



A Practical Guide to Beach Access and the Public Trust Doctrine in New Jersey

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“There is not the slightest doubt that New Jersey has always recognized the trust doctrine”

—NEW JERSEY SUPREME COURT, 1972



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INTRODUCTION

The right of citizens to stroll along the beach unhindered by “Keep Off” and “Private Property” signs, to walk across the dry sand to reach the ocean and swim, surf or fish, or to set a blanket down on the sand and spend the day sunbathing are all governed by one legal principle: the Public Trust Doctrine. The need to understand and protect these rights grows each year as more people move to coastal communities and competition for limited waterfront resources increases. Despite its importance, the Public Trust Doctrine and the rights it establishes remain widely misunderstood. This guide seeks to clarify the rights afforded New Jersey citizens and visitors under the Public Trust Doctrine by explaining its basis and origins, reviewing the court decisions that established those rights, and providing a series of Frequently Asked Questions that apply the court decisions and other relevant influences to real-world public access situations.

Public Trust Doctrine Today

Under the Public Trust Doctrine, the State of New Jersey holds all tidally flowed lands in trust for the use and enjoyment of the public. This includes the ocean, bays and tidal rivers, as well as the adjoining shoreline over which these waters flow and, in certain circumstances, some amount of the upland dry sand area, even if the upland area is privately owned.

1 Common law is distinguished from “statutory law,” which is law embodied in statutes passed by legislatures, or “Constitutional law,” which is law embodied in a written constitution.

2 It is believed that these Public Trust principles, particularly as they relate to the ancient rights of navigation and fishing, originated much earlier in “Justinian” times, during the 527 to 565 AD reign of the Emperor Justinian over the Byzantine Empire..

Public Trust Doctrine Basis

The Public Trust Doctrine is a “common law” doctrine, also referred to as “judge-made law,” meaning it was developed over the course of time through the rulings of judges presented with access issues.¹ As a result, understanding the Public Trust Doctrine requires an understanding of its origins and the court decisions that collectively define the extent of public trust rights. These decisions came about over hundreds of years, and will continue to evolve for hundreds of years to come as circumstances change and new issues arise. This guide focuses on the ten most significant court decisions that together embody the Public Trust Doctrine as it applies in New Jersey.

Public Trust Doctrine Origin

The court decisions discussed in this guide range in date from 1821 through 2010, although the principles and customs they discuss date back to pre-Revolutionary times. Under English rule, all tidal navigable waters, the coasts of the sea and the land underneath them were common to all citizens, and all citizens had a right to use them. Although the property was considered to be “vested in the sovereign,” meaning the King, it was held by him not for his own use, but in trust, so he could protect it for use by the citizens. When New Jersey was established as a state, the public trust rights previously enjoyed by citizens under English rule vested in the people of the State of New Jersey.²

Important Terms

The relevant court decisions use several terms to describe the property at issue and to explain their reasoning and conclusions.³ They include the following:

Navigable Waters

Waters that are deep enough and wide enough to afford passage to watercraft, including canoes or kayaks, at high tide. Waters upstream of obstructions (e.g., culverts) are considered navigable provided the upstream area is still tidally influenced.

Mean High Water Line

The line on the beach (or map or chart) representing the average reach of high tides.

Mean Low Water Line

The line on the beach (or on a map or chart, and sometimes under water) representing the average reach of low tides.

Upland Dry Beach

The portion of the beach that is above the mean high water line.

Wet Beach

The area on a beach that lies between the mean high and mean low water line. Title to this land is held in trust by the State for the citizens of New Jersey. Also known as the “wet sand”, “foreshore” and “tidelands.”

Perpendicular Access

Access across the upland dry sand portion of the beach perpendicular to the ocean. Perpendicular access allows one to get from the upland dry beach area to the foreshore and ocean, and vice versa (west to east and east to west). Also referred to as “vertical access.”



Parallel Access

Access to that portion of the beach adjacent to the ocean (north to south or south to north). Also referred to as “linear”, “lateral ” or “horizontal” access.

Municipal Police Power

The authority of a municipal governing body to impose laws and regulations which are reasonably related to the protection or promotion of the health, safety or welfare of its citizens. The authority is delegated to municipalities by the State, which derives its police power from the Tenth Amendment to the U.S. Constitution.

Eminent Domain

The government power to take private property for public use, as authorized by the Fifth Amendment of the U.S Constitution, Article 1, section 20 of the N.J. Constitution and the N.J. Eminent Domain Act, N.J.S.A. 20:3-1, et seq. The property must be necessary for a public use or purpose, and the private property owners must receive just compensation.

Taking of Property

The physical occupation or restrictions on use of property (e.g., through regulation or eminent domain) imposed by the government for the public good that deprives the property owner of the economically reasonable or meaningful use or value of the property. Under the Fifth Amendment to the U.S. Constitution, a taking cannot occur without just compensation to the property owner.

³ Sources are respectively: N.J.A.C. 7:7-1.5; NOAA Shoreline Website; *Ibid*; Matthews v. Bayhead Improvement Assoc., 95 N.J. 306 (1981); Van Ness v. Borough of Deal, 78 N.J. 174 (1978); NJDEP Public Access webpage; *Ibid*; N.J.S.A. 40:48-2; N.J.S.A. 20:3-2; and Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992).

FIGURES

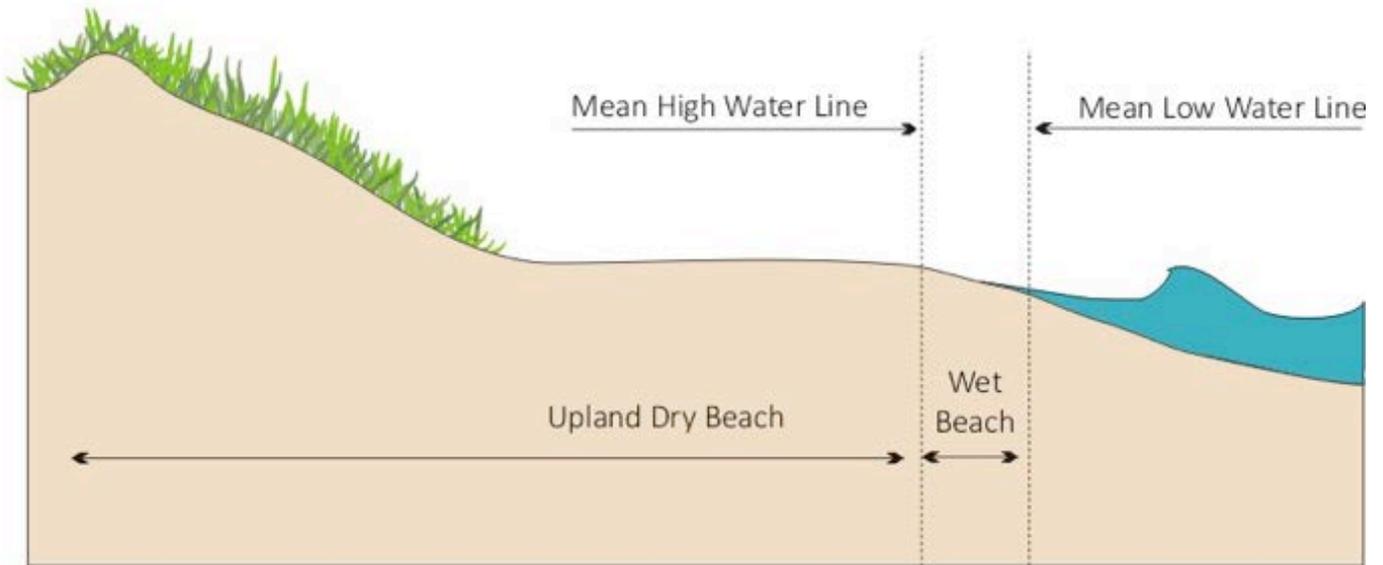


Figure 1: Portions of the Beach



Figure 2: Types of Access

A TIMELINE OF PUBLIC TRUST RIGHTS IN NEW JERSEY

1821

Arnold v. Mundy
NJ Supreme Ct.

- Public Trust Doctrine is the law in the State of NJ.
- All citizens have common right to tidally-flowed navigable waters and the lands underneath them.

1800s

1822

Illinois Central RR v. IL
U.S. Supreme Ct.

- Recognized the Public Trust Doctrine as the law of the U.S.
- The Public Trust Doctrine extends to non-tidal but navigable waters like the Great Lakes.
- The State, as trustee, cannot abdicate its responsibility for public trust lands
- Any grant that purports to give away public trust lands, whether by the state (including by the legislature) or a private land owner, is void and/or revocable.

1972

Neptune v. Avon
NJ Supreme Ct.

- Towns cannot charge non-residents more than residents for use of beaches.
- Public trust activities are not limited to navigation and fishing; also include bathing, swimming and other shore activities.

1970s

1978

Van Ness v. Deal
NJ Supreme Ct.

- All parts of municipally-owned beaches, both above and below the high water mark, must be available to the general public.

1978

Hyland v. Allenhurst
NJ Supreme Ct.

- Where municipal restroom facilities exist adjacent to a public beach they must be made available to members of the general public.

1980s

1981

Lusardi v. Curtis Pt. Prop. Owners Assoc.
NJ Supreme Ct.

- The Public Trust Doctrine is an established state-wide policy that should be considered in the adoption and review of zoning ordinances in shore municipalities.

1981

Matthews v. Bayhead Improvement Assoc.
NJ Supreme Ct.

- In order to enjoy public trust lands, the public has the right to gain access through, and to the use of, the dry sand area of privately-owned beaches.
- The upland sand owner was a "quasi-public body" in that the municipality was involved in its operation.

1990s

1999

National Assoc. of Bldrs. v. NJDEP
U.S. District Ct.

- Formerly submerged lands remain subject to public use, even if such property is granted to private owners.
- The State's requirement of a 20-foot-wide public walkway on private land along the Hudson River was not a taking if it was reasonably necessary to protect the public's right to access the water.

2005

Raleigh Ave. Bch Assoc. v. Atlantis
NJ Supreme Ct.

- Allowed public access through and use of upland of 100% privately-owned beach as reasonably necessary for the public's right to access and enjoy the ocean.

2000s

2010

Long Branch v. Liu
NJ Supreme Ct.

- Land added suddenly and obviously to a beach through government-funded restoration project does not belong to upland property owner; title is held by the State in trust for citizens.

CASES

1. ARNOLD v. MUNDY, 6 N.J. L. 1 (1821)

New Jersey Supreme Court - 1821

ISSUE: Whether a landowner's grant to property adjacent to a tidal navigable river gave him exclusive rights to the riverbed, or whether it was instead subject to a common right shared by all citizens of New Jersey.

FACTS: Mundy removed oysters from an area of the Raritan River adjacent to Arnold's farm described as "bare at very low tides." Arnold sued Mundy for trespass claiming that the grant he obtained when he purchased the property gave him ownership of the riverbed and therefore the exclusive right to the use and enjoyment of the oysters. Mundy argued that, because the oysters were located in the bed of a tidally-flowed navigable river, all citizens of the state had a common right to take the oysters.

DECISION: The court ruled in favor of Mundy, finding that he was not trespassing because the navigable waters and the land underneath them are common to all the people of New Jersey.

KNOWN FOR: This case recognized the existence of the Public Trust Doctrine in New Jersey. The court found that the State, and not the owner of the adjacent upland, has sovereign authority over public trust waters and lands, not for its own use, but to protect them for the use of its citizens.

CRITICAL QUOTE: "Navigable rivers, where the tide ebbs and flows, the ports, bays, coasts of the sea, including both the waters and the land under the waters, for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all other uses of the water and its products, are common to all the people of New Jersey."

SIGNIFICANT FINDINGS:

- Although King Charles granted the property that included the rivers, ports, bays and coasts, to the Duke of York, such waters remained subject to the rights of the public to fish and navigate. With the American Revolution, all of these rights vested with the people of New Jersey.
- The power the State has over these lands and waters is referred to as "jus regium," meaning the right of regulating, improving and securing them for the benefit of every citizen.
- The prior owner of Arnold's land never had any right, interest in or power over the waters in question or the land under them, and therefore, any grant to Arnold that purported to include them was void.

2. ILLINOIS CENTRAL RAILROAD v. STATE OF ILLINOIS, 146 U.S. 387 (1892) U.S. Supreme Court, 1892

ISSUES: (i) Whether the State of Illinois had the authority to grant title to the lands submerged by the navigable waters of Lake Michigan; and (ii) whether the grantee of land adjacent to navigable waters acquires the riparian rights to the bed of such waters.

FACTS: In and around 1869, several large parcels of lake front property were granted by the Illinois state legislature to the Illinois Central Railroad Company. The land transfer was partially effectuated through the legislature's adoption of the Lake Front Act, a statute that gave the railroad "all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan" including the area a significant distance from the shore. The grants prohibited the Railroad from transferring the property, from obstructing the Chicago harbor or impairing the public right of navigation, but imposed no other restrictions on the property's use. The Railroad proceeded to construct tracks, piers and other facilities along the lake front, and filled in several hundred feet of Lake Michigan to provide land for these new facilities. In 1873, a differently-configured state legislature repealed the Lake Front Act, believing the prior legislature, and the Railroad's activities, overstepped their legal bounds. The Railroad sued seeking a judicial determination as to title of and rights to the lands in question, including the submerged lands under the lake.

DECISION: The court ruled against the Railroad, finding that the State of Illinois retained title of the lands under Lake Michigan which were held in trust for the public and the Railroad merely obtained a right of way over these lands for construction and operations. The court determined that the Railroad did not obtain riparian rights either through the legislature's grant or through its filling of or construction in and over the submerged lands.

KNOWN FOR: The Supreme Court determined that the Public Trust Doctrine applied to the lands under the non-tidal navigable waters of the Great Lakes. It clearly established the Public Trust Doctrine as the law of the United States, that the public's rights in public trust lands cannot be relinquished by a transfer of property and a state's control of that trust "can never be lost."

CRITICAL QUOTE: "The state can no more abdicate trust over property in which the whole people are interested, like navigable waters and soils under them...than it can abdicate its police powers in the administration of government and the preservation of the peace."

SIGNIFICANT FINDINGS:

- A grant of all the lands under the navigable waters of a state has never been within the legislative power. Any attempted grant of that kind would be, if not absolutely void on its face, subject to revocation.
- 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 state's control of the public trust can never be lost.

3. BOROUGH OF NEPTUNE v. AVON-BY-THE-SEA, 61 N.J. 296 (1972) New Jersey Supreme Court, 1972

ISSUE: Whether an oceanfront municipality can charge non-residents higher fees than residents for the use of its beaches.

FACTS: Until 1970, the Borough of Avon, through its beach-fee ordinance, made no distinction between residents and non-residents with regard to price or availability of its seasonal, monthly or daily beach badges. In 1970, Avon amended the ordinance to restrict the sale of seasonal beach badges to residents and taxpayers of Avon and to substantially increase the rate for monthly and daily badges available to all. The result was considerably higher charges for non-residents using the beach than residents. The Borough of Neptune City, an adjacent inland municipality, and two of its residents sued Avon claiming the ordinance was discriminatory and in violation of the common-law right of access to the ocean of all citizens of the state.

DECISION: Based on the “modern meaning and application of the Public Trust Doctrine” the municipality may not charge non-residents more than residents for use of its beaches.

KNOWN FOR: The court determined that the public’s rights under the Public Trust Doctrine are not limited to navigation and fishing but extend to recreational uses, including bathing, swimming and other shore activities. The court also determined that, while municipalities may validly charge reasonable beach fees for the use of their beaches, they may not discriminate in any way between their residents and non-residents.

CRITICAL QUOTE: “The Public Trust Doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet the changing condition and needs of the public it was created to benefit.”

SIGNIFICANT FINDINGS:

- Where the upland sand area is owned by a municipality, the public trust dictates that the beach and the open waters must be open to all on equal terms and without preference.
- 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 is not static and must be molded and extended to meet the changing conditions and needs of the public it was created to benefit.

4. VAN NESS v. BOROUGH OF DEAL, 78 N.J. 174 (1978) New Jersey Supreme Court, 1978

ISSUE: Whether an upland beach area adjacent to a municipally-owned and operated beach club to which only borough residents can obtain membership is subject to the Public Trust Doctrine, when the Borough provides other beach areas for general public access.

FACTS: Deal's municipally-owned beach was divided into three sections: (1) The Phillips Avenue Pavilion Beach, which had bath houses, restrooms, a play area and sun deck that were available to residents and non-residents through the purchase of daily or seasonal beach fees; (2) the Deal Casino, a club dedicated for the use of residents of Deal and, except for a 50-foot wide roped-off strip East of the high water line, was reserved for the use of Casino members and guests; and (3) a surfing and boating beach used by bathers from both the Pavilion and Casino beaches as well as other members of the general public. Stanley Van Ness, the Public Advocate for the State of New Jersey, brought suit against Deal, alleging that the roped-off dry beach area in front of the Casino was subject to the Public Trust Doctrine and should be available to the general public so it could properly enjoy its public trust rights.

DECISION: The court determined that this area was subject to the Public Trust Doctrine and that the public could not be kept from it.

KNOWN FOR: Determining that all municipally-owned beaches and all parts of those beaches, both above and below the high water line, are subject to the Public Trust Doctrine and must be made available to the general public.

CRITICAL QUOTE: “In Avon, we were not limiting our ruling to the beach area between the 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 municipally owned upland sand area adjacent to the tidal waters must be open to all on equal terms and without preference.”

SIGNIFICANT FINDINGS:

- Dismissed as “immaterial” Deal’s argument that the Public Trust Doctrine did not apply because the beach in question had never been dedicated for public use, finding that Deal may not allocate “to the public on a limited basis rights which, under the doctrine, the public inherently has in full.”
- Dismissed the dissenting judge’s argument that the ruling amounted to a taking of municipal property without compensation and stating: “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.”
- The court’s ruling is limited to municipally owned beaches: “Our ruling here, as in Avon, is concerned with municipally-owned open beaches. We are not called upon to deal with beaches...as to which a claim of private ownership is asserted.”

5. HYLAND v. BOROUGH OF ALLENHURST, 78 N.J. 190 (1978) New Jersey Supreme Court, 1978

ISSUE: Whether the right to use and enjoy a public beach under the Public Trust Doctrine also extends to municipally-owned and operated restrooms and changing facilities adjacent to the public beach.

FACTS: Allenhurst owned and maintained a beach club adjacent to the municipally-owned beach that, among its numerous facilities, included bathhouses, cabanas and restrooms. Membership in the club was open to residents and non-residents on a seasonal or half-seasonal basis. Fees to use the beaches were the same for residents and non-residents and included daily passes; however, non-residents were charged higher fees for use of the beach club facilities. The Attorney General of New Jersey sued Allenhurst on several grounds, many of which were resolved in the lower court.⁴ The only issue that remained when the matter reached the Supreme Court was whether the public had a right to access the existing municipal restrooms and changing facilities.

DECISION: The court determined that the public did have the right to access existing municipal restrooms adjacent to a public beach area finding that it would be “an abuse of municipal power and authority” to bar the public from such facilities. However, the public did not have the right to access the changing facilities.

KNOWN FOR: Requiring public access to restroom facilities located adjacent to municipal public beaches.

CRITICAL QUOTE: “We hold that where municipal toilet facilities exist adjacent to a public beach area, it would be an abuse of municipal power and authority to bar the users of the public beach from access to this basic accommodation.”

SIGNIFICANT FINDINGS:

- The court rejected the Attorney General’s argument that the Public Trust Doctrine gave the public the right to access the facilities, and instead found that such a right was based on the municipal police powers.
- The court did not find that municipalities are required to provide toilet facilities in connection with the maintenance and operation of their public beaches; instead, it held that “*where such facilities exist adjacent to the public beach, they must be made available to users of the beach on a nondiscriminatory basis.*”
- The court found that, unlike bathrooms, the changing facilities were not basic accommodations related to the public health and welfare, and were not generally available to all who use the public beach. Instead, they were paid for by and assigned to individuals who left their clothing and effects in them under lock and key.

⁴ The lower court upheld Allenhurst’s right to charge non-residents more for access to the club facilities because construction of the club and maintenance expenses were financed in part by taxation of borough residents.

6. LUSARDI v. CURTIS POINT PROPERTY OWNERS ASSOC., 86 N.J. 217 (1981) New Jersey Supreme Court, 1978

ISSUE: What role does the Public Trust Doctrine play in the review of a municipal zoning ordinance that restricts private property owners from the recreational use of their own beach?

FACTS: Brick Township’s zoning ordinance specifically prohibited the recreational use of all dry beach areas of its oceanfront lots except as an accessory to a permitted primary use. Permitted primary uses included single family homes, churches, schools, municipal parks and government or cultural buildings. A group of homeowners from a housing development near the ocean collectively purchased an unimproved oceanfront lot in Brick Township and, establishing themselves as the Curtis Point Property Owners Association, used the lot for recreation. An adjacent oceanfront single family homeowner filed suit against the Association noting that the required primary use was not present on the undeveloped property, and sought to enforce the ordinance and enjoin their beach recreation.

DECISION: Viewed in light of relevant statewide policies, including the Public Trust Doctrine, the ordinance was deemed invalid.

KNOWN FOR: Finding that the Public Trust Doctrine is a long standing state-wide policy that encourages municipalities to allow greater access to their beaches and should be considered in the making or review of municipal zoning decisions in shorefront towns.

CRITICAL QUOTE: “As defined in *Neptune and Van Ness*, the Public Trust Doctrine is not directly applicable to this case, which concerns the exercise of zoning power...Nevertheless, the doctrine and the decisions defining its scope signify the desirability of encouraging shore municipalities to permit greater access to the State’s precious ocean beaches for recreational purposes.”

SIGNIFICANT FINDINGS:

- Statewide policies are relevant to zoning decisions because municipalities exercise zoning power only through delegation of the State’s authority; as such, they must consider the welfare of all the State’s citizens, not just the inhabitants in that particular locality.
- Oceanfront property is unique and highly in demand, and there is growing concern about its reduced availability to the public. This concern is reflected in a statewide policy of encouraging greater access to ocean beaches for recreational purposes as is expressed in the Public Trust Doctrine and related court decisions.

7. MATTHEWS v. BAY HEAD IMPROVEMENT ASSOC., 95 N.J. 306 (1981) New Jersey Supreme Court, 1984

ISSUE: Whether the Public Trust Doctrine gives the public the right to access privately-owned upland dry sand beaches to gain access to public trust lands and waters.

FACTS: All but six of the 76 ocean-front lots in Bayhead were privately owned, and the remaining six were jointly held by the Bay Head Improvement Association and available only to Borough Residents. Although no attempt had ever been made to stop members of the public from occupying the beach east of the high water mark, there was no point of vertical access within the Borough through which the public could access this area from the street. A resident of Point Pleasant, a neighboring town, and the New Jersey Public Advocate sued Bay Head and the Association, alleging that they were unlawfully preventing the public from accessing public trust lands and waters.

DECISION: The public does have the right to access privately owned upland dry sand “where it is essential or reasonably necessary” for the public’s enjoyment of its public trust rights.

KNOWN FOR: The court acknowledged that the Public Trust Doctrine includes the public’s right to use privately-owned upland dry sand areas “as reasonably necessary.”

CRITICAL QUOTE: “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 the Public Trust Doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the Public Trust Doctrine.”

SIGNIFICANT FINDINGS:

- The public’s right to access upland dry sand is not limited to municipally-owned property and extends to private property when it “is essential or reasonably necessary for enjoyment of the ocean.” Although the court refers to “private” property, it determined that the municipalities’ involvement in the Association rendered it a “quasi-public body.”
- The court was clear that “the public’s rights in private beaches are not co-extensive with the rights enjoyed by municipal beaches” and the extent of such access depends on the circumstances of each case, and consideration of the following factors: (1) location of the dry sand area in relation to the foreshore; (2) the extent and availability of publicly-owned upland sand area; (3) the nature and extent of public demand; and (4) use of the upland sand area by the owner.
- Highlighting the Borough’s lack of even a single public beach, the court stated: “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.”

8. NATIONAL ASSOC. OF BUILDERS v. NJDEP, 64 F.Supp. 2d 354 (D.N.J. 1999) United States District Court for the District of New Jersey, 1999

ISSUE: Whether requiring developers of private land along the Hudson River to construct a public walkway adjacent to the river was reasonably necessary to protect the public's right to access public trust lands, or a taking of private property without just compensation.

FACTS: As a condition of its issuance of development permits for construction along the Hudson River, the NJDEP required builders to include a public walkway adjacent to the river to preserve the public's access to public trust lands. There were two types of property where the walkway would be required: (1) "public trust property" meaning land that was at one time submerged under the Hudson River, had since been filled in and upon which the walkway was or would be built; and (2) "non-public trust property" meaning private property across which a perpendicular walkway was necessary for the public to gain access to the public trust property. The builders asserted that the walkway requirements on both types of property constituted a taking of private property without just compensation.

DECISION: The court determined that the public had the right to access and enjoy the public trust property and upheld the walkway requirement on this land. With regard to the private property, it determined that the four-factor reasonableness test set forth in the Matthews court decision should be applied to determine whether public access over the private land was reasonably necessary or whether it was a taking.

KNOWN FOR: Finding that the State's requirement for a 20' wide public walkway along privately owned waterfront property was not a taking of private property if it was reasonably necessary to protect the public's right to access the water.

CRITICAL QUOTE: "It is clear that title to such "public trust property" is subject to the public's right to use and enjoy the property, even if such property is alienated to private owners."

SIGNIFICANT FINDINGS:

- The right of the public to use and enjoy public trust land "does not disappear" because the land was filled in and that "the public already owns the land the walkway was built on."
- The State's request for a conservation easement for the property upon which the walkway was constructed did not demonstrate that the property was not public trust property within the State's control; instead it "merely memorializes the State's role in protecting the public's right to use and enjoy the property under the Public Trust Doctrine."
- The court could not determine the outcome of the application of the Matthews reasonableness test, as the issues were brought before the court on motions filed early in the case and the facts necessary were not yet part of the case record.

9. RALEIGH AVE BEACH ASSOC. v. ATLANTIS BEACH CLUB, 185 N.J. 40 (2005) New Jersey Supreme Court, 2005

ISSUES: (1) Does the general public have the right to vertical access across a beach club’s private property to reach the foreshore; (2) how much of the private club’s upland sand can the public access and use; and (3) does the NJDEP have authority over a private club’s beach fees?

FACTS: Atlantis established a private beach club on oceanfront property in Lower Township that had been open and free to the public for decades. Seasonal membership was \$700. Directly west (inland) of the Atlantis property were the La Vida condominiums, which were constructed under a NJDEP CAFRA permit that required public access to the 220-foot wide beach between La Vida and the foreshore, indicating the Atlantis property. A resident was cited for trespassing when he left the foreshore and walked across the Atlantis property to access Raleigh Avenue, the most direct route back to his home. Atlantis sued the resident, the Township and the State asserting it was required to provide no public access other than a three-foot horizontal strip adjacent to the high water line. The resident and the NJDEP sued Atlantis asserting violations of the Public Trust Doctrine. The NJDEP also sought to require Atlantis to offer reasonable beach fees to the public. The NJDEP found that Atlantis had flattened dunes and unlawfully built structures on the beach and ordered Atlantis to restore the dunes and seek a CAFRA permit for the construction. While the court case was pending, Atlantis received the CAFRA permit that also required the construction of a boardwalk over the dunes to allow public access.

DECISION: (1) The public had a right to vertical access across the private Atlantis property; (2) the public had the right to access and use all of the Atlantis upland sands and; (3) the NJDEP had the authority to review and approve the Atlantis beach fees.

CRITICAL QUOTE: “The Beach Club nonetheless asserts that it will lose one of the “sticks” in its bundle of property rights if it cannot charge whatever the market will bear and, in setting fees for membership, decide who can come on its property and use its beach and other services. But exclusivity of use, in the context here, has long been subject to the strictures of the Public Trust Doctrine.”

KNOWN FOR: Finding that the Public Trust Doctrine gave the public the right to access and utilize a 100% privately-owned upland beach, and that the NJDEP had the authority to require the beach club to set reasonable fees for the public.

SIGNIFICANT FINDINGS:

- Applying the Matthews factors, the court highlighted the decades of public use of the beach, the La Vida CAFRA permit public access condition, the complete lack of public beaches in Lower Township and that the upland was used as a business enterprise.
- The court found NJDEP’s authority to review and approve the beach fees derived from two separate and distinct sources: (i) NJDEP’s CAFRA jurisdiction, triggered by Atlantis’ construction of boardwalk pathways over the dunes and (ii) NJDEP’s “general power to promote the health, safety and welfare of the public.”

10. CITY OF LONG BRANCH v. LIU, 203 N.J. 474 (2010) New Jersey Supreme Court, 2010

ISSUE: Who owns the beach that is added to existing oceanfront property by a government-funded beach replenishment program?

FACTS: In 2001, Long Branch initiated eminent domain proceedings to acquire oceanfront property from the Liu's. Due to a government-funded beach replenishment program in the mid- to late- 1990s, sand had been added to the beach and the mean high water line on the Liu's 1977 deed was now 225 feet inland, showing an almost two-acre increase in the property. The Lius claimed they should be compensated for the additional two acres. The City, State and other interested parties argued that the formerly submerged land remained with the State in trust for the people of New Jersey.

DECISION: Because the land was added through the process of "avulsion" - the sudden and obvious addition to the shoreline - the Liu's property line did not change and the additional two acres below the new mean high water line was held by the State in trust for the public.

KNOWN FOR: Setting forth the applicable principles to determine ownership of sand or sediment added to or lost from shore-front property.

CRITICAL QUOTE: "In the end, under the public trust doctrine, the people of New Jersey are the beneficiaries of the lengthening of the dry beach created by this government-funded program."

SIGNIFICANT FINDINGS:

- The court based its decision on the common law principles governing property rights to tidally-flowed lands when man-made or natural events alter their shoreline:
- **Avulsion** is the sudden obvious loss or addition to the shoreline. With avulsion the property line does not shift. When it adds land to the beach, the prior mean high water line will be located on dry sand and the State has title to the beach seaward of that point. When it takes away land, the mean high water mark will be submerged, and the upland owner has title to the tidally-flowed beach.
- **Accretion** is the addition of deposits that extends the dry shoreline seaward gradually and imperceptibly, but becomes apparent over time. The property owner takes title to the dry land added by accretion. **Erosion** is the gradual imperceptible loss of shoreline that lessens the dry beach area. The property owner loses to the State title of the land that becomes tidally flowed as a result.
- This case involved an avulsion, the 1977 property line did not change, and the Lius were not entitled to compensation for the two acres. The State held title to the additional dry land in trust for its citizens. The court did point out that the Lius were a direct beneficiary of the replenishment project because it created a buffer protecting their property.

PUBLIC TRUST DOCTRINE/ PUBLIC ACCESS FAQs

1. Does the Public Trust Doctrine have the force of law?

YES. The Public Trust Doctrine originated in the “common law,” meaning it was established over time through the court decisions of judges interpreting the customs and practices of citizens. Collectively, these court decisions, which build upon each other over a period of nearly two hundred years, set forth the rights afforded to citizens under the Public Trust Doctrine.

2. How long have citizens had the rights bestowed upon them by the Public Trust Doctrine?

FOR MORE THAN 1500 YEARS. When New Jersey was established as a state after the Revolutionary War, the rights under the Public Trust Doctrine previously enjoyed by citizens under English rule vested in the people of the State of New Jersey. *Arnold v Mundy*, 6 N.J. L. 1, 12-13 (1821). Public Trust rights, particularly the ancient rights of navigation and fishing, actually originated in “Justinian” times, meaning during the Emperor Justinian’s reign over the Byzantine Empire from 527 to 565 AD. It was the “Justinian Code” that is thought to have served as the basis for the Public Trust Doctrine in England and other empires across the world and, eventually, the post-Revolutionary United States.

3. Do the rights under the Public Trust Doctrine belong only to those that own or rent beach-front property or that live in a shore town?

NO. The rights under the Public Trust Doctrine belong to all persons that reside in and those that visit the State of New Jersey.

4. Who is responsible for protecting public trust lands and ensuring that the public has access to them?

THE STATE OF NEW JERSEY, as the trustee of public trust lands, is responsible for their protection and for ensuring that the public has access to



them. Because the New Jersey Department of Environmental Protection (NJDEP) has jurisdiction over public trust lands through its implementation of statutes such as the Coastal Area Facility Review Act (CAFRA) and the Waterfront Development Act, the NJDEP has traditionally taken on this responsibility. In response to a court challenge to the NJDEP’s authority to oversee public trust lands and protect and enforce public trust rights, the State Legislature passed a statute in 2016 clearly stating that the NJDEP has the authority to oversee public access in New Jersey and to require public access as a condition of Waterfront Development and CAFRA Permits. P.L. 2015, C. 260, amending *N.J.S.A. 12:5-3* and P.L. 1973, C. 185, effective January 19, 2016.

In addition, under the Public Trust Doctrine, municipalities are trustees of the beaches within their boundaries and must operate and maintain those beaches for the benefit of all members of the public. *Slocum v. Belmar*, 238 N.J. Super. 179 (Law Div. 1989).

It should be noted that, as the intended beneficiaries of the Public Trust Doctrine and the public access it allows, it is also up to members of the public to be vigilant in their efforts to ensure their rights are protected and to document and advise the NJDEP of instances where these rights are violated or threatened.

5. Who must/can enforce the rights of citizens under the Public Trust Doctrine?

THE STATE OF NEW JERSEY, as the trustee of public trust lands and waters, is obligated to protect and enforce the rights of the citizens who are the beneficiaries of the trust. It can do so through court actions brought by the NJDEP and/or the NJ Attorney General's office on behalf of citizens, or through NJDEP permit decisions and enforcement actions. In addition, as trustees of the beaches within their boundaries, municipalities must operate and maintain those beaches for the benefit of all members of the public. Slocum v. Belmar, 238 N.J. Super. 179 (Law Div. 1989).

Citizens must remain vigilant in their efforts to ensure their rights are protected by documenting and advising the NJDEP and/or Attorney General of instances where their rights are violated or threatened. Citizens may also bring court actions against those who violate or threaten their rights on their own or with the support of a citizens' group. Many of the important court decisions setting forth the public's rights under the Public Trust Doctrine were initiated by citizens and citizens' groups, often in conjunction with the NJDEP, the State Attorney General and, when it existed, the New Jersey Public Advocate. For more about the Public Advocate's historical role in protecting public access to New Jersey's beaches, as well as the duties of municipalities as trustees, see FAQ 11.

6. Does the State of New Jersey have rules or regulations regarding public access?

YES. The NJDEP has adopted a Public Access Rule, which can be found in the State Administrative Code at N.J.A.C. 7:7-16.9.

The current Public Access Rule was adopted by the NJDEP in 2012, and acknowledges that, as the trustee of the public rights to natural resources, including tidal waterways and their shores, "it is the duty of the State not only to allow and protect the public's right to use them, but also to ensure that there is adequate access to these natural resources." N.J.A.C. 7:7-16.9(aa).

In December 2015, the NJDEP's authority to oversee public trust lands was challenged in court. Finding that the existing statutes did not expressly grant the NJDEP such authority, the court struck down the Public Access Rule. Hackensack Riverkeeper, NY/NJ Baykeeper v. NJ DEP, 443 N.J. Super 293 (App. Div. 2015) *cert denied* by Order of the N.J. Supreme Court dated June 17, 2016. In response, the New Jersey legislature adopted a statute clearly stating that the NJDEP has the authority to oversee public access in New Jersey and to require public access as a condition of Waterfront Development and CAFRA Permits. PL.2015, C. 260, amending N.J.S.A. 12:5-3 and PL. 1973, C. 185, effective January 19, 2016. As a result, the 2012 Public Access Rule remains in force and effect and continues to be implemented by the NJDEP⁵

7. Can the NJDEP's Public Access Rule impact or change the rights identified in the public access decisions of the courts?

NO. As the trustee of the public trust lands and waters, the state, including the NJDEP, is required to protect the public trust lands and waters throughout the State and ensure the public has meaningful access to them. Thus, the Public Access Rule can ensure the rights afforded to the public through the court decisions are protected and promoted, but it cannot change them. In addition, if the Public Access Rule is revoked or found to be partially or wholly invalid through court challenges, the revocation or invalidation has no impact on the public trust rights established by the courts.

⁵ Despite the legislature's quick action, at the January 25, 2016 meeting of the Senate Environment Committee ("the Committee"), Senator Robert Smith appointed a representative from the NJ Business & Industry Association, The American Littoral Society, the NJ State Chamber of Commerce, and the NY/NJ Baykeeper to co-chair a Public Access Task Force. The Task Force was charged with developing public access recommendations, including consent and non-consent items, for possible use in additional public access legislation. The co-chairs held public stakeholder meetings in which more than 80 persons from a variety of business, industry, recreational and environmental sectors participated. The resultant recommendations report identifying consensus and non-consensus issues was presented to the Committee in 2016, and is being considered for inclusion in additional public access legislation.

8. Does a municipality have any responsibility to protect public trust rights and ensure the public has access to public trust lands within its boundaries and, if so, how does this square with its authority and responsibilities under its municipal police powers?

YES. The New Jersey Supreme Court has determined that the Public Trust Doctrine is an important state-wide policy that is relevant to municipal zoning decisions. While municipalities have wide discretion in determining what uses are suitable within their boundaries, this principle is qualified where land has a unique character and a statewide policy designates what uses are appropriate for such land. Statewide policies are relevant to zoning decisions because municipalities exercise zoning power only through delegation of the State's authority; as such, when making zoning decisions, municipalities must consider the welfare of all of the State's citizens, not just the inhabitants of their particular locality. In the case of shore municipalities, the Public Trust Doctrine is a statewide policy that must be considered in zoning decisions. Lusardi v Curtis Point Property Owners Association, 86 N.J. 217, 227-228 (1981), also referring to N.A.A.C.P. v Township of Mt Laurel, 67 N.J. 151, 178 (1975).

In addition, under the Public Trust Doctrine, municipalities are trustees of their respective beach areas and, as public trustees, are endowed with the same duties and obligations as an ordinary trustee. That is, the municipal trustees owe their beneficiaries, i.e., all members of the beach-going public, a duty of loyalty, a duty of care and a duty of full disclosure. Slocum v. Belmar, 238 N.J. Super. 179 (L.Div. 1989).

New Jersey also has a statute giving "any municipality bordering on the Atlantic Ocean, tidal water bays or rivers...exclusive control" over its public beaches and related facilities. N.J.S.A. 40:61-22.20. Such control includes the ability, through duly adopted ordinances, to make and enforce rules and regulations for the care, governing and policing of such areas as long as the exercise of this control does not "exclude or interfere with" any State law or authority with respect to such lands, property and facilities." Thus, the rules and regulations of shore

municipalities cannot unreasonably interfere with the rights afforded the public by the Public Trust Doctrine.

At the same time, the New Jersey legislature has delegated broad general police powers to municipalities to adopt such ordinances as they "deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants." N.J.S.A. 40:48-2. Under this authority, combined with the "exclusive control" over its beaches granted by the aforementioned statute, municipalities may close public parks and other facilities, including public beaches, when the use of such facilities may pose a threat to public safety and order.

The competing and sometimes overlapping interests of the Public Trust Doctrine and municipal police powers can lead to conflict, requiring the parties to seek clarification and resolution in the courts. An example of this is found in the case State v. Oliver, 320 N.J. Super. 405 (App.Div. 1999), cert. denied, 161 N.J. 332 (1999). During and immediately after a severe tropical storm, the Borough of Spring Lake closed its beaches due to high winds and surf. Lifeguard stands and other equipment were moved from the beach area to prevent damage, and red flags were posted indicating the beach was closed. Despite the closure, four individuals were observed surfing off one of the Borough's beaches and continued to do so despite the efforts of Borough officials to gain their attention. When the surfers did come ashore, they were issued disorderly persons summonses for, among other things, violating municipal ordinances authorizing the closure of beaches and prohibiting bathing under certain conditions. The surfers challenged their summonses in court, arguing that the Public Trust Doctrine precluded Spring Lake from regulating their activity beyond the mean high water mark. The court disagreed, stating that the right of the public to enjoy Public Trust property is not inconsistent with the right of the state or municipality to protect those utilizing that property, and finding further:

“This is the essence of the government’s inherent authority, if not its obligation, to act in the interest of the public safety and welfare...Such action may take the form of the legitimate exercise of police power, for example, to close beaches and preclude use of property, even that falling within the Public Trust Doctrine, when the public safety and welfare is threatened.” State v. Oliver, 320 N.J. Super at 416 (App Div. 1999).

One purpose of the NJDEP’s Public Access Rule is to prevent and resolve such conflicts so that litigation is not necessary. For more on municipal police powers, see FAQ 11 (beach fees), and FAQ 14 (restrictions on public access). For more on the NJDEP’s Public Access Rule, see FAQ 6.

It should be noted that municipalities have a significant incentive to provide reasonable public access. When municipalities have failed to do so and citizens were forced to forge their own path through and onto private property to access public trust lands and waters, courts have upheld such access as being “reasonably necessary” to prevent frustration of the public’s rights under the Public Trust Doctrine. It is beneficial to each municipality, its property-owning residents and the public for the municipality to establish appropriate locations for public access, rather than leaving it up to the public and the courts to decide. Matthews v Bayhead Improvement Association, 95 N.J. 306 (1981); Raleigh Avenue Beach Association v. Atlantis, 185 N.J. 40 (2005).

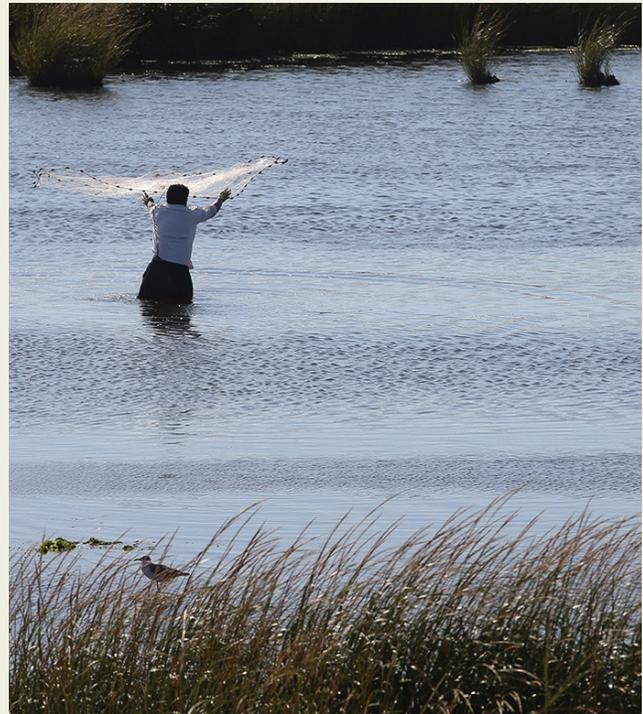
9. Can the State, as trustee of public trust lands, extinguish the citizens’ rights to access and use tidally-flowed lands?

NO. Generally speaking, the State cannot sell, transfer, or give away public trust lands and waters through deeds, grants, regulation, contracts or legislation and any action that purports to do so is null and void. Arnold v Mundy, 6 N.J.L. 1, 14 (1821); Illinois Central Railroad v State of Illinois, 146 U.S. 387, 453-454 (1892).

Through the Tidelands Council, the State is authorized to sell grants to and enter into leases with private individuals for tidally-flowed lands. However, title to such public trust property remains subject to the public’s right to use and enjoyment, even if the property is granted or leased to private owners. National Association of Builders v NJDEP, 64 F.Supp. 354 (D.N.J. 1999).

10. Can a municipality or an oceanfront private property owner sell, transfer or give away public trust lands?

NO. In fact, in a case dating back to 1821, the New Jersey Supreme Court considered a written grant held by a private property owner that, in addition to the upland property, included the land underneath the adjacent tidal waters of the Raritan River. The court held that, because the original property owner “never had any right interest or power over those waters or the land covered by them” the grant purporting to transfer the public trust lands to the new owner was void. Arnold v Mundy, 6 N.J. L. 1, 14 (1821)



11. Can a town charge me for a beach badge to access public trust land?

YES. A town can charge beach fees to produce revenues necessary to offset legitimate beachfront related expenditures. However, if you are simply walking along the wet sand area below the mean high water line you should not be charged a fee.⁶

New Jersey has a statute that authorizes municipalities to charge “reasonable” beach fees and that sets forth the criteria and limitations that apply. N.J.S.A. 40:61-22.20. Fees can be charged to generate funds needed to improve, maintain and police the beaches; to protect them from erosion, encroachment and damage from the ocean; to provide facilities for public bathing and recreation, including lifeguards; and to provide means of access to the beach (e.g., boardwalks, walkways, parking). The statute states that fees cannot be collected from children under 12 years of age, and gives municipalities the discretion to collect no or reduced fees from persons 65 or older, persons in active military service and their families, and veterans of the armed forces.

Oversight of beach fees to ensure they remain affordable and are utilized for legitimate beachfront related expenditures was for many years conducted by the New Jersey Public Advocate. For example, in 1989, the Public Advocate sued the Borough of Belmar alleging that the beach fees it collected were used to supplement the Borough’s general revenues and not just for improving, operating and maintaining its beaches. Slocum v. Belmar, 238 N.J. Super 179 (L.Div.1989). The Public

Advocate argued that this violated the State’s beach fee statute, as well as Belmar’s obligations as the trustee of its beaches.

The court agreed, explaining Belmar’s duties as a trustee and how its actions breached those duties as follows:

“...Belmar is a trustee over its beach area and the public is the beneficiary of the trust lands...A public trustee is endowed with the same duties and obligations as an ordinary trustee. That is, the trustee owes to the beneficiary a duty of loyalty, a duty of care and a duty of full disclosure. Additionally, a trustee has the duty to keep clear and adequate records and accounts. When the trustee fails to keep proper accounts, all doubts are resolved against him.”

“The evidence in this case clearly indicates that Belmar breached its duty of loyalty to the public by increasing beach admission fees, rather than real estate taxes, in order to raise the borough’s general revenues...It operated the beach area as though it were a commercial business enterprise for the sole benefit of its taxpayers. This conduct resulted in surplus beach fee revenues being used to subsidize other municipal expenditures for the exclusive benefit of the residents of Belmar, rather than being set aside to meet future beach-related costs. These actions place the interest of Belmar’s residents before those of beachgoers, in violation of the borough’s duty under the public trust doctrine.” Slocum v. Belmar, 238 N.J. Super at 188.

The court also agreed with the Public Advocate’s argument that Belmar’s beach fees discriminated against non-residents as was evidenced by the double fee charged on weekends as compared to weekdays, the disproportionate price gap between seasonal and daily fees, and the fact that Belmar, without justification, raised the price of its daily and weekend badges faster than the price of its seasonal badges. Slocum v. Belmar at 190.



⁶ See, NJDEP Public Access webpage, History and Legal Precedents, par. 3, Public Rights Under the Public Trust Doctrine, <http://www.nj.gov/dep/cmp/access/njparightslegal.htm>

In addition to the Slocum case, many of the most significant court cases seeking to protect and implement the public's rights under the Public Trust Doctrine were brought or co-litigated by the Public Advocate, including Van Ness v. Borough of Deal (case summary, page 8), Matthews v. Bay Head Improvement Association (case summary, page 11), and City of Long Branch v Liu (case summary, page 14). From 2006 – 2010, the Public Advocate prepared an annual guide to New Jersey's beaches, providing detailed information about public and private beaches and their fees, restrooms, parking, and access for persons with disabilities.

Established in 1974 by Governor Byrne as a department within the State Executive Branch, the effectiveness and existence of the Public Advocate is dependent upon the sitting governor and the legislature. As a result, the Public Advocate was eliminated in 1994, reinstated in 2005, eliminated again in 2011 and has not been reinstated since.

12. Can a town charge non-residents more than residents for a beach badge?

NO. Municipal beaches must be “open to all on equal terms and without preference” and non-residents cannot be charged more than residents to gain access to them. Borough of Neptune v. Avon-by-the-Sea, 61 N.J. 296, 309 (1972);

13. Does the Public Trust Doctrine apply to waterfronts other than ocean-front beaches?

YES. In New Jersey, the Public Trust Doctrine applies to all tidal navigable waters and the land beneath them, and includes tidal rivers and bays as well as the ocean. See, Arnold v. Mundy, and National Association of Builders v. NJDEP confirming the application of the Public Trust Doctrine to the Raritan and Hudson Rivers, respectively. The U.S. Supreme Court has also held that the Public Trust Doctrine applies to the navigable but non-tidal waters of the Great Lakes. Illinois Central Railroad v State of Illinois, 146 U.S. 387, 453-454 (1892).



14. Are there any circumstances under which the public can be denied access to public trust lands or where such access may be restricted?

YES. There are circumstances under which public access may be restricted or denied. These include restrictions that are necessary to protect public health and safety, and for which municipalities, through the exercise of their police powers, can adopt ordinances to address such circumstances. For example, an ordinance could designate certain areas for bathing as distinct from those where surfing and fishing is allowed, or prevent swimming and other activities during rough seas, such as during or after a hurricane, when the lives of swimmers and surfers would be endangered. Restrictions are also permitted where commercial shipping or other operations might endanger the public, or for reasons related to homeland or national security, such as at properties where the upland is owned and operated by the United States Navy. However, if the status of the areas in question changes, i.e., the upland property is no longer subject to a public health or national security risk, the restrictions are no longer applicable and the rights of the citizens to access the associated public trust lands and waters prevail. Many of these circumstances are addressed in the

NJDEP Public Access Rule, which provides that, on certain industrial, commercial and homeland security facilities seeking a CAFRA or Waterfront Development Permit, on-site public access shall be provided “unless it can be demonstrated that public access is not practicable based on the risk of injury from proposed hazardous operations, or substantial permanent obstructions, or upon documentation of a threat to public safety due to unique circumstances concerning the subject property, and no measures can be taken to avert these risks.” N.J.A.C. 7:7-16.9 (n)(3)(ii). But even under these circumstances, “equivalent offsite public access shall be provided on the same waterway and in the same municipality...” N.J.A.C. 7:7-16.9(n)(3)(iii).

Another example in which public access may be restricted or denied is for beach closures during the nesting season of endangered birds that nest on the beach. There are more than 20 such sites throughout New Jersey, and include beaches in 12 different municipalities, five state parks or natural areas, one U.S. Coast Guard base, one inlet island and one county park. See, <http://www.njfishandwildlife.com/ensp/bnbmgt.htm>, for information regarding the NJDEP Division of Fish and Wildlife Beach Nesting Bird Management Program.

15. Can a shore town restrict parking at or near beaches to residents only?

NO. When it comes to public access to and use of the waterfront, municipalities cannot discriminate against non-residents. Borough of Neptune v. Avon by the Sea, 61 N.J. 296 (1972); Van Ness v. Borough of Deal, 78 N.J. 174 (1978); Hyland v Borough of Allenhurst, 78 N.J. 190 (1978). Moreover, actions by a town that would “seriously impinge on, if not effectively eliminate, the rights of the Public Trust Doctrine” have been characterized by the New Jersey Supreme Court as efforts to render those rights meaningless and determined to be in violation of the Public Trust Doctrine. Matthews v Bayhead Improvement Association, 95 N.J. 306, 324 (1984). While no court case to date has specifically addressed whether restrictive parking measures violate the Public Trust Doctrine, it has been widely accepted that this is the case in New Jersey.

This is also likely due to the fact that efforts to

restrict parking are in violation of the three-way Local Cooperation Agreements for beach restoration projects entered into by the Federal government, the State and each benefitting municipality. Specifically, the federal policies governing such projects state:

“Lack of sufficient parking facilities for the general public (including non-resident users) located reasonably nearby, and with reasonable public access to the project, will constitute *de facto* restriction on public use, thereby precluding eligibility for Federal participation.”

U.S. Army Corps of Engineers, Engineer Regulation (ER) 1165-2-130, section h (2), June 15, 1989.

Therefore, municipal restrictions on parking can render the municipality ineligible for the federal cost share funding for beach restoration projects, which typically ranges from 65% to 100% of the total cost of these multi-million dollar projects. This means that no new beach restoration projects would be allowed in that municipality, and for projects already completed or underway, reimbursement of federal funding by the municipality could be required.

16. If every ocean-front lot in a shore town is designated as “private property” are the rights of the public to access and use the waterfront precluded?

NO. The New Jersey Supreme Court considered this scenario several times and found that, in such cases, the public must be given access to as much privately-owned beach as was “reasonably necessary” to allow it to gain access to public trust lands (e.g., the wet beach or foreshore) as well as a reasonable amount of dry upland sand to fully enjoy its rights. Both the Matthews v Bayhead and Raleigh Avenue Beach Association v. Atlantis cases involved circumstances where towns (Bay Head, Lower Township) provided no public beaches.

Similarly, the New Jersey Supreme Court invalidated a Brick Township zoning ordinance that had the effect of keeping everyone except oceanfront property owners off of its beaches, finding that, as an important and longstanding state policy that encouraged public access to beaches, the Public Trust Doctrine was relevant to such zoning decisions and a court’s review of those

decisions. Lusardi v. Curtis Pt. Property Owners Assoc., 86 N.J. 217, 227 -228 (1981) In another case, the court noted that if every municipality bordering the Jersey Shore were to adopt a policy of providing no public beaches, the public would be prevented from exercising its rights to enjoy public trust lands, and that municipal “residents may not frustrate the public’s right in this manner.” Matthews v. Bayhead Improvement Association, 95 N.J. 306, 331 (1984).

17. Does the Public Trust Doctrine require that a municipality provide restrooms for the citizens that access and use its public beaches?

NO. Public access must be reasonable and meaningful but, to date, this has not been interpreted to require that a municipality provide public restrooms at its public beaches. However, where such facilities already exist adjacent to a public beach area, the New Jersey Supreme Court determined that it would be an abuse of municipal police power and authority to bar the users of the public beach from access to this basic accommodation. Hyland v. Borough of Allenhurst, 78 N.J. 190, 196 (1978).

18. Does the Public Trust Doctrine allow citizens to access private property?

YES, but only as “reasonably necessary” to gain access to and enjoy public trust lands and waters. To determine whether and how much private property the public should be permitted to access, a reviewing court will consider the following four factors:

- (i) The location of the dry sand area in question in relation to the foreshore (wet beach, public trust lands);
- (ii) The extent and availability of publicly-owned upland sand area;
- (iii) The nature and extend of public demand; and
- (iv) Usage of the upland sand by the owner (e.g., is it a business, such as a beach club)



Matthews v. Bayhead Improvement Association, 95 N.J. 306, 326 (1984). In essence, the less public access a municipality provides, the more access to private property will be necessary to ensure the public can exercise its Public Trust rights. Conversely, if a municipality provides adequate public access, no access to private property will be reasonably necessary. See, for example Bubis v. Kassin, 404 N.J. Super. 105 (App.Div. 2008), in which the court determined that public access to private upland beach was not warranted and compared the circumstances at hand to those in the Raleigh Avenue case, where the court had determined that public access to private property was required. The Bubis court determined that the unique factors that warranted public access to private upland property in the Raleigh Avenue case were not present, i.e., there was no CAFRA permit associated with the property requiring public access, the municipality in question provided other public beaches and the private property at issue was not being used as a business enterprise such as a beach club.

19. If it is determined that access through private property is reasonably necessary for the public to access public trust lands, are the owners of that private property required to provide parking and restrooms for the public?

NO. Private property owners are not required to provide parking or restrooms for members of the public that gain access to public trust lands through their property.

20. Do fishermen need to pay to access public trust lands and waters to fish?

NO. In acknowledgment and consideration of the most ancient public trust right of fishing, citizens are not charged to access and remain on or adjacent to public trust lands to fish. However, they may be subject to restrictions designed to protect the public health and welfare, such as a restriction against fishing at a bathing beach during bathing hours and/or fishing in designated areas only.

21. Do surfers need to pay to access public trust lands and waters to surf?

NO. In acknowledgment and consideration of the most ancient public trust right of navigation, citizens are not charged to access and remain on or adjacent to public trust lands to surf. However, like fishermen, surfers may be subject to restrictions designed to protect the public health and welfare, such as a restriction against surfing at a bathing beach during bathing hours and/or surfing in designated areas only.



22. Does the Public Trust Doctrine give citizens the right to access private beaches that are enhanced by government/taxpayer-funded beach nourishment projects?

YES. When a beach nourishment project, or some other manmade or natural occurrence, suddenly and obviously adds sand to an existing shoreline, the newly added beach does not belong to or increase the size of the land owned by the upland private property owner. Instead, the newly-added beach is considered to be public trust lands and title to any land seaward of the former high tide line, meaning the high tide line before the beach nourishment project commenced, belongs to the State in trust for the citizens. This sudden and obvious addition of beach is known as “avulsion” and is the opposite of “accretion” which is the slow imperceptible addition of sand that only becomes apparent over many years. In the case of accretion, the newly-added beach does belong to the upland property owner. City of Long Branch v. Liu, 203 N.J. 474 (2010).

23. Are there any additional public access requirements for beaches that benefit from beach nourishment projects?

YES. The federal policies that govern funding for beach nourishment projects prohibit federal funding for privately-owned shores where the use of such shores is limited to private interests. Engineer Regulation (ER) 1165-2-130, section 9 e (3).

Specifically, the federal cost-share is 65% for projects benefitting publicly owned property and for privately-owned property with adequate public benefits. The federal cost share for projects benefitting privately owned property only and where public access is restricted is 0%. ER 1165-2-130, section 6, Table 2. The significance of public access to this cost share formula is clear when the overall cost of these projects is considered. For example, a post-Sandy nourishment project for Deal, Allenhurst and Loch Arbour, a relatively small stretch of beach in Monmouth County, cost \$38.2 million. Projected costs for re-nourishment of northern Ocean County through 2065 are \$513.9 million.⁷

7 See, Moore, Kirk, “Money and Sand: Will There Be Enough for New Jersey’s Beaches?” N.J. Spotlight, September 29, 2016.



Other public-access related sections of the federal beach-nourishment policies include:

- **Continued Public Ownership and Use.** The state and the municipality in which a project occurs must ensure that the continued condition of public ownership and public use of the property is met during the economic life of the project, which is typically 50 years. ER 1165-2-130, section 10 e.
- **Public Use.** Public use is a condition for Federal participation in shore protection projects. In the case of beaches used for recreation, public use means use by all on equal terms. This means that project beaches cannot be limited to a segment of the public. ER-1165-2-130, section 6 h.
- **Parking.** Lack of sufficient parking facilities for the general public, including non-resident users, located reasonably nearby and with reasonable public access to the project, will constitute *de facto* restriction on public use, thereby precluding eligibility for Federal participation. ER-1165-2-130, section 6 h (2).
- **Access.** Reasonable public access must be provided, meaning public access points for beaches benefitting from beach nourishment projects must be located no more than every quarter mile. Public access points greater than one quarter mile apart are considered as “effectively limiting” public access. ER-1165-2-130, section 6 h (3).
- **Beach Use Restricted to Private Organizations Not Funded.** Federal participation in projects for private shores owned by beach clubs and private hotels is incompatible with the intent of the federal laws authorizing such projects, if the beaches are limited to use by members or paying guests. ER-1165-2-130, section 6 h (4).
- **Public Shores with Limitations Not Funded.** Publicly-owned beaches which are limited to use by residents of the community or a group of communities are not considered to be open to the general public and will be treated as private beaches, meaning 0% federal funding will be provided. ER-1165-2-130, section 6 h (5).
- **Local Cooperation Agreement Requirements.** Municipalities and the State must enter into an agreement declaring, among other things, that they will
 - maintain continued public ownership and public use of the shore upon which the amount of Federal participation is based during the economic life of the project (normally 50 years) ER-1165-2-130, section 10 c.
 - provide and maintain necessary access roads, parking areas and other public use facilities open and available to all on equal terms. ER-1165-2-130, section 10 e.



24. Does the Public Trust Doctrine apply to marinas?

YES. Marinas are located on and over public trust lands and waters. Although no court case has determined the extent of public access required at marinas or what constitutes “meaningful” or “reasonable” access at these establishments, it has traditionally been accepted in New Jersey that, by providing opportunities for boaters to access the state’s navigable waters and by doing so in a non-discriminatory manner (e.g., equal opportunity for residents and non-residents), marinas are in effect providing public access.

In addition, the NJDEP Public Access Rule addresses public access requirements at marinas that seek development permits. N.J.A.C. 7:7-16.9(q). The requirements vary depending upon whether the permit is requested for work at an existing marina, e.g. for maintenance, renovation, redevelopment or expansion, or if it is requested for new marina development. The Public Access Rule also provides flexibility for the applicant. For example, for new development, public access proposed by the applicant may include any one or a combination of the following:

- A public accessway (walkway) parallel to the shoreline;
- A boat ramp, pier, fishing or other direct access to the waterway;
- A waterfront pocket park;
- Public restrooms to accommodate those utilizing public access; and/or
- Additional public parking to accommodate those utilizing public access

25. Will the rights currently afforded citizens under the Public Trust Doctrine ever change?

YES. It is highly likely that the rights under the Public Trust Doctrine will change, as additional issues are brought before and resolved by the courts and as circumstances relating to public access (both physical and political) change. The New Jersey Supreme Court has described the Public Trust Doctrine as “dynamic” and a doctrine that “is not fixed or static, but must be molded to meet the changing conditions and needs of the public it was created to benefit.” Borough of Neptune v. Avon-by-the-Sea, 61 N.J. 296, 309 (1972).

Opportunities for the broader application of the Public Trust Doctrine in New Jersey are apparent from the way in which it has been applied in other states, such as California’s consideration of the Public Trust Doctrine in reviewing the impact water diversion permits will have on the quality and salinity of Mono Lake, National Audubon Society v Superior Court of Alpine County, 658 p.2d 709 (1983), and in Idaho’s application of the Public Trust Doctrine to a request for a moratorium on development permits to protect the water quality of Lake Couer d’Alene, Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P2d 1085 (1983).

Other Important Public Access And Public Trust Doctrine Cases

Below are cases demonstrating factors that can impact public access, such as state or municipal police power, constitutional protections of private property and the duties and authorities of “trustees”.

Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987) – Beach-front property owners challenged a permit condition requiring a public access easement. In considering the property owners’ takings claim and the Coastal Commission’s assertion of its police powers, the court rejected the Commission’s stated purpose for the easement and found that the condition was an unconstitutional taking of private property.

Slocum v. Belmar, 238 N.J. Super. 179 (L.Div. 1989) – The NJ Public Advocate challenged Belmar’s beach fees and its use of those fees to supplement its general revenues. The court determined that Belmar was the trustee of its beaches, the general public was the beneficiary of that trust and, by collecting fees for the benefit of its own taxpayers, Belmar breached the fiduciary duties owed to the beneficiary.

Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) – A property owner challenged a state law prohibiting construction in flood-prone dune areas that was adopted after he purchased two beach front lots with the clear intent to develop them. The court identified the factors to be considered in a takings analysis and remanded the matter back to the lower court for full consideration of those factors.

Dolan v. City of Tigard, 114 S. Ct. 3141 (1994) – The City conditioned a building permit upon the property owner’s dedication of a public greenway along the adjacent creek to minimize flooding. The court found that, although flood protection was a legitimate state interest, Dolan could advance that interest through a private greenway while maintaining her right to exclude others from her property. Thus, the nexus between the condition and its stated purpose did not exist.

State v. Oliver, 320 N.J. Super. 405 (App. Div. 1999) – The court determined that it is a legitimate exercise of municipal police power to preclude access to beaches when the public safety and welfare is threatened. The case involved disorderly persons citations given to four surfers who ignored a beach closure during Tropical Storm Bertha.

Borough of Avalon v. N.J. DEP, 403 N.J. Super. 590 (App. Div. 2008), cert. denied, 199 N.J. 133 (2009) – The court invalidated NJ DEP’s 2007 Public Access Rules finding they exceeded the scope of the agency’s authority and wrongfully preempted municipal police powers.

Bubis v. Kassin, 404 N.J. Super. 105 (App. Div. 2008) – Applying the Matthews factors, the court determined that the public does not have a right to access the upland sand portions of this private beach front property. The unique facts of the Raleigh Avenue case (a CAFRA permit requiring public access, the lack of public beach in the municipality, and the use of the private sand as a business enterprise) are not present in this case.

Borough of Harvey Cedars v. Karan, 214 N.J. 384 (2013) – Through its use of eminent domain, the Borough built a storm protection dune on the Karan’s property, obstructing their ocean view. Because other residents would benefit from the dune’s protections, the court found this benefit was not “special” to the property, and precluded evidence that it would enhance the property value. The NJ Supreme Court disagreed and ordered a new trial to allow such evidence to be presented.

Hackensack Riverkeeper, NY/NJ Baykeeper v. NJ DEP, 443 N.J. Super. 293 (App. Div. 2015) – The court invalidated NJ DEP’s Public Access Rule finding the agency did not have the authority to adopt and enforce such rules. NJ has since adopted a statute granting NJDEP the necessary authority.

OTHER PUBLIC ACCESS AND PUBLIC TRUST DOCTRINE RESOURCES

New Jersey Department of Environmental Protection website, public access page with links to public access maps, locations, FAQs and other resources, <http://www.nj.gov/dep/cmp/access/>

New Jersey Coastal Access: Everything You Wanted to Know About the Rights and Responsibilities of Accessing New Jersey's Coast, New Jersey Sea Grant Consortium, website available at http://www.njseagrant.org/njcoastalaccess/waterfront_users/waterfront_users.html

Report to Senator Robert Smith from the Public Access Task Force, Sarah Bluhm, NJ Business and Industry Association, Tim Dillingham, American Littoral Society, Michael Egerton, NJ State Chamber of Commerce, and Debbie Mans, NY/NJ Baykeeper, April 2016

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