



# State of New Jersey

## DEPARTMENT OF ENVIRONMENTAL PROTECTION

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KEVING MORAN, C/O SEA POINT  
CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,  
LAND USE REGULATION,

Respondent.

ADMINISTRATIVE ACTION

FINAL DECISION

OAL DOCKET NO. ELU 04852-21

AGENCY DKT. NO. 1524-18-0001.2

LUP200001

### INTRODUCTION

This order addresses the appeal by Sea Point Condominium Association, Inc. (Petitioner or Sea Point) of a condition in its Waterfront Development Individual Permit (Permit) issued by the New Jersey Department of Environmental Protection (Department) on November 10, 2020 (the Permit), pursuant to the Waterfront Development Act, N.J.S.A. 12:5-3, and its implementing Coastal Zone Management Rules (CZM Rules), N.J.A.C. 7:7. The Permit authorized the reconstruction of an existing timber bulkhead 24 inches waterward of the current alignment and replacement of other sections of bulkhead within their current alignment; legalization of existing rip-rap, catwalks, and mooring piles; removal of areas of existing rip rap and a floating dock; and removal and reconstruction of an existing small area of rip-rap and a parallel dock at its property at 3 Sea Point Drive, Block 362, Lot 84, in the Borough of Point Pleasant, Ocean County (Property). Petitioner challenges Pre-Construction Condition #1 of the Permit, which requires that

Petitioner submit to the Department for review and approval a proposal for providing public access to the waterfront at its Property.

On October 5, 2022, Administrative Law Judge (ALJ) Dean J. Buono issued an Initial Decision granting the Department's motion for summary decision and denying Petitioner's motion for the same. Finding there is no dispute that Petitioner's development would change the existing footprint of a structure on the Property, the ALJ concluded the Department was required under N.J.S.A. 13:1D-150 to -156 (the Public Access Law) to undertake a review of any existing public access provided to tidal waters and adjacent shorelines at the Property and to require as a condition of the Permit that additional public access to those waters and shorelines be provided. The ALJ concluded the Department properly applied the requirements of the Public Access Law when it imposed Pre-construction Condition #1.

For the reasons set forth herein, the Initial Decision granting summary decision in favor of Respondent and denying summary decision in favor of Petitioner is ADOPTED as MODIFIED below.

### **BACKGROUND**

#### **Factual and Procedural History**

Petitioner is a non-profit homeowners association consisting of the owners of condominium units located at the Property, which includes three two-story residential condominium buildings, a swimming pool, walkways, parking lots, and other improvements. The Property is located adjacent to the tidal waters of the North Branch of Beaverdam Creek. Along the water at the Property are paved cul-de-sacs, an area for launching kayaks, and an existing boat basin containing boat slips designated for Sea Point residents. On July 14, 2020, Petitioner submitted an application to the Department for a Waterfront Development Individual Permit,



proposing various changes in and around the boat basin. The proposed development included the reconstruction of approximately 750 linear feet of its existing timber bulkhead 24 inches waterward of the current alignment within the boat basin;<sup>1</sup> replacement of 13 linear feet and 15 linear feet of existing bulkhead return and 111 linear feet of bulkhead within their existing alignment outside the boat basin; legalization of rip-rap, catwalks, and mooring piles that had been previously constructed without a permit; and removal and reconstruction of an existing small area of rip-rap and a parallel dock at the Property.

Because the Property is located adjacent to a tidal waterway, Petitioner's proposed development falls under the consideration of three laws relevant to this matter: 1) the common law public trust doctrine; 2) the Department's public access rule at N.J.A.C. 7:7-16.9 (Public Access Rule); and 3) P.L. 2019, c. 81, entitled "An Act Concerning Public Access to Certain Public Trust Lands," codified at N.J.S.A. 13:1D-150 through -156 (the Public Access Law). As discussed in greater detail below, the common law public trust doctrine provides the public with the right to access and use the tidal waterways and associated shores of the State, including the ocean, bays, and tidal rivers. N.J.A.C. 7:7-9.48(c). Under the doctrine, tidal waterways and their shores are held in trust by the State for the benefit of the public. N.J.A.C. 7:7-9.48(a). Consistent with the public trust doctrine, the Department promulgated the Public Access Rule, N.J.A.C. 7:7-16.9. Pertinent here, regarding proposed development, the Public Access Rule states that "[d]evelopment proposed on sites which are located on or adjacent to tidal waterways and their shores shall provide public access [in accordance with this rule]." N.J.A.C. 7:7-16.9(c). Subsequent to the Department's adoption of, and subsequent amendment to the Public Access Rule,<sup>2</sup> the Legislature

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<sup>1</sup> In its permit application, Petitioner refers to this waterward extension of the bulkhead as a "bump-out."

<sup>2</sup> The Public Access Rule was last amended on September 18, 2017. See 49 N.J.R. 3145(a) and footnote 9, below.





enacted the Public Access Law on July 2, 2019. The Public Access Law codifies and expands the public trust doctrine and, pertinent to this matter, provides:

For any application for a permit or other approval to be issued by the Department of Environmental Protection . . . if the application provides for a change in the existing footprint of a structure, a change in use of the property, or involves beach replenishment or beach and dune maintenance, the department shall review the existing public access provided to tidal waters and adjacent shorelines at the property and shall require as a condition of the permit or other approval that additional public access to the tidal waters and adjacent shorelines consistent with the public trust doctrine be provided.

[N.J.S.A. 13:1D-153(a) (emphasis added).]

In accordance with the above, and as a result of the changes proposed in Petitioner's permit application, the Department undertook a review of the existing public access provided to the tidal waters and adjacent shorelines at the Property. As required at N.J.S.A. 13:1D-153(a), the Department considered 1) the scale of the changes to the footprint or use; and 2) the demand for public access. Based on its review, the Department determined 1) the changes to the footprint are, as discussed above, substantial; and 2) there is a demand for additional public access in the area because the density of existing development along the waterfront provides little opportunity for new or expanded public access points to the waterfront to serve the needs of the community. As a result, the Department concluded "a reasonable level of public access is warranted at the site in order to comply with the [n]ew Public Access Law," and "this is the type of development the Public Access Law was designed to address."

Having determined that additional public access is required, the Department turned to the extent and form of such access. Absent a Department-approved municipal public access plan or a public access element of a municipal master plan in the Borough of Point Pleasant, the Department





requested that Petitioner submit to the Department for review and approval a proposal for providing public access to the waterfront at its Property (Public Access Plan).

In response, Petitioner asserted by letter dated October 5, 2020, that it is not required to provide public access at the Property and, consequently, did not submit the requested Public Access Plan. In its letter, Petitioner asserted no access was required at the Property because 1) there is no existing public access at the Property; and 2) according to Petitioner, “there are no changes proposed to the existing footprints of the building, parking areas, or other land-based site improvements, and only very minor changes to the bulkhead to bump out 24 inches into the basin.” To further support its assertion, Petitioner noted that two locations near the Property already provided public access—Slade Dale Sanctuary, a 12.93 acre preserve located immediately adjacent to the site, and Dorsett Dock Wharf.

Finding themselves in disagreement, representatives from the Department and Sea Point corresponded about whether public access must be provided at the Property, in which manner, and to what extent. The Department suggested several options for onsite public access. Petitioner rejected the suggestions, asserting that they were infeasible due to safety or environmental constraints. Petitioner in turn suggested the use of a dedicated parking space and an area dedicated to public access for “viewing the creek and Slade Dale Sanctuary,” but the Department rejected this suggestion, noting that public access must be provided to the tidal waters and adjacent shorelines. Petitioner then inquired as to whether it could provide monetary compensation to the municipality to enhance public access at another location *in lieu* of onsite public access, and to this the Department responded that compliance with the Public Access Law required that onsite public access be provided, pursuant to the plain language at N.J.S.A. 13:1D-153(a). Ultimately, the parties were unable to reach an agreement on a Public Access Plan.



Rather than deny the permit because Petitioner had not complied with the Public Access Law, the Department issued the Permit<sup>3</sup> on November 10, 2020, subject to Pre-Construction Condition #1, which requires that Petitioner submit a Public Access Plan. Along with the Permit, the Department issued a report entitled In-Water Waterfront Development Permit Environmental Report. In its report, the Department explained its determination that Petitioner's proposed activities "will result in a significant change to the footprint of the existing bulkhead and filling of water areas for its replacement as well as the legalization of added in-water structures at the site." As a result, the Department determined the Public Access Law at N.J.S.A. 13:1D-153(a) required its review of the existing public access provided to tidal waters and adjacent shorelines at the Property and required it include as a condition of the Permit that additional public access to the tidal waters and adjacent shorelines be provided.

On November 24, 2020, Petitioner requested an adjudicatory hearing to contest Pre-Construction Condition #1. That same day, Petitioner submitted a November 18, 2020, letter from its engineer, Lindstrom, Diessner & Carr, P.C., certifying the existing bulkhead was in "very poor condition" and "in immediate need of replacement." As a result of the engineer's determination, Petitioner requested that it be allowed to begin construction on the bulkhead while its hearing request on Pre-Construction Condition #1 was pending. On December 14, 2020, the Department granted Petitioner's request to begin construction on the bulkhead and, on May 28, 2021, granted Petitioner's request for an adjudicatory hearing. The Department transmitted the matter to the Office of Administrative Law (OAL) on June 2, 2021.

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<sup>3</sup> Permit No. 1524-18-0001.2 (LUP200001).



### Initial Decision

On October 5, 2022, ALJ Buono issued an initial decision granting the Department's motion for summary decision and denying Petitioner's motion for the same. The ALJ found that, contrary to Petitioner's contention, the plain language of the Public Access Law clearly indicates that the Legislature intended to expand the public trust doctrine rather than merely codify it. As a result, the ALJ rejected Petitioner's primary argument that 1) the Public Access Law merely codified the public trust doctrine; 2) the Department's authority to require public access across privately-owned land is consequently governed and constrained by the public trust doctrine as interpreted by the Court in Matthews v. Bay Head Improvement Association, 95 N.J. 306 (1984)<sup>4</sup> and its progeny; and 3) therefore, because the Legislature intended to codify the public trust doctrine and incorporate the Court's interpretation under Matthews and its progeny, the Department's public access determinations can be "consistent with the public trust doctrine" only if they are made in accordance with Matthews and its progeny, which in this case it was not. The ALJ reasoned that "if the Legislature had intended for the Matthews factors to apply [rather than the requirements listed in the Public Access Law], that body would have so provided instead of listing specific requirements under N.J.S.A. 13:1D-153 that touch upon, but do not mirror, the Matthews factors."

The ALJ found the plain language of the Public Access Law at N.J.S.A. 13:1D-153(a) requires that, when a permit applicant proposes a change in the existing footprint of a structure, the Department undertake a review of any existing public access provided to tidal waters and

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<sup>4</sup> As discussed below, prior to the Public Access Law, Matthews v. Bay Head Improvement Association, 95 N.J. 306 (1984) established a four-factor test for the Department to determine "[p]recisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine..." Id. at 326. Under the Matthews test, the four factors to be weighed are: 1) the 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) the usage of upland sand land by the owner. Ibid.





adjacent shorelines at the property and require as a condition of the permit that additional public access to those waters and shorelines be provided. Finding there is no dispute that Petitioner's development would change the existing footprint of a structure on the Property, the ALJ concluded the Department was thus required to undertake its review and properly applied the requirements of the Public Access Law when it imposed Pre-Construction Condition #1.

The ALJ further found that the CZM Rules do not exclude Petitioner from the requirement to provide public access because the relevant provisions of the CZM Rules that might otherwise have excluded Petitioner's development had been superseded by the Public Access Law. The ALJ pointed to the canons of statutory construction and noted that, because the Public Access Law "came later in time and directly addresses the standards for public access," any conflict between it and existing regulations is resolved in favor of the statute.

Likewise, ALJ found that the Public Access Law also does not limit the Department's ability to require public access to only those cases in which there is existing public access. The ALJ again pointed to the canons of statutory construction and noted that the Legislature at N.J.S.A. 13:1D-154 expressly excluded certain marinas from the requirement of providing public access where there is no existing public access, yet the Legislature included no mention under N.J.S.A. 13:1D-153 for other properties where there is no existing public access. Because the Legislature at N.J.S.A. 13:1D-153 omitted any mention of an exclusion for properties without existing public access, yet included an exclusion in a separate section of the same statute, it is presumed that the Legislature acted intentionally and purposely when either omitting or including the exclusion from the respective sections. Petitioner's property is not considered a marina under N.J.S.A. 13:1D-154. Therefore, under a plain reading of N.J.S.A. 13:1D-153, onsite public access is required at Petitioner's Property because Petitioner's development would change the existing footprint of a



structure on the Property. The ALJ found it is immaterial whether the change in footprint is “significant” or not “because the Public Access Law applies to development activities that simply ‘change’ the existing footprint of a structure.”

Finally, the ALJ rejected Petitioner’s arguments that 1) the Department cannot apply the Public Access Law because it has not adopted regulations implementing the Law; 2) the Public Access Law would allow monetary contributions *in lieu* of onsite public access; and 3) the requirement of onsite public access amounts to an unconstitutional taking by the government. The ALJ found that the standards set forth under the Public Access Law are sufficiently definite to enable the Department to impose an onsite public access condition in Petitioner’s permit. The Department’s determination about whether there is a change in footprint and how to impose a public access requirement is sufficiently guided by the relevant definitions in the existing regulations, including N.J.A.C. 7:7-1.5, as well as the language in the Public Access Law itself at N.J.S.A. 13:1D-153. Regarding the takings claim, the ALJ noted there has been no ‘taking’ of Petitioner’s property because the Department has not yet determined the extent of public access that will be required.

#### Exceptions to the Initial Decision

Petitioner filed timely exceptions to the Initial Decision on October 18, 2022. In its exceptions, Petitioner asserts summary decision in favor of the Department was inappropriate because this case presents a matter of first impression regarding the application of a new statute and numerous issues of material fact remain in dispute. Petitioner lists several examples of such facts: the Department’s conclusion there had been a “significant expansion” of the footprint at the Property; that public access could be provided on the Property with minimal intrusion on the existing residents; and that a small beach area on the Property could serve as a public kayak launch



point. Petitioner takes exception to the ALJ's conclusion that the material facts have been stipulated to and the only remaining question is who is entitled to prevail as a matter of law regarding the permit condition. Further, Petitioner takes exception to the ALJ's denial of its request for oral argument, which Petitioner believes was necessary to develop an adequate factual record.

With regard to the ALJ's findings concerning the requirements of the Public Access Law, Petitioner takes exception to the ALJ's interpretation and application of Matthews; findings that the CZM Rules were superseded by the Public Access Law, the Public Access Law can be applied in the absence of promulgated rules, and that monetary contributions for offsite public access are not permitted under the Public Access Law; and the conclusion that the Department properly applied the Public Access Law. Petitioner emphasized the proposed development would not change the location or dimensions of any structure on the property except for the section of the bulkhead to be reconstructed within the boat basin. The change to that section of the bulkhead would not alter the existing footprint, according to Petitioner, because it is located underneath an existing walkway, the dimensions of which will not be changed.

Finally, Petitioner takes exception to the ALJ's conclusion that Petitioner unpersuasively argued the Public Access Law limits the Department's ability to require public access to only those cases in which there is existing public access. Petitioner asserts it made no such argument, but rather has maintained that circumstances could exist that would require access where none had previously existed, but that is not the case here.

The Department filed a reply to Petitioner's exceptions on October 24, 2022, asserting 1) the factual issues Petitioner listed in its exceptions were not material to the ALJ's Initial Decision; and 2) the ALJ correctly determined there is no dispute that the proposed development would





change the existing footprint of a structure on the Property, thereby triggering the requirements of the Public Access Law.

Petitioner later submitted what it deemed a “supplemental reply” by letter dated November 23, 2022. In its letter, Petitioner points to an October 11, 2022, decision, Saiti v. Garden Homes, Docket No. A-1328-20 (slip op.), to support its argument that a hearing was required in this matter but was improperly denied. In Saiti, the Appellate Division of the Superior Court observed the actions of the defendant likely violated the statutory scheme of the Workers Compensation Act, N.J.S.A. 34:15-1 to-142, but nevertheless vacated and remanded the matter for a hearing because, in the absence of a hearing, it was unable to determine whether the workers’ compensation judge had reasonably imposed penalties and assessments. Petitioner asserts that Saiti is relevant to this matter for two reasons: 1) the court made it clear that a hearing was required even when a statutory scheme had been violated and the conduct of one of the parties was egregious; and 2) an administrative law judge’s conclusions of law are not entitled to any deference.

On November 28, 2022, the Department responded to Petitioner’s letter, contending the Saiti decision was issued before Petitioner submitted its exceptions and, because Saiti concerns the Workers Compensation Act, it is irrelevant to this matter. Consequently, The Department requested that Petitioner’s letter be rejected.

### **DISCUSSION**

The ALJ found that summary decision in favor of the Department was appropriate because there were no issues of material fact in dispute and, as a matter of law, the Department properly applied the Public Access Law when it imposed Pre-Construction Condition #1. Under N.J.A.C. 1:1-12.5(b), a motion for summary decision may be granted if the parties’ submissions “show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to



prevail as a matter of law.”<sup>5</sup> “[A] non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute”; indeed, “summary judgment is appropriate if the non-moving party only points to disputed issues of fact that are of an insubstantial nature.” Piccone v. Stiles, 329 N.J. Super. 191, 195 (App. Div. 2000) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)). In reviewing a motion for summary decision, a judge “must determine ‘whether the competent evidential materials . . . are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.’” Stiles, 329 N.J. Super. at 194 (quoting Brill, 142 N.J. at 523).

I concur with the ALJ that summary decision in favor of the Department was appropriate under the circumstances here. No issues of material fact are in dispute and, as a matter of law, the Department properly applied the requirements of the Public Access Law when it imposed Pre-Construction Condition #1.

As previously discussed, Petitioner’s Property is located adjacent to a tidal waterway, and thus as Petitioner’s proposed development triggers the requirement of the public trust doctrine, Public Access Rule, and Public Access Law, the Department must properly address the public’s right of access. The heart of the matter here is whether the Department was required to and properly did apply the requirements of the Public Access Law as intended by the Legislature. The Legislature set forth in the Public Access Law at N.J.S.A. 13:1D-150 its findings and declarations regarding public access to tidal waters and adjacent shorelines. In doing so, it made clear that the public trust doctrine is the foundation of the Public Access Law, recognizing the public’s “longstanding and inviolable rights under the public trust doctrine to use and enjoy the State’s tidal waters and adjacent shorelines for navigation, commerce, and recreational uses.”

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<sup>5</sup> The standard for summary decision at N.J.A.C. 1:1-12.5 is akin to that for summary judgment under Rule 4:46-2.



N.J.S.A. 13:1D-150(a). The Legislature then traced the long history of the doctrine from its roots in ancient law, through English law, and finally to the State of New Jersey where the doctrine has been established in common law by the courts. N.J.S.A. 13:1D-150(c). Importantly, the Legislature made a point to note that the public trust doctrine, as judicially interpreted, “is not fixed or static; rather, it is to be molded and extended to meet changing conditions and the needs of the public it was created to benefit.” N.J.S.A. 13:1D-150(c).

According to the Legislature’s findings and declarations, the public trust doctrine establishes the ownership of the State’s natural resources, including tidally flowed waters, “is vested in the State to be held in trust for the people,” N.J.S.A. 13:1D-150(b) and (c). The Legislature was clear that the Department “has the authority and the duty to protect the public’s right of access to tidally flowed waters and their adjacent shorelines under the public trust doctrine and statutory law.” N.J.S.A. 13:1D-150(e). This duty is wide in scope. The Department,

has the duty to make all tidal waters and their adjacent shorelines available to the public to the greatest extent practicable, protect existing public access, provide public access in all communities equitably, maximize different experiences provided by the diversity of the State’s tidal waters and adjacent shorelines, ensure that the expenditure of public moneys by the department maximizes public use and access where public investment is made, and remove physical and institutional impediments to public access to the maximum extent practicable.

[Ibid.]

Also wide in scope is the Legislature’s precise definition of what “public access” includes: “visual and physical access to, and use of, tidal waters and adjacent shorelines, sufficient perpendicular access from upland areas to tidal waters and adjacent shorelines, and the necessary support amenities to facilitate public access for all, including, but not limited to, public parking and restrooms.” N.J.S.A. 13:1D-150(f).





To effectuate the principles articulated at N.J.S.A. 13:1D-150, the Legislature codified the essence and fundamentals of the public trust doctrine, but by no means did the Legislature stop there. Instead, the Legislature expressly codified new public access requirements to be triggered under specified circumstances. The provision at issue in the present matter, N.J.S.A. 13:1D-153, describes the Department's obligation to require public access as a condition of a permit:

For any application for a permit or other approval to be issued by the Department of Environmental Protection . . . if the application provides for a change in the existing footprint of a structure, a change in use of the property, or involves beach replenishment or beach and dune maintenance, the department shall review the existing public access provided to tidal waters and adjacent shorelines at the property and shall require as a condition of the permit or other approval that additional public access to the tidal waters and adjacent shorelines consistent with the public trust doctrine be provided.

[N.J.S.A. 13:1D-153(a) (emphasis added).]

Once the Department determines additional public access is required under the criteria above, it is then mandated to determine the extent of public access that is required at a property by "consider[ing] the scale of the changes to the footprint or use, the demand for public access, and any department-approved municipal public access plan or public access element of a municipal master plan." Ibid. These criteria differ in part from those previously set forth in the common law public trust doctrine.

In the present matter, Petitioner bases its primary challenge on its contention that the plain language and legislative history of the Public Access Law clearly show that in fact the Public Access Law was intended to merely codify the public trust doctrine, not expand it. That the Legislature intended to codify the public trust doctrine is made clear, Petitioner asserts, through its requirement at N.J.S.A. 13:1D-153(a) that any public access to the tidal waters and adjacent



shorelines required by the Department as a condition of any permit or approval be “consistent with the public trust doctrine.” From this premise Petitioner draws several conclusions.

First, according to Petitioner, the Department’s authority to require public access across privately-owned land is consequently governed and constrained by the public trust doctrine as interpreted in common law under Matthews v. Bay Head Improvement Association, 95 N.J. 306 (1984), which prior to the Public Access Law established a four-factor test<sup>6</sup> for the Department to determine “[p]recisely what privately-owned upland sand area will be available and required to satisfy the public’s rights under the public trust doctrine...” Id. at 326.

Second, because the Legislature intended to codify the public trust doctrine and incorporate the Matthews test, it follows that the Department’s public access determinations can be “consistent with the public trust doctrine” as required by the Public Access Law only if they are made in accordance with the Matthews test, which in this case they were not.

Third, the Department’s public access determinations can be “consistent with the public trust doctrine” only if they are made in accordance Matthews’ progeny, Raleigh Avenue Beach Association v. Atlantis Beach Club, 185 N.J. 40 (2005), as well. Because the Court’s decision in Raleigh Avenue “hinged in large part on the long-standing prior use of the property by the public,” it would not be consistent with the public trust doctrine to require public access on properties with no existing public access, such as at Petitioner’s Property.

Finally, as a result, the Department having failed to apply the factors of the Matthews test and there being no existing public access at Petitioner’s Property, the Department’s determination

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<sup>6</sup> Under the Matthews test, the four factors to be weighed are: 1) the 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) the usage of upland sand land by the owner. Id. At 326.





to require public access at Petitioner's Property is not "consistent with the public trust doctrine" and is therefore in violation of the Public Access Law.

Petitioner's fundamental premise and the conclusions that flow from it are incorrect. Petitioner's claim that the Legislature intended to merely codify the public trust doctrine via the Public Access Law is undermined by the plain language of the Public Access Law as discussed above, which clearly indicates that the Legislature did in fact intend to expand upon the public trust doctrine.<sup>7</sup> As ALJ Buono correctly noted, the Public Access Law does not reference Matthews at all, let alone the four-factor test in Matthews, but instead expressly lists specific requirements to guide the Department's public access determinations that "touch upon, but do not mirror, the [four-factor test in Matthews]." (Id. at 21-22); see also N.J.S.A. 13:1D-153(a). It was these requirements the Department relied upon when making its determination to impose Pre-Construction Condition #1. If the Legislature had intended that the Department use the Matthews factors instead, it would have stated so rather than listing the specific requirements under N.J.S.A. 13:1D-153(a).

The omission of any reference to Matthews is even more noteworthy considering the Legislature instead specifically chose to reference a different case, Arnold v. Mundy, 6 N.J.L. 1 (1821), in its legislative findings and declarations. See N.J.S.A. 13:1D-150(c). The Legislature explained that Arnold was a "seminal" case that "outlin[ed] the history of the public trust doctrine and appli[ed] it to tidally flowed lands in New Jersey." Ibid. Further, the Legislature continued, "from the time [Arnold] was decided, New Jersey courts have held that the State holds in trust for the people of the State those lands flowed by tidal waters to the mean high water mark," and "have

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<sup>7</sup> To the extent that Petitioner references legislative history, I find that, because the plain language of the Public Access Law is clear and unambiguous, it is not necessary to consider legislative history or other extrinsic evidence. See, e.g., DiProspero v. Penn., 183 N.J. 477, 492-93 (2005). I MODIFY the Initial Decision accordingly.





also recognized that the public trust doctrine is not fixed or static; rather, it is to be molded and extended to meet changing conditions and the needs of the public it was created to benefit.” Ibid. The Legislature’s articulation of those public trust principles, as shaped by Arnold, combined with the lack of any reference to Matthews, indicates that it did not intend the Department’s public access determinations under N.J.S.A. 13:1D-153 to be governed by the Matthews test.

It follows then, as well, that the phrase “consistent with the public trust doctrine” at N.J.S.A. 13:1D-153(a) does not require that the Department’s public access determinations be made in accordance Matthews’ progeny, Raleigh Avenue, rather than in accordance with the express requirements of the Public Access Law, and therefore does not prohibit the Department as a result of Raleigh Avenue from requiring public access on properties with no existing public access. As discussed in greater detail below, had the Legislature intended at N.J.A.C. 13:1D-153 to exclude such properties it would have expressly done so as it did at N.J.A.C. 13:1D-154.

Even if the Public Access Law expanded the public trust doctrine, Petitioner asserts the Department’s determination to impose Pre-Construction Condition #1 contradicted the provisions of the CZM Rules, which would have excluded Petitioner from the requirement to provide public access. Petitioner takes exception to the ALJ finding otherwise. To this end, Petitioner relies on N.J.A.C. 7:7-16.9(k)2i, which provides:

“At an existing residential development, where the proposed activities consist solely of accessory development or structural shore protection, no public access is required if there is no existing public access onsite.”

Petitioner contends that its catwalks and mooring piles are “small accessory structures,” and notes its bulkheads are defined as “structural shore protection” under N.J.A.C. 7:7-15.11. Therefore, in accordance with the above provision, no public access is required because there is no existing public access at the Property.



Petitioner likewise asserts it is excluded from the requirement to provide public access under N.J.A.C. 7:7-15.11(d)2ii, which provides that “[m]aintenance or reconstruction of an existing bulkhead is conditionally acceptable provided that . . . [t]he replacement bulkhead is located no more than 24 inches outshore of the existing bulkhead when the replacement bulkhead is constructed of a corrugated material, and the replacement bulkhead is located as close as possible to the face of the existing bulkhead.” Petitioner further contends N.J.A.C. 7:7-15.11(d)2ii “expressly allows the reconstruction of an existing bulkhead 24 inches outshore of the existing structure.” Thus, it argues that the Department’s imposition of Pre-Construction Condition #1 contravened those rules.

As with Petitioner’s primary assertions above, here the canons of statutory construction support the Department’s interpretation and application of the Public Access Law. It is well-settled that a regulation cannot supersede, alter, or “frustrate the policy embodied in” a statute. N.J. State Chamber of Com. v. N.J. Elec. Law Enforcement Comm’n, 82 N.J. 57, 83 (1980); In re Terebetski, 338 N.J. Super. 564, 571 (App. Div. 2001). The Court has made clear that, “[s]tatutes, when they deal with a specific issue or matter, are the controlling authority as to the proper disposition of that issue or matter. Thus, any regulation or rule which contravenes a statute is of no force, and the statute will control.” Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ., 226 N.J. 297, 314 (2016). There is no dispute that the Public Access Law was made effective after the adoption of the relevant provisions of the CZM Rules and any amendments<sup>8</sup> to those provisions, and that the

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<sup>8</sup> N.J.A.C. 7:7-16.9 was last amended effective September 18, 2017, to address the decision in Hackensack Riverkeeper, Inc. and NY/NJ Baykeeper v. N.J. Dep’t. of Env’tl. Prot., 443 N.J. Super. 293 (App. Div. 2015), and amendments to the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq., and the Waterfront Development Act, N.J.S.A. 12:5-3, effectuated by P.L. 2015, c. 260. (See 49 N.J.R. 3145(a) (Sept. 18, 2017)). N.J.A.C. 7:7-15.11 was last amended effective January 16, 2018, to update the web address in (b)1; substitute “are, therefore,” for “is therefore” in the fourth paragraph of (h); substitute “*N.J. 296 (1972)*” for “N.J. 296 (1972)” in the seventh paragraph of (h); and insert an end quote following “impermissible.” Substitute “*N.J.*” for “N.J.” and delete an end quote from the end in the eighth paragraph of (h). (See 50 N.J.R. 361(a) (Jan. 16, 2018)).





Public Access Law directly addresses the issue at hand. As such, the ALJ found and I concur that the Public Access Law, not the CZM Rules, governs the Department's public access determinations.

Having affirmed the ALJ's findings regarding the authority and standards that govern the Department's public access determinations, I turn to consider Petitioner's arguments regarding the Department's application of the Public Access Law at N.J.S.A. 13:1D-153 in the present matter.

First, Petitioner asserts the proposed development would not change the location or dimensions of any structure on the property except for the section of the bulkhead to be reconstructed within the boat basin. The change to that section of the bulkhead would not alter the existing footprint, according to Petitioner, because it is located underneath a walkway, the dimensions of which will not be changed. As described above, Petitioner proposed to reconstruct the bulkhead in the boat basin with a two-foot bump out, reconstruct sections of the bulkhead outside the boat basin without a bump-out, and gain retroactive authorization for catwalks and mooring piles previously constructed without a permit. The parties dispute whether the expansion of the bulkhead within the boat basin constitutes a change in footprint, given it is located underneath a walkway. No matter the outcome of that dispute, the catwalks and mooring piles clearly changed the Property's structural footprint, thereby necessitating compliance with the Public Access Law. Although Petitioner stated in its permit application that it merely seeks after-the-fact authorization for pre-existing moorings, catwalks, and mooring piles and does not propose to build new ones, those structures are, in fact, legally new because they were built without a permit and must be authorized in the first instance. They are, under the Public Access Law, changes to the footprint.





Moreover, although the Public Access Law does not define “footprint,” the definitions in the CZM Rules, N.J.A.C. 7:7-1.5, were sufficient to guide the Department’s analysis of whether there was a change in footprint under N.J.S.A. 13:1D-153. For example, “footprint of development” is defined as “the vertical projection to the horizontal plane of the exterior of all exterior walls of a structure,” N.J.A.C. 7:7-1.5, and piers and pilings are included in the definition of “structure,” Id., both of which support the Department’s determination that the authorization of catwalks and mooring piles changes the footprint of structures on the Property. Overall, the ALJ correctly concluded “although the [Department] should have implemented the Public Access Law rules within the time prescribed by the Legislature, the absence of such rules does not preclude the action taken by the [Department] in this matter.” (*Id.* at 24). As stated by the ALJ, the plain meaning of the Public Access Law’s terms, in combination with existing definitions in the CZM Rules, was sufficient to determine what constitutes a “change in footprint of a structure,” and thus no additional guidance was necessary. (*Id.* at 13 (citing, e.g., N.J.A.C. 7:7-1.5)). As such, the ALJ found, and I concur, that Petitioner’s proposed development would change the existing footprint of a structure and thus falls squarely within the scope of activities that require additional onsite public access as a condition of receiving a permit.

Petitioner also objects to the Department’s finding that its proposed development would constitute a “significant” change in footprint. Petitioner insists this is a material disputed fact, contrary to the ALJ’s conclusion.<sup>9</sup> Petitioner appears to misconstrue the Department’s analysis

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<sup>9</sup> Petitioner’s exceptions list two other disputed facts which it asserts are material to the decision: (1) the Department’s conclusion that a small beach area on the Property could serve as a public kayak launch point, and (2) the Department’s assertion that public access on the Property can be provided with minimal intrusion on Sea Point residents and their dwellings. However, the Public Access Law directs the Department to require public access when the specified criteria at N.J.S.A. 13:1D-153(a) are met—none of which relate to the level of intrusion or inconvenience that public access would entail, or specific features of the property in question. Therefore, the two disputed facts above are not material to the Department’s public access determinations or this adjudication.



under N.J.S.A. 13:1D-153(a). Once the Department finds that the proposed activities “provide for a change in the existing footprint of a structure,” the Department is required to “consider the scale of the changes to the footprint or use, the demand for public access, and any department-approved municipal public access plan or public access element of a municipal master plan” in “determining the public access that is required at a property.” N.J.S.A. 13:1D-153(a). Accordingly, in the present matter, the Department analyzed each of those factors as indicated in Petitioner’s Permit. (*See* Permit, J0180). With respect to the first factor, the Department found “the proposed changes will result in a significant change to the footprint of development” based on Petitioner’s proposal to “replace the existing bulkhead 24 inches waterward of the existing bulkhead alignment as well as to reconstruct and legalize existing dock structures, mooring piles, and areas of rip-rap on the project site.” Although the Department concluded the change in footprint at the Property was “significant,” that does not mean a certain degree of change is necessary to trigger the requirement to provide public access under N.J.S.A. 13:1D-153(a). Rather, as ALJ Buono correctly stated, “the Public Access Law applies to development activities that simply ‘change’ the existing footprint of a structure, whether that change is significant or not.” (*Id.* at 18). Thus, while the parties dispute whether there was a “significant” change in footprint at the Property, that does not raise a genuine issue of material fact because the degree of change in footprint is not a factor in the Department’s public access determination. The degree of change would underly only the extent of public access to be provided, which in this matter has yet to be determined.

Although Petitioner has not indicated a specific dispute regarding the second and third factors, Petitioner asserted the Department failed to explain or justify its determination under them. Regarding the second factor, the Department found “there is very little access to the waterfront for the residential development in the surrounding community due to the occupation of water frontage





primarily by single family homes” and thus, “there is a demand for additional public access in the area.” As to the third factor, the Department noted the Borough of Point Pleasant does not have a Department-approved municipal public access plan or public access element of a municipal master plan. As a result of its overall analysis, the Department determined “a reasonable level of public access is warranted at the site in order to comply with the [n]ew Public Access Law.” The Department’s analysis of the three factors discussed above complied with the statutory mandate in N.J.S.A. 13:1D-153(a) and it adequately justified its permitting decision as reflected in Pre-Construction Condition #1.

Next, Petitioner contends N.J.S.A. 13:1D-153 limits the Department’s ability to require public access where there is no existing public access. This contention is distinct from Petitioner’s previously discussed assertion that Raleigh Avenue and the CZM Rules prohibit the Department from requiring public access where there is no existing public access. Here, Petitioner argues that because the Department is directed to “review the existing public access” and require “additional public access” if the specified criteria are met, there must be *existing* public access in order for the Department to require *additional* public access under N.J.S.A. 13:1D-153(a). In other words, the term “additional” implies there must already be public access on the property.

However, by its plain meaning, “additional” merely indicates the additive nature of any newly required public access, the sum of which represents the “additional” access. One can most certainly “add” to zero. Further, if the Legislature intended to exclude from the Public Access Law’s requirements at N.J.S.A. 13:1D-153 those properties where there is no existing public access, it could have included language there that it included in the subsequent section: “If no public access is provided to the waterfront and adjacent shoreline prior to application for a permit or other approval, the department shall not impose new public access requirements to the





waterfront or adjacent shoreline as a condition of the permit or other approval.” N.J.S.A. 13:1D-154(a). The Legislature at N.J.S.A. 13:1D-153 included no mention of an exclusion for those properties where there is no existing public access. To the contrary, the provision mandates for development that would change the existing footprint of a structure that the Department “shall review the existing public access” on the property and “shall require . . . additional public access . . . consistent with the public trust doctrine[.]” On the other hand, at N.J.S.A. 13:1D-154 the Legislature expressly excluded certain marinas from the requirement of providing public access where there is no existing public access. As the ALJ correctly observed, where “[the Legislature] includes particular language in one section of the statute but omits it in another section of the same [a]ct, it is generally presumed that [the Legislature] acts intentionally and purposely in the disparate inclusion or exclusion.” Shipyard Assocs., LP v. City of Hoboken, 242 N.J. 23, 38 (2020) (alterations in original).

Moreover, the Legislature’s broad intent to protect the public’s rights to use and enjoy the State’s tidal waters and adjacent shorelines pursuant to the public trust doctrine, and the Department’s mandate to “to make all tidal waters and their adjacent shorelines available to the public to the greatest extent practicable,” would be undermined if the Public Access Law only applied to properties on which there was existing public access. See N.J.S.A. 13:1D-150(a) and (e). See also Shipyard Assocs., 242 N.J. at 38 (“We review statutory language ‘in context with related provisions so as to give sense to the legislation as a whole.’”) (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)). As such, the ALJ properly concluded “a change in the existing footprint of a structure” triggers the Department’s statutory obligation to require public access as a condition of a permit or other approval, regardless of whether public access currently exists at the property in question. (Id. at 19-20).



Next, Petitioner takes exception to ALJ Buono's finding that the Public Access Law does not permit monetary contributions for offsite public access projects. N.J.S.A. 13:1D-153(a) states that when proposed development activities change the existing footprint of a structure at a property, the Department "shall review the existing public access . . . at the property and shall require as a condition of the permit . . . that additional public access . . . be provided." (emphasis added). It then lists the factors the Department "shall consider" in determining the public access required at the property. N.J.S.A. 13:1D-153(a). The plain text of N.J.S.A. 13:1D-153(a) leaves no room for the Department to consider alternative arrangements, such as monetary contributions.<sup>10</sup> Accordingly, the ALJ properly rejected Petitioner's argument that it should be permitted to contribute money for public access elsewhere in Point Pleasant *in lieu* of providing onsite public access at the Property.

As a matter of procedure, Petitioner takes exception to the ALJ's determination to decide the motions for summary decision on the papers, even though Petitioner requested oral argument. Petitioner asserts oral argument was warranted because this is a case of first impression involving a new statute, and there are "numerous factual and novel legal issues in dispute." As previously discussed, however, none of the disputed facts raised in Petitioner's exceptions were material to the ALJ adjudication of the relevant legal issues. Oral argument is not required to develop an adequate factual record. Rather, motions in the OAL are decided on the papers by default unless the ALJ, in his or her discretion, orders oral argument. See N.J.A.C. 1:1-12.2(d); N.J.A.C. 1:1-

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<sup>10</sup> See also Hackensack Riverkeeper, 443 N.J. Super. at 313 (finding "the creation of municipal Public Access Funds by which participating municipalities may, pursuant to the Rules, receive monetary contributions from permit applicants is, absent a specific legislative grant of authority, ultra vires"). The holding in Hackensack Riverkeeper led the Department to amend its regulations to delete the provision in its rules that purported to allow monetary contributions to satisfy public access requirements. (Id. at 10-11 (citing 49 N.J.R. 3145(a) (Sept. 18, 2017))).





12.3; N.J.A.C. 1:1-12.5(b).<sup>11</sup> In light of the applicable regulations and the evidence in the record, I find that ALJ Buono's determination to decide the motions for summary decision on the papers and thus not hold oral argument was not an abuse of discretion.

Finally, Petitioner asserts that Department's determination that public access is required in accordance with the Public Access Law is an unconstitutional taking of private property under the Fifth Amendment to the U.S. Constitution. According to Petitioner, there is no essential nexus between the Petitioner's proposed development and Pre-Construction Condition #1. I find that the OAL lacks jurisdiction to adjudicate Petitioner's Fifth Amendment challenge to Pre-Construction Condition #1. Petitioner's takings claim is effectively a facial constitutional challenge because Pre-Construction Condition #1 merely requires Petitioner to submit a Public Access Plan for the Department's review and approval. Pre-Construction Condition #1 does not prescribe any type or degree of public access. An as-applied challenge at this stage is impossible because, as ALJ Buono stated, "DEP has not yet determined the extent of public access that will be required on the Site. As such, there has not yet been any 'taking' of Sea Point's property." Therefore, Petitioner appears to be challenging the constitutionality of the Public Access Law itself, which gives the Department authority to require public access as a condition of a permit. Because the proper forum for a facial constitutional challenge to a statute is the Appellate Division of the Superior Court, not the OAL, Petitioner's takings claim could not be decided by the ALJ or me in this matter. See Christian Bros. Inst. of N.J. v. Northern N.J. Interscholastic League, 86 N.J. 409, 416 (1981); Rivkin v. N.J. Dep't of Env'tl. Prot., 96 N.J.A.R. 2d (EPE) 353, at \*4 (July 9, 1996). As such, I MODIFY the portion of ALJ Buono's decision that stated Petitioner's constitutional claim is not ripe for adjudication

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<sup>11</sup> Petitioner relied on Saiti in its November 23, 2022, letter to support its argument that oral argument was necessary here. Not only was Petitioner's submission of Saiti untimely under the submittal requirements at N.J.A.C. 1:1-18.4(a) and (d), but that case is unpublished and not overtly relevant to this matter.






“[w]ithout deciding whether the OAL would have jurisdiction to address the substance of Sea Point’s as-applied takings claim,” and I find, instead that the OAL lacks jurisdiction to adjudicate Petitioner’s facial constitutional challenge.

In sum, the ALJ correctly determined there was no genuine issue of material fact regarding whether the Department properly imposed Pre-Construction Condition #1 in Petitioner’s Waterfront Development Individual Permit. I therefore ADOPT the ALJ’s decision granting the Department’s cross-motion for summary decision and denying Petitioner’s cross-motion for summary decision, with one modification: I find that Petitioner’s takings claim is a facial—rather than as-applied—constitutional challenge and, as such, cannot be adjudicated by the OAL.

### **CONCLUSION**

For the reasons above, I ADOPT the ALJ’s Initial Decision as MODIFIED as set forth above. IT IS SO ORDERED.

Dated: October 6, 2023

  
Shawn M. LaTourette  
Commissioner



KEVIN MORAN, C/O SEA POINT  
CONDOMINIUM ASSOCIATION, INC.,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,  
LAND USE REGULATION

OAL DKT. NO.: ELU 04852-21  
AGENCY DKT. NO.: 1524-18-0001.2 LUP200001

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