State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING SUMMARY DECISION
OAL DKT. NO. ELU 04852-21
AGENCY DKT. NO. 1524-18-0001.2
LUP200001

KEVIN MORAN, C/O SEA POINT CONDOMINIUM ASSOCIATION, INC.,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAND USE REGULATION,
Respondent.

Neil Yoskin, Esq., for petitioner (Cullen and Dykman, LLP, attorneys)

Katherine G. Hunt, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: July 15, 2022 Decided: October 5, 2022

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF CASE

In this matter, petitioner Sea Point Condominium Association, Inc. (Sea Point), a homeowners association for condominiums situated along the Beaverdam Creek in Point Pleasant, appeals the determination of respondent Department of Environmental Protection (DEP or Department) that, as a condition of the DEP's approval of Sea Point's waterfront development permit to, among other things, reconstruct a bulkhead two feet waterward of its current location, Sea Point must allow onsite public access pursuant to the Public Access Law, N.J.S.A. 13:1D-150 to -156. As part of this matter, the parties have filed cross-motions for summary decision regarding the legality of the permit condition.

PROCEDURAL HISTORY AND FACTUAL DISCUSSION

For purposes of the parties' cross-motions for summary decision, they have stipulated to the following facts:

1. Sea Point is a non-profit Homeowners Association comprised of the owners of condominium units located on property known as Block 362, Lot 84 in the Borough of Point Pleasant (the Site). Sea Point is the owner of the common elements which, together with the condominium units, compromise the Site.

2. On July 14, 2020, the DEP's Division of Land Resource Protection received an application for a Waterfront Development Individual In-Water Permit pursuant to N.J.S.A. 12:5-3 from Karen Gruppuso, Coastal Environmental Consulting, LLC, on behalf of Sea Point. Exhibit A, J000l.

3. The proposed activities for which approval was sought are described in the permit application as "reconstruction of a bulkhead 24 inches waterward of its current location and request for after-the-fact authorization of finger piers and mooring piles" which had been

constructed over time without the benefit of a permit. Exhibit A, J004 & J0026.

4. According to Sea Point's application materials, the Site "is developed with three two-story residential condominium buildings, a swimming pool, walkways, driveways, parking lots, landscaping and associated site improvements." Exhibit A, J0027. The boat basin contains boat slips dedicated to the residential condominium units on the Site. Id. at J0026.

5. The Site also contains two, paved cul-de-sacs located on the waterfront adjacent to Beaverdam Creek, a tidal waterbody, in the southeast and southwest corners of the property. Exhibit A, J0044. Each cul-de-sac contains several parking spaces. Ibid. Additionally, there is an area for launching kayaks at the cul-de-sac in the southwest corner of the property. Exhibit A, J0048.

6. There is currently no public access to the water's edge of Beaverdam Creek on the Site, nor has there been any since the Site was developed as condominiums. The entrance road to the Site contains signs that say, "Private Property - No Trespassing" and "Condo Owners and Guest Only." Exhibit N, J0187.[1]

7. P.L. 2019, c. 81, enacted on May 3, 2019, and codified at N.J.S.A. 13:1D-150 to -156, (entitled "an Act" concerning public access to certain public trust lands, hereinafter the "Public Access Law") provides, in pertinent part, as follows:

> For any application for a permit or other approval to be issued by the Department of Environmental Protection pursuant to [the Waterfront Development Act, N.J.S.A. 12:5-3] or any other law, *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*

[1] The photographs included in Exhibit N, J0187, are not part of the record below.

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. In determining the public access that is required at a property, the department shall 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".

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

8. According to generally available public information, https://ptboro.com/our-community, the Borough of Point Pleasant has about 19,000 residents and is bounded by the Manasquan River on its northern border and Beaverdam Creek and Barnegat Bay along its southern border. The Point Pleasant Canal bisects the Borough from north to south connecting the Manasquan River and the Barnegat Bay. The Manasquan River, Beaverdam Creek, Barnegat Bay, and Point Pleasant Canal are all tidal waters.

9. The Borough of Point Pleasant does not have a department-approved Municipal Public Access Plan or public access element of its municipal master plan.

10. During the permit review process, in follow-up to a request by the Department that Sea Point submit a public access proposal for the Site, by letter dated October 5, 2020, Sea Point's agent Karen Gruppuso responded that "public access is not required at this Site because there are no changes proposed to the existing footprint of the buildings, parking areas or other land-based Site improvements and only very minor changes to the location of the bulkhead to bump out 24 inches into the basin." Exhibit B, J0070. Sea Point's agent also stated that public access was already provided at two locations near the Site, including Slade Dale Sanctuary, a 12.93 acre preserve located immediately adjacent to the Site

which was donated to the municipality by a prior owner of the Site, and another, the Dorsett Dock Wharf, which includes benches, various amenities and a kayak launch. Id. at J0071.

11. By email dated October 6, 2020, the Department responded to Sea Point's October 5, 2020, letter stating that "the use of existing areas of public access without any proposed improvements would not be sufficient . . . a new public access proposal should be submitted for the Site. Exhibit C, J0105.

12. In an email to the Department dated October 20, 2020, Sea Point detailed the challenges to providing public access to the waterfront on the Site and expressed concern that: "Since the site is accessed from a residential neighborhood, there is a legitimate concern that children will walk, bike, and/or skate on the road to gain access to the water's edge of the property. My understanding is that the Association or residents/unit owners would have no authority to refuse access to them." Exhibit D, J0118.

13. On October 29, 2020, in follow-up to a further email exchange between the parties about public access, Sea Point indicated that it was willing to offer one dedicated parking space and an area between the parking lot and bulkhead dedicated to public access that could be used for "passive recreation, specifically viewing the creek and Slade Dale Sanctuary, sunset and bird watching." Exhibit D, J0113.

14. In response to Sea Point's October 29, 2020, public access proposal, the Department indicated that Sea Point would also need to provide a way for the public to access the waterfront on Beaverdam Creek on foot, and to provide public access signs at the entrance to the development. Exhibit D, J0112.

15. By email dated October 30, 2020, Sea Point indicated that a footpath to the waterfront was not feasible due to size and environmental constraints on the Site. Exhibit D, J0109.

16. The parties exchanged additional options and requirements for public access, but could not agree on a public access plan for the Site. Exhibit E, J0135-0154.

17. By email to the Department dated November 4, 2020, Sea Point asked whether it could make a monetary contribution to the municipality to enhance access at another location in lieu of an onsite access requirement. Exhibit F, J0155.

18. On November 5, 2020, the Department responded to the monetary contribution proposal from the applicant stating that onsite access is required. Exhibit G, J0162.

19. The Department, rather than deny the permit because Sea Point had not demonstrated compliance with the requirements of the Public Access Law, agreed to issue the permit with a condition that required Sea Point to provide an onsite public access proposal. Exhibit H, J0167.

20. On November 10, 2020, the Department issued a Waterfront Development Individual Permit, Permit No. 1524-18-0001.2 LUP200001 ("the Permit"), to Sea Point which authorized, among other things, the "construction of approximately 750 linear feet of replacement bulkhead within the boat basin using vinyl 24-inches waterward of the existing bulkhead alignment . . ." Exhibit I, J0172.

21. The Permit also legalized preexisting "catwalks" (or finger piers) "and mooring piles within the boat basin in their existing dimensions and configuration." Ibid.

22. Prior to construction, the Permit requires the permittee to submit to the Division for review and approval a proposal for providing public access on the project site. The Division-approved onsite public access project must be constructed prior to, or concurrent with, the construction of the project authorized by this permit. [Id. at J0172, Pre-construction Condition #1.]

23. As part of the Permit, the Department approved a plan entitled "Waterfront Development Plan, Lot 84, Block 362, Borough of Point Pleasant, Ocean County, New Jersey," prepared by Charles E. Lindstrom, P.E., P.P. from Lindstrom, Diessner & Carr, P.C., dated 2/5/2020, last revised 11/5/2020. Exhibit M, J0186.

24. Concurrent with issuance of the Permit, the Department prepared an "In-Water Waterfront Development Permit Environmental Report" ("Environmental Report") that describes the proposed project and compliance with various regulatory and statutory requirements. Exhibit J, J0178.

25. On November 24, 2020, Sea Point submitted a hearing request to challenge Pre-construction Condition #1 of the Permit regarding submission of a public access proposal. Sea Point contends that "the Department's determination that the permitted improvements constitute a change in footprint or use of the property such that on-site public access is required under P.L.2019, c.81, is arbitrary, capricious, unreasonable and otherwise not in accordance with the law."

26. Also on November 24, 2020, Sea Point, citing the poor condition of the existing bulkhead, requested permission to begin construction of the replacement bulkhead while its appeal of the public access requirement was pending. Exhibit K, J0182. By email dated December 14, 2020, the Department granted permission to Sea Point to commence reconstruction of the bulkhead. Exhibit L, J0184.

On June 2, 2021, after the parties were unable to reach an agreement through an alternative dispute resolution process, the DEP transmitted the matter to the Office of Administrative Law as a contested case. In April 2022, the parties filed cross-motions for summary decision and supporting briefs on the issue of whether the DEP properly imposed a public access condition on Sea Point's waterfront development permit. Thereafter, each party submitted a brief in reply to the other's motion.

The Parties' Cross-Motions for Summary Decision

The parties dispute whether the DEP may, pursuant to the Public Access Law, require Sea Point to provide public access to Beaverdam Creek across its privately-owned land as a condition of approval of the association's waterfront development permit.

In its summary decision brief, the DEP contends that, because Sea Point's project involves the reconstruction of a bulkhead two feet offshore from its prior location and the after-the-fact legalization of preexisting finger piers and mooring piles, the Public Access Law requires onsite public access to the Beaverdam Creek.

First, the DEP notes that, because Sea Point's project involves the construction of a bulkhead and piers along a waterfront, the project requires a permit under the Waterfront Development Act, N.J.S.A. 12:5-1 to -11, which states that "[a]ll plans for the development of any waterfront upon any navigable water or stream of this State . . . which involves the construction or alteration of a pier, bulkhead . . . shall be first submitted to the Department of Environmental Protection" for approval. N.J.S.A. 12:5-3(a). As the DEP points out, in 2016, the Legislature amended the Waterfront Development Act to provide that the DEP "may, as a condition of an approval . . . require a person or municipality to provide on-site public access to the waterfront and adjacent shoreline[.]" N.J.S.A. 12:5-3(d); P.L. 2015, c. 260 (eff. Jan. 19, 2016). The Public Access Law, which became effective in 2019, delineated the circumstances under which the DEP must require onsite public access as a condition of permit approvals under environmental laws such as the Waterfront Development Act.

According to the DEP, "the Public Access Law requires that individual permits for projects wherein the applicant proposes 'a change in the existing footprint of a structure' must include a permit condition which 'require[s] . . . additional public access to the tidal waters and adjacent shorelines consistent with the public trust doctrine.' N.J.S.A. 13:1D-153(a)." The fact that Sea Point's replacement bulkhead and previously unapproved construction of piers and moorings changed the existing footprint of structures on the Site, DEP's argument goes, the Public Access Law was triggered such that DEP must condition Sea Point's permit on the provision of onsite public access.

The DEP maintains that "the entire 750-linear foot bulkhead will be moved 24-inches waterward of its preexisting location along the shore" and thus "will extend the dry land area on the Site by 1,500 square feet and will reduce the existing water area by the same amount." Likewise, the piers and mooring piles, "which were previously constructed without required DEP permits . . . extend out into the water and therefore expand Sea Point's overall footprint." Thus, the DEP argues that the agency "properly imposed Pre-Construction Condition #1, which requires that Sea Point submit 'a proposal for providing public access on the project site.'"

In support of its motion, the DEP included a certification from a DEP environmental scientist, Lindsey Davis. In her certification, Davis not only describes the DEP's review of Sea Point's permit application, but also reaches conclusions about required public access on the Site using the factors listed under N.J.S.A. 13:1D-153(a). Davis asserts that public access is required because "[t]he bulkhead replacement project . . . results in a significant 'change in the existing footprint of a structure' . . . because the entire 750-linear foot bulkhead will be moved 24-inches waterward of its existing location along the shore." Davis Cert., ¶ 24. And according to Davis, "[a]lthough Sea Point has not submitted a public access plan for the Department's consideration of the 'extent of public access required' on the site and the demand for public access in the area, I reviewed the extent of available public access to the waterfront near the site[.]" Id. at ¶ 34.

Davis concludes that "[b]ased on my observations of public access areas near Sea Point, there are few opportunities for new, meaningful public access to Beaverdam

Creek to serve the extensive neighboring residential community" and that the "property provides an opportunity for new public access that is not available at other locations along Beaverdam Creek given the size of the property and its large waterfront area," and that there would be "minimal intrusion to the existing condominium residents due to the large size of the lot, the availability of water access from numerous portions of the property, and the existence of large common areas on the property." Id. at ¶¶ 36-37.

By cross-motion, Sea Point lists several reasons why the onsite public access condition is improper. First, Sea Point argues that the provision at issue, N.J.S.A. 13:1D-153, "by its plain language, limits the Department's ability to require public access to only those cases where there is existing public access," and that "additional public access can only be required consistent with and to the extent authorized by the Public Trust Doctrine," as developed by the New Jersey courts under the common law.

Because the Legislature declared that a public access condition must be "consistent with the public trust doctrine," that body "intended to codify the Public Trust Doctrine, not to expand it," and thus the DEP can only impose a public access condition if the common law factors for public access on private property set forth in Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306 (1984), are met. According to the Court in Matthews, "[p]recisely 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." Id. at 326.

Next, Sea Point submits that, even if the Public Access Law expands the common law, the DEP misapplied the standards set forth under N.J.S.A. 13:1D-153(a), which states that, "[i]n determining the public access that is required at a property, the department shall 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."

According to Sea Point, requiring public access where none previously existed on the Site and in light of the activities for which Sea Point sought a permit conflicts with the DEP's Coastal Zone Management Rules at N.J.A.C. 7:7. For this proposition, Sea Point cites N.J.A.C. 7:7-16.9(k)(2)(i), the public access rule, which states that "[a]t 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," and N.J.A.C. 7:7-15.11(d)(2)(ii), the coastal engineering rule, which provides that "reconstruction of an existing bulkhead is conditionally acceptable" in part if "[t]he replacement bulkhead is located no more than 24 inches outshore of the existing bulkhead." Sea Point argues that there should be no public access required under the former rule because its replacement bulkhead is a structural shore protection feature and the finger piers are accessory structures, and that its replacement bulkhead fits within the 24-inch requirement under the latter rule. Sea Point also takes issue with the DEP's assessment that there is demand for additional public access on the Site, and that such access would cause minimal intrusion on Sea Point residents.

Sea Point's final three arguments in support of its cross-motion for summary decision are (1) that the DEP cannot apply the Public Access Law in this case because the agency has failed to promulgate rules implementing the act, as statutorily required; (2) that the DEP should allow Sea Point to make a monetary contribution for public access elsewhere in lieu of onsite public access; and (3) that requiring onsite public access constitutes an unconstitutional taking by the DEP.

In reply, the DEP asserts that the Public Access Law is intended to not only protect, but expand, the public's enjoyment of tidal waters and shorelines, and the Legislature tasked the agency with the duty to make these natural features "available to the public to the greatest extent possible." The plain language of the statute does not limit additional public access to those sites where public access already exists, but instead requires additional public access if, as in this case, a waterfront project "provides for a change in the existing footprint of a structure." Under the dictates of the Public Access Law, DEP argues that the agency must "ensure that any permit it issues

is 'consistent with the public trust doctrine' and require 'additional public access' . . . when a structure's footprint expands."

According to the DEP, "in New Jersey, every property located along tidal waters is subject to the public's right to access adjacent lands to the mean high water mark, as recognized by the New Jersey Supreme Court in 1821 in Arnold v. Mundy, 6 N.J.L. 1, 10-11 (1821)." Thus, "even if Sea Point has never facilitated public entry on its property to access the shoreline, its property has always been intimately related to existing common law rights of the public to access the tidal waters," and "[c]onsistent with the public trust doctrine and the Law's broad public purpose," DEP is required to condition Sea Point's permit on the provision of additional public access due to the change in the existing footprint on the Site.

Moreover, despite what the current public access and coastal engineering rules provide, the fact that the replacement bulkhead is 24 inches out from the previous bulkhead triggers the requirement for additional public access as a "change in the existing footprint of a structure." In this regard, the DEP notes that the rules predate the statute, and are superseded by the statute to the extent they are contradictory.

The DEP points out that Sea Point's argument that the DEP must apply the Matthews factors is "undercut by the fact that nowhere does the Act mention either Matthews or instruct DEP that it must consider those factors before requiring any public access in its permitting decisions." Instead, once the additional public access is triggered, the statute specifically provides that, "[i]n determining the public access that is required at a property, the department shall 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." According to the DEP, "the extent of public access 'that is required' at the site is yet not an issue here because Sea Point has not yet submitted a public access proposal for the Department's review" and "[t]he only issue raised in this appeal is whether the Department properly imposed the public access condition in Sea Point's permit at all."

Finally, the DEP contends that Sea Point's remaining arguments fail because monetary contributions in lieu of onsite public access are not allowed, the statute "contains no provision prohibiting its implementation if the Department does not adopt regulations within the prescribed time period," and the OAL does not have jurisdiction over takings claims.

In Sea Point's brief in reply to the DEP's motion, the association initially takes issue with the Davis Certification, "the contents of which go well beyond those that were agreed to in the Joint Stipulation of Facts" and "cannot serve as a basis for Summary Decision."[2] Sea Point further disagrees with the public access characterizations and conclusions reached by Davis in her certification.

In response to the Davis Certification, Sea Point submitted a certification from Kevin Moran, who is the president of Sea Point. Therein, Moran responds generally to Davis' assertions about the public access required on the Site, and specifically calls "inaccurate" Davis' characterization of the replacement bulkhead as a "'significant expansion' of the Property." Moran Cert., ¶¶ 3-5, 6. According to Moran, "[n]ot only has there been no expansion of any of the existing buildings on the Property, the area adjacent to the bulkheads both prior to and after their reconstruction is covered by a wooden walkway, the dimensions of which have not changed" and "[t]hus, there has been no change in the actual footprint of the Property." Id. at ¶ 6.

Sea Point then reiterates its position that "as a matter of law . . . neither the common law Public Trust Doctrine nor the 2019 Public Access Law authorize NJDEP to impose public access" on the Site. In Sea Point's opinion, "the common law approach" in "Matthews set out a template for determining when public access across private property might be required, but nothing more," and "the Public Access Law, having codified rather than expanded the Public Trust Doctrine, did not authorize NJDEP to impose public access unless the four[-]factor test in Matthews was met" and "DEP never determined whether that was the case."

[2] On the cover page of its reply brief submission, Sea Point wrote, "[w]e believe, incidentally that Your Honor would benefit from a site visit prior to rendering a decision." To the extent this may be interpreted as a formal request for a site visit, such request is denied based on the extensively complete submissions by the parties.

Sea Point also reasserts that, even if "the Public Access Law did give the Department expanded authority independent of the Public Trust Doctrine," the standards under N.J.S.A. 13:1D-153(a), which Sea Point states are used "in determining whether and to what degree public access can be required as a condition of a Coastal permit," "are essentially a codification of the Matthews criteria."

Moreover, Sea Point maintains that, under these standards, the DEP "must determine if a 'significant change' occurred and if so, conduct the analysis listed in the statute." According to Sea Point, "DEP never did this prior to issuing the Permit, and the Davis Certification constitutes a belated and flawed effort to do so after-the-fact."

Based on the arguments of both parties above, I disagree.

LEGAL ARGUMENT AND CONCLUSION

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, 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." N.J.A.C. 1:1-12.5(b). When the motion "is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

In this matter, the parties have stipulated to the material facts, and only dispute by cross-motions for summary decision who is entitled to prevail as a matter of law regarding the propriety of the onsite public access permit condition imposed by the DEP under the Public Access Law.

For the reasons that follow, Your Honor should grant the DEP's motion for summary decision and conclude that the Public Access Law requires public access on Sea Point's property due to the nature of the development for which the association sought permission from the DEP.

The Public Access Law

In 2019, the Legislature passed, and Governor Murphy signed the Public Access Law. P.L. 2019, c. 81 (eff. July 2, 2019). Under the act, codified as N.J.S.A. 13:1D-150 to -156, the Legislature made several findings and declarations regarding public access to New Jersey's tidal waters and shorelines.

First, the Legislature recognized that "[t]he public has 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, including, but not limited to, bathing, swimming, fishing, and other shore-related activities." N.J.S.A. 13:1D-150(a). The Legislature explained that "[t]he public trust doctrine establishes the rule that ownership of the State's natural resources, including, but not limited to, ground waters, surface waters, and land flowed or formerly flowed by tidal waters is vested in the State to be held in trust for the people, that the public has the right to tidal lands and waters for navigation, fishing, and recreational uses, and, moreover, that even land that is no longer flowed by the tide but that was artificially filled is considered to be public trust land and the property of the State." N.J.S.A. 13:1D-150(b).

The Legislature noted that the public trust doctrine "stems from Roman jurisprudence declaring that the air, running water, and shores of the sea are common to mankind," and that since 1821, "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." N.J.S.A. 13:1D-150(c). The Legislature further noted that New Jersey's "courts have 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.

According to the Legislature, "[p]ursuant to the public trust doctrine, the State of New Jersey has a duty to promote, protect, and safeguard the public's rights and ensure reasonable and meaningful public access to tidal waters and adjacent shorelines." N.J.S.A. 13:1D-150(d). As such, the Legislature declared that "[t]he Department of Environmental Protection 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). And "[i]n so doing, 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.

Finally, the Legislature pronounced that "[p]ublic 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).

The act includes specific criteria for DEP approval of permit applications under several environmental laws, including those issued "pursuant to the "Coastal Area Facility Review Act," P.L.1973, c.185 (C.13:19-1 et seq.), R.S.12:5-3, "The Wetlands Act of 1970," P.L.1970, c.272 (C.13:9A-1 et seq.), the "Flood Hazard Area Control Act," P.L.1962, c.19 (C.58:16A-50 et seq.), or the State's implementation of the "Coastal Zone Management Act of 1972," 16 U.S.C. § 1451 et seq., or any other law." N.J.S.A. 13:1D-153(a).

In particular, "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." Ibid. And "[i]n determining the public access that is required at a property, the department shall 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." Ibid. These requirements "shall apply to any application for an individual permit submitted on or after the effective date [July 2, 2019] of P.L.2019, c.81 (C.13:1D-150 et al.)." Ibid.

Although the Legislature directed the DEP to promulgate rules applying these requirements to permits-by-rule, general permits, or general permits-by-certification "[n]o later than 18 months after the effective date of P.L.2019, c.81 (C.13:1D-150 et al.), or by December 2, 2020, the DEP has yet to do so.

The DEP may impose an onsite public access condition on Sea Point's permit pursuant to the Public Access Law.

Summary decision in the DEP's favor is appropriate because the DEP properly applied the Public Access Law in imposing an onsite public access condition on Sea Point's permit. Under a plain reading of N.J.S.A. 13:1D-153(a), and in furtherance of the findings and declarations made by the Legislature in the Public Access Law, onsite public access is triggered by the fact that Sea Point's development activities change the existing footprint of structures on the Site. Moreover, contrary to Sea Point's arguments, N.J.S.A. 13:1D-153 is not limited in applicability to properties on which there was previous onsite public access, and the standards specifically listed in N.J.S.A. 13:1D-153(a), and not the Matthews factors, dictate the extent to which public access is required on the Site.

The purpose of statutory interpretation is "to further the Legislature's intent." Klumb v. Bd. of Educ. of the Manalapan-Englishtown Reg'l High Sch. Dist., 199 N.J. 14, 23 (2009) (citing Bd. of Educ. of Sea Isle City v. Kennedy, 196 N.J. 1, 12 (2008)). In this regard, "the language of the statute and the findings and declarations made in the statute itself control." New Jersey Coal. of Health Care Prof'ls, Inc. v. New Jersey Dep't

of Banking & Ins., 323 N.J. Super. 207, 263 (App. Div. 1999). Here, the language of N.J.S.A. 13:1D-153(a) and the Legislature's findings and declarations in N.J.S.A. 13:1D-150 lead to the following conclusion: the Public Access Law requires onsite public access in situations in which, like here, a permit "application provides for a change in the existing footprint of a structure" such that the DEP "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" be provided on the property "consistent with the public trust doctrine" as outlined in the findings and declarations made by the Legislature in N.J.S.A. 13:1D-150.

There is no genuine issue of material fact whether Sea Point's activities – "reconstruction of a bulkhead 24 inches waterward of its current location and request for after-the-fact authorization of finger piers and mooring piles" – change the existing footprint of structures on the Site. As the DEP notes, "the entire 750-linear foot bulkhead will be moved 24-inches waterward of its preexisting location along the shore" and thus "will extend the dry land area on the Site by 1,500 square feet and will reduce the existing water area by the same amount." And the piers and mooring piles, "which were previously constructed without required DEP permits . . . extend out into the water and therefore expand Sea Point's overall footprint."

In contesting that the reconstructed bulkhead changes the existing footprint, Moran, the president of Sea Point, presented a certification in which he states that the DEP's characterization of the replacement bulkhead results in a "'significant expansion' of the Property" is "inaccurate," and he maintains that "[n]ot only has there been no expansion of any of the existing buildings on the Property, the area adjacent to the bulkheads both prior to and after their reconstruction is covered by a wooden walkway, the dimensions of which have not changed" and "[t]hus, there has been no change in the actual footprint of the Property."

However, the DEP's characterization of the expansion as "significant" is immaterial because the Public Access Law applies to development activities that simply "change" the existing footprint of a structure, whether that change is significant or not.

And Moran's statement that the dimensions of a wooden walkway adjacent to the replacement bulkhead "have not changed" and "thus, there has been no change in the actual footprint of the Property" misses the mark since it is uncontested that the replacement bulkhead is 750 linear feet and is 24 inches waterward of its preexisting location, and thus 1500 square feet larger than the preexisting bulkhead. Moreover, the finger piers and mooring piles for which Sea Point sought after-the-fact authorization also resulted in a change in the existing footprint of those structures. As such, those development activities change the existing footprints of structures and fall within the scope of activities requiring additional onsite public access as a condition of receiving a permit from the DEP under N.J.S.A. 13:1D-153. In this regard, it is important to note that, while the term "footprint" is not defined in the Public Access Law, the Coastal Zone Management Rules include a definition of "footprint of development," which "means 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.

Sea Point unpersuasively argues that N.J.S.A. 13:1D-153, "by its plain language, limits the Department's ability to require public access to only those cases where there is existing public access." This argument is belied by not only the language of that provision, but also by the language of another provision of the Public Access Law, N.J.S.A. 13:1D-154, which unlike N.J.S.A. 13:1D-153, specifically excludes from a public access requirement certain properties on which there was no prior public access.

First, contrary to Sea Point's argument, the language of N.J.S.A. 13:1D-153 in fact plainly requires onsite public access whether or not there is existing public access. Under the terms of that provision, if a project entails a "change in the existing footprint of a structure," then the DEP "shall review the existing public access" on 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." The provision says nothing about excluding properties without prior public access, and instead mandates that, for activities that change the footprint of a structure, like here, the DEP "review the existing public access" and "*shall* require . . . additional public access . . . consistent with the public trust doctrine[.]"

And unlike N.J.S.A. 13:1D-153, N.J.S.A. 13:1D-154, which governs public access to marinas, explicitly excludes from a public access requirement certain marina properties that do not have public access at the time of a permit application. In particular, for marina properties without beaches, "[i]f 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." The differing language in successive statutory provisions is important because under the canons of statutory interpretation, "'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.'" Cashin v. Bello, 223 N.J. 328, 340 (2015) (citations omitted). That N.J.S.A. 13:1D-154 specifically exempts properties without prior public access, while N.J.S.A. 13:1D-153 does not, supports the conclusion that the Legislature intended to treat projects involving marinas differently from projects covered by N.J.S.A. 13:1D-153.

And to the extent that Sea Point argues that there should be no public access required under N.J.A.C. 7:7-16.9(k)(2)(i), the public access rule, because its replacement bulkhead is a structural shore protection feature and the finger piers are accessory structures, and that its replacement bulkhead fits within the 24-inch requirement under N.J.A.C. 7:7-15.11(d)(2)(ii), the coastal engineering rule, those regulations are, as pointed out by the DEP, superseded by the Public Access Law, which came later in time and directly addresses the standards for public access. For that proposition, the DEP appropriately cites New Jersey Ass'n of Realtors v. New Jersey Dep't of Envtl. Prot., 367 N.J. Super. 154 (App. Div. 2004), in which the court stated that "[b]ecause regulations must coexist with state statutes, when a statute deals with a specific issue or matter, the statute is 'the controlling authority as to the proper disposition of that issue or matter.'" Id. at 160 (quoting Terry v. Harris, 175 N.J. Super. 482, 496 (Law Div. 1980)).

The next issue of contention revolves around the statutory language about the need for "additional public access" to be "consistent with the public trust doctrine." Sea

Point argues that, for a public access requirement to be "consistent with the public trust doctrine," "the DEP can only impose a public access condition if the common law factors for public access on private property set forth in Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306 (1984) are met." Sea Point is incorrect for a couple of reasons.

As background and explanation, in Matthews, the Court "established the framework for application of the public trust doctrine to privately-owned upland sand beaches." Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 185 N.J. 40, 54 (2005). Under that framework, "[p]recisely 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," such that "[l]ocation of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of 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." Matthews, 95 N.J. at 326.

According to Sea Point, these Matthews factors dictate whether "additional public access" is "consistent with the public trust doctrine," and the DEP cannot require Sea Point to provide onsite access unless and until the agency properly applies those factors to the circumstances in this matter. However, as the DEP more persuasively submits, Sea Point's argument that the DEP must apply the Matthews factors is "undercut by the fact that nowhere does the Act mention either Matthews or instruct DEP that it must consider those factors before requiring any public access in its permitting decisions." Instead, once the additional public access is triggered by a change in the existing footprint of a structure, N.J.S.A. 13:1D-153 specifically provides that, "[i]n determining the public access that is required at a property, the department shall 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." Moreover, according to the DEP, "the extent of public access 'that is required' at the site is yet not an issue here because Sea Point has not yet submitted a public access proposal for the Department's review" and "[t]he only issue raised in this appeal is whether the Department properly imposed the public

access condition in Sea Point's permit at all."[3] In sum, the DEP is correct that, if the Legislature had intended for the Matthews factors to apply, 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 Legislature's intent regarding the language requiring "additional public access . . . consistent with the public trust doctrine" is evident from the findings and declarations regarding public access under N.J.S.A. 13:1D-150. In those findings and declarations, the Legislature acknowledged the public trust doctrine as developed by the courts, specifically observing, however, that "[t]he courts have 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." N.J.S.A. 13:1D-150(c).

Starting with the premise that "[t]he public has 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, including, but not limited to, bathing, swimming, fishing, and other shore-related activities," the Legislature declared that "[p]ursuant to the public trust doctrine, the State of New Jersey has a duty to promote, protect, and safeguard the public's rights and ensure reasonable and meaningful public access to tidal waters and adjacent shorelines." And in order that the public trust doctrine "be molded and extended to meet the changing conditions and the needs of the public it was created to benefit," the Legislature also declared that the DEP "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"

[3] Given the scope of this appeal, such that "the extent of public access 'that is required' at the site is yet not an issue here because Sea Point has not yet submitted a public access proposal for the Department's review," it is curious that in her certification, Lindsey Davis, the DEP environmental scientist, acknowledged that "Sea Point has not submitted a public access plan for the Department's consideration of the 'extent of public access required' on the site and the demand for public access in the area" but she still "reviewed the extent of available public access to the waterfront near the site" and concluded that "[b]ased on my observations of public access areas near Sea Point, there are few opportunities for new, meaningful public access to Beaverdam Creek to serve the extensive neighboring residential community" and that the "property provides an opportunity for new public access that is not available at other locations along Beaverdam Creek given the size of the property and its large waterfront area," and that there would be "minimal intrusion to the existing condominium residents due to the large size of the lot, the availability of water access from numerous portions of the property, and the existence of large common areas on the property."

and that "[i]n so doing, the department has the duty to make all tidal waters and their adjacent shorelines available to the public to the greatest extent practicable[.]" N.J.S.A. 13:1D-150(d) and (e). These findings and declarations regarding public access under the public trust doctrine are the principles by which the Legislature intended the DEP to be guided in ensuring that "additional public access . . . consistent with the public trust doctrine be provided."

In light of the above, summary decision in favor of the DEP is appropriate because the DEP properly imposed an onsite public access condition on Sea Point's permit in accordance with the Public Access Law. And, as argued by the DEP, the extent to which public access is required on the Site shall be determined after Sea Point submits a public access plan to the agency for review.

Other arguments

Sea Point's final three arguments also do not warrant summary decision in its favor or preclude summary decision in the DEP's favor. Again, those arguments are (1) that the DEP cannot apply the Public Access Law in this case because the agency has failed to promulgate rules implementing the act, as statutorily required; (2) that the DEP should allow Sea Point to make a monetary contribution for public access elsewhere in lieu of onsite public access; and (3) that requiring onsite public access constitutes an unconstitutional taking by the government. In opposition, the DEP contends that Sea Point's remaining arguments fail because monetary contributions in lieu of onsite public access are not allowed, the statute "contains no provision prohibiting its implementation if the Department does not adopt regulations within the prescribed time period," and that the OAL does not have jurisdiction over Sea Point's takings claim, which is nonetheless premature since the scope of required public access is not yet known.

First, while the DEP has neglected to promulgate rules implementing the Public Access Law as directed by Legislature, the standards set forth under N.J.S.A. 13:1D-153 are sufficiently definite to enable the DEP to impose an onsite public access condition on Sea Point's permit. While Sea Point states that "[t]here is no guidance in the Law, for example, as to what constitutes a 'change in the footprint of a structure,'"

the DEP correctly notes that current regulations provide guidance for such determinations, including definitions at N.J.A.C. 7:7-1.5 for "footprint of development," or "the vertical projection to the horizontal plane of the exterior of all exterior walls of a structure;" "structure," which is "any assembly of materials above, on, or below the surface of the land or water, including, but not limited to, buildings, fences, dams, pilings, footings, breakwaters, culverts, pipes, pipelines, piers, roads, railroads, and bridges, and includes floating structures;" and also "bulkhead," which meets the definition of a structure as "a vertical shore protection structure installed to withstand the forces of waves and currents." And once, as here, the DEP determines that there has been a change in the footprint of a structure, N.J.S.A. 13:1D-153 adequately directs the DEP to "review the existing public access" on the property and require "additional public access . . . consistent with the public trust doctrine," the intent of which phrase was discussed above. Thus, although the DEP 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 DEP in this matter.

Second, although Sea Point would prefer to contribute money for public access elsewhere in Point Pleasant, the Public Access Law does not allow for such an arrangement.

Finally, Sea Point's takings claim is premature. Certainly, the government may not take private property for public use without paying just compensation. U.S. Const. amend. v. Sea Point maintains that an onsite public access requirement would constitute an unconstitutional taking of Sea Point's property. The DEP argues that the OAL does not have jurisdiction over takings claims and that, regardless, Sea Point's claim is premature since there are certain unknown facts about the scope of public access that will be required on the Site. Without deciding whether the OAL would have jurisdiction to address the substance of Sea Point's as-applied takings claim, the claim, as also argued by the DEP, is not ripe for adjudication because the 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.

CONCLUSION

For the foregoing reasons, **I CONCLUDE** that no issue of material fact exists. **I FURTHER CONCLUDE** that the DEP's motion for summary decision should be granted and Sea Point's cross-motion for summary decision be denied. There are no genuine issues of material fact, and the DEP is entitled to prevail as a matter of law on the issue of whether the agency may impose an onsite public access condition on Sea Point's permit.

ORDER

It is therefore hereby **ORDERED** that the respondent's motion for summary decision be and hereby is **GRANTED**. It is further **ORDERED** that petitioner's cross-motion for summary decision be and hereby is **DENIED**. It is further **ORDERED** that Sea Point shall submit a public access proposal or plan to the DEP so that the DEP may determine the extent to which public access is required on the Site pursuant to N.J.S.A. 13:1D-153.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 5, 2022
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: October 5, 2022

Date Mailed to Parties: October 5, 2022

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