

contiguous with the West Canal Marina and Park facility in the Town of Pendleton, which is situated just outside of the Sub-Area to the east.

Herman Baisch Park is the only public park in Sub-Area 2. This 3.7 - acre recreation facility, which is owned by the Town of Wheatfield, is utilized for picnicking and similar passive uses, but lacks sufficient amenities for full enjoyment. It contains a surfaced court area of basketball or tennis, with open lawn and some wooded area. There is a small, formalized parking area. This park has some drainage issues that need to be remedied. Additional amenities, such as picnic pavilions, picnic tables and grills, and some additional play equipment would vastly improve the public use and enjoyment of the park.

2.5.5 Zoning

Within the Town of Wheatfield, land use is regulated by the Zoning Ordinance (Chapter 200 of the Wheatfield Town Code - Zoning) and by Subdivision Regulations (Chapter 169 - Subdivision of Land). Zoning in the waterfront area includes four classifications (R-2 Residential-2 District, R-3 Residential-3 District, C-1 Commercial District and M-1 Light Industrial District). Existing zoning along the waterfront is depicted on [Map 4A](#) and [Map 4B](#). Zoning regulations include provisions for site plan review, home occupations, cluster and planned unit development and signage. The zoning code establishes height and bulk regulations, site plan specifications, development standards, required improvements, and penalties. A summary of the zoning districts that occur within the LWRA is as follows:

Sub-Area 1

The majority of the waterfront, seaward of River Road is zoned R-2; a section at the eastern end of the sub-area, along the north side of River Road, is zoned R-3. A small area at the east end, and the western end of the sub-area are zoned C-1. The remainder of the area, north of River Road, is zoned M-1.

There are many residential lots in Sub-Area 1 that do not meet the zoning setback requirements for the R-2 Residential classification. This has created a situation where many of the properties are non-conforming and zoning enforcement is a more difficult issue; therefore, as the Town has long been allowing variances for development or redevelopment in this area. The use of a zoning overlay district or a new zoning classification that has setback requirements that are realistic for this area would be a practical way to address this problem.

Sub-Area 2

The east and west sections of this sub-area are zoned R-2. The area surrounding Niagara Falls Blvd. is zoned C-1. The central section of Sub-Area 2 is also located within the Niagara Falls Blvd. overlay district (NFBO). The intent of the NFBO is to enhance the positive image of the Town of Wheatfield and to preserve greenspace, while at the same time improving commercial business activity along this important roadway. The NFBO overlay district sets forth additional

regulations to promote, protect and improve aesthetics and safety along the Niagara Falls Blvd. corridor.

The zoning classifications in the LWRA include the following provisions.

- *R-2 Residential-2 District* - This district allows one and two-family dwellings, churches, schools, parks, playgrounds and fire stations. Special Permit uses allowed in an R-2 district include cemeteries, golf courses, clubs and fraternal organizations, parks and recreation buildings, nursing homes, excavation and mining (in compliance with Section 200-34.1 of the Zoning regulations) and mortuaries.
- *R-3 Residential-3 District* – The R-3 district allows uses that are permitted in an R-2 district (both by right and with a special use permit), and multi-family housing. Accessory uses allowed are those as permitted in an R-1 district.
- *C-1 Commercial District*– This general commercial district allows a host of business and commercial uses including, telephone exchanges, real estate and insurance offices, mortuaries, opticians and optometrists, indoor recreation (bowling, health spas, tennis courts, etc.), medical offices and clinics (with restrictions), nursing and convalescent homes, professional and executive offices, tourist homes, day-care centers, personal service shops, laundromats, dry cleaners, theaters, assembly halls, custom shops (lighting, plumbing, woodworking, etc.), machine and tool sales and service, job and newspaper printing, shopping centers and plazas, nurseries and greenhouses, golf driving ranges, facilities for the assembly of previously prepared materials (with restrictions), indoor gun ranges and mobile home parks.

Uses allowed by Special Use permit in the C-1 district include car washes, drive-in theaters, gasoline service stations, collision shops, commercial storage buildings, new and used motor vehicles sales and services, kennels, drug and alcohol-related hospitals or clinics, and small animal hospitals. The C-1 classification also allows all uses that are allowed by right and all special permit uses that are allowed in the R-3 Residential district.

- *M-1 Light Industrial District* – As-of-right uses in this district include warehouses, truck terminals, airports, contracting and construction services, theme parks that may include other uses that are permitted in the C-1 and M-1 districts, and other businesses, services, manufacturing or processing of materials, goods or products not otherwise prohibited by law when conducted in a completely enclosed building (and when in conformance with M-1 performance standards as set forth in the zoning). Residential dwellings and adult entertainment establishments are permitted in an M-1 district by Special Use permit. The M-1 district also allows any as-of-right and special permit uses that are permitted in a C-1 district.
- *NFBO Niagara Falls Boulevard Overlay District* – This overlay district is designed to better manage and accommodate increasing commercial growth along the Niagara Falls Blvd. corridor through the implementation of guidelines to regulate traffic, signage and

development/redevelopment. It is intended to encourage the development of uses that are in harmony with the surrounding area, improve visual character, protect adjoining residential uses and enhance the character of the area as an important gateway.

The Town's subdivision regulations are fairly standard, with procedures for both minor subdivisions (4 or less lots, not involving public infrastructure improvements or extensions) and major subdivisions (more than 4 lots). A minor subdivision approval is a two step process with sketch plan and minor subdivision plat review. A major subdivision requires three steps: sketch plan, preliminary plan review, and final plat review.

Other codes in the Town of Wheatfield that affect land use in the Town include Chapter 82, which regulates drainage and drainage structures; Chapter 92 – Excavations; Chapter 101, which regulates flooding and flood damage prevention; Chapter 114 for Mobile Home Parks; Chapter 123, which regulates parks and recreation areas in the Town; Chapter 134 – Property Maintenance, which sets forth provisions for controlling litter, weeds and other debris abandoned or stored on public property; Chapter 146 – Sewers; Chapter 161 – Solid Waste – which controls the dumping, storage, collection and disposal of refuse in the Town; Chapter 163 – Storm Sewer System; Chapter 164 – Stormwater Management – which establishes minimum stormwater management requirements and controls; Chapter 165 – Streets and Sidewalks; Chapter 177 – Towers and Antennas, which regulates the installation of towers; Chapter 194 – Water; Chapter 196 – Weeds, which establishes provisions to control excessive growth of weeds, grass and other unhealthful plants that can constitute a nuisance; and Chapter 198 – Wind Energy Conversion Systems.

2.5.6 Public and Underwater Land Ownership

There is only one property along the waterfront that is owned by the Town. This is a 4.8-acre brownfield property that the Town desires to utilize for future public parkland.

- *Public Trust Doctrine*

New York, upon attaining Statehood, succeeded the King of England in ownership of all lands within the State not already granted away, including all rights and title to the navigable waters and the soil under them (Public Lands Law, Section 4; People v. Trinity Church, 22 N.Y. 44, 1860; Langdon v. Mayor, 93 N.Y. 129, 1883). Broadly speaking, the State holds title to all underwater lands not otherwise conveyed away by patents or grants. The State holds title to these tidelands and submerged lands in its sovereign capacity in trust for the use and enjoyment of the public under the *Public Trust Doctrine* (People v. Steeplechase Park Co., 218 N.Y. 459, 1916; Appleby v. City of New York, 271 US364, 1926; Coxe v. State, 144 N.Y. 396, 1895). This legal doctrine emerged from the ancient concept that the sovereign had the right of way, an "incorporeal hereditament", to all navigable streams and waterways; the underlying theory being the protection of the public interest in fisheries and navigation.

State title to the public foreshore and submerged lands, and the power of disposition, is incident and part of its sovereignty, which cannot be surrendered, alienated or delegated, except for some public purpose or some reasonable use for the public benefit, and without impairing public rights in the remaining lands and water. Inherent in the nature of public trust lands is that they support diversified and important ecosystems without which many public rights, including fishing, swimming and the like, would be impossible to enjoy. The public interest demands the preservation and conservation of this vital natural resource against pollution, overuse, destruction and infringement by others, whether public or private.

It is in the public interest that State and other governmental ownership of public trust lands be maintained and, when possible, recovered from private ownership. Where full public ownership no longer exists, the application of the Public Trust Doctrine requires that any remaining rights of the public to use such lands should be preserved and protected for present and future enjoyment.

Occupation of public trust lands by riparian owners for purposes of gaining access to navigable waters should be undertaken in a reasonable manner that does not unnecessarily interfere with the public's right of passage upon, the use of the waters overlying such lands, and other public trust purposes. Considerations of public safety, resource protection and the need for access at a given location may be utilized as factors in determining the level and types of access to be provided. Public use of publicly-owned underwater lands and lands immediately adjacent to the shore shall be discouraged only where such use would be inappropriate for reasons of public safety, military security, or the protection of coastal resources.

- *Underwater Land Ownership*

Ownership of Lakes Erie and Ontario, within the territorial limits of New York State, and all submerged lands, including the subsurface lying under the lakes and the Niagara River, is held by the State of New York, unless ownership has been granted to any other person or entity. The beds of the Great Lakes and the River are susceptible to private ownership only for special purposes. The boundary line between State ownership of the lakebed or riverbed and ownership of the adjacent upland is the low water mark. The New York State Canal Corporation has jurisdiction of the Erie Canal and its underwater lands.

State-owned underwater lands in the Niagara River are managed by the New York State Office of General Services (OGS). The OGS issues grants, leases, easements and other interests for these underwater lands. They also investigate encroachments on littoral rights (the right of an upland owner to access the navigable waters of the lakes or river) and administer Navigation Law with respect to the location of structures in or on navigable waters. The OGS reviews NYSDEC and Army Corps of Engineers comments for proposed projects that affect State-owned bottom lands to ensure that the benefits of the public will not be deprived and that the environment will not be adversely impacted. The OGS strives to

achieve satisfaction on the part of all parties involved prior to the issuance of an interest (grant, lease or easement).

The State Office of General Services is the agency responsible for issuing grants, leases and easements for the use of underwater lands, and for other interests for docks and associated marine-related structures that are placed on State-owned underwater lands. In the case of the Town of Wheatfield, the OGS is an authorizing agency for the use of underwater lands for docks proposed along the Niagara River. The construction of any commercial dock or any private, non-commercial dock that exceeds 4,000 square feet in area size (including the perimeter) would require the granting of an interest (a grant or easement) from the OGS. Non-commercial structures that are less than 4,000 square feet in size (as measured from the outermost perimeter and including the surface area of the water contained within), less than 15 feet in height, and have a capacity of five or fewer boats, would not need an interest. For any property where an interest has been issued, Section 334(5) of the Real Property Law requires that riparian (or littoral) lines be included on the survey that is prepared for the subdivision of waterfront properties situated on navigable waters.

- *Underwater Land Grants and Leases*

Over the years, a number of underwater land grants have been issued by the State along the shoreline of the Niagara River in the Town of Wheatfield (see [Map 5](#)). These grants were issued for the express purpose of either *commerce* or *beneficial enjoyment*. Grants issued for commerce were given to shorefront businesses for more restricted activities and were usually written with conditions. If the conditions were not followed, the State could bring an action to declare the grant void and thereby recover ownership, per Section 78 of the Public Lands Law. Beneficial enjoyment grants were given to shorefront property owners without restriction and provided more complete title to the underwater lands. In either case, the grantee was given full ownership rights to the bottom lands. Grants for commerce were issued in the early to mid 1800's, and then the issuance of grants for beneficial enjoyment became more commonplace. Around 1890, the State began to restrict the grants issued for beneficial enjoyment, as well. Furthermore, in making grants of underwater lands, the State could also impose conditions on the use of these lands.

Water grant index maps were acquired from the NYS Office of General Services (OGS) Bureau of Land Management for the Wheatfield waterfront area. These maps indicate that numerous underwater land grants were issued in the area, primarily during the mid to late 1800's and early 1900's. Approximately 12 grants were issued along the shoreline between 1890 and 1897; all for beneficial enjoyment. These underwater grant lands consisted of offshore area that was likely used for the installation of docks or other offshore structures. In general, the form of the current day waterfront is due in part to fill, bulkheading and other activity that occurred through the issuance of the underwater land grants.

Based on discussions with Richard Bennett from the NYSOGS Bureau of Land Management in December of 2009, the interest in underwater lands is attached to either the new upland property that is created through fill activity or to the coterminous upland property. As ownership of the land changes hands, the interest in the underwater land moves with the title to that land. For private property, because the interest in the underwater lands is attached to the title, there is no need for the State to reconvey the lands to the new landowner. Therefore, underwater land ownership has been transferred, over the years, to the present day owners of the upland properties. In the future, when shoreline property owners are proposing the installation of off shore docking facilities or other structures requiring use of bottom lands, confirmation of the land grants should be cleared with the OGS.

2.6 Surface Water Uses, Navigation and Harbor Management

2.6.1 Vessel Use and Navigation

Sub-Area 1: Niagara River

Vessel use along the Wheatfield waterfront is limited to small pleasure craft, which are used for recreation and fishing. There are no commercial vessels docked in the area and no commercial fishing industry or support facilities. A large number of residents along the shoreline have docks that are supported through underwater land grants (as noted above). Many of these structures (approximately 50 percent) are removed in the winter. These private docks are used primarily to launch small craft that would otherwise be docked at a marina outside the area (see Appendix D).

There is a federally-designated navigation channel that extends through the central portion of the Niagara River. Known as the Niagara River Channel, this navigation channel is dredged to a depth of 12 feet. This channel is maintained by the U.S. Army Corps of Engineers to facilitate safe passage. The Army Corps of Engineers conducts surveys to determine when the channel may need maintenance dredging.

According to the National Oceanic and Atmospheric Administration (NOAA) navigation chart, the off-shore water depths in the Niagara River range between 5 feet or less along the shoreline to between 10 and 13 feet mid river. While in places the near-shore bottom is sandy, the river bottom is predominately mud and silt. According to National Oceanic and Atmospheric Administration navigation charts, there are underwater obstructions in the form of submerged pilings and cribs. There are pilings for abandoned floating docks located near the shoreline in areas up to six feet deep. The cribbing is deeper and includes the wastewater treatment plant outfall.