

# Litigating a Public Trust Doctrine Case

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New Jersey's beaches are a significant source of tourism in the state. While we complain that tourists hinder summertime road travel, we all welcome the substantial flow of tourism revenue brought in by those who vacation at the Jersey shore.

**M**any of New Jersey's beaches, perhaps up to 25 percent according to some newspaper accounts, are not publicly accessible because the upland dry sand area is privately owned. The extent to which private beach ownership reduces public use and enjoyment of the ocean waters, and threatens the state's tourism industry, remains to be seen. Nevertheless, further seaside development, and an increase in the private ownership and control over New Jersey's beaches, would necessarily reduce the amount of beach area available for the general public to enjoy. To the extent that our beach-

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es become inaccessible, there would undoubtedly be a ripple effect experienced by the tourism industry and others. Is there anything to prevent the loss of beach area available to the general public and the accompanying harm to tourism in New Jersey?

Enter the public trust doctrine. Certainly relatively few New Jersey practitioners have the opportunity or a reason to consider the public trust doctrine with any degree of frequency. However, it is an important doctrine of real property law for beach-lovers, beachfront property owners, and legal theory historians alike.

With roots preceding the American Revolution, the public trust doctrine is founded on the proposition that tidally flowed waters were part of the original 13 colonies, and thus owned by the British crown. As successors to the British sovereign, each of the original 13 states, upon admission to the union, including New Jersey, were endowed with ownership rights similar to that of the monarchy.

The public trust doctrine posits that each state owns its respective coastal lands subject to a public trust for the benefit of its citizens with respect to certain rights. Historically, those rights were related to fishing and other commercial activities. In recent times, the doctrine has been expanded to include recreational rights, such as swimming and use and enjoyment of the beach.

Within the context of contemporary beach access issues, there are several practical implications of the public trust doctrine. One notable implication

is that many private property owners along New Jersey's coastal areas are very angry. After all, the deed they acquired to their property appeared like any other deed; it described their property by lots and blocks, and metes and bounds, but mentioned nothing about a public trust. Understandably, uninformed purchasers of oceanfront property believed that along with these fee simple deeds came the whole bundle of rights that lawyers learned about in law school.

The purchasers of oceanfront property are often angry when they learn that the property they purchased is missing a twig because deeply entrenched in our society's notion of property ownership is the right of a private property owner to decide who can enter and use the property, the right of *exclusivity*. However, when a property is encumbered by the public trust doctrine, absolute strangers may have a legal right to access. They may have to pay a reasonable fee for access, as well as any services that accompany access, but the property may no longer be exclusive.

#### **New Jersey's Public Trust Doctrine'**

The public trust doctrine reserves to the state of New Jersey authority to regulate coastal properties that is more expansive in its reach and more protective in its allowable measures than is normally associated with the state's traditional police powers. This is because the doctrine emanates from real property law, as well as concepts of implied trust. Therefore, the case

law relating to trusts and implied trusts, and the beneficiaries of those trusts, may also have applicability in public trust cases.

The most recent pronouncement relating to the public trust doctrine is found in *Raleigh Avenue Beach Association v. Atlantis Beach Club*.<sup>2</sup> At issue in this case was whether or not the owner of a private beach club in Cape May County could charge local residents what they believed to be excessive beach fees.<sup>3</sup>

The plaintiff initially obtained relief in the Law Division, which resulted in an appeal. Following an emergent order granting expansive relief to the plaintiff one day after oral argument, the final order of the Appellate Division authorized the New Jersey Department of Environmental Protection (NJDEP) to engage in its own beach fee determination process, through which it lowered the access fee from \$700 to \$55 per season. NJDEP also established daily fees, which were not previously available to the public.<sup>4</sup> The defendants sought certification before the New Jersey Supreme Court, which was granted.<sup>5</sup> In a 5-2 vote, the Supreme Court affirmed the Appellate Division decision on July 26, 2005.<sup>6</sup>

The significance of *Raleigh Avenue* is that it applies the public trust doctrine with equal vigor to privately owned beaches as it does to publicly owned beaches. An earlier decision, *Matthews v. Bayhead Improvement Association*,<sup>7</sup> involved a quasi-public beach, and held the doctrine also applied to a certain amount of dry sand above the mean

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high-tide line.<sup>8</sup> In *Raleigh Avenue*, the Supreme Court not only reaffirmed its commitment to *Matthews*, but extended the *Matthews* doctrine to apply to private beaches.

The extent over which dry beach area is implicated by the public trust doctrine is case specific:

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.<sup>9</sup>

The *Raleigh Avenue* Court applied some of the factors enumerated in *Matthews*, and determined that the entire beach should be publicly available at beach fees that were similar to those charged by municipalities.<sup>10</sup>

A notable point about the public trust doctrine is that public trust assertions are unlikely to be subject to regulatory takings claims. This is because the doctrine is grounded in the notion that the owners of oceanfront property never held exclusivity rights to their property because public access to the beach was always held in trust for the public, and never conveyed to the private owner. Therefore, it is logically impossible for a private property owner to assert a takings claim, based on the theory that one

cannot have taken from him or her something that was not owned in the first place.

Continued concerns over private beach ownership and control suggest that it is reasonable to anticipate that additional public trust assertions will continue to be made along the coast line. These claims will inevitably be fact specific, based both on New Jersey public trust case law and the fact that the doctrine is founded primarily in real property law, which has always recognized the unique qualities of each parcel of property.<sup>11</sup>

#### **Who are the Claimants in a Public Trust Case?**

Who will likely initiate future beach access challenges? The most obvious candidates are the neighbors who are being denied beach access. There are many private beach clubs in New Jersey who pride themselves on their exclusivity, their amenities, and their high prices. While many residing within the immediate vicinity of these clubs may be able to support the clubs and even become members, many others lack the financial means to do so. These beaches may be the only reasonably available beaches, and those excluded by the high access fees represent potential public trust claimants.

Municipalities and other government entities may also be claimants. For many local governments, public beach access equates to tourism and tourism dollars, and many New Jersey municipalities are heavily dependant on the beaches to support their economy. For those municipalities, the threat of limit-

ed public access to their beaches is something that cannot be taken lightly.

Similarly, local merchants' associations may have members whose businesses are adversely affected by beach access restrictions of private property owners. Visitors may understandably be less inclined to visit coastal communities with limited beach access due to private control. From a merchant's standpoint, fewer visitors mean less tourist business. Such associations may also become claimants.

Environmental organizations also represent potential public trust claimants. There are many environmental and public or community interest groups that are concerned about public trust issues and are actively monitoring the application of the public trust doctrine throughout New Jersey.

The NJDEP is also a possible claimant. As discussed more fully below, many public trust doctrine concepts are embodied in state laws that are enforced by the NJDEP.<sup>12</sup> Where there is a violation of statutory access requirements, there may also be a parallel violation of the public trust doctrine. In certain cases, NJDEP may seek to enforce access obligations contained in coastal permits.

#### **The Genesis of a Public Trust Claim**

Every public trust dispute begins with a claim of entitlement to access. As a general matter, this begins with a privately owned or operated beach, and assertions that either access is not being provided to the public or that a sufficient level of access is not being provided.

One such example is a private beach owner that sells beach tags to the public generally. The beach may be the only beach that is realistically available within the community. If its seasonal fees are substantially higher than those charged by nearby municipal beach operators, or it refuses to sell daily passes to the public, its conduct may be inconsistent with the public trust doctrine. Such conduct might also violate the requisite Coastal Area Facility Review Act (CAFRA)<sup>13</sup> authorizations needed to operate this kind of business. A public trust claim may arise from these facts.

Private beach clubs may also be a target for public trust claims. Many clubs must provide some level of public beach access, especially if they have a CAFRA permit. These permits may specify the level of access that is required, and may also require signage informing the public of these access rights. Claims may arise if the signs are not visually apparent, because, for example, they are physically blocked or they are not legible. Claims may also arise if access is not being provided at all, or is provided at a minimal level that falls short of NJDEP or public trust doctrine requirements.

Private developments along public waterways, even (as the authors have seen) private improvements of property that is municipally owned, may also be subject to these challenges. Such inquiries are invariably fact sensitive. Are there applicable permits? How is the private owner utilizing the property and meeting access expectations? What alternatives, if any, are available to the public? Does the private party claim to provide access, but actually employ intimidation measures to reduce access? Answers to these questions, and others, may trigger public trust claims.

Before commencing litigation, it is appropriate to communicate public trust and related beach access asser-

tions in writing to the potentially offending owner or operator. As with any contested matter, amicable solutions may be available and may need to be actively explored. Since the state has an interest in many of these claims that are being asserted in the first instance, it may be a resource for developing possible resolutions that may be reached amicably.

The ultimate goal is to resolve public trust and related beach access issues expeditiously and with finality. Since the public trust doctrine has real property implications, one must evaluate whether a settlement agreement alone is enough to accomplish final resolution. Such an agreement may be sufficient in some cases; in other instances, a form of deed notice may be more suitable.

Public trust disputes seem to be 50 percent law and 50 percent emotion. This suggests that while amicable resolutions are always preferable, they may not always be possible in light of the deeply rooted emotions of the interested parties. In such cases, judicial relief may be the only available course.

### **The Public Trust Complaint and Claims Asserted**

A public trust complaint will most likely be filed in state court. These are historically state-related claims, and it is usually difficult to find federal subject matter jurisdiction.

In accordance with applicable public trust case law, the counts alleged are necessarily very fact sensitive. A complaint should include a public trust violation count that pleads sufficient facts to set forth, at a minimum, a *prima facie* violation of the public trust doctrine, including the following elements:

1. That the defendant is the owner or operator of real property;
2. That the public trust doctrine is applicable to the subject property;

3. That pursuant to the public trust doctrine, the defendant owner or operator of the subject property has certain obligations that are held in trust;
4. That the plaintiffs represent the beneficiaries of that trust;
5. That in a specified manner, the plaintiffs are being denied the benefits of the trust; and
6. That the court should grant relief, including a declaration that the public trust doctrine applies to the subject property and the parameters of the public trust with regard to the subject property, an injunction requiring the defendants to afford all of the rights, benefits and obligations to the plaintiff and all other similarly situated members of the public, and such other and further appropriate relief.

How will a claimant establish that a specific parcel is encumbered by the public trust doctrine, and that the public has certain specified rights in the subject property? There are numerous cases that were filed by the New Jersey public advocate and others that define the extent of the public trust doctrine on beach property.<sup>14</sup> A significant decision by the federal court in New Jersey set forth a contemporary view of the public trust doctrine in the context of previously flowed tidal waters along the Hudson River.<sup>15</sup> Of course, the *Raleigh Avenue* case provides our Supreme Court's most recent articulation of the doctrine in the context of a private beach.<sup>16</sup>

Allegations regarding the availability of rights to the *dry sand*, or to equivalent dry areas, will require inquiry as to the location of the dry sand in relation to the foreshore, the extent and availability of publicly owned upland sand area, the nature and extent of the public demand, and the usage of the upland

sand land by the owner and, as appropriate, specific allegations relating to these factors.<sup>17</sup>

It should be noted that the *Matthews* list of pertinent public trust factors may not be exhaustive. The Supreme Court explained that "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 circumstance." Inasmuch as property law is by its nature fact sensitive, one can surmise that the list is not exhaustive.

The complaint may also include allegations that the defendant violated statutory requirements under CAFRA,<sup>18</sup> or other applicable statutes or regulations establishing public access. Because such regulatory schemes may not provide a private right of action to enforce them, the Environmental Rights Act may be the mechanism for pursuing

such an enforcement action by private plaintiffs.<sup>19</sup>

The Environmental Rights Act is New Jersey's "private Attorney General statute" (referred to as such because the litigation pursued by the private party is akin to litigation traditionally advanced by the attorney general) relating to environmental and public safety and health claims.<sup>20</sup> The act requires that notice be provided to the defendant, and other specified parties, before litigation may be instituted.<sup>21</sup> Municipalities are exempt under the statute from providing such notice. Also under the act, attorney's fees may be awarded to the prevailing party up to a specified dollar amount.<sup>22</sup>

It is important to note that, if the Environmental Rights Act is relied upon in the litigation, there must be an underlying substantive state law cause of action. Many access requirements are found in permits issued by the state of New Jersey pursuant to its CAFRA program.<sup>23</sup> Most non-residential coastal activities, including even soil raking, require NJDEP-issued CAFRA permits. Therefore, where a permit requires access to the beach, and that access has been denied by the owner and/or operator of a beach, a state law access claim may be available.<sup>24</sup>

Further, the tort of conversion should be evaluated and considered in connection with public trust doctrine litigation. Owners and/or operators who are required to provide public access and fail to do so may arguably have converted the public's access right to their own private use. As this is an intentional tort, punitive damages may be available.

Finally, common law trust claims should also be considered by public trust plaintiffs. The public trust doctrine relies in part on the recognition of an implied trust, with the public being the beneficiary. There exists centuries of New Jersey common law on the require-

ments of trustees, including fiduciary obligations relating to the creation of a trust and special damages that are available to remedy violations.<sup>25</sup>

### Potential Public Trust Claim Defendants

As the starting point, the operator of the property in violation of the public trust doctrine is an obvious defendant candidate. The owner of the property is also a likely defendant. Notwithstanding these obvious choices, there may be more than meets the eye.

There are several preliminary questions about potential public trust defendants that should be addressed. Is the operator an individual, a corporation, a partnership? Are there multiple operators or owners who are potential defendants? Has there been a succession of operators who have violated the public trust doctrine? In fact, are these operators truly independent from one another, or is there a close relationship that ties them together? Given the form of ownership and the available facts, have the claims been properly alleged?

Unique issues arise when a governmental entity is either the owner or the operator. Tort claim immunities may apply to some but perhaps not all claims.<sup>26</sup> A municipality may also become involved if it is called to either exclude the public (as when the beach club owner calls the police or other local officials), or to assist the public in gaining access. Depending upon the circumstances, the municipality may be an appropriate defendant.

The state of New Jersey may also have involvement, either because it originally sold the property to the defendant but did not insure that the public trust rights would be enforced, or because there are state license, grant or permit issues implicated by the litigation. In cases where the state issued a grant to the offending party,<sup>27</sup> or where questions relate to previously flowed

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tidal waters, the state may be deemed a necessary defendant.<sup>25</sup>

### **Discovery Peculiar to Public Trust Litigation**

Documents are extremely important in public trust cases, just as they are in any real property and commercial litigation. A litigant should order a title search and understand the chain of title, as well as the relationship between prior and current owners and operators. Documents that affirm or modify the rights of the public to the subject property under the public trust doctrine or any state- or local-issued licenses, grants or permits should be sought.

In addition, business documents from the parties are often highly relevant. For example, where a party alleges excessive access fees by a beach owner, the defendant's business records are necessary to address the reasonableness of the fees. What are the costs to operate this beach? How much does insurance cost? How much does it cost to hire employees? What are all of the maintenance costs? What is the debt service for any loans on the property? What are the access charges and fee schedules?

Interrogatories can also be extremely useful. The interrogatories can be used to establish facts relating to the defendant's practices that may or may not constitute a public trust violation. For example, what are the membership requirements, and how long have the various requirements been in place? What does the owner or operator believe his, her or its rights or obligations are with regard to public access, and what is the basis for that belief? Who told the owner or operator about any public trust obligations? What, if any, actions are the owner or operator undertaking to ensure public access to the beach or compliance with the public trust doctrine? What exactly does the owner or operator believe it owns? How many of those bundle of rights

does the owner or operator believe it still retains?

Inquiry should also be made of the enforcement policies and practices followed by the parties. For example, do they have bouncers that forcefully keep people out? Do they routinely contact the police department to preclude access, and if so, who do they speak with and how do the police respond? To that end, the Open Public Records Act (OPRA)<sup>29</sup> file review requests to applicable government agencies may also be useful.

Additionally, it is important to fully understand the business organization, its structure and its principals. If the organization is a corporation, a request for the production of corporate documents, such as meeting minutes and any other documents relating to corporate law requirements, may be an effective discovery tool to establish the defendant's policies and practices.

As in most cases, depositions are key. The testimony of owners, operators and other potential defendants must be preserved so the plaintiff is not confronted with a moving target regarding the facts relating to the elements of the public trust doctrine. Simple questions such as "who do you believe has a right to use this beach," "what rights do you think the public has to use your beach," and "under what circumstances does the public have that right to use the beach," can lead to important information. The defendant's basis for any assertions of exclusivity or an entitlement to charge exceptional access fees must be probed with questions such as "why do you believe you can do this," "who said you could do this," "where did you read that?" Extensive scrutiny is appropriate for each side to this dispute.

Depositions provide a party with an opportunity to inquire into specific incidents involving the plaintiffs. If a person was denied access on certain dates, depositions provide an opportunity to review the facts relating to each

refusal of admission or related incident. Important questions to ask include, "who did it," "why did they do it," "who told them to do it," "what level of access did they allow," and "why didn't they allow access?"

Requests for admissions may also be helpful. These admissions would logically follow the interrogatories, document demands and depositions, but in an appropriate case may precede such other discovery. It is often beneficial to closely track the complaint with an eye toward motion for summary judgment or partial summary judgment. Alternatively, the admissions may lead to stipulations of certain facts at trial, and may streamline the issues for trial. This may be particularly helpful where the parties are emotionally charged; a narrowed scope of trial may enable you to re-focus your client on the critical, dispositive issues.

What claims are subject to jury trial or a bench trial? In New Jersey, the right to a jury is dependant on what was allowed a common law.<sup>30</sup> While a jury is not available for certain claims in the lawsuit, it may be for claims relating to property rights and/or trust issues. That having been said, the public trust doctrine involves intricate and sometimes arcane concepts that might not be readily digestible by a jury. As with much environmental litigation, these cases may more likely result in puzzled faces than learned jurors.

### **Conclusion**

Notwithstanding its pre-Revolutionary roots, the public trust doctrine is an evolving, multi-faceted legal concept that originally protected fisherman and now protects those who wish to use and enjoy the beach. In light of increasing development along our coast, the finite amount of property available with beach and water access, society's needs to ensure sufficient beach, dry sand, and water access for the public, and the

rights of private property owners and operators in coastal areas, the public trust doctrine remains a critically important legal doctrine with ongoing modern-day relevance. While these issues exist in many states, they are pronounced in New Jersey in large part due to recent coastal redevelopment initiatives highlighting these concerns, the density of our population in and around coastal areas, and the importance of the Jersey shore as a resource for commerce and recreation.

Multi-faceted and emotionally charged from every conceivable angle, the public trust doctrine litigation often seems more like divorce court or probate court than anything else. Perhaps the Legislature will find one fix that takes care of everything. Until then, it will be up to the courts, and to some extent the NJDEP, to sort out these weighty affairs. ☺

#### Endnotes

1. A very detailed discussion of New Jersey's public trust doctrine is found in the article authored by Brian Weeks, published elsewhere in this edition.
2. See *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005).
3. See *Id.* at 42. The testimony in the case reflected that for all intents and purposes, this was the only available beach in the area. Furthermore, there were many retirees and senior citizens who lived in the area, and it would cause substantial hardship to them to have to walk the many blocks to visit the nearest available beach. Sworn testimony in the case discussed senior citizens having to walk with their grandchildren, carrying beach bags and beach chairs many blocks, and many being physically unable to accomplish the task.
4. *Id.*
5. See *Raleigh Avenue Beach Ass'n v.*

*Atlantis Beach Club, Inc.*, 370 N.J. Super. 171, 194 (App. Div. 2004), *certif. granted*, 181 N.J. 548 (2004).

6. *Id.*
7. See *Matthews v. Bay Head Improvement Ass'n.*, 95 N.J. 306, 316-317 (1984).
8. See *Raleigh Beach*, *supra*, note 2.
9. See e.g. *Matthews*, *supra*, note 8 at 326.
10. See *Raleigh*, *supra*, 185 N.J. at 60-62. Specifically on these issues, the Court stated, "In sum, based on the circumstances in this case and on application of the *Matthews* factors, we hold that the Atlantis upland sands must be available for use by the general public under the public trust doctrine. In so holding we highlight the longstanding public access to and use of the beach, the La Vida CAFRA permit condition, the documented public demand, the lack of publicly-owned beaches in Lower Township, and the type of use by the current owner as a business enterprise. We also adopt the construct put forward by the Appellate Division in connection with an appropriate fee structure for use of the beach by the public." *Id.* at 60.
11. *Id.*
12. See N.J.A.C. 13:19-1, *et seq.*
13. See *Matthews*, *supra*, note 8, and *Slocum v. Borough of Belmar*, 238 N.J. Super. 179 (Law Div. 1989).
14. See *National Ass'n of Home Builders of the U.S. v. N.J. Dep't of Environ. Prot.*, 64 F. Supp. 2d 354 (D.N.J. 1999).
15. N.J.S.A. 13:19-1 *et seq.*
16. See *Raleigh*, *supra*, note 2.
17. See *Matthews*, *supra*, note 8; see also generally *Raleigh Avenue Beach Ass'n*, *supra*, note 1 (describing this analysis).
18. See *supra*, note 14.
19. See N.J.A.C. 2A:35-1, *et seq.* If the Department of Environmental Protection does not actively assume the field and take enforcement measures

when there has been a statutory public access violation, presumably under the Environmental Rights Act a private litigant may go forward and enforce the rights.

20. *Id.*
21. *Id.*
22. *Id.*
23. See N.J.A.C. 12:19-1, *et seq.* Under CAFRA, which is a land use statute administered by the Department of Environmental Protection over New Jersey's coastal regions, it is not uncommon for development permits to contain a public access requirement.
24. See *Id.*
25. See, e.g. N.J.S.A. 59:2-1 to -11.
26. Once again, the current owner may not be the only appropriate defendant. A title search is essential to understanding who owned the property, when it was owned, and in particular, who owned it when the property was subject to the public trust obligations.
27. See *supra*, note 6.
28. See *supra*, note 16.
29. N.J.S.A. 47:1A-1 to -13.
30. New Jersey Constitution, Article I, Section 9.

**Stuart J. Lieberman and Shari M. Blecher** are shareholders of Lieberman & Blecher, P.C., a firm that represents individuals and municipalities in environmental and land use cases. The authors express their appreciation to Keith B. Hofmann and Emily M. Lamond for their assistance in writing this article, and Special Editor James J. Ferrelli for his assistance in finalizing the article.