Cast & Characters

Quint: Caitlin Donnelly

Chair Brody: Mitch Klevan

Vaughn: Gerald Cedrone

Hooper: Rhiannon DiClemente

Public Comment No. 1/Young Parent: Joel Michel

Public Comment No. 2/Fisherman: Eric Yoon

Public Comment No. 3/D.J. Trump: Judge Marlene Lachman

Discussion Facilitators: Erin Lamb, Alan Nochumson, Edward Chacker

Additional March Team Members: Jacqueline Campbell, Brian Chacker, Joseph Gordon, Jenny Perkins, Dan Purtell, Eric Weitz; Students: Duncan Becker, Ashley Friedman, and Peter Mazur.

Special Guest Presentation By:

Len & Nick Anderson of Core Insurance Group

Temple American Inn of Court March Team Presents

Public Trust and Private Property – It's a Shore Thing

CLIFF NOTES

An exploration of the laws surrounding beach access, ownership of beachfront property, riparian laws generally and the different legal mechanisms that balances the public trust against private property rights.

SOURCES & REFERENCED CASELAW

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- Coastal Disaster Insurance In The Era of Global Warming – The Case for Relying on the Private Market, Georgetown Environmental Law & Policy Center, by Justin R. Pidot
- Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296 (1972)
- Matthews v. Bay Head Imp. Ass'n, 95 N.J. 306 (1984)
- Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 370 N.J. Super. 171 (2004)
- Van Ness v. Borough of Deal, 78 N.J. 174 (1978)

61 N.J. 296
Supreme Court of New Jersey.

The BOROUGH OF NEPTUNE CITY, a municipal corporation of the State of New Jersey, et al., Plaintiffs-Appellants,
v.
The BOROUGH OF AVON-BY-THE-SEA, a municipal corporation of the State of New Jersey, et al., Defendants-Respondents.

Argued March 6, 1972.
Decided July 24, 1972.

Action challenging ordinance setting fee for persons using beach. The superior Court, Law Division, 114 N.J.Super. 115, 274 A.2d 860, upheld the ordinance and appeal was taken. The Supreme Court, Hall, J., held that municipalities may validly charge reasonable fees for use of their beaches but may not discriminate in any respect between residents and nonresidents.

Reversed and remanded.

Francis, J., dissented and filed opinion in which Mountain, J., joined.

Attorneys and Law Firms

*298 **48 Robert V. Carton, Asbury Park, for plaintiff-appellants (Carton, Nary, Witt & Arvanitis, Asbury Park, attorneys; Robert V. Carton, Asbury Park, of counsel and on the brief).

Thomas J. Spinello, Avon, for defendants-respondents.

Opinion

The opinion of the Court was delivered by

HALL, J.

The question presented by this case is whether an oceanfront municipality may charge non-residents higher fees than residents for the use of its beach area. The **49 Law Division sustained an amendatory ordinance of defendant *299 Borough of Avon-By-The-Sea (Avon) so providing. 114 N.J.Super. 115, 274 A.2d 860 (1971). The challenge came from plaintiffs Borough of Neptune City, an adjacent inland municipality, and two of its residents. We granted plaintiffs' motion to certify their appeal to the Appellate Division before argument in that tribunal. R. 2:12-2. The question posed is of ever increasing importance in our metropolitan area.[1] We believe that the answer to it should turn on the application of what has become known as the public trust doctrine.

Avon, in common with other New Jersey municipalities bordering on the Atlantic Ocean, is a seasonal resort-oriented community. The attraction to the influx of temporary residents and day visitors in the summer months is, of course, the ocean beach for bathing and associated recreational pleasures and benefits. See Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 243-244, 281 A.2d 513 (1971). According to the stipulation of facts, Avon's year-round population of 1850, resident within its approximately seven square block area, is increased in the summertime to about 5500 people (not counting day visitors), with the seasonal increase living in four hotels, 40 rooming and boarding houses and innumerable rented and owned private dwellings.

[1] The municipality borders on the ocean for its full north-south length. Ocean Avenue, a county highway, is the easternmost street. Municipal east-west streets end at Ocean Avenue. Between it and the ordinary high water line or mark of the ocean waters are located an elevated boardwalk and a considerable stretch of sand, dry except in time of storms and exceptionally high tides. This stretch, as well as the boardwalk, is owned and maintained by the municipality and has been for many years. Although the derivation of the borough's title is not contained in the record, there is no dispute that the sand area has been dedicated for *300 public beach recreational purposes-in effect, a public park-and is used for access by bathers to the water, as well as for sunning, lounging and other usual beach activities. The tide-flowed land lying between the mean high and low water marks, as well as the ocean covered land seaward thereof to the state's boundary, is owned by the State in fee simple, Bailey v. Driscoll, 19 N.J. 363, 367-368, 117 A.2d 265 (1955). There has been no alienation in any respect of that land bordering Avon; even if this state-owned land had been conveyed to Avon,

it would be required to maintain that land as a public park for public use, resort and recreation. N.J.S.A. 12:3-33, 34.

Years ago Avon's beach, like the rest of the New Jersey shore, was free to all comers. As the trial court pointed out, 'with the advent of automobile traffic and the ever-increasing number of vacationers, the beaches and bathing facilities became overcrowded and the beachfront municipalities began to take steps to limit the congestion by regulating the use of the beach facilities and by charging fees.' 114 N.J.Super. at 117, 274 A.2d at 861. It also seems obvious that local financial considerations entered into the picture. Maintenance of beach fronts is expensive and adds substantially to the municipal tax levy if paid for out of property taxes. Not only are there the costs of lifeguards, policing, cleaning, and the like, but also involved are capital expenses to prevent or repair erosion and storm damage through the construction of jetties, groins, bulkheads and similar devices. (Construction of the latter is generally aided in considerable part, as it has been in Avon, by state and other governmental funds.) In addition, the seasonal population increase requires the expansion of municipal services and personnel in the fields of public safety, health and order. On the other hand, the values of real estate in the community, both commercial and residential, are undoubtedly greater than those **50 of similar properties in inland municipalities by reason of the proximity of the ocean and the accessibility of the beach. And commercial enterprises located in the town are more valuable *301 because of the patronage of large numbers of summer visitors. (Avon does not have, in contrast with many other shore communities, extensive boardwalk stores and amusements.)

[2] [3] Legislative authority to municipalities to charge beach user fees, for revenue purposes, was granted by two identical statutes-the first, L.1950, c. 324, p. 1083, N.J.S.A. 40:92-7.1, applicable only to boroughs, and the second, L.1955, c. 49, p. 165, N.J.S.A. 40:61-22.20, applicable to all municipalities. The latter reads as follows:

> The governing body of any municipality bordering on the Atlantic ocean, tidal water bays or rivers which owns or shall acquire, by any deed of dedication or otherwise, lands bordering on the ocean, tidal water bays or rivers, or easement rights therein, for a place of resort for public health and recreation and for other public purposes shall have the exclusive control, government and care thereof and of any boardwalk, bathing and recreational facilities, safeguards and equipment, now or hereafter constructed or provided thereon, and may, by ordinance, make and enforce rules and regulations for the government and policing of such lands, boardwalk, bathing facilities, safeguards and equipment; provided, that such power of control, government, care and policing shall not be construed in any manner to exclude or interfere with the operation of any State law or authority with respect to such lands, property and facilities. Any such municipality may, in order to provide funds to improve, maintain and police the same and to protect the same from erosion, encroachment and damage by sea or otherwise, and to provide facilities and safeguards for public bathing and recreation, including the employment of lifeguards, by ordinance, make and enforce rules and regulations for the government, use, maintenance and policing thereof and provide for the charging and collecting of reasonable fees for the registration of persons using said lands and bathing facilities, for access to the beach and bathing and recreational grounds so provided and for the use of the bathing and recreational facilities, but no such fees shall be charged or collected from children under the age of 12 years.

In passing we should say that we see no legislative intent therin to authorize discrimination in municipal beach fees between residents and non-residents. The statute amounts to a delegation to a municipality having a dedicated beach (dry sand area) of the state's police power over that

area and the tide-flowed land seaward of the mean high water *302 mark; the proviso indicates an affirmation of the state's paramount interest and inherent obligation in insuring that such seaward land be equally available for the use of all citizens.

Until 1970 Avon's ordinance, adopted pursuant to the quoted statute, made no distinction in charges as between residents and non-residents. The scheme then and since is that of registration and issuance of season, monthly or daily identification badges for access to and use of the beach area east of the boardwalk. (The boardwalk is open and free to all.) The amounts of money involved are substantial. In 1969, 32,741 badges of all categories were issued and the revenue from beachfront operations totalled $149,758.15, which went into the borough's general revenues.

The distinction between residents and non-residents was made by an amendment to the ordinance in 1970, the enactment which is attacked in this case. It was accomplished by making the rate for a monthly badge the same as that charged for a full season's badge ($10.00), by restricting the sale of season badges to residents and taxpayers of Avon and the members of their immediate families, and also apparently by substantially increasing the rates for daily badges (from $1.00 and $1.25 to $1.50 **51 and $2.25). A 'resident' is defined as any person living within the territorial boundaries of the borough for not less than 60 consecutive days in the particular calendar year. The result is considerably higher charges for non-residents under the definition than for permanent residents, taxpayers and those staying 60 days or more. Residents of Neptune City, for example, using the beach daily, would pay twice as much for the season (two monthly badges) as residents of Avon.

[4] Plaintiffs attacked the ordinance on several grounds, including the claim of a common law right of access to the ocean in all citizens of the state. This in essence amounts to reliance upon the public trust doctrine, although not denominated by plaintiffs as such. Avon, although inferentially recognizing some such right, defended its amendatory *303 ordinance on the thesis, accepted by the trial court, that its property taxpayers should nevertheless not be called upon to bear the expense, above non-discriminating beach user fees received, of the cost of operating and maintaining the beachfront, claimed to result from use by non-residents and that consequently the discrimination in fees was not irrational or invidious. All recognized that an oceanfront municipality may not absolutely exclude non-residents from the use of its dedicated beach, including, of course, land seaward of the mean high water mark; a trial court decision, Brindley v. Lavallette, 33 N.J.Super. 344, 348-349, 110 A.2d 157 (Law Div.1954), had so held, although not by reliance upon the public trust doctrine. We approve that holding.

Avon's proofs, based on 1969 figures, sought to show a deficit of about $50,000 between user fees received in that year and the costs of operation and maintenance of the beach. The cost figures were derived from estimates of the portions of budgetary line items said to be attributable to the beach as well as from projections on an annual basis of expected future capital expenses. Plaintiffs urge that some of these allocations are unsound. Moreover, there was no showing that the same costs would not be incurred even if only residents (under the definition) used the beach, nor was it demonstrated that the 1970 discriminatory fee schedule closed the alleged financial gap.

We prefer, however, not to treat the case on this basis, but rather, as we indicated at the outset, to approach it from the more fundamental viewpoint of the modern meaning and application of the public trust doctrine.

That broad doctrine derives from the ancient principle of English law that land covered by tidal waters belonged to the sovereign, but for the common use of all the people. Such lands passed to the respective states as a result of the American Revolution. For recent dissertations on the history, development and modern connotations of the doctrine, See generally 1 Waters and Water Rights (Clark ed. 1967), ss 36.3, 36.4, pp. 190-202; Sax, 'The Public Trust Doctrine *304 in Natural Resource Law: Effective Judicial Intervention,' 68 Mich.L.Rev. 471 (1970); Note, 'The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine,' 79 Yale L.J. 762 (1970); and with particular reference to New Jersey, Note, Jaffee, 'State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey,' 25 Rutgers L.Rev. 571 (1971).

A succinct statement of the principle is found in the leading case of Illinois Central Railroad Company v. People of State of Illinois, 146 U.S. 387, 435, 13 S.Ct. 110, 111, 36 L.Ed. 1018, 1036 (1892):

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount ****52** right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court . . ..

The original purpose of the doctrine was to preserve for the use of all the public natural water resources for navigation and commerce, waterways being the principal transportation arteries of early days, and for fishing, an important source of food. This is also well pointed up in Illinois Central:

> It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially ***305** impair the public interest in the lands and water remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. (146 U.S. at 452, 13 S.Ct. at 118, 36 L.Ed. at 1042)

There is not the slightest doubt that New Jersey has always recognized the trust doctrine.[2] The basic case is Arnold v. Mundy, 6 N.J.L. 1 (Sup.Ct.1821), where Chief Justice Kirkpatrick spoke as follows:

Every thing susceptible of property is considered as belonging to the nation that possesses the country, and as forming the entire mass of its wealth. But the nation does not possess all those things in the same manner. By very far the greater part of them are divided among the individuals of the nation, and become Private property. Those things not divided among the individuals still belong to the nation, and are called Public property. Of these, again, some are reserved for the necessities of the state, and are used for the public benefit, and those are called 'the domain of the crown or of the republic;' others remain common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use, and are called Common property. Of this latter kind, according to the writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish, and the wild beasts. Vattel lib. i, 20. 2 Black.Com. 14. But inasmuch as the things which constitute this Common property are things in which a sort of transient usufructuary possession, only, can be had; and inasmuch as the title to them and to the soil by which they are supported, and to which they are appurtenant, cannot well, according to the common law notion of title, be vested in all the people; therefore, the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected, and regulated for

the common use and benefit. But still, though this title, strictly speaking, is in the sovereign, yet the use is common to all the people. (6 N.J.L. at 71)

And I am further of opinion, that, upon the Revolution, all these royal rights became **53 vested in The people of New Jersey as the sovereign of the country, and are now in their hands; and that they, having, themselves, both the legal title and the usufruct, may make *306 such disposition of them, and such regulation concerning them, as they my think fit; that this power of disposition and regulation must be exercised by them in their sovereign capacity; that the legislature is their rightful representative in this respect, and, therefore, that the legislature, in the exercise of this power, may lawfully erect ports, harbours, basins, docks, and wharves on the coasts of the sea and in the arms thereof, and in the navigable rivers; that they may bank off those waters and reclaim the land upon the shores; that they may build dams, locks, and bridges for the improvement of the navigation and the ease of passage; that they may clear and improve fishing places, to increase the product of the fishery; that they may create, enlarge, and improve oyster beds, by planting oysters therein in order to procure a more ample supply; that they may do these things, themselves, at the public expense, or they may authorize others to do it by their own labour, and at their own expense, giving them reasonable tolls, rents, profits, or exclusive and temporary enjoyments; but still this power, which may be thus exercised by the sovereignty of the state, is nothing more than what is called the Jus regium, the right of regulating, improving, and securing for the common benefit of every individual citizen. The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people. (6 N.J.L. at 78)

Similar expressions are found throughout our decisions down through the years. See e.g., Cobb v. Davenport, 32 N.J.L. 369, 378-379 (Sup.Ct.1867); Ross v. Mayor and Council of Borough of Edgewater, 115 N.J.L. 477, 483, 180 A. 866 (Sup.Ct.1935), affirmed o.b. 116 N.J.L. 447, 184 A. 810 (E. & A.1936), cert. den. 299 U.S. 543, 57 S.Ct. 37, 81 L.Ed. 400 (1936); Bailey v. Driscoll, Supra (19 N.J. at 367-368, 117 A.2d 265); Baker v. Normanoch Ass'n, Inc., 25 N.J. 407, 414, 136 A.2d 645 (1957).

It is safe to say, however, that the scope and limitations of the doctrine in this state have never been defined with any great degree of precision. That it represents a deeply inherent right of the citizenry cannot be disputed. Two aspects should be particularly mentioned, one only tangentially involved in this case and the latter directly pertinent. The former relates to the lawful extent of the power of the legislature to alienate trust lands to private parties; the latter to the inclusion within the doctrine of public accessibility *307 to and use of such lands for recreation and health, including bathing, boating and associated activities. Both are of prime importance in this day and age. Remaining tidal water resources still in the ownership of the State are becoming very scarce, demands upon them by reason of increased population, industrial development and their popularity for recreational uses and open space are much heavier, and their importance to the public welfare has become much more apparent. Cf. New Jersey Sports & Exposition Authority v. McCrane, 61 N.J. 1, at 55, 292 A.2d 545, at 579 (1972) (concurring and dissenting opinion of Hall, J.). All of these factors mandate more precise attention to the doctrine.

Here we are not directly concerned with the extent of legislative power to alienate tidal lands because the lands seaward of the mean high water line remain in state ownership, the municipality owns the bordering land, which is dedicated to park and beach purposes, and no problem of physical access by the public to the ocean exists. The matter of legislative alienation in this state should, nonetheless, be briefly adverted to since it has a tangential bearing. As the earlier quotations indicate, it has always **54 been assumed that the State may convey or grant rights in some tidal lands to private persons where the use to be made thereof is consistent with and in furtherance of the purposes of the doctrine, E.g., the improvement of commerce and navigation redounding to the benefit of the public. However, our cases rather early began to broadly say that the State's power to vacate or abridge public rights in tidal lands is absolute and unlimited, and our statutes dealing with state conveyances of such lands contain few, if any, limitations thereon. (The Statutes are collected in Revised Statutes, Chapter 3,

Riparian Lands, of Title 12, Commerce and Navigation, N.J.S.A. 12:3-1 et seq.). An early case so indicating is Stevens v. Paterson & Newark Railroad Co., 34 N.J.L. 532, 549-552 (E. & A.1870); a more recent example is Schultz v. Wilson, 44 N.J.Super. 591, 597, 131 A.2d 415 (App.Div.1957), certif. den. 24 N.J. 546, 133 A.2d 395 (1957). But see ***308** Borough of Wildwood Crest v. Masciarella, 51 N.J. 352, 358, 240 A.2d 665 (1968). See also Mayor and Council of City of Hoboken v. Pennsylvania Railroad Co., 124 U.S. 656, 688-691, 8 S.Ct. 643, 653-655, 31 L.Ed. 543, 551-552 (1888); Shively v. Bowlby, 152 U.S. 1, 21-23, 14 S.Ct. 548, 555-556, 38 L.Ed. 331, 339-340 (1894), purporting to summarize the New Jersey law to that date. But compare Illinois Central Railroad Company v. People of State of Illinois, Supra, 146 U.S. at 453, 13 S.Ct. at 118, 36 L.Ed. at 1042, holding that a state may not completely abdicate its obligations with respect to such lands:

> The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

[5] **[6]** The observation to be made is that the statements in our cases of an unlimited power in the legislature to convey such trust lands to private persons may well be too broad. It may be that some such prior conveyances constituted an improper alienation of trust property or at least that they are impliedly impressed with certain obligations on the grantee to use the conveyed lands only consistently with the public rights therein. For example, the conveyance of tide-flowed lands bordered by an ocean dry sand area in private ownership to the owner thereof may well be subject to the right of the public to use the ocean waters. And, whether or not there was any such conveyance of tidal land, the problem of a means of public access to that land and the ocean exists. This case does not require resolution of such issues and we express no opinion on them. We mention this alienation aspect to indicate that, at least where the upland sand area is owned by a municipality-a political subdivision and creature of the state-and dedicated to ***309** public beach purposes, a modern court must take the view that the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.

[7] **[8]** We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit. The legislature appears to have had such an extension in mind in enacting N.J.S.A. 12:3-33, 34, previously mentioned. Those sections, generally speaking, authorize grants to governmental bodies of tide-flowed lands which front upon a public park extending ****55** to such lands, but only upon condition that any land so granted shall be maintained as a public park for public use, resort and recreation. Cf. Martin v. City of Asbury Park, 114 N.J.L. 298, 176 A. 172 (E. & A. 1935).

Other states have readily extended the doctrine, beyond the original purposes of navigation and fishing, to cover other public uses, and especially recreational uses. In Massachusetts, it was held many years ago that 'it would be too strict a doctrine to hold that the trust for the public, under which the state holds and controls navigable tide waters and the land under them, beyond the line of private ownership, is for navigation alone. It is wider in its scope, and it includes all necessary and proper uses, in the interest of the public.' Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124, 129 (1909). Wisconsin, where the doctrine covers all navigable waters, has long held that it extends to all public uses of water including pleasure boating, sailing, fishing, swimming, hunting, skating and enjoyment of scenic beauty. Representative modern cases

are *310 Hixon v. Public Service Commission, 32 Wis.2d 608, 146 N.W.2d 577, 582 (1966); Muench v. Public Service Commission, 261 Wis. 492, 53 N.W.2d 514, 520 (1952), affirmed on rehearing 261 Wis. 492, 55 N.W.2d 40 (1952). Courts in several other states have recently recognized the vital public interest in the use of the sea shore for recreational purposes and have, under various theories consistent with their own law, asserted the public rights in such land to be superior to private or municipal interests. See e.g., State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969); Gion v. City of Santa Cruz, 2 Cal.3d 29, 84 Cal.Rptr. 162, 465 P.2d 50 (1970); Gewirtz v. City of Long Beach, 69 Misc.2d 763, 330 N.Y.S.2d 495 (Sup.Ct., Nassau City. 1972). Modern text writers and commentators assert that the trend of the law is, or should be, in the same direction. 1 Waters and Water Rights, Supra, s 36.4(B), pp. 200-202; Sax, Supra, 68 Mich.L.Rev. at 556, 565; Note, Supra, 79 Yale L.J. at 777-778, 784-785; Note, Jaffee, Supra, 25 Rutgers L.Rev., at 608 n. 226, 690, 701.

[9] We are convinced it has to follow that, while municipalities may validly charge reasonable fees for the use of their beaches, they may not discriminate in any respect between their residents and nonresidents. The Avon amendatory ordinance of 1970 clearly does so by restricting the sale of season badges to residents, as defined in the ordinance, resulting in a lower fee to them. In addition the fee for daily badges, which would be utilized mostly by non-residents, may have been as well discriminatorily designed with respect to the amount of the charge. Since we cannot tell what fee schedule the municipality would have adopted when it passed this ordinance in 1970 if it had to do so on the basis of equal treatment for all, we see no other course but to set aside the entire amendatory enactment.

[10] We recognize, however, that Avon has operated under the present schedule since 1970 and that the present beach season is about half over. Other ocean-front municipalities may well have similar enactments. Also Avon very *311 likely has operated its budget and financial affairs on the basis of the beach user fees expected to be collected under the present schedule in reliance upon the trial court decision. To attempt now to turn the clock back to the non-discriminatory schedule (with considerably lower charges) specified in the pre-amendment ordinance would only create hopeless practical confusion and some unfairness to the municipality and its taxpayers. We therefore determine that the judgment to be entered pursuant to this opinion should operate prospectively only and become effective on January 1, 1973.

[11] [12] We ought also to say that we fully appreciate the burdens, financial and otherwise, resting upon our oceanfront municipalities by reason of the attraction of the sea and their beaches in the summer season to large numbers of people not permanently resident in the community. The **56 rationale behind N.J.S.A. 40:61-22.20 certainly is that such municipalities may properly pass on some or all of the financial burden, as they decide, by imposing reasonable beach user fees, which we have held here must be uniform for all. We think it quite appropriate that such municipalities may, in arriving at such fees, consider all additional costs legitimately attributable to the operation and maintenance of the beachfront, including direct beach operational expenses, additional personnel and services required in the entire community, debt service of outstanding obligations incurred for beach improvement and preservation, and a reasonable annual reserve designed to meet expected future capital expenses therefor. They may also, we think, very properly regulate and limit, on a first come, first served basis, the number of persons allowed on the beach at any one time in the interest of safety.

The judgment of the Law Division is reversed and the cause is remanded to that tribunal for the entry of a judgment consistent with this opinion. No costs.

For reversal: Chief Justice WEINTRAUB and Justices JACOBS, HALL and SCHETTINO-4.

For affirmance: Justices FRANCIS and MOUNTAIN-2.

FRANCIS, J. (dissenting).

I cannot agree with the result reached by the majority.

*312 It is undisputed that anciently and currently the sovereign-here the State of New Jersey-owns the fee title to the portion of the ocean beach front seaward of the mean high water mark. Nor can it be denied that the beach

area landward of the mean high water mark is owned by the upland title holder. I agree that the people have the right to use and enjoy the ocean in common, and that the right includes use in common of the beach area seaward of the mean high water mark; such is the public trust doctrine. In the absence of some unusual circumstance, or some reasonable regulation by the State, it is undoubtedly true that no person using That strip as an incident of his temporary enjoyment of the ocean can be considered a trespasser. Reference has been made to the fact that in the past agencies of the State have either given or sold certain riparian grants purporting to convey to the upland owner title to the land for a specified distance seaward of the mean high water mark. It has been suggested that the land described in such grants (at least the portion thereof remaining in its natural state) would be subject to the common public right to use and enjoy the strip between the mean high water mark and the ocean. But that problem is not before us now.

However, the majority opinion here states views upon a subject of serious consequence to ocean front communities and to the owners, private or public, of beach front land above the mean high water mark. The basic question may be couched in these terms: Since the people generally have the common right to use and enjoy the ocean and the portion of the beach below the mean high water mark, of what utility is that right if access from the upland does not exist or is refused by the upland owner? Although the majority opinion disclaims any positive ruling on the subject, it seems to imply that exercise of the common right carries with it by way of implementation, the right to use and enjoy Any beach upland for purposes of recreation and access to the ocean.

*313 In my view, the common right is not so pervasive. Of course, generally speaking reasonable access to the ocean and to the land strip which is in the public domain cannot be denied, but the law does not require that such access be without limitation or qualification. In localities where ocean front municipalities do not own or operate public beaches, and all ocean front property is in private ownership, such municipalities, as a legitimate Exercise of their right of eminent domain, could provide for reasonable public access. For example, we are told that in some out of state communities **57 where title to the public roads terminates at high or low water mark, the beach for the width of the road is regarded as subject to an easement of way for members of the public to the longitudinal strip of beach front seaward of the mean high water mark and into the ocean. But, whatever the technical situation in those places, it does not mean in this State that privately owned beach area upland of the mean high water mark is subject to public use. In my judgment a private owner could legally fence in his entire beach area upland of the mean high water mark, if he was moved to do so.

Communities like Avon which have only a few blocks of ocean front are aware that their publicly owned and maintained beaches risk overcrowding to the detriment of local residents and taxpayers unless some reasonable limitations are imposed on use by nonresidents. In my view it is neither arbitrary nor invidiously discriminatory for the local governing body which owns, operates and maintains a public beach in the interest of its residents to charge a higher daily, weekly or monthly fee to non-residents who seek the privilege of using the beach. Avon has the right, I think, to fence in its beach to the mean high water mark, if it wishes and restrict the use thereof to its own residents and taxpayers with or without an admission fee. If it wishes to open this upland beach (owned by it) to use by non-residents, I see nothing in N.J.S.A. 40:92-7.1 or N.J.S.A. 40:61-22.20 which prohibits the municipality from imposing reasonable limits *314 on the invitation by means of a charge of higher use fees to the non-residents Accordingly, I see no merit in the contention that the inequality between the fees Avon charges for use of its upland beach to its own residents and taxpayers, and those charged to non-residents, renders illegal the fees imposed upon the non-residents.

For the reasons stated, I would affirm the judgment of the trial court. Justice MOUNTAIN joins in this dissent.

All Citations

61 N.J. 296, 294 A.2d 47, 57 A.L.R.3d 983, 2 Envtl. L. Rep. 20,519

Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296 (1972)

294 A.2d 47, 57 A.L.R.3d 983, 2 Envtl. L. Rep. 20,519

Footnotes

1 See N.Y. Times, July 10, 1972, p. 1, col. 1.

2 In probably most states the doctrine covers all navigable waters, non-tidal as well as tidal. New Jersey early limited it to tidal waters and does not apply the navigability test. Cobb v. Davenport, 32 N.J.L. 369 (Sup.Ct.1867).

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78 N.J. 174
Supreme Court of New Jersey.

Stanley C. VAN NESS, Public Advocate of the State of New Jersey, Plaintiff-Appellant,
and
Attorney General of the State of New Jersey, Plaintiff-Respondent,
v.
BOROUGH OF DEAL et al., Defendants-Appellants.

Argued June 13, 1978.
|
Decided Oct. 16, 1978.

The public advocate brought suit against a shore municipality, asserting illegal discrimination against nonresidents with respect to a municipally owned beach facility. From an adverse judgment of the Superior Court, Chancery Division, 139 N.J.Super. 83, 352 A.2d 599, the municipality appealed. The Superior Court, Appellate Division, reversed, 145 N.J.Super. 368, 367 A.2d 1191. On grant of certification, following application therefor by the Public Advocate, the Supreme Court, Sullivan, J., held that a municipally owned open beach on which permanent improvements had not been built and as to which no claim of private ownership had been asserted was subject to the public trust doctrine, and all had a right to use and enjoy it, and the municipality could not frustrate public right by limiting its dedication of use to residents of the municipality, nor could it allocate to the public on a limited basis rights which, under the doctrine, the public inherently possessed in full.

Reversed in part.

Mountain, J., dissented and filed opinion, in a portion of which Schreiber, J., joined.

Attorneys and Law Firms

****571 *175** Robert P. Corman, Asst. Deputy Public Advocate, for plaintiff-appellant (Stanley C. Van Ness, Public Advocate, attorney).

Stephen Skillman, Asst. Atty. Gen., for respondent Atty. Gen. (John J. Degnan, Atty. Gen., attorney; Michael S. Bokar, Deputy Atty. Gen., on the brief).

Thomas L. Morrissey, Deal, for respondents Borough of Deal et al. (Carpenter, Bennett & Morrissey, attorneys; Michael S. Waters and Rudy B. Coleman, Newark, on the brief).

Opinion

The opinion of the court was delivered by

SULLIVAN, J.

The underlying suit was brought by Stanley C. Van Ness, Public Advocate of the State of New Jersey, against the Borough of Deal charging the Borough with illegal and discriminatory practices in the maintenance and operation of its publicly owned beaches and related facilities. The suit was bottomed on this Court's 1972 decision in Bor. of Neptune v. Bor. of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47, which held that a coastline municipality, in the maintenance and operation of its public beaches, could not discriminate in any respect between residents and nonresidents.

Deal is a municipality in Monmouth County bordering on the Atlantic Ocean for its entire one-mile eastern boundary. Only about 1325 feet of that coastline is suitable for beach and bathing purposes. This area is municipally owned and is divided into three sections. The north beach is called the ***176** Phillips Avenue Pavilion Beach and extends for some 475 feet along the ocean. It has bathhouses, rest rooms, a play area and ****572** sun deck. The facilities are available on a daily or seasonal basis at fixed charges which are constant for residents as well as nonresidents. [1] This beach area has been dedicated by the municipality to general public use.

Just to the south of the Pavilion area is the Deal Casino, also municipally owned, but operated on a restricted basis. The Casino has two swimming pools, a snack bar-restaurant, rest rooms, bathhouses and deluxe cabanas, as well as facilities for shuffleboard, ping-pong, basketball and the like. Only Deal residents or property owners can obtain membership in the Casino.

The beach area in front of the Casino, which extends approximately 420 feet along the ocean, is dedicated for the use of residents of Deal and, except for a 50-foot wide strip along the high water line, is reserved for the use of Casino members and guests. Prior to construction of the Casino in 1956, this area consisted of a bluff about 20-30 feet high which was unsuitable as a bathing beach. As a part of the Casino project, the bluff was bulldozed and graded to form a dry beach area. Approximately $800,000 was spent by Deal to construct the Casino and beach. Maintenance expenses are paid out of the membership fees.

There is no restriction on the right of the public to bathe and swim in the ocean in front of the Casino. The public is also allowed to use a 50-foot wide strip of the Casino's dry beach area extending along the high water mark. However, commencing about 50 feet west of the high water mark, the dry sand area in front of the Casino is roped off and reserved for the use of Casino members.

***177** To the south of the Casino is the municipally owned surfing and boating beach approximately 430 feet in width. This area is used by bathers from both the Pavilion and the Casino, as well as by the general public.

The original suit had as its object the opening to the public of the Casino memberships and facilities, as well as the restricted dry beach area in front of the Casino. It was asserted that these facilities came under the Public Trust Doctrine as applied by this Court in Avon. The trial judge, in an opinion reported at 139 N.J.Super. 83, 352 A.2d 599 (Ch.Div.1975), sustained the proposition that these municipally owned facilities, including the beach area, must be made available to nonresidents of Deal on the same basis as to residents. However, the specific relief ordered,[2] was not rested on the Public Trust Doctrine but, rather, based on the concept of municipal power and the requirement of equal protection.

The Appellate Division reversed. Its opinion is reported at 145 N.J.Super. 368, 367 A.2d 1191 (1976). As to the Casino, it held that limiting membership in the Casino to residents of Deal did not deny equal protection since the classification was reasonable under the circumstances. It found in N.J.S.A. 40:61-22.1, the statute empowering a municipality to build and operate a swimming pool facility, authorization to establish membership qualifications as long as they were reasonable.

It also held that the beach in front of the Casino was not subject to our holding in Avon as it had not been dedicated to the general public's use and, since the remaining beach area made available for the use of the general public was adequate for the enjoyment of public trust rights, the Appellate Division sustained the power of the municipality to ***178** restrict use of the Casino beach to Casino membership. This Court granted certification on application by the ****573** Public Advocate. 74 N.J. 262, 377 A.2d 667 (1977).

At the argument of the appeal before this Court, the Public Advocate abandoned that part of the case which claimed that the Casino facilities were subject to the Public Trust Doctrine and must be opened to the public. His sole contention now is that the dry beach area immediately in front of the Casino is subject to the doctrine and should be available to the general public so that there may be a proper enjoyment of public trust rights. This is the only issue before us.

In Bor. of Neptune v. Bor. of Avon-by-the-Sea, Supra, as heretofore noted, we held that an oceanside municipality, in the maintenance and operation of its public beaches, could not discriminate in any respect between residents and nonresidents. There involved was Avon's asserted right to charge nonresidents higher fees than residents for the use of its public beach. Our ruling was bottomed on an expanded application of the Public Trust Doctrine, the original purpose of which was to preserve for all the public natural water resources for navigation and fishing. In Avon, supra, 61 N.J. at 303-310, 294 A.2d 47, there is discussed in some detail the origins of the doctrine, its history, development and modern connotations, citing numerous authoritative articles and critiques.

The Public Trust Doctrine has always been recognized in New Jersey. It is deeply engrained in our common law, Arnold v. Mundy, 6 N.J.L. 1 (Sup.Ct.1821), due, no doubt, to New Jersey's unique location on the Atlantic Ocean, Delaware and New York Bays with numerous rivers and tributaries emptying into these bodies, resulting in extensive shorelines and considerable tidal waters and tidal lands in the State. New Jersey beaches adjacent to its

tidal areas are world famous because of their suitability for bathing, surf fishing and other forms of recreation.

In Avon, this Court had no difficulty in finding that in this day and age the public rights in tidal lands were not *179 limited to the ancient prerogatives of fishing and navigation, but extended as well to recreational uses including bathing, swimming and other shore activities. 61 N.J. at 309, 294 A.2d 47. In so holding, we noted that the Public Trust Doctrine, like all common law principles, was not fixed or static, but should be molded and extended to meet changing conditions and the needs of the public the doctrine was created to benefit. Id.

With regard to municipally owned beaches, we said this:
* * * at least where the upland sand area is owned by a municipality a political subdivision and creature of the state and dedicated to public beach purposes, a modern court must take the view that the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.

Id. at 308-309, 294 A.2d at 54.

This ruling is fully applicable to the present appeal. In Avon, contrary to defendants' contention herein, we were not limiting our ruling to the beach area between low and high water the wet beach area. We said and we meant that, in New Jersey, a proper application of the Public Trust Doctrine requires that the municipally owned upland sand area adjacent to the tidal waters must be open to all on equal terms and without preference. See Note, 26 Rutgers L.Rev. 179, 181 (1972). Of course, the municipality, in the exercise of its police power and in the interest of the public health and safety, would have the right to adopt reasonable regulations as to the use and enjoyment of the beach area.

Our ruling here, as in Avon, is concerned with municipally owned open beaches. We are not called upon to deal with beaches on which permanent improvements may have been built, or beaches as to which a claim of private ownership is asserted.

The fact that Deal has never dedicated the Casino beach to the use of the general public is immaterial. The beach is dedicated to recreational uses including bathing, swimming, surf fishing and other shore activities. **574 If the area, *180 which is under municipal ownership and dedication, is subject to the Public Trust Doctrine, and we hold that it is, all have the right to use and enjoy it. Deal cannot frustrate the public right by limiting its dedication of use to residents of Deal. Nor may it allocate to the public on a limited basis, rights which, under the doctrine, the public inherently has in full.

Nor do we think it significant that the area in front of the Casino in its natural state, was unsuitable for normal beach activities and that a bluff had to be levelled and graded in order to create a beach area. Whether natural, or man-made, the beach is an adjunct to ocean swimming and bathing and is subject to the Public Trust Doctrine.

Our ruling herein is intended to encompass normal beach areas. We are not presented with special circumstances such as an unusually large dry beach which might call for a modified application of our ruling herein.

The dissent herein, expressing uncertainty as to the extent of the Public Trust Doctrine, would not, at this time, hold that it applied to municipally owned dry sand beaches. However, this State is rapidly approaching a crisis as to the availability to the public of its priceless beach areas. The situation will not be helped by restrained judicial pronouncements. Prompt and decisive action by the Court is needed.

The dissent also expresses concern that in Avon the Court appeared to deny the Legislature power to alter the status of property impressed with the public trust. Avon, by way of dictum, does say that "state * * * action," which is contrary to the concept that beach and ocean waters must be open to all on equal terms, "is impermissible," 61 N.J. at 309, 294 A.2d 47, and that statements in New Jersey cases of an unlimited power in the Legislature to convey such trust lands to private persons "may well be too broad." 61 N.J. at 308, 294 A.2d 47. This proposition, the dissent asserts, would place public trust property beyond legislative control and regulation, and cast doubt upon the validity of titles to public trust lands which *181 have been or may hereafter be conveyed by the State. We agree that the question is troublesome, but it is not involved in the present case and we leave a more definite resolution of

it to specific facts and circumstances where it can be dealt with directly.

The last ground of dissent suggests that the inclusion of municipally owned dry sand beaches within the Public Trust Doctrine making them at once indiscriminately available to all members of the public constitutes a taking for which the municipality would be entitled to compensation from the State. No such claim is made herein by Deal, nor has the issue been briefed or argued. We, therefore, hold the question for a more appropriate case. However, our adjudication that the Deal municipal dry sand beach is subject to the Public Trust Doctrine does not create a public right where none existed previously. It merely gives recognition to the existence of such right. To say that this adjudication constitutes a compensable taking is questionable at best.

In summary, we hold that the municipally owned beach in front of the Deal Casino must be opened to the general public on the same basis as the Pavilion beach. [3] That portion of the Appellate Division judgment which approved and sanctioned the municipal restriction on the use of the Casino beach to Casino members is reversed.

For reversal: Chief Justice HUGHES and Justices SULLIVAN, PASHMAN, CLIFFORD and HANDLER 5.

For affirmance: Justices MOUNTAIN and SCHREIBER 2.

MOUNTAIN, J., dissenting.

I dissent from the majority opinion and would affirm the judgment of the Appellate Division substantially for the reasons given by Judge Morgan in her opinion reported **575 at 145 N.J.Super. 368, 367 A.2d 1191 (1976).

The majority today follows the opinion of this Court in *182 Borough of Neptune v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972), (Avon), and elaborates somewhat upon that holding. It is now unmistakably clear that all municipally owned beaches from Sandy Hook to Cape May are open to all members of the public on equal terms. This result is reached by judicially declaring that the public trust doctrine applies to these upland expanses of dry sand. The implications and ramifications of this ruling require more careful attention than they have received.

I

I submit that in New Jersey today there is a continuing and pervasive uncertainty as to just what the public trust doctrine is and to what properties it applies. Of these uncertainties, one of the most significant has to do with the question of legislative supervision and control. Until the scope of the public trust doctrine is clarified, it would certainly be the part of wisdom to refrain from incorporating within this doctrine the many miles of valuable beach on the Atlantic Ocean that are owned by our municipalities.

In Avon, the Court appeared to deny the Legislature power to alter the status of property impressed with the public trust:

> The observation to be made is that the statements in our cases of an unlimited power in the legislature to convey such trust lands to private persons may well be too broad. It may be that some such prior conveyances constituted an improper alienation of trust property or at least that they are impliedly impressed with certain obligations on the grantee to use the conveyed lands only consistently with the public rights therein. (61 N.J. at 308, 294 A.2d at 54) [1]

The Court in Avon characterized this statement as Dictum, but what follows is surely a holding in the case:

> We mention this alienation aspect to indicate that, at least where the upland sand area is owned by a municipality a political subdivision *183 and creature of the state and dedicated to public beach purposes, a modern court must take the view that the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without

> preference And that any contrary state or municipal action is impermissible. (61 N.J. at 308-309, 294 A.2d at 54; emphasis added)

Observe that "any . . . contrary state . . . action is impermissible." This must mean that Legislative action is impermissible.

One well qualified commentator, concluding his study of the public trust doctrine in New Jersey after Avon, has this to say:

Neptune City (Avon) apparently announces recognition by the Supreme Court of New Jersey that its 1821 decision in Arnold v. Mundy established an inalienable, indefeasible equitable property in the citizens of New Jersey respecting the state's tidalwater resources. This interest, whose legal title is held in trust for the public by the legislature, seems to be cognizable at the suit of individual citizens Qua citizens. Expansive or protean, though principally related to navigation, fishing and attendant interests, the public trust is defined by actual citizenry demand. Thus, presently the trust comprehends the rights of sea-bathing and foreshore and tidelands recreation, and precludes discrimination in its regulation. This public trust also appears to be beyond legislative prerogative. Citizens accordingly would seem entitled to judicial review of legislative allocations of tidalwater resources, review even of relevant legislative findings and policies. (Jaffee, "The Public Trust Doctrine is Alive and Kicking in New Jersey Tidalwater: Neptune City v. Avon-by-the-Sea A Case of **576 Happy Atavism?," 14 Natural Resources J. 309, 334-5 (1974); emphasis added)

Is this a correct description of New Jersey law as it is today? There is support for every statement made, and yet I, for one, am far from sure. Such a rule, purporting to place public trust property beyond legislative reach, is substantially at variance with every decision on the subject handed down in this State during the 150 years separating Arnold v. Mundy, 6 N.J.L. 1 (Sup.Ct.1821) from Avon.[2]

*184 In discussing the power of the Legislature to regulate and control lands subject to the public trust doctrine, Judge Goldmann, as recently as 1957, observed,

> The Legislature has the power, absolute and unlimited, to regulate, abridge or vacate public rights in tidal waters except in the field reserved to Congress by the Federal Constitution. (Schultz v. Wilson, 44 N.J.Super. 591, 597, 131 A.2d 415, 419 (App.Div.1957))

The statement is followed by the citation of a number of cases squarely supporting this position. Of course, if such powers exist with respect to tidal waters, which have been subject to the public trust doctrine for hundreds of years, they must surely exist with respect to upland beaches that have only recently become part of the public trust lands.

Just why the Legislature should be forbidden to control and regulate public trust properties is by no means clear. All admit that the public trust doctrine came to North America from Great Britain apparently as part of the common law. But in England the status of public trust properties could be freely altered by Parliament.

It was never doubted that an act of Parliament would operate to extinguish any public right of passage, whether by land or water . . .. (Woolrych, Law of Waters 272 (1st Amer.ed. 1853))

Parliament has the power to extinguish the public trust by grant or in any other way it sees fit. (Note, "The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine," 79 Yale L.Jour. 762, 771 (1970))[3]

In commenting upon the contention that public trust lands and waters may be beyond legislative reach, one authority in this field has remarked,

*185 If the trusteeship puts such lands wholly beyond the police power of the state, making them inalienable and unchangeable in use, then the public right is quite an extraordinary one, restraining government in ways that neither Roman nor English law seems to have contemplated. (Sax, "The Public Trust Doctrine in

Natural Resource Law: Effective Judicial Intervention," 68 Mich.L.Rev. 471, 477 (1970))

My purpose here, however, is not to reach any conclusion on the issue of legislative control of public trust lands and waters, but rather to suggest that no authoritative body or statement of law with respect thereto can be said to exist in this State at this time. This being so, it seems to me improvident to rule now that great stretches of our most valuable beach properties shall be subject to this amorphous and ill-defined doctrine. If the Legislature is found to possess powers and responsibilities with respect to these properties as I strongly suspect it should and will be it may have quite different ideas as to how these matters should be handled. Until the contours of the public trust doctrine have been more precisely defined, I suggest that the admirable solution of the Appellate Division be adopted.

**577 II

A possibly more important consideration militates against the action taken by the majority. There are very strong grounds for believing that inclusion of municipally owned dry sand beaches within the public trust doctrine making them at once indiscriminately available to all members of the public constitutes a compensable taking. An almost identical issue has recently been so resolved in Massachusetts.

In Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (1974) the Supreme Judicial Court was called upon to render an advisory opinion to the Legislature as to whether a proposed bill, if enacted into law, would or would not be *186 constitutional. The bill proposed to establish "a public on-foot free right-of-passage along the shore of the coastline, between the mean high water line and the extreme low water line," subject to certain restrictions and limitations.[4] The right-of-passage would apply to the coastline throughout the entire Commonwealth.

The Court first held that the rights of the public did not include any right to walk on the beach. Public trust rights were confined, the Court said, to fishing, fowling and navigation and interests accessory thereto. This holding is of course contrary to this Court's decision in Avon and could not be said to represent the law of our State at the present time. Avon was cited by the Massachusetts court, but with only enigmatic comment and was not followed.

The Court next determined that the proposed creation of the right-of-passage, permitting as it did the intrusion of persons upon property otherwise private, would constitute a compensable taking.
The permanent physical intrusion into the property of private persons, which the bill would establish, is a taking of property within even the most narrow construction of that phrase possible under the Constitution of the Commonwealth and of the United States.

The interference with private property here involves a wholesale denial of an owner's right to exclude the public. If a possessory interest in real property has any meaning at all it must include the general right to exclude others. (313 N.E.2d at 568)

Having found that there would be a compensable taking, the Court next considered certain provisions in the proposed *187 bill purporting to afford compensation, and found them to be constitutionally inadequate.

Finally, the Court pointed out that certain other clauses in the bill seemed "to transfer from the Legislature to the courts not merely the decision on the amount of compensation but also the decision whether or not to compensate, that is, whether or not to exercise the power of eminent domain." To the extent that this transfer were accomplished, said the Court, the bill would be unconstitutional under the doctrine of the separation of powers. "The power of eminent domain is a legislative power." 313 N.E.2d at 569. The taking power, it pointed out, may never be exercised by the judiciary.

The opinion concludes that were the bill to be enacted into law, it would violate the Constitution of the Commonwealth of Massachusetts as well as the Fourteenth Amendment to the Constitution of the United States.

The relevance of this opinion to the case at bar seems plain. This Court decided in Avon, and made more explicit

today, that a new kind of property dry sand upland beach comes within the contours of the public trust doctrine. No court had ever so held before. See Note, 42 Cin.L.Rev. 554, 560 (1973). When later faced with an all but identical issue, the Massachusetts Court ****578** ruled the other way. It thus avoided the problems which we in New Jersey must face.

The first of these problems is whether or not there has been a taking. As to this, I submit there can be no possible doubt. Of course there has been a taking. The Borough of Deal, owner of the beach, itself created the dry sand area entirely at its own expense with the purpose of restricting the upper part of the beach to use solely by its own residents. This portion of the beach has never been dedicated to the public at large and has never, until now, been available for use by the general public. As the Massachusetts Court observed,

> ***188** If a possessory interest in real property has any meaning at all it must include the general right to exclude others. (313 N.E.2d at 568)

See, further, 2 Nichols, Eminent Domain (3rd ed. 1976), s 5.1(1).

Also instructive is the recent decision in United States v. 10.0 Acres, 533 F.2d 1092 (9th Cir. 1976).[5] There the government took what had been an exclusive easement and converted it into a public road. The condemning authority insisted it was a non-compensable taking because the condemnee retained his original right of use. A majority of the court felt otherwise, holding that the condemnee had been deprived of the exclusivity which he had previously enjoyed the right to exclude others. The court agreed with the landowner's contention that the government's action had converted his "quiet wooded sanctuary into just another 'house by the side of the road.' " 533 F.2d at 1095.

The fact that the property taken in this case was owned by a municipality rather than by a private individual makes no difference. It is the accepted law of New Jersey that municipal property, at least if not held in a governmental capacity, when taken by the State, must be paid for. There must be compensation. State Highway Com. v. Elizabeth, 102 N.J.Eq. 221, 226, 140 A. 335 (Ch.1928), aff'd 103 N.J.Eq. 376, 143 A. 916 (E. & A.1928). Indeed it has been suggested that the State must compensate a municipality for property taken even if it be held in a governmental capacity. State v. Cooper, 24 N.J. 261, 269-70, 131 A.2d 756 (1957). See also State v. Township of South Hackensack, 65 N.J. 377, 322 A.2d 818 (1974).

The second problem relates to the manner in which the taking has come about. As indicated above, the power of eminent domain is a legislative and not a judicial power. The leading treatise on this subject states it thus:

> ***189** Under the customary division of governmental power into three branches, executive, legislative and judicial, the right to exercise the power of eminent domain is legislative, and there can be no taking of private property for public use without the consent of the owner in the absence of direct authority from the legislature. The power of eminent domain lies dormant until legislative action is had, pointing out the occasions, modes, agencies and conditions for its exercise. (1 Nichols on Eminent Domain s 3.2 (3rd ed. 1976))

There has been no legislative action with respect to the matter we are considering.

To sum up what has happened: The Borough of Deal, using only its own funds, constructed a beach where there had been no beach before. It did this solely for the pleasure and benefit of its residents. There was nothing in the law to suggest that this could not or should not be done. Suddenly the magic wand labeled "public trust" is gently waved and, lo and behold, what had been a beach reserved solely for residents of the Borough has been transformed into a beach open to the general public. It matters not at all in what terms this bit of judicial legerdemain is couched. The fact remains that one right in the bundle of rights we call ownership has been destroyed the right to exclude others. There has been a compensable taking, accomplished by judicial act. But the judiciary may not exercise the power of eminent domain!

**579 III

In brief recapitulation, it is my view that no more land or water should be found to come within the ambit of the public trust until such time as the scope and contours of this doctrine are made clear. It is especially necessary to decide what role, if any, the Legislature is entitled or required to play.[6] There should also be an initial determination as to *190 whether the inclusion of municipally owned dry beach land within the public trust making it available to indiscriminate usage is or is not a compensable taking and whether the judiciary should purport to exercise the taking power.

Justice SCHREIBER joins in the introduction and Part I of this opinion.

All Citations

78 N.J. 174, 393 A.2d 571

Footnotes

1 Pavilion charges originally were higher for nonresidents than for residents. This was one of the discriminatory practices which the Public Advocate challenged. The trial judge ruled that the charges had to be the same for both residents and nonresidents. The Borough, accordingly, has amended its ordinance to equalize these charges and the matter is no longer an issue in the case.

2 The trial judge ordered that the Casino facilities and beach be opened to nonresidents as well as residents, and memberships allocated among the applicants on a lottery basis. He also required the Casino, up to a safe limit of people, to provide for daily rates and admissions to Casino facilities.

3 The Public Advocate represents that there is adequate public access to the Casino beach from the Pavilion beach immediately to the north and the surfing and boating beach immediately to the south, and that direct access through the Casino itself is unnecessary.

1 This proposition casts doubt upon the validity of titles in public trust lands which have been or may hereafter be conveyed by the state.

2 The cases are examined and critically analyzed in Jaffee, "State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey," 25 Rutgers L.Rev. 571, 649-710 (1971).

3 An argument can certainly be made that this legislative power in England rested upon the doctrine of Parliamentary supremacy, which finds no counterpart in this country. Even so, we search in vain for any act or circumstance that placed an inhibition on legislative assertion of power as the doctrine of the public trust came to our shores and made its way into our jurisprudence. It may well be that legislative superintendence should be subject to judicial review in the public interest. But none of this is clear at this time.

4 In Massachusetts, unlike New Jersey, private titles normally extend as far as the mean low-water mark or for a distance of 100 rods from the mean high-water line, whichever is the lesser measure. Accordingly the proposed right-of-passage would traverse the private land of owners of the littoral. (313 N.E.2d at 565) It would be otherwise in this State because here private titles extend only to mean high-water mark. Bailey v. Driscoll, 19 N.J. 363, 367, 117 A.2d 265, 561 (1955).

5 The case is noted in 63 Va.L.Rev. 135 (1977).

6 It is my understanding that a case is now pending which will provide an appropriate vehicle for the definitive resolution of these issues. They cannot well be decided here, having been neither discussed nor briefed.

95 N.J. 306
Supreme Court of New Jersey.

Virginia MATTHEWS, Plaintiff-Appellant,
and
Stanley C. Van Ness, Public Advocate of the State of New Jersey, Plaintiff-Intervenor-Appellant,
v.
BAY HEAD IMPROVEMENT ASSOCIATION, a non-profit corporation of the State of New Jersey; Philip D. Reed, Jr.; Paul E. Parker & Catherine Parker, h/w; James L. Tyson & David O. Tyson; John Bowman Delaney; Robert L. Johnson & Roberta Johnson, h/w; Helen Loblein; Martha L. Van Emburgh; H. Corbin Day; Carol C. Schmitz; Benjamin Barnett & Catherine, h/w; Katherine W. Fortenbaugh; George P. Egbert; Lester D. Egbert; George O. Nodyne; Andrew H. Campbell; Joseph Shelby & Miriam Rohrer Shelby; Bruce B. Swenson & Nancy T. Swenson, h/w; Ferdinand W. Roebling, III; Dorothy Anderson & Clifford O. Anderson; Estate of Eileen Rucker; Mary G. Hill; Robert S. Corbin; John A. Brown; George R. Schultz; Edward McGrath & Elizabeth McGrath, h/w; Walter H. Brown & Catherine Brown, h/w; Alfred E. Johnson, Jr.; Edward F. & Joan Van Johnson, h/w; John Magee & Elizabeth Magee, h/w; Frank J. O'Brien; Edith Wells Pardoe; George H. & Estelle M. Sands, h/w and Clyde A. Szuch, Defendants-Respondents,
and
Joseph Decibus & Hazel Decibus, h/w Frederick Mellor; William De Bray & Vilma De Bray, h/w; Elizabeth M. Heath; F.W. Clark & Lucille Clark, h/w; Henry Thuman; Elizabeth Matthews; Paul Samborn; Howard McClintic; Donald Lusardi; Henry C. Day; M. Dickinson; Margaret B. Dunn; Dick Zuver & Jean Zuver, h/w; Albert Robert Johnson; Andrew Conte; Richard Otto & Judith Otto, h/w; Gordon A. Willspangh, Elizabeth Hanus; Rebekah Collins; Maria A. Carmichael; Herbert J. Garmbow; Carolyn L. Ottley Frank E. Curran, Jr.; Darwin James, Jr.; William H. Nimick, III; Clark Estate; Marian R. Reichel; Lawrence Bathgate & Pamela Bathgate, h/w; Ricardo Mestres; Beverly Robertson; William Spofford; Austin Starkey; Henry Gibson; Henry Smith; Barr Elizabeth Loizeaux; Albert Dittman; Tristina Johnson; Quail Hill Estates; Ash Association; Malvern C. Burroughs; Herb & Ann Draesel, h/w; Florence Eberhardt; Peter Hausmann: Thomas Jones & Vera Jones, h/w; James W. Kelley; Morgan Macom & Mary Macom, h/w; John F. Moore, Donald A. Pickering & Dorothy Pickering, h/w; Elizabeth H. Strecch; Zorlas, James & Barbara, h/w; Walter & Marion Braun, h/w; David & Shirley Gaesford, h/w; Herbgmarth-Taylor Ross & Amy Wright, h/w and Marx & Guiliana Renzulli, h/w, Defendants,
and
Mrs. Paul Hay; Edward H. Hein; Harold L. Herbert; Robert King; Herman Schmitz; Christine Wilder; Samuel B. Fortenbaugh, Jr., Gregory Gibson; Ann F. Mestres; Dorothy L. Corbin; Max Habernickel, III & Gael S. Habernickel, h/w; J. Stuart Hill; Ricardo A. Mestres, Jr.; Anne K. Nodyne and Elizabeth B. Reed, Respondents Not Named in the Complaint.

Argued May 10, 1983.
|
Decided Feb. 2, 1984.

SYNOPSIS

Suit was brought against nonprofit association which controlled access to municipal beachfront and owners and others who had interest in properties located on beachfront, asserting that defendants denied general public its right of access to public trust lands on the beaches in municipality and its right to use private property fronting on the ocean incidental to public's right under the public trust doctrine. The Superior Court granted defendants' motions for summary judgment, and plaintiffs appealed. The Superior Court, Appellate Division, affirmed. After granting plaintiffs' petition for certification, the Supreme Court, Schreiber, J., held that: (1) public must be given both access to and use of privately owned dry sand areas as reasonably necessary under public trust doctrine; (2) nonprofit corporation

which had virtual monopoly over beachfront was a quasi-public association, considering its purposes, relationship with municipality, communal characteristic and activities; and (3) by limiting membership only to residents of municipality and foreclosing the public, association was acting in conflict with strong public policy in favor of encouraging and expanding public access to and use of shoreline areas and was frustrating public's right under the public trust doctrine, and thus association would be required to open membership to public at large.

Affirmed in part; reversed in part.

Attorneys and Law Firms

****357** ***310** Sandra T. Ayres, Deputy Public Advocate, Div. of Public Interest Advocacy, for plaintiff-appellant (Joseph H. Rodriguez, Public Advocate, attorney).

***311** Alvin Weiss, Livingston, for defendants-respondents Clifford O. Anderson & Dorothy Anderson; Benjamin & Catherine Barnett, h/w; John A. Brown; Walter H. Brown & Catherine Brown, h/w; Andrew H. Campbell; H. Corbin Day; Samuel B. Fortenbaugh, Jr. & Katherine W. Fortenbaugh, h/w; Gregory Gibson; Mrs. Paul Hay; Edward H. Hein; Harold L. Herbert; Edward F. & Joan Van Johnson, h/w; Robert King; Edward McGrath & Elizabeth McGrath, h/w; Ann F. Mestres; Paul E. Parker & Catherine Parker, h/w; Philip D. Reed, Jr.; Estate of Eileen Rucker; George H. & Estelle M. Sands, h/w; Herman Schmitz; Joseph Shelby & Miriam Rohrer Shelby; David O. Tyson; James L. Tyson and Christine Wilder (Riker, Danzig, Scherer & Hyland, Newark, attorneys; Glenn Clark, Morristown, and Andrew Manshel, West Orange, on the brief).

John R. Weigel, Princeton, for defendants-respondents John A. Brown; Robert S. Corbin & Dorothy L. Corbin, h/w; Samuel B. Fortenbaugh, Jr. & Katherine W. Fortenbaugh, h/w; Max Habernickel, III & Gael S. Habernickel, h/w; J. Stuart Hill & Mary G. Hill, h/w; Ricardo A. Mestres, Jr.; George O. Nodyne & Anne K. Nodyne, h/w; Philip D. Reed, Jr. & Elizabeth B. Reed, h/w; Ferdinand W. Roebling, III; Carol C. Schmitz; George R. Schultz and Bruce B. Swenson & Nancy T. Swenson, h/w (John R. Weigel, attorney; and Joseph M. Clayton, Jr., Princeton, attorney and on the brief).

Richard H. Woods, Lavallette, for defendants-respondents Bay Head Imp. Ass'n, etc.; John Bowman Delaney; George P. Egbert; Lester D. Egbert; Alfred E. Johnson, Jr.; Robert L. Johnson and Roberta Johnson, h/w; Helen Loblein; John Magee & Elizabeth ****358** Magee, h/w; Edith Wells Pardoe and Martha L. Van Emburgh (Schuman & Butz, Toms River, attorneys).

Frank J. O'Brien submitted a letter brief, pro se.

Clyde A. Szuch, Morristown, submitted briefs, pro se (Clyde A. Szuch, attorney; J. Michael Nolan, Jr., Jeri E. Ruscoll, Bloomfield, and Peter A. Scarpato, Flemington, on the briefs).

Opinion

The opinion of the Court was delivered by

SCHREIBER, J.

[1] The public trust doctrine acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people. The public's right to use the tidal lands and water encompasses navigation, fishing and recreational uses, including bathing, swimming and other shore activities. *Borough of Neptune City v. Borough of Avon-by-the-Sea,* 61 *N.J.* 296, 309, 294 *A.*2d 47 (1972). In *Avon* we held that the public trust applied to the municipally-owned dry sand beach immediately landward of the high water mark. [1] The major issue in this case is whether, ancillary to the public's right to enjoy the tidal lands, the public has a right to gain access through and to use the dry sand area not owned by a municipality but by a quasi-public body.

The Borough of Point Pleasant instituted this suit against the Borough of Bay Head and the Bay Head Improvement Association (Association), generally asserting that the defendants prevented Point Pleasant inhabitants from gaining access to the Atlantic Ocean and the beachfront in Bay Head. The proceeding was dismissed as to the Borough of Bay Head because it did not own or control the beach. Subsequently, Virginia Matthews, a resident of Point Pleasant who desired to swim and bathe at the Bay Head beach, joined as a party plaintiff, and Stanley Van

Ness, as Public Advocate, joined as plaintiff-intervenor. When the Borough of Point Pleasant ceased pursuing the litigation, the Public Advocate became the primary moving party. The Public Advocate asserted that the defendants had denied the general public its right of access during the summer bathing season to public trust lands along the beaches in Bay *313 Head and its right to use private property fronting on the ocean incidental to the public's right under the public trust doctrine. The complaint was amended on several occasions, eliminating the Borough of Point Pleasant as plaintiff and adding more than 100 individuals, who were owners or had interests in properties located on the oceanfront in Bay Head, as defendants.

Both sides moved for summary judgment. The trial court granted the defendants' motions except with respect to the plaintiff's claim that the public had acquired rights in the dry sand beach resulting from an implied dedication or prescriptive easement prior to 1932. When the plaintiff abandoned these claims, the trial court entered a final judgment in favor of the defendants. Upon plaintiff's appeal, the Appellate Division affirmed, one judge dissenting. Plaintiff appealed as of right, *R.* 2:2-1(a), and also filed a petition for certification, which we granted. 91 *N.J.* 559, 453 *A.*2d 873 (1982).

[2] The facts as gleaned from the record consisting of depositions, answers to interrogatories, admissions[2] and the pleadings are substantially undisputed.

****359** I

Facts

The Borough of Bay Head (Bay Head) borders the Atlantic Ocean. Adjacent to it on the north is the Borough of Point Pleasant Beach, on the south the Borough of Mantoloking, and on the west Barnegat Bay. Bay Head consists of a fairly narrow strip of land, 6,667 feet long (about 1 1/4 miles). A beach runs along its entire length adjacent to the Atlantic Ocean. There are 76 separate parcels of land that border the beach. All *314 except six are owned by private individuals. Title to those six is vested in the Association.

The Association was founded in 1910 and incorporated as a nonprofit corporation in 1932. Its certificate of incorporation states that its purposes are

> the improving and beautifying of the Borough of Bay Head, New Jersey, cleaning, policing and otherwise making attractive and safe the bathing beaches in said Borough, and the doing of any act which may be found necessary or desirable for the greater convenience, comfort and enjoyment of the residents.

Its constitution delineates the Association's object to promote the best interests of the Borough and "in so doing to own property, operate bathing beaches, hire life guards, beach cleaners and policemen ...."

Nine streets in the Borough, which are perpendicular to the beach, end at the dry sand. The Association owns the land commencing at the end of seven of these streets for the width of each street and extending through the upper dry sand to the mean high water line, the beginning of the wet sand area or foreshore. In addition, the Association owns the fee in six shore front properties, three of which are contiguous and have a frontage aggregating 310 feet. Many owners of beachfront property executed and delivered to the Association leases of the upper dry sand area. These leases are revocable by either party to the lease on thirty days' notice. Some owners have not executed such leases and have not permitted the Association to use their beaches. Some also have acquired riparian grants from the State extending approximately 1000 feet east of the high water line.

The Association controls and supervises its beach property between the third week in June and Labor Day. It engages about 40 employees who serve as lifeguards, beach police and beach cleaners. Lifeguards, stationed at five operating beaches, indicate by use of flags whether the ocean condition is dangerous (red), requires caution (yellow), or is satisfactory (green). In addition to observing and, if need be, assisting those in the water, when called upon lifeguards render first aid. Beach *315 cleaners are engaged to rake and keep the beach clean

of debris. Beach police are stationed at the entrances to the beaches where the public streets lead into the beach to ensure that only Association members or their guests enter. Some beach police patrol the beaches to enforce its membership rules.

Membership is generally limited to residents of Bay Head. Class A members are property owners. Class B are non-owners. Large families (six or more) pay $90 per year and small families pay $60 per year. Upon application residents are routinely accepted. Membership is evidenced by badges that signify permission to use the beaches. Members, which include local hotels, motels and inns, can also acquire badges for guests. The charge for each guest badge is $12. Members of the Bay Head Fire Company, Bay Head Borough employees, and teachers in the municipality's school system have been issued beach badges irrespective of residency.

Except for fishermen, who are permitted to walk through the upper dry sand area to the foreshore, only the membership may use the beach between 10:00 a.m. and 5:30 p.m. during the summer season. The public is permitted to use the Association's beach from 5:30 p.m. to 10:00 a.m. during the summer and, with no hourly restrictions, between Labor Day and mid-June.

No attempt has ever been made to stop anyone from occupying the terrain east of ****360** the high water mark. During certain parts of the day, when the tide is low, the foreshore could consist of about 50 feet of sand not being flowed by the water. The public could gain access to the foreshore by coming from the Borough of Point Pleasant Beach on the north or from the Borough of Mantoloking on the south.

Association membership totals between 4,800 to 5,000. The Association President testified during depositions that its restrictive policy, in existence since 1932, was due to limited parking facilities and to the overcrowding of the beaches. The Association's avowed purpose was to provide the beach for the residents of Bay Head.

***316** There is also a public boardwalk, about one-third of a mile long, parallel to the ocean on the westerly side of the dry sand area. The boardwalk is owned and maintained by the municipality.

The trial court held that the Association was not an arm of the Borough of Bay Head, that the Association was not a municipal agency, and that nothing in the record justified a finding that public privileges could attach to the private properties owned or leased by the Association. A divided Appellate Division affirmed. The majority agreed with the trial court that the Association was not a public agency or a public entity and that the action of the private owners through the Association established no general right in the public to the use of the beaches.

Judge Greenberg dissented. He argued that the Association's beaches are de facto public to a limited extent, being public to residents and visitors who stay in hotels. They are private to everyone else. He reasoned that Bay Head residents have the advantage of living in a municipality with public beaches, but are not troubled by having their beaches made available to outsiders. Judge Greenberg concluded that the Association's beaches must be open to all members of the public. However, he would not preclude any lessor from terminating his lease with the Association and thereby eliminating the public right of access to that part of the beach.

II

The Public Trust

In *Borough of Neptune City v. Borough of Avon-by-the-Sea,* 61 *N.J.* 296, 303, 294 *A.*2d 47 (1972), Justice Hall alluded to the ancient principle "that land covered by tidal waters belonged to the sovereign, but for the common use of all the people." The genesis of this principle is found in Roman jurisprudence, which held that "[b]y the law of nature" "the air, running water, the sea, and consequently the shores of the sea," were "common to ***317** mankind." Justinian, *Institutes* 2.1.1 (T. Sandars trans. 1st Am. ed. 1876). No one was forbidden access to the sea, and everyone could use the seashore[3] "to dry his nets there, and haul them from the sea ...." *Id.,* 2.1.5. The seashore was not private property, but "subject to the same law as the sea itself, and the sand or ground beneath it." *Id.* This underlying concept was applied in New Jersey in *Arnold v. Mundy,* 6 *N.J.L.* 1 (Sup.Ct.1821).

The defendant in *Arnold* tested the plaintiff's claim of an exclusive right to harvest oysters by taking some oysters that the plaintiff had planted in beds in the Raritan River adjacent to his farm in Perth Amboy. The oyster beds extended about 150 feet below the ordinary low water mark. The tide ebbed and flowed over it. The defendant's motion for a nonsuit was granted. The Supreme Court denied the plaintiff's subsequent motion to set aside the nonsuit.

Chief Justice Kirkpatrick, in an extensive opinion, referred to the grant by Charles II of the land comprising New Jersey with "all rivers, harbors, waters, fishings, etc., and of all other royalties, so far as the king had estate, right, title or interest therein" to the Duke of York. 6 *N.J.L.* at 85 (2d ed. 1875) ****361** (emphasis deleted). The duke had been delegated the same power as the king with respect to the land, and by virtue of the charter could divide and grant only those properties and interests that the king could. The Chief Justice's analysis then turned to the power of the English king. According to English law, public property consisted of two classes. Some was necessary for the state's use, and the remainder was common property available to all citizens. Chief Justice Kirkpatrick wrote that "[o]f this latter kind, according to the writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish and the wild beasts." *Id.* at 86. ***318** He argued that "though this title, strictly speaking, is in the sovereign, yet the use is common to all the people." *Id.* He pointed out the significant difference between public property necessary for the state and common property:

> The title of both these, for the greater order, and, perhaps, of necessity, is placed in the hands of the sovereign power, but it is placed there for different purposes. The citizen cannot enter upon the domain of the crown and apply it, or any part of it, to his immediate use. He cannot go into the king's forests and fall and carry away the trees, though it is the public property; it is placed in the hands of the king for a different purpose; it is the domain of the crown, a source of revenue; *so neither can the king intrude upon the common property, thus understood, and appropriate it to himself, or to the fiscal purposes of the nation, the enjoyment of it is a natural right which cannot be infringed or taken away, unless by arbitrary power;* and that, in theory at least, could not exist in a free government, such as England has always claimed to be. [*Id.* at 87-88 (emphasis supplied).]

The Chief Justice traced the use of common property by the kings and concluded that appropriation of common property by William the Conqueror and his successors was questionable and that the Magna Charta rectified the prior improper conduct by providing "*that where the banks of rivers had first been defended in his time,* (that is, when they had first been fenced in, and shut against the common use, in his time) *they should be from thenceforth laid open.* " *Id.* at 88. A charter of Henry III confirmed this principle at least to the extent that only grants of common property made before the reign of Henry II were valid. *Id.* at 89. [4]

***319** Chief Justice Kirkpatrick concluded that all navigable rivers in which the tide ebbs and flows and the coasts of the sea, including the water and land under the water, are "common to all the citizens, and that each [citizen] has a right to use them according to his necessities, subject only to the laws which regulate that use ...." *Id.* at 93. Regulation included erecting docks, harbors and wharves, and improving fishery and oyster beds. This common property had passed from Charles II to the Duke of York. Upon surrender of all rights of government in 1702, the common property reverted to the Crown of England, and upon the Revolution these royal rights became vested in the people of New Jersey. *Id.* at 94. *See also* J. Angell, *A Treatise on the Right of Property in Tidewaters and in the Soil and Shores Thereof* 42-43 (2d ed. 1847); D. Ducsik, *Shoreline for the Public* 89-91 (1974). Later in *Illinois Central R.R. v. Illinois,* 146 *U.S.* 387, 453, 13 *S.Ct.* 110, 118, 36 *L.Ed.* 1018, 1043 (1892), the Supreme Court, in ****362** referring to the common property, stated that "[t]he State can no more abdicate

its trust over property in which the whole people are interested ... than it can abdicate its police powers ...." [5]

*321 [3] In *Avon,* Justice Hall reaffirmed the public's right to use the waterfront as announced in *Arnold v. Mundy.* He observed that the public has a right to use the land below the mean average high water mark [6] **363 where the tide ebbs and flows. These uses have historically included navigation and fishing. In *Avon* the public's rights were extended "to recreational uses, including bathing, swimming and other shore activities." 61 *N.J.* at 309, 294 *A.*2d 47. *Compare Blundell v. Catterall,* 5 *B. & Ald.* 268, 106 *Eng.Rep.* 1190 (K.B.1821) (holding no right to swim in common property) *with Martin v. Waddell's Lessee,* 41 *U.S.* (16 Pet.) 367, 10 *L.Ed.* 997 (1842) (indicating right to bathe in navigable waters). The Florida Supreme Court has held:

> The constant enjoyment of this privilege [bathing in salt waters] of thus using the ocean and its fore-shore for ages without dispute should prove sufficient to establish it as an American common law right, similar to that of fishing in the sea, even if this right had not come down to us as a part of the English common law, which it undoubtedly has. [*White v. Hughes,* 139 *Fla.* 54, 59, 190 *So.* 446, 449 (1939).]
>
> It has been said that "[h]ealth, recreation and sports are encompassed in and intimately related to the general welfare of a well-balanced state." *N.J. Sports & Exposition Authority v. McCrane,* 119 *N.J.Super.* 457, 488, 292 *A.*2d 580 (Law Div.1971), aff'd, 61 *N.J.* 1, 292 *A.*2d 545, appeal dismissed *sub nom. Borough of East Rutherford v. N.J. Sports & Exposition Authority,* 409 *U.S.* 943, 93 *S.Ct.* 270, 34 *L.Ed.*2d 215 (1972). Extension of the public trust doctrine to include bathing, swimming and other shore activities is consonant with and furthers the general welfare. The public's right to enjoy these privileges must be respected.

[4] In order to exercise these rights guaranteed by the public trust doctrine, the public must have access to municipally-owned *322 dry sand areas as well as the foreshore. The extension of the public trust doctrine to include municipally-owned dry sand areas was necessitated by our conclusion that enjoyment of rights in the foreshore is inseparable from use of dry sand beaches. *See Lusardi v. Curtis Point Property Owners Ass'n,* 86 *N.J.* 217, 228, 430 *A.*2d 881 (1981). In *Avon* we struck down a municipal ordinance that required nonresidents to pay a higher fee than residents for the use of the beach. We held that where a municipal beach is dedicated to public use, the public trust doctrine "dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible." 61 *N.J.* at 309, 294 *A.*2d 47. The Court was not relying on the legal theory of dedication, although dedication alone would have entitled the public to the full enjoyment of the dry sand. Instead the Court depended on the public trust doctrine, impliedly holding that full enjoyment of the foreshore necessitated some use of the upper sand, so that the latter came under the umbrella of the public trust.

In *Van Ness v. Borough of Deal,* 78 *N.J.* 174, 393 *A.*2d 571 (1978), we stated that the public's right to use municipally-owned beaches was not dependent upon the municipality's dedication of its beaches to use by the general public. The Borough of Deal had dedicated a portion of such beach for use by its residents only. We found such limited dedication "immaterial" given the public trust doctrine's requirement that the public be afforded the right to enjoy all dry sand beaches owned by a municipality. 78 *N.J.* at 179-80, 393 *A.*2d 571.

III

Public Rights in Privately-Owned Dry Sand Beaches

In *Avon* and *Deal* our finding of public rights in dry sand areas was specifically and appropriately limited to those beaches owned by a municipality. We now address the extent of the public's interest in privately-owned dry sand beaches. This interest may take one of two forms. First, the **364 public may have *323 a right to cross privately owned dry sand beaches in order to gain access to the foreshore. Second, this interest may be of the sort enjoyed by the public in municipal beaches under *Avon* and *Deal,* namely, the right to sunbathe and generally enjoy recreational activities.

Beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and improvement of transportation facilities. Furthermore the projected demand for salt water swimming will not be met "unless the existing swimming capacities of the four coastal counties are expanded." Department of Environmental Protection, *Statewide Comprehensive Outdoor Recreation Plan* 200 (1977). The DEP estimates that, compared to 1976, the State's salt water swimming areas "must accommodate 764,812 more persons by 1985 and 1,021,112 persons by 1995." *Id. See also* Note, "Public Access to Beaches: Common Law Doctrines and Constitutional Challenges," 48 *N.Y.U.L.Rev.* 369 (1973). Sensitivity to the increased demand and limited supply was voiced by Justice Pashman in *Lusardi v. Curtis Point Property Owners Ass'n,* 86 *N.J.* 217, 227-28, 430 *A.*2d 881 (1981), when he wrote:

> Oceanfront property is uniquely suitable for bathing and other recreational activities. Because it is unique and highly in demand, there is growing concern about the reduced "availability to the public of its priceless beach areas," *Van Ness v. Borough of Deal,* 78 *N.J.* 174, 180 [393 *A.*2d 571] (1978). This concern is reflected in a statewide policy of encouraging, consonant with environmental demands, greater access to ocean beaches for recreational purposes. Expressions of this policy can be found in three sources: the decisions of this Court concerning the public trust doctrine, *Van Ness v. Borough of Deal, supra; Hyland v. Borough of Allenhurst,* 78 *N.J.* 190[393 *A.*2d 579] (1978); *Borough of Neptune City v. Borough of Avon-by-the-Sea, supra,* legislation such as the Beaches and Harbors Bond Act of 1977, *L.*1977, *c.* 208, and the Coastal Resource and Development Policies promulgated by the Department of Environmental Protection, *N.J.A.C.* 7:7E-1.1 to -9.23.

[5] Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without ***324** assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine. This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea.

Judge Best, in his dissent in *Blundell v. Catterall,* 5 *B. & Ald.* 268, 275, 106 *Eng.Rep.* 1190, 1193 (K.B.1821), stated that passage to the seashore was essential to the exercise of that right. He believed that bathing in the tidal waters was an essential right similar to that of navigation and served the general welfare by promoting health and the ability to swim. 5 *B. & Ald.* at 278-79, 106 *Eng.Rep.* at 1194. (Best, J., dissenting). Though respecting the interest of the private owner, Judge Best observed that the greatest part of the seashore had been barren and therefore had not become exclusive property. "It is useful only as a boundary and an approach to the sea; and therefore, ever has been, and ever should continue common to all who have occasion to resort to the sea." *Id.* at 283-84; 106 *Eng.Rep.* at 1196. Judge Best would have held on principles of public policy "that the interruption of free access to the sea is a public nuisance.... The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man. If it be extended so far as to touch the right of walking over these barren sands, it will take from the people ****365** what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbours." *Id.* at 287, 106 *Eng.Rep.* at 1197.

The touchstone of Judge Best's reasoning is that the particular circumstances must be considered and examined before arriving at a solution that will accommodate the public's right and the private interests involved. Thus an undeveloped segment of the shore may have been available and used for access so as to establish a public right-of-way to the wet sand. Or there may be publicly-owned property, such as in *Avon,* which is suitable. Or, as in this case, the public streets and adjacent upland sand ***325** area might serve as a proper means of entry. The test is whether those means are reasonably satisfactory so that the public's right to use the beachfront can be satisfied.

The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry

sand area is also allowed.[7] The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge. *See State ex rel. Thornton v. Hay,* 254 *Or.* 584, 599-602, 462 *P.*2d 671, 678-79 (1969) (Denecke, J., concurring). The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to the recreational use of the ocean. This was a principal reason why in *Avon* and *Deal* we held that municipally-owned dry sand beaches "must be open to all on equal terms ...." *Avon,* 61 *N.J.* at 308, 294 *A.*2d 47. We see no reason why rights under the public trust doctrine to use of the upland dry sand area should be limited to municipally-owned property. It is true that the private owner's interest in the upland dry sand area is not identical to that of a municipality. Nonetheless, where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.[8]

We perceive no need to attempt to apply notions of prescription, ***326** *City of Daytona Beach v. Tona-Rama, Inc.,* 294 *So.*2d 73 (Fla.1974), dedication, *Gion v. City of Santa Cruz,* 2 *Cal.*3d 29, 465 *P.*2d 50, 84 *Cal.Rptr.* 162 (1970), or custom, *State ex rel. Thornton v. Hay,* 254 *Or.* 584, 462 *P.*2d 671 (1969), as an alternative to application of the public trust doctrine. Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be "fixed or static," but one to "be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Avon,* 61 *N.J.* at 309, 294 *A.*2d 47.

[6] Precisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand.

[7] Today, recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. While ****366** the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.

V

The Beaches of Bay Head

The Bay Head Improvement Association, which services the needs of all residents of the Borough for swimming and bathing in the public trust property, owns the street-wide strip of dry sand area at the foot of seven public streets that extends to the ***327** mean high water line. It also owns the fee in six other upland sand properties connected or adjacent to the tracts it owns at the end of two streets. In addition, it holds leases to approximately 42 tracts of upland sand area. The question that we must address is whether the dry sand area that the Association owns or leases should be open to the public to satisfy the public's rights under the public trust doctrine. Our analysis turns upon whether the Association may restrict its membership to Bay Head residents and thereby preclude public use of the dry sand area.

[8] **[9]** The general rule is that courts will not compel admission to a voluntary association. *See Rutledge v. Gulian,* 93 *N.J.* 113, 118, 459 *A.*2d 680 (1983); *Higgins v. American Society of Clinical Pathologists,* 51 *N.J.* 191, 199, 238 *A.*2d 665 (1968). Ordinarily, a society or association may set its own membership qualifications and restrictions. However, that is not an inexorable rule. Where an organization is quasi-public, its power to exclude must be reasonably and lawfully exercised in furtherance of the public welfare related to its public characteristics. *See Guerrero v. Burlington Cty. Memorial Hospital,* 70 *N.J.* 344, 358, 360 *A.*2d 334 (1976).

In *Greisman v. Newcomb Hospital,* 40 *N.J.* 389, 192 *A.*2d 817 (1963), plaintiff, holder of a degree of osteopathy and

licensed to practice medicine and surgery, sought to be admitted to the courtesy staff of the defendant hospital. The defendant hospital refused to permit the plaintiff to file an application. The defendant contended that it was a private hospital and that its actions were not reviewable by a court. Justice Jacobs, writing for the Court, responded:

> They are private in the sense that they are nongovernmental but they are hardly private in other senses. Newcomb [Hospital] is a nonprofit organization dedicated by its certificate of incorporation to the vital public use of serving the sick and injured, its funds are in good measure received from public sources and through public solicitation, and its tax benefits are received because of its nonprofit and non-private aspects. *Cf. Fairmount Hospital, Inc. v. State Board of Tax Appeals,* 122 *N.J.L.* 8, 11 [4 *A.*2d 67] (Sup.Ct.1939), aff'd 123 *N.J.L.* 201 [8 *A.*2d 273] (E. & A.1939). It constitutes a virtual monopoly in the area in which it functions and it is in no position to claim immunity from public supervision and control because of its ***328** allegedly private nature. Indeed, in the development of the law, activities much less public than the hospital activities of Newcomb, have commonly been subjected to judicial (as well as legislative) supervision and control to the extent necessary to satisfy the felt needs of the times. [*Id.,* 40 *N.J.* at 396, 192 *A.*2d 817.]

In considering the public interest, Justice Jacobs noted that the defendant hospital was the only available hospital where the plaintiff practiced and that the hospital was operated not for private ends but for the benefit of the public. Justice Jacobs concluded that "courts would indeed be remiss if they declined to intervene where ... the [hospital's] powers were invoked at the threshold to preclude an application for staff membership, not because of any lack of individual merit, but for a reason unrelated to sound hospital standards and not in ****367** furtherance of the common good." *Id.* at 404, 192 *A.*2d 817.

In *Falcone v. Middlesex Cty. Medical Society,* 34 *N.J.* 582, 170 *A.*2d 791 (1961), plaintiff, a doctor of osteopathy licensed to practice medicine and surgery, was refused membership in the defendant County Medical Society. The effect of the refusal was that the plaintiff could not obtain staff privileges at any hospital in the area. Recognizing the judiciary's reluctance to interfere with the internal affairs of membership associations, the Court stated that it would do so "in particular situations, where considerations of policy and justice were sufficiently compelling...." *Id.* at 590, 170 *A.*2d 791. Noting that the Medical Society was not simply a social organization, the Court viewed membership as an economic necessity and asserted that courts "must be particularly alert to the need for truly protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity for earning a livelihood while not impairing the proper standards and objectives of the organization." *Id.* at 592, 170 *A.*2d 791.

[10] **[11]** A principle that may be distilled from *Greisman* and *Falcone* is that a nonprofit association that is authorized and endeavors to carry out a purpose serving the general welfare of the community and is a quasi-public institution holds in trust its powers of exclusive control in the areas of vital public concern. ***329** *See also Marjorie Webster Jr. College v. Middle States Ass'n of Colleges and Secondary Schools, Inc.,* 302 *F.Supp.* 459, 469 (D.D.C.1969) (stating that court may be forced to intervene in affairs of a voluntary association where the association "enjoys monopoly power in an area of vital public concern"), rev'd on other grounds, 432 *F.*2d 650 (D.C.Cir.), *cert.* denied, 400 *U.S.* 965, 91 *S.Ct.* 367, 27 *L.Ed.*2d 384 (1970). When a nonprofit association rejects a membership application for reasons unrelated to its purposes and contrary to the general welfare, courts have "broad judicial authority to insure that exclusionary policies are lawful and are not applied arbitrarily or discriminately." *Greisman,* 40 *N.J.* at 395, 192 *A.*2d 817; *see also Oates v. Eastern Bergen County Multiple Listing Service, Inc.,* 113 *N.J.Super.* 371, 387-89, 273 *A.*2d 795 (Ch.Div.1971); *Davis v. Morristown Memorial Hospital,*

106 *N.J.Super.* 33, 42, 254 *A.*2d 125 (Ch.Div.1969). That is the situation here.

Bay Head Improvement Association is a non-profit corporation whose primary purpose as stated in its certificate of incorporation is the "cleaning, policing and otherwise making attractive and safe the bathing beaches" in the Borough of Bay Head "and the doing of any act which may be found necessary or desirable for the greater convenience, comfort and enjoyment of the residents." Its constitution states:

> The objects of this corporation shall be to promote the best interests of the Borough of Bay Head and in so doing to own property, operate bathing beaches, hire life guards, beach cleaners and policemen and do any and all things which, in the judgment of their Executive Committee, may be in the best interests of the Borough of Bay Head....

Shortly after the Association was incorporated and had established a plan to operate beaches that would be open to all residents of Bay Head, the Bay Head Borough Council, after discussion with the Association's members, adopted resolutions approving the plan and agreeing to cooperate with the Association in carrying out this plan "insofar as it lies within the power of the Council so to do." The municipality evidenced its cooperation thereafter in a number of ways. It provided office space without charge in the Borough Hall between 1934 and 1973. Until 1975 seven parcels that ran from public streets to the ***330** mean high tide, all owned by the Association, were not assessed and the Association paid no realty taxes for those properties. The Borough's blanket liability insurance policies in effect between 1962 and 1968 covered the Association's activities on the beach area. The Borough appropriated public ****368** funds for the Association's benefit, $600 annually between 1936 and 1941, and $1,000 in 1969. Six groins (stone jetties) have been installed on the beach. The Borough paid one quarter of their cost; Ocean County, one quarter; and the State, one half.

[12] The Association's activities paralleled those of a municipality in its operation of the beachfront. The size of the beach was so great that it stationed lifeguards at five separate locations. The beach serviced about 5,000 members. The lifeguards performed the functions characteristic of those on a public beach. They posted warnings with respect to the safety of swimming. They stood ready to render assistance to anyone in need of aid. These guards were available daily throughout the summer months. The beach was maintained and kept clean by crews who worked each day. These crews cleaned the beach from end-to-end, including properties not leased to the Association. Membership badges were sold and guards were stationed at entrances to the beach to make certain that only those licensed could gain admittance. Further, some guards patrolled the beach to make certain that members and guests complied with the Association's rules and regulations. When viewed in its totality-its purposes, relationship with the municipality, communal characteristic, activities, and virtual monopoly over the Bay Head beachfront-the quasi-public nature of the Association is apparent. The Association makes available to the Bay Head public access to the common tidal property for swimming and bathing and to the upland dry sand area for use incidental thereto, preserving the residents' interests in a fashion similar to Avon. [9]

***331** **[13]** There is no public beach in the Borough of Bay Head. If the residents of every municipality bordering the Jersey shore were to adopt the Bay Head policy, the public would be prevented from exercising its right to enjoy the foreshore. The Bay Head residents may not frustrate the public's right in this manner. [10] By limiting membership only to residents and foreclosing the public, the Association is acting in conflict with the public good and contrary to the strong public policy "in favor of encouraging and expanding public access to and use of shoreline areas." ***332** *Gion v. City of Santa Cruz,* 2 *Cal.*3d 29, 43, 465 *P.*2d 50, 59, 84 *Cal.Rptr.* 162, 171 (1970). Indeed, the Association is frustrating the public's right under the public trust doctrine. It should not be permitted to do so.

Accordingly, membership in the Association must be open to the public at large. In ****369** this manner the public will be assured access to the common beach property

during the hours of 10:00 a.m. to 5:30 p.m. between mid-June and September, where they may exercise their right to swim and bathe and to use the Association's dry sand area incidental to those activities. Although such membership rights to the use of the beach may be broader than the rights necessary for enjoyment of the public trust, opening the Association's membership to all, nonresidents and residents, should lead to a substantial satisfaction of the public trust doctrine. However, the Association shall also make available a reasonable quantity of daily as well as seasonal badges to the nonresident public. Its decision with respect to the number of daily and seasonal badges to be afforded to nonresidents should take into account all relevant matters, such as the public demand and the number of bathers and swimmers that may be safely and reasonably accommodated on the Association's property, whether owned or leased. The Association may continue to charge reasonable fees to cover its costs of lifeguards, beach cleaners, patrols, equipment, insurance, and administrative expenses. The fees fixed may not discriminate in any respect between residents and nonresidents. The Association may continue to enforce its regulations regarding cleanliness, safety, and other reasonable measures concerning the public use of the beach. In this connection, it would be entirely appropriate, in the formulation and adoption of such reasonable regulations concerning the public's use of the beaches, to encourage the participation and cooperation of all private beachfront property owners, regardless of their membership in or affiliation with the Association.

*333 The Public Advocate has urged that all the privately-owned beachfront property likewise must be opened to the public. Nothing has been developed on this record to justify that conclusion. We have decided that the Association's membership and thereby its beach must be open to the public. That area might reasonably satisfy the public need at this time. We are aware that the Association possessed, as of the initiation of this litigation, about 42 upland sand lots under leases revocable on 30 days' notice. If any of these leases have been or are to be terminated, or if the Association were to sell all or part of its property, it may necessitate further adjudication of the public's claims in favor of the public trust on part or all of these or other privately-owned upland dry sand lands depending upon the circumstances. However, we see no necessity to have those issues resolved judicially at this time since the beach under the Association's control will be open to the public and may be adequate to satisfy the public trust interests. We believe that the Association and property owners will act in good faith and to the satisfaction of the Public Advocate. Indeed, we are of the opinion that all parties will benefit by our terminating this prolonged litigation at this time.

The record in this case makes it clear that a right of access to the beach is available over the quasi-public lands owned by the Association, as well as the right to use the Association's upland dry sand. It is not necessary for us to determine under what circumstances and to what extent there will be a need to use the dry sand of private owners who either now or in the future may have no leases with the Association. Resolution of the competing interests, private ownership and the public trust, may in some cases be simple, but in many it may be most complex. In any event, resolution would depend upon the specific facts in controversy.

[14] None of the foregoing matters were fully argued or briefed, the disputes concerning rights in and to private beaches having been most general. All we decide here is that private *334 land is not immune from a possible right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming.

**370 We realize that considerable uncertainty will continue to surround the question of the public's right to cross private land and to use a portion of the dry sand as discussed above. Where the parties are unable to agree as to the application of the principles enunciated herein, the claim of the private owner shall be honored until the contrary is established.

The modifications in the membership and daily badge practice we have decided upon here shall be made effective for the next summer season commencing June 1, 1984.

The judgment of the Appellate Division is reversed in part and affirmed in part. Judgment is entered for the plaintiff against the Association. Judgment of dismissal against the individual property owners is affirmed without prejudice. No costs.

Opposed-None.

For reversal in part; affirmance in part -Chief Justice WILENTZ and Justices CLIFFORD, SCHREIBER, HANDLER, POLLOCK and O'HERN-6.

All Citations

95 N.J. 306, 471 A.2d 355

Footnotes

1 The dry sand area is generally defined as the land west (landward) of the high water mark to the vegetation line or where there is no vegetation to a seawall, road, parking lot or boardwalk. New Jersey Beach Access Study Commission, *Public Access to the Oceanfront Beaches: A Report to the Governor and Legislature of New Jersey* 2 (1977).

2 Individual defendants claim that a co-defendant's admissions may not be used against them on a summary judgment motion. We do not agree. For the purpose of the motion, admissions are similar to an affidavit of a person other than the party to the motion. We perceive of no reason why these admissions are not available for this purpose.

3 The seashore extended to the limit of the highest winter flood, Justinian, *supra,* 2.1.3, and not the mean high water mark.

4 Chief Justice Taney in *Martin v. Waddell's Lessee,* 41 *U.S.* (16 Pet.) 367, 410, 10 *L.Ed.* 997, 1013 (1842), came to substantially the same conclusion that Chief Justice Kirkpatrick did, and wrote:

> The question is not free from doubt, and the authorities referred to in the English books cannot, perhaps, be altogether reconciled. But ... the question must be regarded as settled in England against the right of the king since Magna Charta to make such a grant [of a portion of the soil covered by navigable waters].

It is doubtful whether the sections of the Magna Charta upon which the Chief Justices relied support the proposition that the crown could not make grants involving the tidal waters. *See* Note, "The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine," 79 *Yale L.J.* 762 (1970).

5 Despite the language in *Arnold v. Mundy,* there developed the notion that a shoreowner could obtain unrestricted ownership rights in the tidelands. *See Gough v. Bell,* 22 *N.J.L.* 441 (Sup.Ct.1850), aff'd, 23 *N.J.L.* 624 (E. & A. 1852); *see also Ross v. Mayor of Edgewater,* 115 *N.J.L.* 477, 485, 180 *A.* 866 (Sup.Ct.1935), aff'd o.b., 116 *N.J.L.* 447, 184 *A.* 810 (E. & A.), *cert.* denied, 299 *U.S.* 543, 57 *S.Ct.* 37, 81 *L.Ed.* 420 (1936) (noting that owner of upland contiguous to the shore could appropriate the land between high and low water marks, provided he did not injuriously interfere with paramount right of navigation and that upon appropriation the owner had an "exclusive and indefeasible right of property"). This principle exists despite the fact that the State's title in tidelands cannot be lost by adverse possession or prescription. *O'Neill v. State Hwy. Dep't,* 50 *N.J.* 307, 320, 235 *A.*2d 1 (1967). The Legislature, at least up to the 1860's, granted corporate charters that included powers to occupy, possess and enjoy tide flowed land. *See, e.g., L.* 1833, *p.* 92. In addition, the Legislature had from time to time made direct grants of riparian lands. No general supervision or control seems to have been exercised by the State until 1851, when the Legislature enacted the Wharf Act, which authorized counties to grant licenses to riparian owners to construct wharves in tidal waters. *L.* 1851, *p.* 335.

The Wharf Act was modified in 1869 to exclude the Hudson River, New York Bay and Kill Von Kull. *L.*1869, *c.* 383, § 3. It was repealed in 1891, and the Riparian Commission was authorized to sell riparian grants. *L.*1891, *c.* 124, § 3; *N.J.S.A.* 12:3-4. The Commission's administration was extremely lax and it frequently sold or leased in perpetuity riparian rights for inadequate amounts. See *1873 Report of the Riparian Commissioners* 5, which states that "[t]he Commissioners, in all cases, favor a liberal arrangement with shore owners, and deem that it is for the mutual interest and advantage of the riparian owners and of the State, to fix a valuation where the lands under tidal water along the whole frontage of the riparian owner are taken at one time, at such reasonable rates as will enable such owners, for a moderate sum which will not be burdensome, to acquire the ownership and control of such lands, and also secure an immediate return therefor to the State treasury." *See Report of the New Jersey Committee to Investigate Granting of Riparian Lands by the State, Etc.* (1907); *see also* Platt, "With Rivers and Harbors Unsurpassed: New Jersey and Her Tidelands, 1860-1870," 99 *N.J.Hist.* 145 (1981). One commentator states that decisional law post-*Arnold* acquiesced in legislative and private derogation of the common rights so that by 1973 the "legal and equitable tidalwater resource title had, practically, been squeezed from the citizenry." Jaffee, "The Public Trust Doctrine Is Alive and Kicking in New Jersey Tidalwaters: *Neptune City v. Avon-By-The Sea*-A Case of Happy Atavism?," 14 *Nat. Resources J.* 309, 310 (1974).

We are not unmindful of the principle that proceeds received by the State from the sale of property lying under water constitute a part of the permanent school fund. *N.J.S.A.* 18A:56-5, -6; *see N.J. Const.* (1947), Art. VIII, § IV, par. 2; *N.J. Const.* (1844), Art. IV, § VII, par. 6. The fact that compensation has been paid for grants and leases may not eliminate per se the public's right to some use of the common property for a public purpose. *Compare Schultz v. Wilson,* 44 *N.J.Super.* 591, 597, 131 *A.*2d 415 (App.Div.), certif. denied, 24 *N.J.* 546, 133 *A.*2d 395 (1957), which stated that "[t]he Legislature has the power, absolute and limited, to regulate, abridge or vacate public rights in tidal waters except in the field reserved to Congress by the Federal Constitution," *with Borough of Neptune City v. Borough of Avon-by-the-Sea,* 61 *N.J.* 296, 308, 294 *A.*2d 47 (1972), asserting that the Legislature may not have had unlimited power to convey trust lands or "at least that they are impliedly impressed with certain obligations on the grantee to use the conveyed lands only consistently with the public rights therein. For example, the conveyance of tide-flowed lands bordered by an ocean dry sand area in private ownership to the owner thereof may well be subject to the right of the public to use the ocean waters." *See also N.J. Sports & Exposition Authority v. McCrane,* 61 *N.J.* 1, 67-68, 292 *A.*2d 545 (Hall, J., concurring in part and dissenting in part) (stating that the public trust doctrine does not prohibit all alienation by the state of riparian lands, but that conveyances are subject to use by the public depending on the nature of the land), appeal dismissed *sub nom. Borough of East Rutherford v. N.J. Sports & Exposition Authority,* 409 *U.S.* 943, 93 *S.Ct.* 270, 34 *L.Ed.*2d 215 (1972). The leasing and granting of foreshore and ocean beach property by the state not inconsistent with the public interest are unquestionably valid.

6 The high water mark is the "line formed by the intersection of the tidal plane of mean high tide with the shore." *O'Neill v. State Hwy. Dep't,* 50 *N.J.* 307, 323, 235 *A.*2d 1 (1967). The mean or ordinary high tide is a mean of all high tides over a period of 18.6 years. *Id.* at 324, 235 *A.*2d 1; *see also Borax Consolidated, Ltd. v. City of Los Angeles,* 296 *U.S.* 10, 26-27, 56 *S.Ct.* 23, 31, 80 *L.Ed.* 9, 20 (1935).

7 Some historical support for this proposition may be found in an analogous situation where fishermen, in exercising the right of public fishery in tidal waters, were permitted to draw nets on the beach above the ordinary high water mark in the act of fishing. S. Moore & H. Moore, *The History and Law of Fisheries* 96 (1903).

8 The Coastal Resource and Development Policies of the Department of Environmental Protection espouse a similar goal. *N.J.A.C.* 7:7E-3.21(c) states: "Unrestricted access [to the beaches, the area landward from the mean high water line] for recreational purposes is desirable so that the beaches can be enjoyed by all residents and visitors of the state."

9 There are nine public streets, which run in an east-west direction, that terminate at the upper dry sands of the oceanfront. With respect to seven of these streets, the Association owns the strip of dry sand stretching from the ends of these streets to the wet sands where the public has a right to bathe and swim. The Association acquired those properties to enable all Bay Head residents to enjoy the public's common interest in the beach-both swimming and bathing in the water and incidental uses in the dry sand adjacent thereto. The municipality extended its public streets, which run in an east-west direction, into the upper dry sand area in order to give the public a means of access to the beach. That this was its probable intent becomes apparent when noting the location of the terminals of these streets. The east-west streets run beyond East Avenue, which runs parallel to the ocean and is the most easterly highway running north-south in the borough, to the upland sands. The land beyond is barren. The only apparent purpose in extending these streets to the upper sands was to provide a means of ingress to and egress from the beach.

Because of our holding herein, we need not decide whether the public streets may be deemed to extend to the foreshore or whether the public's right of way from the public streets to the foreshore exists because of an easement by necessity, dedication, or prescription. It has been contended that "trespass actions will not lie against New Jersey citizens who, without injuring improvements, traverse upland beach abutting a public road or street to reach foreshore." Jaffee, *supra* n. 4, at 316. *See Mayor of Jersey City v. Morris Canal and Banking Co.,* 12 *N.J.Eq.* 545 (E. & A. 1859) (holding that public was entitled to an extension of the street to tide water over land filled in by shore owner in front of terminus of the street as if land filled in were an alluvion).

10 According to a report of the New Jersey Beach Access Study Commission, *supra* n. 1, at 21-22, app. 5, only four of the forty-eight municipalities have no publicly-owned dry beach.

370 N.J.Super. 171
Superior Court of New Jersey,
Appellate Division.

RALEIGH AVENUE BEACH ASSOCIATION, Plaintiff-Appellant,
v.
ATLANTIS BEACH CLUB, INC., Defendant-Respondent,
and
Seapointe Village Association, Lower Township Police Department, Defendants,
and
The State of New Jersey, Defendant-Appellant.
Atlantis Beach Club, Inc., Plaintiff-Respondent,
v.
Tony Labrosciano, as an individual and representative, Lower Township, Defendants,
and
The State of New Jersey, Defendant-Appellant.

Argued May 19, 2004.
|
Decided June 3, 2004.

Synopsis

Background: Beach association brought declaratory judgment action against beach club, seeking access to club's private beach under the public trust doctrine. The Superior Court, Chancery Division, Cape May County, found in favor of association, but limited beach access vertically and horizontally and allowed the imposition of a fee.

Holdings: On cross-appeals, the Superior Court, Appellate Division, Lintner, J.A.D., held that:

[1] circumstances did not justify limiting beach access under public trust doctrine;

[2] public was entitled to use dry sand area of beach under public trust doctrine;

[3] Department of Environmental Protection had jurisdiction to determine the appropriate fee for beach access; and

[4] beach club's access fee was excessive and exclusionary.

Reversed in part, modified in part, and remanded.

Attorneys and Law Firms

****21** ***174** Stuart J. Lieberman, Princeton, argued the cause for appellant Raleigh Avenue Beach Association (Lieberman & Blecher, attorneys; Mr. Lieberman, on the brief).

Brian Weeks, Deputy Attorney General, argued the cause for appellant State of New Jersey (Peter C. Harvey, Attorney General, attorney; Patrick DeAlmeida, Deputy Attorney General, of counsel; Mr. Weeks, on the brief).

***175** Gerald J. Corcoran, Pleasantville, argued the cause for respondent Atlantis Beach Club, Inc. (Youngblood, Corcoran, Lafferty, Hyberg & Waldman, attorneys; Chad M. Sherwood, on the brief).

Andrew J. Provence, Newark, argued the cause for amici curiae The American Littoral Society, Inc., and Raritan Baykeeper, Inc. (Ansell Zaro Grimm & Aaron, attorneys; Gordon N. Litwin, of counsel and on the brief; Mr. Provence, on the brief).

Daniel A. Clarkin, Third Year Law Student (Thomas A. Borden, Newark, Supervising Attorney), argued the cause for amicus curiae Citizens' Right to Access Beaches, Inc. (Robin Greenwald, Director, Rutgers Environmental Law Clinic, attorney; Carter H. Strickland, Jr., on the brief).

Before Judges KING, LINTNER and LISA.

Opinion

The opinion of the court was delivered by

LINTNER, J.A.D.

These two consolidated cases arise from a final judgment of the Chancery Division declaring certain beach and

ocean properties owned by Atlantis Beach Club (Atlantis) subject to the public trust doctrine but limiting the public's vertical (perpendicular **22 to the ocean) and horizontal (parallel to the ocean) access to Atlantis's beach property. Although the judge did not place any limitations on the public's use of the ocean area, he permitted Atlantis to set a fee for such use subject to approval by the Department of Environmental Protection (DEP). He ordered DEP's approval to be based on a fee structure "commercially reasonable under all of the relevant circumstances."

The central issue to be decided here is to what extent, if any, can the public's right to horizontal and vertical access be limited to Atlantis's beach and ocean property given the unusual circumstances of this case. Ancillary issues are: (1) under what circumstances can a fee be charged by Atlantis to members of the public; (2) the standard to be used for determining the amount of the fee; and (3) whether the DEP should approve the fee in the first instance.

*176 We hold that Atlantis cannot limit vertical or horizontal public access to its dry sand beach area nor interfere with the public's right to free use of the dry sand for intermittent recreational purposes connected with the ocean and wet sand. However, Atlantis may charge a fee to those members of the public who remain upon and use its beach for an extended period providing it cleans the beach, picks up trash regularly, and permits use of its shower facility. Atlantis must also provide customary lifeguard services for members of the public who use the ocean areas up to the high water mark regardless of whether they are just passing through or remaining on the beach area of its property. Finally, Atlantis may charge a fee, subject to DEP approval, that is reasonable and comparable to other beach tag charges in the region. In recognition of Atlantis's private status, such fees shall reflect an amount sufficient to cover costs of operation, which may include a reasonable amount of expenses incurred for management services.

We combine the procedural history with the substantially undisputed relevant facts. The subject property, Block 730.02, Lots 1.02 and 1.03 (the Atlantis property) (Appendix A), is located in Lower Township in what is known as Diamond Beach, which covers a residential area of roughly three blocks by nine blocks. Diamond Beach extends from the southern border of Wildwood Crest at Jefferson Avenue south to the southern border of Atlantis's property. Running eastward from a bulkhead that forms its westerly boundary, Lot 1.02 occupies approximately three acres comprised of dunes, a dry sand beach, and ocean floor. Lot 1.03, which shares the same north and south boundaries, is located to the east of Lot 1.02 and is completely under water at high tide. Both lots were formerly part of a larger tract of land encompassing an area of approximately 7767 acres of which 2450 acres are currently located in the ocean. This larger tract was conveyed by the State of New Jersey by way of a tidelands grant to the Cape May Real Estate Company in 1907.

*177 Two four-story, multiple-unit condominium apartment buildings, La Quinta del Mar (La Quinta) and La Vida del Mar (La Vida), occupy the properties immediately to the west of the bulkhead. La Quinta occupies Block 735.02, Lot 1, and La Vida occupies Block 730.02, Lot 1.01. To the west of La Quinta is the Villa House and La Quinta Towers, both of which contain a significant number of residential units. La Quinta's lot continues along the same southerly boundary line as the Atlantis property while La Vida has the same northerly boundary. Raleigh Avenue's right-of-way runs between La Vida and La Quinta and has its easterly terminus at the bulkhead midway along the westerly boundary of Atlantis's property. **23 A boardwalk pathway flush with the sand (the boardwalk) runs between the condominiums along the Raleigh Avenue right-of-way and continues through the bulkhead where it "doglegs" to the south as it crosses the dunes, terminating at the beach almost in the center of Atlantis's dry beach property. Atlantis maintains the portion of the boardwalk on its property as well as a seasonal gazebo adjacent to the boardwalk at its entrance. [1] The boardwalk and bulkhead are the only permanent structures on the property. According to Atlantis, the boardwalk pathway, which is depicted on a large undated map entitled "Beach and Dune Plan" (Appendix A), was approved by the DEP pursuant to the authority granted it by the Coastal Area Facility Review Act, *N.J.S.A.* 13:19-1 to -21 (CAFRA). [2]

On July 31, 1986, developers of La Vida obtained the necessary permit from the DEP under CAFRA. Although the record is somewhat unclear, the subject property was apparently subdivided and acquired by Atlantis or its

predecessor in title from either *178 A.T. & L., Inc., developer of La Vida, or a predecessor in title, which sought to develop the tract. [3]

Seapointe Village (Seapointe) is located to the north of La Vida. It is a large condominium and hotel complex comprised of over five hundred residential dwelling units and a one-hundred-room hotel occupying 63.4 acres, including the beach property to the north of Atlantis's property. It provides lifeguards for its beach property and maintains a public restroom facility, outdoor showers, and parking. Seapointe sells seasonal beach badges pursuant to a 1987 approval by the DEP's Division of Coastal Resources. Currently, Seapointe is before the DEP seeking an increase in the amount it is permitted to charge the public for use of its beach facilities. Seapointe does not deny either vertical or horizontal public access to its beach. The land immediately south of Atlantis, which is owned by the Federal Government, is essentially undeveloped and extends to the Cold Spring Inlet.

The Diamond Beach area comprises the only beach property fronting on the Atlantic Ocean located in Lower Township. Although Lower Township does not sell beach badges or regulate who can use its beaches, it controls by ordinance the beach area and the beach approaches within its jurisdiction. The ordinance, in pertinent part, makes it unlawful to:

> (A) [play] ... any game which endangers the health and safety of others, including ... use of surfboards ...;
>
> (B) throw, place deposit or leave any bottles, glass, crockery, sharp or pointed article, or thing, paper, refuse or debris of any kind ...;
>
> (C) dress, undress or change clothing for bathing or other purpose in any ... **24 vehicle ... regardless of whether the doing thereof is in public view ...;
>
> (D) *179 possess ... or to consume alcoholic beverages within the ... beach and approaches thereof;
>
> (E) revel, disport, or behave in a noisy or boisterous manner ... so as to inconvenience others ... disrupt and disturb the public peace and dignity within ... the beach or approaches thereto;
>
> (F) act in a loud, indecent, obscene, offensive or lascivious manner ...;
>
> (G) engage at any time ... in the practice commonly known as "sleeping in cars."
>
> [Lower Township, N.J., Code § 178-3 (amended 1981).]

Until 1996, the Atlantis beach and ocean property was open to the public. In the summer of 1996, Atlantis started to limit access to its beach and charge a minimum seasonal rate of $300 for six seasonal badges. By the summer of 2002, the fee jumped to $700 for a minimum of eight badges or $10,000 for a life membership. By contrast, Seapointe has no mandatory minimum and currently charges a single individual $2.50 per day, $10 per week, or $40 per season. [4] Atlantis placed a sign on the gate traversing the boardwalk pathway at the bulkhead blocking the Raleigh Avenue entrance to its beach. The sign reads: "FREE PUBLIC ACCESS ENDS HERE/MEMBERSHIP AVAILABLE AT GATE." As a result of condominium development, vertical access to the portion of beach that is the subject of this appeal is limited to the eastern terminus of Raleigh Avenue, Memphis Avenue, and Dune Drive.

According to several certifications filed by residents of La Quinta Towers at 300 East Raleigh Ave, people living in the condominiums adjoining Atlantis's property to the west, [5] who are not members of Atlantis, have to walk west on Raleigh to its intersection with Seaview Avenue then north along Seaview, crossing North Station Avenue where the sidewalk along Seaview ends, to Memphis Avenue or Dune Drive, which ends at the west gate of Seapointe. Walking north along Seaview, the first street providing access to the beach is Dune Drive, then Memphis Avenue. *180 Access to the beach via Dune Drive entails an eight-block walk from Raleigh Avenue, a distance of approximately one-half mile.

The following warning appeared in Atlantis's 2003 Rules and Regulations:

> ANYONE ATTEMPTING TO USE, ENTER UPON OR CROSS OVER CLUB PROPERTY

> FOR ANY REASON WITHOUT CLUB PERMISSION OR WHO IS NOT IN POSSESSION OF A VALID TAG AND AUTHORIZED TO USE SUCH TAG WILL BE SUBJECT TO PROSECUTION, CIVIL AND OR CRIMINAL TO THE FULLEST EXTENT PERMITTED BY LAW INCLUDING ALL COSTS AND LEGAL FEES INCURRED BY THE CLUB.

In a 2003 letter to Diamond Beach residents and Atlantis members, Atlantis stated:

> The 2003 Summer Season will soon be upon us. This past year has been one of significant change and uncertainty. Diamond Beach has the unique privilege of having available to its [residents] a private, clean and safe beach.
>
> ****25** The beaches are there for your enjoyment, the fact that they are exclusive and private is what prompted many of you to purchase in Diamond Beach to begin with. The price of exclusivity is not cheap.
>
> ....
>
> Diamond Beach has seen tremendous growth over the last few years and the CLUB will make every effort to provide the same level of services as in the past to insure the enjoyment of its members. As a Club member you are entitled to use and enjoy the facilities. To that end should you see anything that is not in keeping with Club Rules please report it immediately to our guards.
>
> Notwithstanding all of the above those who possess a valid membership will be protected and the services for which they paid will be guarded. The Club will operate under a zero tolerance policy. Uniformed private security personnel will be on hand to insure against any violations including signing complaints which would require a court appearance. Please read the enclosed updated "RULES AND REGULATIONS."

The 2003 letter also explained that the beach fees must keep up with escalating property values, taxes, insurance, and "other expenses."

Susan Tosti, an Atlantis member, certified that during the third week of July 2003 an Atlantis lifeguard drove on the beach and with the aid of a bullhorn announced that people who were sitting on the wet sand area (the foreshore) were trespassing and robbing members of Atlantis's services. Additionally, many of the residents of La Quinta Towers complained about the need to purchase a minimum of eight beach badges in addition to the restricted ***181** access and the necessity of having to walk north to Dune Drive or Memphis Avenue.

Robert A. Ciampitti, the co-owner of Atlantis, certified that the Club provides "security, maintenance, and lifeguard services, together with some recreational activities" and submitted a list of expenses incurred in 2002, which included $25,000 paid to himself and co-owner Silverio Basile for management fees and salaries. [6]

On July 2, 1999, the DEP entered into an Administrative Consent Order (ACO) with Atlantis and Robert A. Ciampitti as the owners of the "oceanfront beach and dune property located at the end of Raleigh Avenue and extending in front of [La Quinta and La Vida] condominiums." The ACO provided in part that it was entered into "to resolve the violation originally cited in the Notice of Violation issued July 7, 1997, for the unauthorized grading and excavation of dunes at this site." On June 3, 2003, the DEP issued an Administrative Order Notice of Civil Administrative Penalty Assessment (AO/NOCAPA) under its CAFRA jurisdiction. The AO/NOCAPA stated, in part, that following a May 23, 2003 compliance evaluation, the DEP found that Atlantis "failed to comply with the [July 2, 1999 ACO], conducted beach maintenance activities without a valid CAFRA General Permit for beach and dune maintenance and excavated/graded dunes without a CAFRA Individual Permit." It further noted that Atlantis had violated CAFRA, specifically *N.J.A.C.* 7:7-2.1. Within thirty days of receiving the June 3, 2003 AO/NOCAPA, the DEP directed Ciampitti and Atlantis to

> ****26** restore the approximately .4 of an acre of dunes destroyed on May 23, 2003, to the pre-disturbance conditions observed and photographed by the [DEP]

> on May 8 & 14, 2003. All dune restoration shall be in accordance with the Rules on Coastal Zone Management (*N.J.A.C.* 7:7E-3A). The restored sand dunes must be graded to predisturbance elevations consistent with the existing adjacent undisturbed dunes. The installation of sand fencing in a zig-zag pattern is required throughout ***182** the restoration area. Planting of the dunes shall be with sprigs of American Beach Grass (Amophila breviligulata) at 2# centers. There must be at least 85% survivability of the planted beach grass for 3 growing seasons.

An appeal of this order is currently pending before the Office of Administrative Law.

Meanwhile, on July 26, 2002, Atlantis filed an Order to Show Cause and Verified Complaint seeking, in pertinent part, to enjoin Tony Labrosciano, a resident of the adjacent condominium development, and members of his class from "trespassing, entering onto and accessing" its property and declaring that it is not required to provide access to or use of any portion of its property. [7] On August 14, 2002, the Raleigh Avenue Beach Association (the Association), consisting of a group of residents who reside on Raleigh Avenue, filed its complaint against Atlantis and the State, seeking a declaration that they are entitled to free public access through the Atlantis property to the beach, along with a sufficient amount of dry sand above the mean high water line, to enable the public to enjoy the beach and related activities. The Association also sought a determination that Atlantis was in violation of the public trust doctrine. [8]

The complaints were consolidated. The State moved for partial summary judgment. On September 19, 2003, the Chancery Division judge entertained oral argument and issued a bench ruling. The ruling was clarified in a September 22, 2003 Memorandum of Decision and further refined after an October 10 telephone conference and later correspondence. A final order was entered on November 3, 2003. The order declared that the public trust doctrine "applied" to Atlantis's property, however, it limited horizontal access for the purpose of entering into or exiting from the ***183** ocean (the area below the high water mark) to a three-foot-wide strip of dry sand immediately landward of the mean high water line running in a north-south direction. The judge limited vertical access at the terminus of Raleigh Avenue, precluding public use of the boardwalk path bisecting the dry sand, but required, subject to DEP approval, that a path "insofar as practical" run from the Raleigh Avenue access where it exits upon the dune and runs along the northern boundary of the property to Seapointe. The judge did not provide the exact location, leaving it to the discretion of the DEP within the guidelines set by his order. Atlantis was not permitted to impose a fee upon the public's right to use these limited accesses or the ocean area. However, Atlantis was entitled to charge a "commercially reasonable fee," subject to DEP approval ****27** and conditioned upon it providing services such as lifeguards, equipment, or other facilities to persons using the ocean area. The order further provided that Atlantis was not precluded under the public trust doctrine from imposing fees for access to, or use of, any portion of its property by its members. It could also charge a fee for services provided to members of the public in the ocean area. Finally, the order denied Atlantis's application to amend its pleadings to assert a claim against the State for a regulatory taking without prejudice to present such a claim in the future if warranted.

The State filed its notice of appeal on December 15, 2003. The Association filed its brief in support of the State's appeal. Citizens' Right to Access Beaches, Inc., was permitted to join in the State's appeal and file an amicus curiae brief. The American Littoral Society, Inc., and Raritan Baykeeper, Inc., also joined the appeal, filing a common amicus brief.

On April 20, 2004, the State moved before us for a stay of the imposition of beach fees for 2004. Atlantis cross-moved for a remand to the Chancery Division so that the court could make certain factual determinations, specifically, what constitutes a "commercially reasonable" fee. On May 4, 2004, we stayed the imposition of beach fees. We also ordered the return of any beach ***184** fees paid after January 1, 2004, and stayed Atlantis's motion

for a remand pending appellate argument. Following oral argument, we granted Atlantis's motion for clarification and issued an interim order (Appendix B).

On appeal, Atlantis concedes that its property is subject to the public trust doctrine but asserts that the Chancery Division judge's order precluding the vertical access to the beach pathway at Raleigh Avenue and limiting horizontal access to a strip three feet wide was appropriate. The State, the Association, and the amicus parties contend that the judge erred in limiting the public's right to vertically access and horizontally traverse the beach, which they assert is contrary to the public trust doctrine. They also argue that Atlantis should be restricted to charging reasonable fees for public use of its beaches.

We begin our analysis with the public trust doctrine. *Matthews v. Bay Head Improvement Ass'n,* 95 *N.J.* 306, 471 *A.*2d 355 (1984), extended the application of the doctrine from publicly owned to privately owned beaches. The origin of the public trust doctrine was explained in *Matthews:*

> In *Borough of Neptune City v. Borough of Avon-by-the-Sea,* 61 *N.J.* 296, 303, 294 *A.*2d 47 (1972), Justice Hall alluded to the ancient principle "that land covered by tidal waters belonged to the sovereign, but for the common use of all the people." The genesis of this principle is found in Roman jurisprudence, which held that "[b]y the law of nature" "the air, running water, the sea, and consequently the shores of the sea," were "common to mankind." Justinian, *Institutes* 2.1.1 (T. Sandars trans. 1st Am. ed. 1876). No one was forbidden access to the sea, and everyone could use the seashore "to dry his nets there, and haul them from the sea...." *Id.,* 2.1.5. The seashore was not private property, but "subject to the same law as the sea itself, and the sand or ground beneath it." *Id.* This underlying concept was applied in New Jersey in *Arnold v. Mundy,* 6 *N.J.L.* 1 (Sup.Ct.1821).
>
> [*Matthews, supra,* 95 *N.J.* at 316-17, 471 *A.*2d 355 (footnote omitted).]

Matthews noted that *Avon* extended the public's right from navigation and fishing uses " 'to recreational uses, including bathing, swimming and other shore activities.' " *Id.* at 321, 471 *A.*2d 355 (quoting *Avon, supra,* 61 *N.J.* at 309, 294 *A.*2d 47). ****28** Recognizing that "enjoyment of rights in the foreshore is inseparable from use of dry sand beaches," the *Matthews* Court concluded "some use of the upper sand ... [comes] under the umbrella of the public ***185** trust." *Id.* at 322, 471 *A.*2d 355. The Court then noted that the public's interest in the privately owned dry sand beach takes two forms: (1) the "right to cross privately owned dry sand beaches in order to gain access to the foreshore;" and (2) "the right to sunbathe and generally enjoy recreational activities." *Id.* at 323, 471 *A.*2d 355.

We first examine the applicable principles underlying the public's right to access privately owned dry sand beaches. In 1984, the *Matthews* Court observed that our beaches are "a unique resource ... irreplaceable" for which the "public demand ... has increased with the growth of population and improvement of transportation...." *Ibid.* " 'Oceanfront property is uniquely suitable for bathing and other recreational activities' " and there is a " 'growing concern about the reduced availability to the public of its priceless beach areas.' " *Id.* at 323, 471 *A.*2d 355 (quoting *Lusardi v. Curtis Point Prop. Owners Ass'n,* 86 *N.J.* 217, 227-28, 430 *A.*2d 881 (1981) (internal quotations omitted)). These concerns are of course present to a much greater degree today given the meteoric increases in population and development we have experienced since *Matthews.*

Matthews points out that access to the foreshore is "depend[ent] upon a right to pass across the upland beach" and "meaningless" without some means of access. *Matthews, supra,* 95 *N.J.* at 323, 471 *A.*2d 355. *Matthews* concluded that the public must be given reasonable access to the sea. The determination of what is reasonable is dependent upon the "particular circumstances [which] must be considered and examined before arriving at a solution that will accommodate the public's right and the private interests involved." *Id.* at 324, 471 *A.*2d 355. The following excerpt from Judge Best's dissent in *Blundell v. Catterral,* 5 *B & Ald.* 268, 275, 106 *Eng. Rep.* 1190, 119 (K.B.1821), as it appears in *Matthews,* is illustrative of the process to be used and equally applicable to the circumstances here:

> Judge Best would have held on principles of public policy "that the interruption of free access to the sea is a public nuisance.... The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of ***186** man. If it be extended so far as to touch the right of walking over these barren sands, it will take from the people what is essential to their welfare...."
>
> [*Matthews, supra,* 95 *N.J.* at 324, 471 *A.*2d 355.]

[1] Other circumstances relevant in the determination of reasonable access, and applicable here, are the existence of (1) an "undeveloped segment of the shore [that] may have been available and used for access so as to establish a public right of way to the wet sand" or (2) a public street serving an adjacent upland sand area. *Id.* at 324-25, 471 *A.*2d 355. With these principles in mind, we turn to Atlantis's arguments.

Atlantis argues that restriction of access at the Raleigh Avenue entrance is reasonable because there is meaningful access through neighboring Seapointe. Atlantis claims that providing its members with services so as to generate a profit is the only beneficial use that it can make of its land. It argues that permitting public access across and use of its upland beach deprives it of the property's sole beneficial use.

****29** **[2]** The four condominium buildings located adjacent to and along the eastern end of Raleigh Avenue were developed after the early 1980s. Prior to this development, the Raleigh Avenue entrance was unrestricted. Following completion and occupancy of the several condominium units, the residents continued to have unrestricted access until 1996, when Atlantis's predecessor, Club Atlantis,[9] for the first time attempted to restrict access both at Raleigh and along the dry sand beach at its northerly and southerly boundaries. There are no streets to the south providing access to the federal-owned undeveloped beach that is open to the public except for certain times a year when piping plovers are nesting.[10]

***187** The closest perpendicular access to the north is through Seapointe, which is a considerable distance away. The access route over the dune along the northerly boundary of Atlantis's property, as reflected in the final judgment, is a longer, significantly less direct route than that available at the Raleigh Avenue entrance. The boardwalk path located between La Quinta and La Vida occupies a public right-of-way, which all parties acknowledge is the extension of Raleigh Avenue ending at the bulkhead at the westerly boundary of Atlantis's property. The continuation of that same boardwalk, bisecting a portion of Atlantis's dry sand beach, is the only permanent improvement on the Atlantis property. Except for the boardwalk, the remainder of the beach is without permanent structures and remains undeveloped, virtually barren sand.

Atlantis does not provide cabanas, changing facilities, or other improvements necessitating further accommodation to the privacy of its members, which favors limiting horizontal access along the northerly or southerly borders of the property. Likewise, limiting public access at the Raleigh Avenue entrance is not appropriate given the history of long-time access, the large number of nearby residential units, the inconvenience associated with the nearest available perpendicular access to the north, and lack of perpendicular access to the south. Remarkably, these circumstances are virtually identical to those related by the *Matthews* Court as militating in favor of public access. Perpendicular access at the Raleigh Avenue entrance and unlimited parallel access along the beach reasonably satisfy the public's right to the use and enjoyment of the beach, foreshore, and ocean. We are not persuaded by Atlantis's arguments to the contrary that the circumstances here justify limiting either.

[3] **[4]** We next consider the extent to which the public is entitled to use the dry sand area under the public trust doctrine. Recognizing that the use of dry sand, like access, is "essential or reasonably necessary for enjoyment of the ocean," the *Matthews* Court noted:

> ***188** The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water edge.

**30 [*Id.* at 325, 471 *A.*2d 355 (footnote omitted).]

As it did with access, *Matthews* concluded that the public has the right to use privately owned upland sand "subject to an accommodation of the interests of the owner." *Ibid.* To this end, the public "must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand." *Id.* at 326, 471 *A.*2d 355. Again, the precise extent to which privately owned upland sand should be made available for public use is dependent on the circumstances. *Ibid.* Factors to be considered include "[l]ocation of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of upland sand land by the owner." *Ibid.*

[5] [6] Lower Township does not provide any beach services nor does it own or maintain beaches along the Atlantic Ocean within its borders. Residents and non-residents wishing to use ocean waterfront in Lower Township have no other option but to use beaches that are privately held. The public's intermittent recreational enjoyment of the dry sand area in connection with the use of the foreshore and ocean would not prevent Atlantis's members, who remain on its dry sand areas, from enjoying the services provided. As we pointed out earlier, there are no cabanas, changing facilities, or improvements necessitating further accommodation to the privacy of Atlantis's members. *Cf. Hyland v. Borough of Allenhurst,* 78 *N.J.* 190, 393 *A.*2d 579 (1978). Atlantis does not offer nor does the record establish any facts or reasons supporting the conclusion that the public's intermittent recreational use of the upland sand would interfere with or otherwise prevent it from servicing its members. Instead, Atlantis maintains that it is entitled to use its land to generate profit by providing an exclusive place for its paying clientele. Exclusivity is not a valid reason for limiting use or access. We are satisfied that *189 Atlantis's attempts to limit access to, and use of, its upland sand are hostile to the public trust doctrine and not sustainable on appeal.

At oral argument, Atlantis noted that it provides lifeguard services, beach maintenance, showers, and sale of food and beverages. Atlantis also indicated that it did not object to that part of the Chancery Division order extending, without fee, its lifeguard services to members of the public who use the ocean but do not remain upon its property. Likewise, there is no objection by either the State or amicus parties to Atlantis's right to charge a reasonable fee for those who choose to remain on its upland sand and partake of the services provided as members. Accordingly, we affirm that part of the order to the extent that it requires Atlantis to provide lifeguard services, without charge, to non-member individuals who use the ocean off Atlantis's beach.

The services provided privately by Atlantis fill an important void, given the lack of service provided by the Township. Therefore, the remaining questions we must address are whether Atlantis should be limited to the same extent as a municipality in the determination of the amount and manner in which a fee is to be charged; and if not, what standard should apply, who should be required to pay, and who should regulate the fee.

Initially, we note that the record reflects some confusion concerning the jurisdiction under which the judge ordered Atlantis to obtain DEP approval of its fees. During the telephone conference of October 10, the judge indicated his belief that a permit under CAFRA was needed to create the public pathway northward toward Seapointe. Because he denied access across **31 the beach at Raleigh Avenue and limited horizontal access to a three-foot-wide strip above the high water mark, the judge found that DEP did not have authority to set fees. He stated:

> No. Let me try it again, although you're close. The word CAFRA permit is a word of art. And it implicates a certain process, certain filing, certain fees, certain standards, all kinds of matters that I do not believe have anything to do with this case.
>
> *190 I have ruled and reiterate that apart from leaving out the dunes ... [a]nd leaving out the vertical and horizontal access implications of the public trust doctrine, apart from that I have ruled that (a) the public trust doctrine does not apply to this property; and (b) that absent the application of the public trust doctrine, the State has no interest in regulating it.

> That means, with respect to access to, use of, structures upon, fees charged for, services provided for, the upland portion of this property, other than the two accesses, the State has no permit authority under CAFRA or otherwise, save for the dunes.... So ... what that tells me is, that if ... Atlantis wants to charge, it needs the permission of the State and it is my assumption that the State will structure-or either it already has in place or will structure a place for the receipt and review and reaction to such an application, without the formal CAFRA process. And if it doesn't, it should. And that absent that, I can perceive no authority under CAFRA to regulate the upland portion of the property.

Atlantis contends that *N.J.A.C.* 7:7E-8.11b does not apply to the present litigation because it is "not part of its previous application under CAFRA for dune and beach maintenance." Atlantis admits, and the record reflects, that it has been before the DEP respecting the boardwalk pathway. Moreover, it is currently before it with respect to dune maintenance. Nevertheless, Atlantis asserts that the DEP is without jurisdiction to act under *N.J.A.C.* 7:7E-8.11b because it is not currently before it for a beach fee permit. At oral argument before us, Atlantis also claimed that the DEP does not have CAFRA jurisdiction because its property lacks any beach development.

CAFRA was enacted by the Legislature in 1973. *In re Egg Harbor Assocs.*, 94 *N.J.* 358, 362, 464 *A.*2d 1115 (1983). Although CAFRA is primarily an environmental protection statute, "the powers delegated to DEP extend well beyond protection of the natural environment." *Id.* at 364, 464 *A.*2d 1115. Specifically, CAFRA delegates powers to the DEP and requires it to adopt rules and regulations governing land use within the coastal zone "for the general welfare." *Ibid.* The legislature amended CAFRA in 1993, significantly expanding its jurisdiction. *In re Protest of Coastal Permit Program Rules,* 354 *N.J.Super.* 293, 310, 807 *A.*2d 198 (App.Div.2002).

[7] Atlantis's argument that the DEP is without jurisdiction here to determine the relevant questions respecting fees is misplaced. ***191** First, the public trust doctrine is applicable to the beach access Atlantis attempted to maintain for the exclusive use of its members. Therefore, the judge mistakenly used the wrong reason in arriving at his determination that beach access and its use does not come within the purview of the DEP. More importantly, the boardwalk extension over the dune leading to the beach and the waterfront is maintained by Atlantis and qualifies as development, triggering the DEP's CAFRA jurisdiction over all related issues of ****32** use and public access, the specific subjects of this appeal.

N.J.S.A. 13:19-2 covers all new development on a beach or dune and forms the basis for DEP jurisdiction under CAFRA. *See* Assembly Environment Committee Statement to Senate, No. 1475 (1993). The existence, maintenance, and use of the walkway are covered by the provisions of the rules and regulations adopted by the DEP pursuant to CAFRA. Chapter 7 of the DEP's administrative regulations, Coastal Permit Program Rules, establishes procedures by which the DEP will review applications for permits. *N.J.A.C.* 7:7-2.1(a)(1) requires a CAFRA permit for "[a]ny development located on a beach or dune." Chapter 7E, Costal Zone Management, establishes rules for "the use and development of coastal resources" in connection with the DEP's review of permit applications under CAFRA. *N.J.A.C.* 7:7E-1.1. *N.J.A.C.* 7:7E-3A.1 to -3C.2 covers beach and dune activities respecting dune walk-over and boardwalk structures. *N.J.A.C.* 7:7E-8.11 specifically deals with public access, providing in pertinent part:

> (a) Public access to the waterfront is the ability of all members of the community at large to pass physically and visually to, from and along the ocean shore and other waterfronts.
>
> (b) Coastal development adjacent to all coastal waters, including both natural and developed waterfront areas, shall provide permanent perpendicular and linear access to the waterfront to the maximum extent practicable, including both visual and physical access....
>
> ....
>
> 4. A fee for access, including parking where appropriate, to or use of publicly owned waterfront facilities shall be no greater than that which is required to operate and maintain the facility and must not discriminate between residents and non-residents....

> 5. ***192** All establishments ... which control access to tidal waters shall comply with the Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*
>
> ....
>
> 13. Development adjacent to coastal waters shall provide barrier free access within the provisions of public access wherever feasible and warranted by the characteristics of the access area.

N.J.A.C. 7:7E-8.11 is consistent with the principles and objectives requiring open public access to, and use of, the waterfront under the public trust doctrine. Accordingly, we are satisfied that under CAFRA the DEP has jurisdiction to determine what is an appropriate fee to be charged by Atlantis for use of its upland sand, consistent with *N.J.A.C.* 7:7E-8.11.

[8] Having determined that the DEP has the jurisdiction to regulate the fee sought to be charged by Atlantis, we turn our attention to (1) who should be subject to these fees and (2) the standard to be used for determining the amount. Seapointe's permit sheds some light on these issues. It provides in pertinent part:

> The entire beach shall be open to the public. Beach use fees, regulations, and operations shall remain subject to periodic DEP review and approval as specified in Section 7:7E-3.20.

Seapointe is permitted to charge a "beach use fee" that presumably applies to those members of the public who wish to remain on its beach and use the services provided. As we have previously pointed out, under the public trust doctrine, beach use fees cannot limit those members of the public seeking access to, or use of, the ocean and foreshore nor can they limit, under the circumstances here, use of the upland sand ****33** for either passage or intermittent recreation connected with use of the ocean.

[9] **[10]** Fees must be "no greater than that which is required to operate and maintain the facility and must not discriminate between residents and non-residents." *N.J.A.C.* 7:7E-8.11(b)4. Moreover, there should be a daily, weekly, monthly, and seasonal fee available. Atlantis's current fee structure, requiring a minimum seasonal payment of $700 for up to eight household members, discriminates against individuals and small families by forcing ***193** them to pay an amount bearing no rational relationship to the cost associated with individual use of the property. Atlantis's minimum $700 fee makes it impossible for a single individual to use the beach for relaxation or sunbathing. It suggests a tariff or toll designed to limit membership and provide an excessive per capita return for the owners. Simply stated, it is exclusionary. Limiting access by placing an unreasonable economic burden on the public undermines the objectives of the public trust doctrine to the same extent as any physical barrier. "[T]he public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference...." *Avon, supra,* 61 *N.J.* at 309, 294 *A.*2d 47. All members of the public who use the waterfront are entitled to use Atlantis's adjacent upland sand for extended periods and must be afforded a fair opportunity to pay a reasonable single-person fee.

We recognize that, as a private entity, Atlantis's fee schedule should not be limited to the same extent as a public or non-profit organization. *See Slocum v. Borough of Belmar,* 238 *N.J.Super.* 179, 191, 569 *A.*2d 312 (Law Div.1989) (holding that fees "must be reasonable in relation to the municipality's expenses incurred as a result of the beachfront"); *see also Secure Heritage, Inc. v. City of Cape May,* 361 *N.J.Super.* 281, 309, 825 *A.*2d 534 (App.Div.), *certif. denied,* 178 *N.J.* 32, 834 *A.*2d 405 (2003). The notion that lands are to be held in public trust, protected and regulated for the common use and benefit, is incompatible with the concept of profit. However, as trustee, Atlantis should be entitled to expenses actually incurred for reasonable management services in addition to reimbursement for other costs incurred for the services provided. *N.J.A.C.* 7:7E-8.11(b)4's proscription that fees should be "no greater than that which is required to operate and maintain the facility" does not run afoul of Atlantis's right to recover reasonable costs for administration or management.

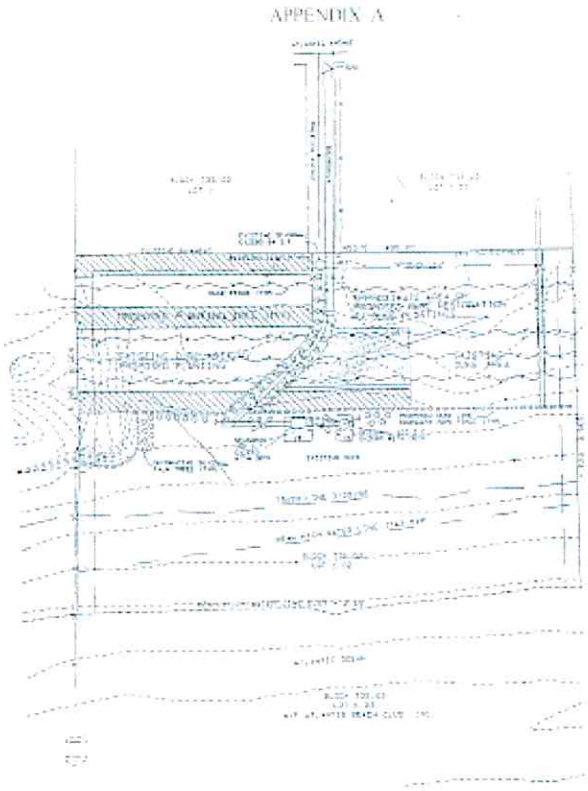
In setting an appropriate fee, consideration must also be given to the private nature of similarly situated beaches in the Diamond Beach area. Of course, approval of fees is contingent upon ***194** Atlantis continuing to

provide customary lifeguard services comparable to that provided by public entities, regular beach maintenance, including cleaning and trash pickup, and outdoor showers. Accordingly, the amount approved by the DEP shall be reasonable and comparable to other beach tag charges in the region, recognizing that it should reflect an amount sufficient to cover costs of operation, including a reasonable amount for administrative services particular to Atlantis. Of course, in the future, Atlantis may apply to the DEP for increases in fees and request an administrative hearing.

We reverse that portion of the final judgment insofar as it limits the public's (1) horizontal access along the northerly and southerly boundaries of Atlantis's property; (2) vertical access at the Raleigh Avenue entrance; and (3) intermittent use of the upland sand for recreational activities connected with use of the foreshore and ocean. The remaining issue of what **34 appropriate fee is to be charged for beach use is remanded to the DEP for determination in accordance with its CAFRA permit jurisdiction. We modify the judge's order requiring setting a standard of "commercially reasonable" as more specifically enunciated in this opinion. The DEP shall expedite its determination and approve a fee schedule, consistent with the guidelines set forth in this opinion, by June 10, 2004, so as not to unduly interfere with the upcoming beach season beginning June 15, 2004.

Reversed in part, modified in part, and remanded to the DEP for further administrative review.

**35 *195 APPENDIX A



**36 *196 APPENDIX B

APPENDIX A

ORDER ON MOTION

RALEIGH AVENUE BEACH ASSOCIATION
VS
ATLANTIS BEACH CLUB

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002134-03T3
MOTION NO. M-004853-03
BEFORE PART: B
JUDGE(S): KING
LINTNER
LISA

MOTION FILED: MAY 11, 2004 BY: ATLANTIS BEACH CLUB

ANSWER(S) FILED: MAY 14, 2004 BY: DEPT. OF ENV. PROTECTION
MAY 18, 2004 BY: RALEIGH AVE BEACH ASSOC

SUBMITTED TO COURT: MAY 14, 2004

O R D E R

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 19th DAY OF MAY, 2004 HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT/RESPONDENT	GRANTED	DENIED	OTHER
- FOR CLARIFICATION	(XXX)	( )	(XXX)

SUPPLEMENTAL.

The respondent's motion for clarification is granted. Pending filing of a formal, full opinion on this appeal, the panel makes this interim order.

1. The public shall enjoy vertical access to the beach, without any interference by respondent's agents, upon the boardwalk pathway which currently exists through the dunes on the subject property as an extension of Raleigh Avenue.

2. The public shall enjoy the right to use all of the dry sand and complete horizontal access to the subject property, including the ocean.

3. The respondent may charge for use of the subject beach pursuant to approval of fees by the DEP, which must approve a fee schedule by June 30. The schedule shall cover daily, weekly, monthly and seasonal beach tags.

4. The amount charged shall be reasonable and comparable to other beach tag charges in the region, recognizing that the respondent is a private corporation; the fees established shall reflect an amount sufficient to cover costs of operation, which may include a reasonable amount for administrative services.

5. If respondent decides to charge fees it must at a minimum (1) provide customary life guard services comparable to municipal services; (2) clean the beach and pick up trash regularly; (3) provide a shower facility.

6. We relinquish jurisdiction, in part, to the DEP for purposes of issuing a fee schedule consistent with this order and for the processing of any regulatory application necessary to confirm the public's use of the beach with open access, consistent with the public trust doctrine.

7. If the respondent does not or chooses not to issue beach tags and charge fees for services, it shall not interfere to any extent with public access to the beach and ocean. In any event, the beach and ocean shall be open to the public.

8. The order of the Chancery Division of November 3, 2003 is so modified, pending our final opinion.

CPM C-57-02

FOR THE COURT:

MICHAEL PATRICK KING, P.J.A.D.

JUSLDP

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All Citations

370 N.J.Super. 171, 851 A.2d 19

Footnotes

1 At oral argument on appeal, Atlantis represented that the gazebo was recently removed.

2 We cannot find a specific approval in the voluminous appendix, which does not have a table of contents as required by *R.* 2:6-1(c). However, for the purposes of this appeal, we accept Atlantis's representation that the "pathway [formed by the boardwalk] was approved by the State in its issuance of a prior CAFRA permit relating to Atlantis's dune system."

3 Robert Ciampitti and Silverio Basile are co-owners of Atlantis. Ciampitti was the agent and representative of Pacific Four Corporation, a Pennsylvania corporation doing business in New Jersey, which planned in the early 1980's to develop six to eight multi-unit dwellings on the tract that at the time was primarily owned by Ciampitti's brother, Bruce, who acquired the land in 1951 under the name Bruce Nicholas. *See United States v. Ciampitti,* 583 *F.Supp.* 483, 485-86 (D.N.J.1984). As of 1986, La Quinta had already been built.

4 Seapointe's beach fees were approved by the DEP in 1987. It is currently before the DEP seeking to raise its beach tag fees to $3 per day, $15 per week, and $50 per season.

5 La Quinta, La Vida, The Villa, and La Quinta Towers.

6 In a deposition taken on June 11, 2003, Basile acknowledged that he was also the President of the La Vida del Mar Condominium Association. He apparently resigned from his position as president of the condominium association sometime after the deposition was taken.

7 The complaint is not provided in the appendix, therefore, the relief sought is taken from the State's brief.

8 Seapointe and Lower Township were named as defendants in the Association's complaint. They are not, however, parties to this appeal. Again, the essential allegations of the complaint are taken from the State's brief because the complaint is not provided in the appendix to this appeal.

9 Club Atlantis transferred its holdings in the subject property to Atlantis by a November 25, 1997 deed for one dollar.

10 The State represented at oral argument before us that, except for an area near the Cape May Canal where access is limited for security reasons connected with a loran antenna, the Federal Government permits access to its beach.

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