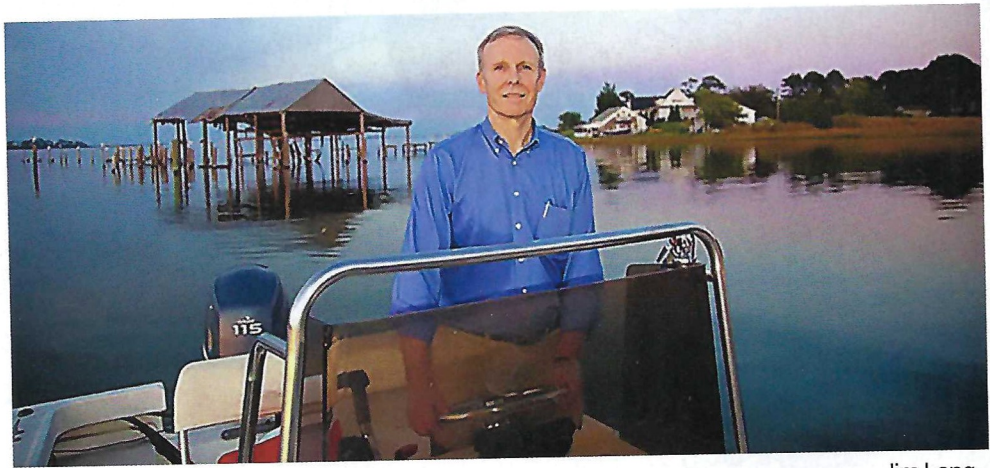
There are a few exceptions—if you're on

a lake or pond that is privately owned, the land under the water is also privately owned and the rules are different. In that case, you must obtain permission from the owner.

By statute, whenever the Commonwealth owns the bottom land, the property line between the upland property owner and the owner of the bottom land will be the mean low water mark, determined by a complicated formula involving low tides over time, Lang explains.

The waterfront boundary line shifts and moves through erosion, reducing the shoreline; and deposits of soil, called alluvium, that expand the shoreline. These

“You may see the pier and a boat tied up and you’re thinking as a buyer, ‘Oh, this will be great. How much fun I could have with this piece of property.’ And then, after they close, they find out that those rights didn’t come with it.”



Jim Lang

PHOTO BY RAMONE PHOTOGRAPHY

issues must be taken into consideration when planning a dock or other structure.

“If you are a property owner on a state-owned bottom, which is what you’re going to have if you’re on most rivers, oceans or bay, then to build a pier you need permission from the owner, just as you would if you were on a privately owned pond or lake, but this time the owner is the Commonwealth of Virginia,” he says. “Virginia has set up a whole set of rules for how this works.”

The process for gaining permission involves filing a joint permit application to the Virginia Marine Resources Commission (VMRC), acting as a clearing house to obtain permission through other agencies, such as the Army Corps of Engineers, the Virginia Department of Environmental Quality and the Virginia Department of Historic Preservation.

“Instead of putting the burden on the applicant to figure all that out, the VMRC does that for you.”

People considering waterfront property must be careful to research whether they will own the riparian property rights—the rights to build a dock, pier or boat lift—because those rights can be sold separately from the property. If they don’t, they could become very disappointed buyers.

“You may see the pier and a boat tied up and you’re thinking as a buyer, ‘Oh, this will be great. How much fun I could have with this piece of property.’ And then, after they close, they find out that those rights didn’t come with it.”

When considering buying property, it’s important to know that Virginia is a caveat emptor state—meaning “buyer beware,” Lang says. “It’s an awfully good idea that if you’re buying waterfront property to let us help you before you make a purchase that’s going to generate some serious buyer’s remorse.”

Lang handles a number of issues pertaining to property rights. He does a thorough title search—going back at least 60 years—to determine if the property rights had ever been severed and sold to someone else. He makes sure that any existing structures were properly permitted.

He also handles controversy involving neighbors. He checks to see if neighbors on either side of the property have applications pending to build something that the purchaser might object to, such as a pier that might block the view of the water or otherwise interfere with the enjoyment of the property.

In some cases he represents owners who might want to build a pier. In other cases, he is retained by neighbors who are against the proposal to build a pier. In either situation, he handles the required hearings before VMRC.

Lang also represents clients contending with dam issues. There are only two naturally formed lakes in Virginia, he says, which means the rest have been artificially created by dams, many of which are privately owned.

“There’s been an increasing emphasis under the Virginia Dam Safety Act to locate all those dams and evaluate them to determine if they are safe because if a dam fails, the

release of water can have catastrophic consequences.”

Dam owners could face expensive lawsuits if the structures fail and flood nearby neighborhoods.

Another area that produces legal challenges is sea level rise, an especially serious issue in Coastal Virginia, second only to New Orleans in the U.S. for its negative effect.

“One problem that works against us here in Hampton Roads is sea level rise and the other is that the land is subsiding, caused by the extraction of groundwater, producing a much more pronounced effect.”

Lang says some industries, such as the Franklin paper mills and Eastern Shore chicken processing plants, use huge amounts of groundwater.

“That water is encapsulated in a ‘balloon’ under the ground, and as you pull water out of the ground, the balloon gets smaller and smaller and the ground sinks.”

That effect can cause subsidence many miles from the source. The Navy has recognized these issues as major threats to military readiness, and their construction projects now all have to incorporate design criteria to deal with them.

Sinking land and rising sea levels also reduce waterfront property lines, affecting owners’ lifestyles and investments.

“Unless the law is changed, your land is going to get smaller. In a low-lying waterfront property adjoining state-owned bottom land there is a risk that the entire parcel will be gone.” **CoVa**