

GASIOROWSKI & HOLOBINKO

R.S. GASIOROWSKI, ESQ. - ID#244421968

54 Broad Street

Red Bank, New Jersey 07701

(732) 212-9930

Email: gasiorowskilaw@gmail.com

Attorney for Plaintiff/Appellant Jersey Shore Beach and Boardwalk
Company, Inc. a/k/a Jersey Shore Beach & Boardwalk Inc.

JERSEY SHORE BEACH AND	:	SUPERIOR COURT OF NEW JERSEY
BOARDWALK COMPANY,	:	APPELLATE DIVISION
INC., a/k/a JERSEY SHORE	:	DOCKET NO. A-684-24
BEACH & BOARDWALK INC.	:	
	:	On Appeal from Order dated
Plaintiff/Appellant	:	September 24, 2024
	:	
vs.	:	Superior Court of New Jersey
	:	Law Division-Mercer County
NEW JERSEY TIDELANDS	:	Docket No. MER-L-151-24
RESOURCE COUNCIL; NEW	:	
JERSEY DEPARTMENT OF	:	SAT BELOW:
ENVIRONMENTAL	:	Hon. Robert T. Lougy, A.J.S.C.
PROTECTION; MATT	:	
PLATKIN, ATTORNEY	:	
GENERAL OF NEW JERSEY;	:	
BOROUGH OF KEANSBURG;	:	
T&M ASSOCIATES; and	:	
RAYMOND O'HARE a	:	
Municipal Corporation	:	
	:	
Defendant/Respondent	:	

AMENDED BRIEF OF PLAINTIFF/APPELLANT
JERSEY SHORE BEACH AND BOARDWALK COMPANY, INC., a/k/a
JERSEY SHORE BEACH & BOARDWALK INC.

Dated: April 8, 2025

TABLE OF CONTENTS

TABLE OF CITATIONS.....	iii
TABLE OF ORDERS.....	iv
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS.....	2
PROCEDURAL HISTORY.....	10
LEGAL ARGUMENT	
POINT I.....	12
THE COURT BELOW ERRED IN THE DISMISSAL OF THE COMPLAINT UNDER <u>R.4:6-2</u> ON THE BASIS THAT JURISDICTION AS TO THE CHALLENGE TO KEANSBURG APPLICATION FOR A RIPARIAN GRANT LIES EXCLUSIVELY IN THE APPELLATE COURT UNDER <u>R. 2:2-3(a)</u> (APPEALS ORDER DISMISSING COMPLAINT Pa98)	
POINT II.....	18
AS AN ADJACENT PROPERTY OWNER PLAINTIFF HAS STANDING TO BRING THE LEGAL CLAIMS IN THE COMPLAINT DURING THE ONGOING ADMINISTRATIVE REVIEW AND APPROVAL PROCESS (APPEALS ORDER DISMISSING COMPLAINT Pa98)	
POINT III.....	22
THE COURT BELOW ERRED IN DISMISSING THE COMPLAINT WITH PREJUDICE. THE COURT SHOULD HAVE, AT MOST, DISMISSED THE CLAIMS AGAINST THE DEP AND ATTORNEY GENERAL WITHOUT PREJUDICE AND HAVE ALLOWED AND DEFERRED TO ALLOWING AN AMENDED COMPLAINT AGAINST KEANSBURG AND THE	

TRC AS DEFENDANTS (APPEALS ORDER
DISMISSING COMPLAINT Pa98)

CONCLUSION29

TABLE OF CITATIONS

<u>Banco Popular N.A. v. Gandi</u> , 184 N.J. 161, 181 (2005).	13
<u>Dimitrakopoulos v. Borrus Goldin</u> , 237 N.J. 91; 107-108 (2019)	12/13
Jordan v. Horsemen’s Benevolent and Protective Ass’n, 90 N.J. 422, 432 (1982); Salorio v. Glaser, 82 N.J. 382, 491 (1980).....	19
<u>Printing Mart v. Sharp Electronics</u> , 116 N.J. 739, 746 (1989).....	12
<u>Lakeview Mem. Park Assn. v. Burlington Cty. Constr. Bd. of Appeals</u> , 463 N.J. Super. 459, 471-472 (Law Div. 2019).....	22/23
<u>Lederman v. Prudential Life Ins.</u> , 385 N.J. Super. 324, 349 (App. Div.), cert den. 188 N.J. 353 (2006).....	12
<u>Lederman, supra; Hoffman v. Hampshire Labs Inc.</u> , 405 N.J. Super. 105, 112 (App.Div. 2009).....	13
New Jersey Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402 (App.Div.), certif. granted. 152 N.J. 13 (1997).....	18
Reaves v. Egg Harbor Township, 277 N.J. Super. 360, 366 (Ch. Div. 1994).....	19
Right to Choose v. Byrne, 91 N.J. 287, 313 (1982).....	19
<u>Van Natta Mechanical Corp. v. Dr. Staulo</u> , 277 N.J. Super. 175, 180-180, 187 (App.Div. 1994).....	22
<u>Wild v. Carriage Funeral Inc.</u> , 241 N.J. 285, 287 (2020)	13

TABLE OF ORDERS

1. Order/Opinion Dismissing Plaintiff's Complaint With Prejudice on September 24, 2024 entered by the Honorable Robert T. Lougy, A.J.S.C.....	PA98
---	------

AMENDED TABLE OF CONTENTS FOR APPENDIX OF
PLAINTIFF/APPELLANT,
JERSEY SHORE BEACH AND BOARDWALK COMPANY, INC. A/K/A
JERSEY SHORE BEACH & BOARDWALK, INC.

DOCKET NO. A-684-24

(PA001 – PA116)

Complaint filed on behalf of Plaintiff Jersey Shore Beach and Boardwalk, Inc., a/k/a/ Jersey Shore Beach & Boardwalk, Inc. on January 22, 2024, Docket No. MER-L-151-24	PA001
First Amended Complaint filed on behalf of Plaintiff Jersey Shore Beach and Boardwalk, Inc., a/k/a/ Jersey Shore Beach & Boardwalk, Inc. on April 2, 2024, Docket No. MER-L-151-24	PA025
Stipulation Extending Time to File Answer or other Plead	PA049
Defendant Keansburg's Notice of Motion to Dismiss Plaintiff's Amended Complaint for Failure to State A Claim	PA051
Certification of Keansburg attorney David A. Clark, Esq. in Support of Motion to Dismiss Plaintiff's Amended Complaint with Exhibits	PA053
Exhibit A: State of New Jersey Department of Environmental Protection's letter to Borough of Keansburg dated January 9, 2020 enclosing the executed Revocable License	PA055
Exhibit B: State of New Jersey Department of Environmental Protection's memorandum dated February 8, 2023 attaching the Minutes of the Tidelands Resource Council Meeting of December 7, 2022	PA060
Exhibit C: State of New Jersey Department of Environmental Protection's letter to Plaintiff's attorney dated February 7, 2024 with its ruling denying Plaintiff's request for an adjudicatory hearing	PA066

Defendant State TRC, DEP and Attorney General's Notice of Motion to Dismiss filed on May 6, 2024	PA070
Supplemental Certification of Keansburg Attorney Matthew R. Tavares, Esq. submitting unreported case	PA072
Exhibit A ¹ : <u>New Jersey Educ. Ass'n v. State</u> , 2013 N.J.Super.Unpub. LEXIS 1459 (Mercer County Law Div. 2013)	PA074
Order/Opinion Dismissing Plaintiff's Complaint without Prejudice (September 24, 2024)	PA098
Notice of Appeal filed by Jersey Shore Beach and Boardwalk Company, Inc. a/k/a Jersey Shore Beach and Boardwalk, Inc. on November 7, 2024	PA104
Civil Case Information Statement filed by Jersey Shore Beach and Boardwalk Company, Inc. a/k/a Jersey Shore Beach and Boardwalk, Inc. on November 7, 2024	PA111
Civil Case Information Statement filed by Charlie A. Stegner-Freitag, Esq. on behalf of New Jersey Department of Environmental Protection on November 7, 2024	PA115

¹ Pa 97 is intentionally blank.

PRELIMINARY STATEMENT

This Appeal arises out of the Declaratory Judgment challenge by an interested and affected Keansburg property owner to the validity of an Application for a Riparian Grant filed by Keansburg to the Tidelands Resource Council (TRC), an agency within the State Department of Environmental Protection (DEP) in charge of administering and managing State riparian lands. The Complaint as amended, at its essence, asserts that the Riparian Grant Application was submitted and processed in its preliminary consideration by the TRC without full disclosure by Keansburg as to the ultimate intended disposition and use of the Riparian property (Block 184 Lot 3.02, consisting of about 3.54 acres), if the Riparian Grant is approved. The actual intended disposition and use of the Riparian Lot 3.02 by the defendant/applicant Keansburg is as set forth in an adopted Redevelopment Plan, to convey the Lot as unrestricted to a private developer, for that developer to remove the Lot's present use as a public parking area for 300+ vehicles providing public access to the Keansburg beach/ocean, and to then utilize the Lot for several privately owned multi-story apartment buildings with minimal or no public parking. The Complaint asserts that such intended use, now not fully disclosed and/or misrepresented in the Grant Application. If the Grant is allowed, the actual use would be in contradiction

and violation of the common law and statutory Public Trust Doctrine and DEP public access regulations applicable to municipalities.

The Declaratory Judgment Complaint named as defendants Keansburg and its Town Manager O'Hare and also the TRC, the DEP, and the State Attorney General as the processors of the Grant Application and State Agents responsible to determine the Application upon the Amended Complaint being filed, the Keansburg defendants and the State defendants immediately filed a R. 4:6-2 Motion to Dismiss on the pleadings, primarily asserting that the Complaint was challenging a preliminary State agency decision/action by the TRC and that such challenge was barred by R. 2:2-3(a) until Final State action on the Grant. The Trial court accepted that position and dismissed plaintiff's Complaint as to all defendants with prejudice. As shall be detailed, that dismissal of all Counts/claims with prejudice, against Keansburg as well as the State defendants, was in error.

STATEMENT OF FACTS

As this is an Appeal of an Order Dismissing the Complaint on a Motion to Dismiss as per R. 4:6-2 (Pa25-48), the relevant facts are as essentially as detailed in the First Amended Complaint. The State of New Jersey, as the owner/custodian of riparian lands in the State, is and has been the owner of the Subject 3.54-acre parcel

located adjacent to the beach/bay in downtown Keansburg, now known and identified as Block 184 Lot 3.02. The plaintiff Jersey Shore Beach and Boardwalk Company, Inc. (hereinafter “Jersey Shore”) for the past approximately 100+ years has owned and operated a substantial amusement park business on its owned and leased properties., known as Keansburg Amusement Park, in the immediate vicinity of Lot 3.02, including Block 184 Lot 4 immediately adjacent to the State’s Lot 3.02. (Pa25-26, ¶ 3)

The State of New Jersey, through its agency defendant Tidelands Resource Council, has been responsible to manage and administer its Tidelands/riparian property at Lot 3.02 for many years. (Pa30, ¶ 9) Formerly under water, the Lot 3.02 property has for many yeas been dry land, apparently filled in over time. There is no issue or dispute as to its State-owned riparian status. Since about 1940 the Lot 3.02 property has been used by the defendant Keansburg as a 300+ parking space public parking lot, providing parking to the general public for access to the Keansburg beach and bay for bathing, fishing and water related activities as well as such beach-related boardwalk businesses and recreation facilities, including Jersey Shore’s amusement park. The use of the Lot 3.02 property as a public parking area under Keansburg was authorized in about 1940 pursuant to a Tidelands Lease between the

State's Tidelands Resource Council (TRC) and Keansburg. (Pa62-65) That initial Lease apparently expired in 1967, but Keansburg continued to utilize the riparian property as a paid public parking area, and also expanded the paved parking lot beyond the original leased bulkhead limits in the 1970's. This continued use apparently was without continued lease payments to the TRC for a number of years. (See TRC Report dated December 7, 2022, Pa62-65).

By way of brief legal background, under New Jersey law, the State of New Jersey is the owner of all "Tidelands" also known as "Riparian lands," being all lands identified as new or having been formerly flowed by the mean high tide of a natural waterway. See N.J.S.A.12:30-10 and N.J.S.A.13:1B-13. (Pa29-38, ¶ 4-8) Pursuant to the long-established common law "Public Trust Doctrine", all such tidelands are subject to limitations or restrictions against interfering with or burdening the public's inherent rights to access and use Tidelands property as related to the public's right to access and use natural bodies of water, inclusive of beaches and ocean waters, for bathing and recreation purposes. The defendant Tideland Resource Council (TRC) is an agency within the New Jersey Department of Environmental Protection that is charged with managing and administering the States riparian lands, and giving preliminary reviews and approval to leases and conveyances of such lands by the

State, See N.J.S.A.12:3-1 through 3-71. (Pa30-31, ¶ 9-12) The “Public Trust Doctrine” has been part of the common law of New Jersey since 1776 and was codified into the New Jersey Statutes in 2019 by N.J.S.A.13:10-150 through 156. The State DEP thereafter promulgated administrative rules and regulations under that statute authority. See N.J.A.C.7:7-1 et. seq. Those Regulations include requirements that municipalities --- both in public development and private development approvals --- have an obligation to provide adequate public access to lands and waters subject to public trust rights. See N.J.A.C.7:7-9.48 and N.J.A.C.7:7-16.9. As detailed in the Regulations, municipalities are encouraged but not required to establish and file with the DEP a “municipal public access plan” providing for public access to riparian and ocean/water related facilities. To date, Keansburg has not established a “municipal public access plan.” Municipalities that do not establish such a Plan are still bound by the Statute and Regulations, which include an affirmative administrative obligation to protect and provide for public access to waterways in all development projects and approvals after July 2, 2019. (Pa32-34 ¶ 16-23).

In that context, in July 2005 the defendant Keansburg designated the entire municipality as an “Area in Need of Rehabilitation” as per the then recently enacted

Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A-1 et. seq. On February 9, 2006, Keansburg by Ordinance 1403 adopted the “Beachway Avenue Waterfront Redevelopment Plan”, establishing a plan for the private development of a small area of the Borough along the beachfront inclusive of the subject property and other properties owned or leased by the plaintiff for their business. The plaintiff then initiated the first of several lawsuits against such redevelopment plans; those being concluded or mooted by Keansburg’s adoption of the superseding Second Amendment Beachway Avenue Waterfront Redevelopment Plan in 2016. (Pa35, ¶ 25-26).

The Second Amended Beachway Avenue Waterfront Redevelopment Plan was adopted as an overlay to the existing zoning on an area of approximately ten acres along the beachfront and including Block 184 Lots 1, 3 (now 3.02 and 3.03) with the public parking area. The Plan provides as its primary goal the development of several multi-story apartment buildings at a density of fifty units per acre in and on the Lot 3.02 tidelands parcel now occupied by the public parking area for the beach and related recreation facilities. The parking facilities in the Plan would be much more limited and largely dedicated and available only to residents of the new apartment buildings, and not to the public. Although the Plan references an intent to

require improvements to “pedestrian access” to the Keansburg beach and waterfront, the fact is that the Plan proposes and intends that almost all of the public parking area/spaces are to be eliminated, with the limited parking in Plan area to be strictly available for use only by the residents of the multi-story apartment buildings to be established. Also, no public handicapped parking will be preserved. (Pa35-36, ¶ 27-29). The plaintiff asserts that this Plan is in contradiction and violates the Public Trust Doctrine and Statute, and the NJDEP “public access” rules.

The furtherance of the Second Amended Redevelopment Plan is based and contingent upon Keansburg obtaining title to the tidelands Lot 3.02 from the State and then conveying ownership to the designated redeveloper. The redeveloper will then clear the land, eliminate the existing public parking area, and construct the Plan’s multi-story development. (Pa37-38 ¶ 33-35) To that end, on March 2, 2018 the defendant Keansburg filed an application to the defendant TRC for an unconditional “Tidelands Grant” for Lot 3.02. (Pa38, ¶ 36) While that Application was pending, on May 3, 2019, the Public Trust doctrine Law was codified and adopted by Chapter 81 Laws of 2019 as N.J.S.A.13:10-150 to 156, effective July 2, 2019. As per that law and the DEP Regulations promulgated thereunder for public access to such lands, any development of public or private lands adjoining the

navigable waters or the oceanfront must meet certain requirements for preserving or enhancing public access to such waterways or beach. (Pa39, ¶ 40-43) However, in the grant Application, the defendant Keansburg failed to openly disclose to the TRC, the DEP or the Attorney General that the purpose of the Grant Application was to ultimately re-convey the unrestricted Grant title to Lot 3.02 to a re-developer to construct a substantial development thereon and essentially eliminate public parking for the beach and related amenities. (Pa41, ¶ 48-49)

Without any notice to the Plaintiff Jersey Shore, the Keansburg Grant Application came before the TRC at its December 7, 2022 public meeting. The TRC on that date voted to approve Keansburg Riparian Grant without any restrictions as to use, for consideration of \$1,591,173 and payment to the State of unpaid back license fees. (Pa41, ¶ 50-51) At its February 8, 2023, public meeting, the TRC approved the Official Minutes of the December 7, 2023 TRC meeting; thus referring the Grant Application/approval to the DEP Commissioner and Attorney General for their review and action. (Pa61)

On April 20, 2023, plaintiff Jersey Shore filed an “Adjudicatory Hearing Request and Tracking Form” and Letter requesting an “adjudicatory hearing” to challenge the TRC action. On May 15, 2023, defendant Keansburg filed an objection

to such adjudicatory hearing. On February 7, 2024, the DEP Office of Legal Affairs provided a letter formally denying the Jersey Shore application/request for an Adjudicatory Hearing. (Pa67-69) On March 24, 2024, the plaintiff Jersey Shore filed a timely Notice of Appeal as to that Adjudicatory Hearing Denial (Docket A 002198-23). That Appeal is now pending, with oral argument as of now unscheduled. (Pa113)

On January 22, 2024 --- prior to the DEP February 7, 2024 Denial of an Adjudicatory Hearing --- the plaintiff Jersey Shore filed the instant Complaint (Pa1-27) seeking a Declaratory Judgment and Order by way of Mandamus as to any Riparian Grant application as to Lot 3.02 by Keansburg. On April 2, 2024, plaintiff filed an Amended Complaint correcting the Lot involved to Lot 3.02. (Pa25-48) The plaintiff on May 6, 2024 subsequently filed a voluntary Stipulation Dismissing T&M Associates (Keansburg's Engineer) as a defendant. In lieu of filing Answers, the defendants TRC, DEP and Attorney General represented by DAG Stegman-Freitag, and defendants Keansburg/O'Hare represented by Attorney Clark each on or about May 6, 2024 filed separate Motions to Dismiss the Amended Complaint as per R. 4:6-2 for failure to state a claim and lack of subject matter jurisdiction. (Keansburg Pa51-68; State Pa70-71), with supporting Briefs. Opposition papers were filed by

Plaintiff Jersey Shore, and the motions were presented before the Honorable Robert Lougy, J.S.C. on September 24, 2024. By Order dated September 24, 2024¹, with an accompanying written Findings of Fact and Conclusions of Law (Pa98-103), the Court granted the defendants' Motions and dismissed the plaintiff's Amended Complaint with prejudice. (Pa98) The plaintiff Jersey Shore thereafter filed a timely Appeal on November 7, 2024 (Pa104).

STATEMENT OF PROCEDURAL HISTORY

Plaintiff Jersey Shore filed the instant Complaint for Declaratory Judgment. Mandamus and Injunction on January 22, 2024. (Pa1-24) Before any responsive pleadings were filed, on April 2, 2024 the plaintiff filed the Amended Complaint, (Pa25-47) essentially correcting the subject property Lot number from the incorrect Lot 3.01 to the correct Lot 3.02. Plaintiff thereafter on May 6, 2024 filed a voluntary Stipulation dismissing T&M Associates (Keansburg Borough Engineers) as a defendant.

In lieu of Answers, on May 6, 2024 the defendants TRC, DEP, and Attorney General filed a Motion to Dismiss the Complaint as per R.4:6-2, (Pa70-71), and the defendants Keansburg/O'Hare filed a similar Motion to Dismiss. (Pa51-52) In

¹ The Transcript of the motion hearing on September 24, 2024 is "1T".

support of the Motions, the Keansburg defendants submitted and relied upon certain limited public agency records and correspondence of the TRC and DEP. (Pa53-68) Plaintiff Jersey Shore filed a responsive Brief in opposition to the collective Motions.

On September 24, 2024, the Court (Honorable Robert Lougy, J.S.C.) conducted oral argument on the Motions. (1T) On September 24, 2024, the Court rendered an Order, with written Findings of Fact and Conclusions of Law, granting the Motions to Dismiss the Amended Complaint with prejudice. (Pa98-103) On November 7, 2024, plaintiff Jersey Shore filed a timely Appeal of that Order and Court ruling. (Pa104-115)

LEGAL ARGUMENT

POINT I

THE COURT BELOW ERRED IN THE DISMISSAL OF THE COMPLAINT UNDER R.4:6-2 ON THE BASIS THAT JURISDICTION AS TO THE CHALLENGE TO KEANSBURG APPLICATION FOR A RIPARIAN GRANT LIES EXCLUSIVELY IN THE APPELLATE COURT UNDER R. 2:2-3(a) (APPEALS ORDER DISMISSING COMPLAINT Pa98)

As noted previously and emphasized here, this is the Appeal of a summary dismissal of plaintiff's Complaint under R.4:6-2; the Court concluding the Complaint fails to state a claim upon which relief can be granted,. As is well known, the seminal case on the Standards applicable in such a Motion is Printing Mart v. Sharp Electronics, 116 N.J. 739 (1989). That case specifies that on such a Motion the Complaint and allegations must be searched in depth and with liberality to determine if a cause of action can be gleaned even from an obscure comment or reference, particularly if further discovery is taken. Every reasonable inference is to be accorded to the plaintiff's claims and the Motion is to be granted only in rare instances and ordinarily without prejudice. A Complaint should not be dismissed on a R. 4:6-2 Motion where a cause of action is suggested by the facts and a theory or basis for actionability could be articulated by an amendment of the Complaint. See e.g., Wild v. Carriage Funeral Inc., 241 N.J. 285, 287 (2020); Dimitrakopoulos v.

Borrus Goldin, 237 N.J. 91; 107-108 (2019); Lederman v. Prudential Life Ins., 385 N.J. Super. 324, 349 (App. Div.), cert den. 188 N.J. 353 (2006). As a Motion to Dismiss as per R. 4:6-2, the Motion is based upon the Complaint pleadings themselves, with the factual claims to be accepted as true and all inferences to be in favor of the plaintiff's claims. See Lederman, supra; Hoffman v. Hampshire Labs Inc., 405 N.J. Super. 105, 112 (App.Div. 2009). It should be noted that the facts as asserted in the Complaint may properly be supplemented, demonstrated, or corrected by documents in the public record, and considered by the reviewing Court. See Banco Popular N.A. v. Gandi, 184 N.J. 161, 181 (2005).

The primary point of the collective defendants' Motion to Dismiss --- and the Trial Court's ruling --- was that any claim to a contesting or challenging the Keansburg Application for an unconditional Riparian Grant or the TRC preliminary approval of such Grant is at this point non-justiciable unless R. 2:2-3 (a)(2). That Rule states as follows:

- (a) As of Right.** Except as otherwise provided by R. 2:2-1(a)(3) (final judgments appealable directly to the Supreme Court), and except for appeals from a denial by the State Police of an application to make a gun purchase under a previously issued gun purchaser card, which appeals shall be taken to the designated gun permit judge in the vicinage, appeals may be taken to the Appellate Division as of right

(2) to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer excepting matters prescribed by R.8:2 (tax matters) and matters governed by R. 4:74-8 (Wage Collection Section appeals), except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise;

For an appeal as of right to the Appellate Court to lie under this cited *Court Rule*, there must be a FINAL decision or action of the relevant state administrative agency or officer, with the *Court Rule* further providing "...that that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative before any administrative agency or officer, unless the interest of justice requires otherwise...

The fact is the collective defendants' Motion and position --- that the plaintiff's Complaint is not valid under R. 2:2-3 as jurisdiction to challenge final State Agency Decisions is in the Appellate Division --- is simply not applicable here as the Keansburg Application for a Riparian Grant and the TRC's preliminary approval of such Grant is simply not "final". The defendant's position and the Court ruling is that at this point in the ongoing administrative process, the plaintiff Jersey Shore has no right or ability to challenge the application by Keansburg or TRC

preliminary decision/recommendation. In reality, given the DEP's denial of the request for an "adjudicatory hearing" and the absence of any Notice or hearing process in the remaining administrative process for a Riparian Grant before the DEP Commissioner and Attorney General, neither the plaintiff, nor anyone else, has any forum or avenue in the remaining Riparian Grant administrative process to proffer any objection, evidence, or input, or to establish a record for Court review.

The State defendants and defendant Keansburg referenced and relied upon -- - as the lynchpin of their legal position for dismissal --- R.2:2-3(a) that by its own terms only applies to "...final decisions or actions of any state administrative agency or officer ..." and does not apply if there is "available a right of review before any administrative agency or officer." The Trial Court adopted that position. While the TRC has voted to *preliminarily* recommend approving the Tidelands Grant and the Consideration for that Grant, this TRC's preliminary approval is only one component of a multifaceted review and ongoing administrative approval process that ultimately requires the affirmative review and approval of other additional agencies and officials before that preliminary approval of the Riparian Grant becomes "final". Indeed, while the defendants and the Trial Court all cite and rely upon, that Rule R. 2:2-3(a)(2), that Rule is only is applicable to "...final decisions

or actions of any state administrative agency or officer...” that may be appealed as of right; however, it is clear and undisputed that the administrative process being challenged by plaintiff here is not “final” in any sense.

The reality is that the TRC in *preliminarily approving* at their administrative level is indeed a “decision” or “action”, but it is not a “FINAL decision” or “FINAL action” in any legal or administrative sense, and will not become so until such time as same is further reviewed and approved by at least the DEP Commissioner and the defendant Attorney General (*which is why the NJDEP and Attorney General are named as direct parties) which has not occurred yet. Only then will there be a binding approval of the Riparian Grant to the defendant Keansburg. The actions of the TRC and inactions of the DEP and Attorney General are not yet subject to an appeal of right under R.2:2-3(a)(2). That being the case, the defendants’ position -- - and the Trial Court’s determination --- that jurisdiction is exclusive in the Appellate Division --- does not make any sense when actually there is literally NO jurisdiction on the application and its status or validity YET in the Appellate Division.

The basis and reason for this separate independent lawsuit is to contest the propriety of the Keansburg application and the lack of disclosure of its ultimate

purpose and intent --- which plaintiff asserts will be in violation of the Public Trust Doctrine and Laws. Plaintiff seeks to insure that the DEP Commissioner and Attorney General have full disclosure so as to be able to access and properly consider the statutory and common law requirements before the administrative process continues and becomes finalized without those FACTS and positions being exposed and considered in the record. Plaintiffs' Complaint sought the Trial Court to hear the facts and consider whether the now undisclosed "Plan" to abolish 300+ paid public parking spaces and construct a multi-story apartment building on this Riparian property is in contradiction to N.J.S.A. 12:3-33 (Grant of riparian lands for public park, place, street or highway) and N.J.S.A. 12:3-34 (Conditions in grant) in the *Tidelands Act*, the public access standards required by the Common Law Public Trust Doctrine, and public access standards required by the Statutory Public Trust Doctrine and the NJDEP's "Public Access Rule." Further, the Complaint seeks to require and insure that this non-disclosed, ultimate Keansburg intent and purpose be fully disclosed in the application process, so that these State reviewing officials will fully consider that Plan in the context of their Public Trust charge and responsibilities. Hence, the request for declaratory and injunctive relief against the named defendants is to require full disclosure of the intent and purpose of the

Keansburg grant application and that such facts are known and considered in the administrative process --- which clearly otherwise did not and will not occur. Plaintiff is entitled to a declaratory judgment and injunctive relief in the way of a mandamus from this Court to require full disclosure by the Keansburg application and to insure that the relevant facts and purpose of the Grant is disclosed and properly considered with the Public Trust Doctrine in the administrative process and record. In any event, contrary to the arguments of the State defendants and Keansburg, there is no exclusive jurisdiction in the Appellate Division – nor can there be until the decision is “final” and no more administrative review is available.

POINT II

AS AN ADJACENT PROPERTY OWNER PLAINTIFF HAS STANDING TO BRING THE LEGAL CLAIMS IN THIS COMPLAINT DURING THE ONGOING ADMINISTRATIVE REVIEW AND APPROVAL PROCESS (APPEALS ORDER DISMISSING COMPLAINT Pa98)

Standing is governed by R. 4:26-1, which provides that “{e}very action may be prosecuted in the name of the real party in interest.” There is no distinction between a party in interest and standing in New Jersey. New Jersey Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402 (App.Div.), certif. granted. 152 N.J. 13 (1997), appeal dismissed as moot, 152 N.J. 361(1998); see also Pressler, Current

N.J. Court Rules, comment on R. 4:26. Case law further holds that standing refers to a party's "ability or entitlement to maintain an action before the court." New Jersey Citizen Action, *supra*, at 409. To be entitled to sue, a party must have "a sufficient stake and real adverseness with respect to the subject matter of the litigation." In re Adoption of Baby T., 160 N.J. 332, 340 (1999). Additionally, "[a] substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision is needed for the purposes of standing." *Id.* Standing has been broadly construed in New Jersey. Reaves v. Egg Harbor Township, 277 N.J. Super. 360, 366 (Ch. Div. 1994). Any slight additional interest is sufficient to afford standing to private individuals or organizations to raise issues of public interest. Jordan v. Horsemen's Benevolent and Protective Ass'n, 90 N.J. 422, 432 (1982); Salorio v. Glaser, 82 N.J. 382, 491 (1980). In Right to Choose v. Byrne, 91 N.J. 287, 313 (1982) the Supreme Court made it clear that a coalition organization that alleged a "... slight additional interest ..." beyond those interests possessed by any ordinary citizen or organization confers "standing" on any such citizen or organization to challenge the validity of claimed wrongful government action in Superior Court. Significantly, the case law does not qualify or limit the type of "interest", nor is it limited to issues of "monetary interest", "financial interest",

“pecuniary interest”, or even “great public interest”, but merely “interest”. It is worthy of note that the common law case law explaining the liberal standing requirement that a litigant merely demonstrate infringement of an “interest” is in accord with the New Jersey Declaratory Judgments Act which provides in relevant part as to this case as follows:

A person interested under a deed, will, written contract or other writing constituting a contract or **whose rights, status or other legal relations are affected by a statute,** municipal ordinance, contract or franchise, **may have determined any question of construction or validity arising under the** instrument, **statute,** contract or franchise **and obtain a declaration of rights, status, or other legal relations thereunder.** (Emphasis added).

[N.J.S.A. 2 A:16-53]

Further, N.J.S.A. 2A:16-53 provides that:

A person ... whose rights, status or other legal relations are affected by a statute, ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status, or other legal relations thereunder.

Plaintiff alleges that their business abuts the public parking lot with 300+ public parking spaces that will be removed, and that the abolishing without replacing those public parking spaces along the waterfront is a violation of both the Common Law and the *statutory* Public Trust Doctrine. Moreover, the plaintiff claims that the

planned change in the future use of the property from the long in place 300+ space Public Parking Lot also cumulatively violates the statutory restrictions on change of use found in the *Statutory* Tidelands Act. As plaintiff's rights are "affected" by the Keansburg Application and the TRC Preliminary Consideration, plaintiffs have standing and the legal right under N.J.S.A. 2A:16-53 to "...have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status, or other legal relations thereunder that should certainly include Declaratory Judgment that non-disclosure in the Keansburg Riparian application of the ultimate intended disposition and use of the Grant Property. It is certainly appropriate that such intended disposition and use be disclosed and known to the reviewing State officials so that the effect upon the Public Trust Laws and Obligations may be properly considered.

Further, plaintiff clearly has standing and legal right and authority to seek to enforce the rights created by the Common Law and statutory Public Trust Doctrines themselves. Private parties have always all been recognized as each having the independent rights to bring civil lawsuits to challenge private or government action that in any way infringes upon right established by the Public Trust Doctrine.

POINT III

THE COURT BELOW ERRED IN DISMISSING THE COMPLAINT WITH PREJUDICE. THE COURT SHOULD HAVE, AT MOST, DISMISSED THE CLAIMS AGAINST THE DEP AND ATTORNEY GENERAL WITHOUT PREJUDICE AND HAVE ALLOWED AN AMENDED COMPLAINT AGAINST KEANSBURG SEEKING FULL DISCLOSURE OF THE INTENDED PLAN FOR THE PROPERTY AND FOR INJUNCTIVE RELIEF AS TO THE TRC PENDING THAT DISCLOSURE (APPEALS THE ORDER DISMISSING COMPLAINT WITH PREJUDICE Pa98)

As referenced earlier, as defined in Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989) a Court in considering a Motion to Dismiss a Complaint as per R. 4:6-2 on the pleadings is not concerned with the ability of the plaintiff to prove the allegations and plaintiff is entitled to every reasonable inference of fact. The Supreme Court emphasized that such Motions to Dismiss are “almost always brought at the very earliest stage of the litigation, should be granted only in the rarest of instances”. (at p. 772). The Court further specified that the reviewing Court should conduct a “meticulous and indulgent examination” of the allegations and, to the extent appropriate, dismiss Counts without any basis and allow the filing of an Amended Complaint to address or flesh out the valid causes of action that are “suggested” by the facts alleged. (Id. At p. 746, 772). See Van Natta Mechanical

Corp. v. Dr. Staulo, 277 N.J.Super. 175, 180-180, 187 (App.Div. 1994); Lakeview Mem. Park Assn. v. Burlington Cty. Constr. Bd. of Appeals, 463 N.J. Super. 459, 471-472 (Law Div. 2019). In the instant case, the Amended Complaint clearly “suggested” valid causes of action at the least against the Keansburg defendants and the TRC (at least for injunctive relief).

In fact, the Amended Complaint outlines and asserts the following relevant facts/allegations. In 2016 this defendant Keansburg adopted the Second Amended Beachway Avenue Waterfront Redevelopment Plan, which establishes an overlay zoning over approximately 10 acres, including the 3.54 acre Lot 3.02 (the Riparian Lot) with its public parking area. (Pa35, ¶ 27) Keansburg on March 2, 2018 filed the Application for a Riparian Grant to the TRC seeking to acquire unconditional title and ownership of the Riparian Lot 3.02. By terms of the Second Amended Redevelopment Plan, Keansburg ultimately plans to convey that Lot 3.02 to a designated redeveloper who will then be authorized to abolish the 300+ space public parking lot on Lot 3.02 --- now and for years serving as parking and public access to the beach/ocean nearby and the boardwalk amenities and businesses --- and construct on the property several multi-story residential buildings. (Pa38, ¶ 37-38). Keansburg had been occupying and utilizing the Riparian Lot 3.02 since the 1940's

as a public parking lot, initially by various Riparian Leases with the TRC that had expired. (Pa62-65) On or about May 1, 2019, the TRC approved and executed a new “Revocable License” with Keansburg, authorizing a new lease/rental of Lot 3.02 for the period of May 1, 2019 through April 30, 2034. (Pa56-59) That Lease/License was for continued use of Lot 3.02 as a municipal parking lot only (Pa36 ¶ 30-31). On May 3, 2019 --- while the Keansburg Riparian grant Application was pending --- the Public Trust doctrine Law (N.J.S.A. 13:¶ 150 To 156) was enacted, which essentially codified the common law Public Trust doctrine into positive statutory law. Thereafter, pursuant to that statutory authority, the State DEP adopted Regulations into the Administrative Code, most significantly and relevant being the “public access” regulations applicable to municipalities. See N.J.A.C. 7:7-16.9 and 7:7-9.48 (Pa39, ¶ 42-47). Keansburg in its TRC Application for this Riparian Grant to acquire Lot 3.02 failed to disclose its ultimate Plan and intention --- upon its own obtaining of the Grant --- to then convey that Lot 3.02 along with other lots to a third party private redeveloper to be used as per the Redevelopment Plan to remove the 300+ space parking and then construct and locate several multi-story apartment Buildings thereon with minimal or no public parking, other than for development residents. (Pa41, ¶ 48).

The Keansburg Riparian Grant Application came before the TRC at its public meeting on December 7, 2022. Although the TRC staff had authored a report/recommendation as to this Grant (Pa62-65), the staff Report did not fully or accurately discuss or disclose the Plan of Keansburg's intent to then convey the Riparian Lot to a private redeveloper to be then used for construction of multi-story apartment buildings with elimination of the public parking. As a consequence, the TRC apparently acted to preliminarily approve the Grant, conditioned only upon payment of purported fair market of \$1,591,173 and payment of unpaid back lease payments. This hearing and TRC consideration was without notice to the plaintiff, and no objector appeared at that meeting. The minutes of that December 7, 2022 TRC meeting and action were subsequently approved by the TRC at its meeting on February 8, 2023. Thereafter, as per the Riparian Grant approval process, the Grant Application thereafter must be reviewed and approved by the DEP Commissioner and the Attorney General. None of those reviews/actions requires public notice to interested parties or a hearing. Upon information and belief, no review or approval has been yet effected by at least the Attorney General. (See 1T)

On April 20, 2023, plaintiff Jersey Shore filed an "Adjudicatory Hearing Request and Tracking Form" seeking a formal administrative law hearing to

challenge the TRC Grant preliminary decision. Keansburg filed an objection on May 15, 2023. On February 7, 2024, the DEP Office of Legal Affairs by Letter formally Denied the Jersey Shore Request for an administrative adjudicatory hearing at which the facts of Keansburg's Plan and intended change of use of the Riparian Lot 3.02 could be developed and demonstrated. (Pa67-69). Plaintiff Jersey Shore filed a Notice of Appeal of that DEP Denial on March 22, 2024, which Appeal is now pending in the Appellate Court (Docket 002198-23). (Pa113)

With those facts asserted in the Complaint, it is alleged essentially in the Complaint that defendant Keansburg has filed and is pursuing a misrepresented or false Riparian Grant Application that is ultimately to allow the conveyance and use of Lot 3.02 in contradiction to the Public Trust law and public access regulations. The Complaint further asserts that, because of these Keansburg non-disclosures and misrepresentations, the TRC has been misled and its preliminary approval of a Grant should be enjoined pending further disclosure and proper review.

It is submitted that the Amended Complaint --- viewed as asserting a Declaratory Judgment challenge to the Grant Application as filed by Keansburg as being misrepresented, false, and pursuing a non-disclosed plan to violate the Public Trust law and its public access requirements and regulations --- certainly presents a

viable and legitimate cause of action. The filing and pursuit of a false/misrepresented Application by a Municipality to a State Agency is certainly an action by that municipality that can be challenged by an interested party having standing by a Declaratory Judgment action in Superior Court, Law division as per N.J.S.A. 2A:16-50. Actions and Applications by municipalities are regularly and routinely challenged by persons having standing through such lawsuits in the Law Division. In fact, the Appellate Division has no direct jurisdiction as to such lawsuits, but only appellate jurisdiction after decision in the Law Division.

To the extent the Amended Complaint was phrased or included claims seeking to reverse the TRC action or to require the DEP Commissioner or Attorney General to take some action, those claims or Counts could and should have been deferred or dismissed without prejudice under the Printing Mart analysis. Such deferral or dismissal would avoid any jurisdiction issue or violation of R.2:2-3(a) and Appellate Court jurisdiction over State Agency determinations, while properly allowing the Law Court to make a determination if the Keansburg Grant Application and its intentions have been fully and properly disclosed, and whether those plans and intentions are in compliance with the Public Trust Law.

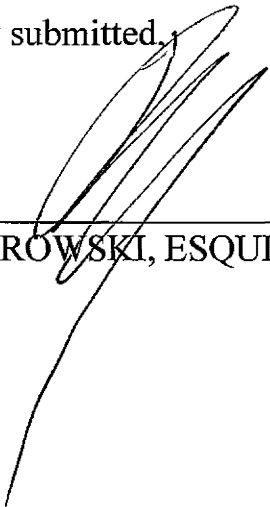
In fact, that the claims/Counts of the Amended Complaint seeking affirmative relief against the State defendant could be dismissed by the Trial Court as per R. 2:2-3(a) --- while the Complaint Counts as to defendant Keansburg's Application being misleading and/or in furtherance of a Plan for third-party redevelopment in contravention to the Public Trust Law and regulations should be allowed to be continued and/or restated in an Amended Complaint against the Keansburg defendants --- was the primary position asserted by plaintiff at the Dismissal Motion Hearing. (See 1T10-3 to 18-24). The filing and pursuit of a misleading Application for a Riparian Grant by a municipality without full disclosure of the intended Plan and use of the Grant property and with that intended Plan/use being contrary to the Public Trust Doctrine and public access regulations certainly presents a viable cause of action for a Complaint against that municipality under the Declaratory Judgment Act. To the extent that confusion or issue arises on jurisdiction because of naming the State agencies in the Amended complaint, the proper Court action would be to dismiss the Complaint against the State defendants only or limited it to possible injunctive relief. That is the judicial and judicious course prescribed by Printing Mart, and that the Court below should have ruled and directed. The Trial Court's

dismissal of the entire Amended Complaint was unwarranted, and contrary to the Printing Mart analysis and instructions.

CONCLUSION

For the foregoing reasons, the Trial Court's analysis and Order dismissing the plaintiff's entire Complaint with prejudice is invalid. This court should reverse and remand that Order with proper instructions as to a limited dismissal without prejudice and allowance of the filing of an Amended Complaint naming the Keansburg defendants as appropriate.

Respectfully submitted,

By: 
R.S. GASIOROWSKI, ESQUIRE

Dated: April 4, 2025

Jersey Shore Beach & Boardwalk Co., Inc. a/k/a Jersey Shore Beach & Boardwalk Inc.	:	Superior Court of New Jersey
	:	Appellate Division
	:	Docket No.: A-0684-24
	:	
	:	
Plaintiff-Appellant,	:	<u>Civil Action</u>
V.	:	
	:	On Appeal From
N.J. Tidelands Resource Council;	:	Superior Court of New Jersey
N.J. Department of Environmental	:	Law Division - Mercer County
Protection; Matthew J. Platkin,	:	
Attorney General of New Jersey;	:	Sat Below:
Borough of Keansburg; T&M	:	Hon. Robert t. Lougy, A.J.S.C.
Associates; and Raymond O'Hare	:	On Motion to Dismiss Complaint
	:	per <u>Rule</u> 4:6-2
Defendant-Respondent.	:	
	:	

BRIEF OF STATE RESPONDENTS
Date Submitted: July 10, 2025

Sookie Bae-Park
Assistant Attorney General
Of Counsel

Charlie A. Stegner-Freitag
(ID: 327702021)
Deputy Attorney General
On the Brief

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW
JERSEY
R.J. Hughes Justice Complex
P.O. Box 093
Trenton, New Jersey 08625
Attorney for Respondents, N.J. Tidelands
Resource Council, N.J. Department of
Environmental Protection, & Matthew J.
Platkin, Attorney General of N.J.
(609) 376-2950
Charlie.Stegner-Freitag@law.njoag.gov

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY AND STATEMENT OF FACTS	2
A. Statutory and Regulatory Background of the TRC & the Conveyance of Tidelands.	2
B. The History of Block 184, Lot 3.02.	6
C. History of Litigation Regarding the Property.	8
ARGUMENTS	10
POINT I	
THE TRIAL COURT PROPERLY DISMISSED APPELLANT’S AMENDED COMPLAINT WITH PREJUDICE	10
A. Judicial review of a final agency action belongs in the Appellate Division.	11
B. Here, lack of subject matter jurisdiction warrants dismissal with prejudice.	14
POINT II	
REVIEW OF FUTURE ACTIONS OR DECISIONS REGARDING THE GRANT ARE NOT RIPE AND WERE PROPERLY DISMISSED	16
POINT III	
APPELLANT’S STANDING WAS NOT CONTESTED AND IS NOT ON APPEAL.	18
CONCLUSION	19

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>Cases</u>	
<u>966 Video v. Mayor & Twp. Comm. of Hazlet Twp.</u> , 299 N.J. Super. 501 (Law Div. 1995)	17
<u>Atlantic City Elec. Co. v. Bardin</u> , 145 N.J. Super. 438 (App. Div. 1972).....	3
<u>Bacon v. N.J. State Dep’t of Educ.</u> , 443 N.J. Super. 24 (App. Div. 2015).....	10
<u>Bailey v. Driscoll</u> , 19 N.J. 363 (1955).....	3, 4
<u>Bailey v. Driscoll</u> , 34 N.J. Super. 228 (App. Div. 1955).....	2
<u>Barker v. Carr</u> , 369 U.S. 186 (1962)	11
<u>Beaver v. Magellan Health Servs., Inc.</u> , 433 N.J. Super. 430 (App. Div. 2013).....	13
<u>Caporusso v. N.J. Dep’t of Health</u> , 434 N.J. Super. 88 (App. Div. 2014).....	13
<u>Cent. R.R. Co. v. Neeld</u> , 26 N.J. 172 (1958)	12
<u>Cohen v. Bd. of Trustees of U. of Med. & Dentistry of N.J.</u> , 240 N.J. Super. 188 (Ch. 1989)	15
<u>Equitable Life Mortg. v. N.J. Div. of Tax’n</u> , 151 N.J. Super. 232 (App. Div. 1977)	13
<u>G&W, Inc. v. Borough of East Rutherford</u> , 280 N.J. Super. 507 (App. Div. 1995)	14
<u>Gilbert v. Gladden</u> , 87 N.J. 275 (1981)	10, 11
<u>Infinity Broad. Corp. v. N.J. Meadowlands Comm’n</u> , 187 N.J. 212 (2006)	12
<u>K. Hovnanian Cos. of N. Cent. Jersey, Inc. v. N.J. Dep’t of Env’t Prot.</u> , 379 N.J. Super. 1 (App. Div. 2005)	17

<u>Le Compte v. State</u> , 128 N.J. Super. 552 (App. Div. 1974)	4, 5
<u>Le Compte v. State</u> , 65 N.J. 447 (1974)	3
<u>Leonard v. State Highway Dep’t</u> , 24 N.J. Super. 376 (Ch. Div. 1953)	4
<u>Loigman v. Twp. Comm. of the Twp. of Middletown</u> , 297 N.J. Super. 287 (App. Div. 1997)	15
<u>Notte v. Merchants Mut. Ins. Co.</u> , 185 N.J. 490, 501 (2006).....	14
<u>Pascucci v. Vaggott</u> , 71 N.J. 40 (1976)	11, 13
<u>Pfleger v. State Highway Dep’t</u> , 104 N.J. Super. 289 (App. Div. 1968).....	12
<u>Prime Acct. Dep’t v. Twp. of Carney’s Point</u> , 212 N.J. 493 (2013).....	14
<u>Switz v. Middletown</u> , 23 N.J. 580 (1957)	15
<u>Taylor v. Sullivan</u> , 119 N.J. Super. 426 (App. Div. 1972)	3, 5
<u>Toll Bros., Inc. v. Dep’t of Env’t Prot.</u> , 242 N.J. Super. 519 (App. Div. 1990).....	13
<u>Twp. of Neptune v. Dep’t of Env’t Prot.</u> , 425 N.J. Super. 422 (App. Div. 2012).....	13

Statutes

N.J.S.A. 12:3	2
N.J.S.A. 12:3-10	4
N.J.S.A. 12:3-16	4
N.J.S.A. 12:3-32	4
N.J.S.A. 12:3-7	4
N.J.S.A. 13:1B-10, -13	2
N.J.S.A. 13:1B-13	passim

N.J.S.A. 52:14B-3.2..... 9

Court Rules

Rule 2:2-3 12

Rule 2:2-3(a) 16

Rule 2:2-3(a)(2)..... passim

Rule 2:2-4 12

Rule 4:6-2 10

Rule 4:9-1 14

Constitutional Provisions

N.J. Const. art. VI, § 5, ¶ 4 11

Other Authorities

Pressler & Vemiero, Current N.J. Court Rules, cmt. 3.2.1. on
 R. 2:2-3 (2024) 13

PRELIMINARY STATEMENT

Appellant, Jersey Shore Beach and Boardwalk Company, Inc. (Jersey Shore), sought a series of declaratory judgments and mandamus orders against the New Jersey Tidelands Resource Council, New Jersey Department of Environmental Protection, and the Attorney General of New Jersey, Matthew J. Platkin (collectively “State Respondents”) to require them to include a provision in a pending tidelands grant that would permanently restrict the use of the property as a parking lot or, in the alternative, to condition the sale of the property based on the income generated from its use as a parking lot if the grant is issued. However, at its core, this matter challenges a final administrative agency action and is only reviewable in the Appellate Division under Rule 2:2-3(a)(2).

To overcome that jurisdictional bar, Appellant now claims that it is seeking review of an interim or non-final agency action. But that argument does not help its cause because even if the court were to indulge that characterization, this matter should be dismissed as unripe.

The trial court rightly dismissed Appellant’s complaint with prejudice and this court should affirm.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

This appeal arises from a September 24, 2024, order of the trial court dismissing Appellant's challenge to the TRC's decision to convey State-owned riparian land for fair-market value to the Borough of Keansburg without a permanent easement for the property, better known as Block 184, Lot 3.02 (the Property).

For context, Respondents provide a brief discussion about the Tidelands Resource Council, the conveyance of riparian lands, and the history of the relevant Property.

A. Statutory and Regulatory Background of the TRC & the Conveyance of Tidelands.

The TRC has had numerous other names throughout its history (e.g., Planning and Development Council, Natural Resource Council), and the current form of the TRC is governed by N.J.S.A. 12:3; 13:1B-10, -13. See generally Bailey v. Driscoll, 34 N.J. Super. 228 (App. Div. 1955) (discussing history of the TRC and its statutory authority). The TRC's purpose is to act as the steward for all lands currently or formally flowed by tidal waters within the State's boundaries, meaning all lands now or formerly below the mean high watermark,

¹ Because they are closely related, these sections are combined for efficiency and the court's convenience.

commonly known as tidelands. Le Compte v. State, 65 N.J. 447, 450-51 (1974). See also Bailey v. Driscoll, 19 N.J. 363 (1955) (title to these lands was vested in the State by virtue of the sovereignty derived from Britain after the revolution). It is wholly within the DEP and acts only with the DEP Commissioner's and the Attorney General's approval. See N.J.S.A. 13:1B-13. Thus, any grant or lease issued by the TRC must be approved by the DEP Commissioner and the Attorney General.

As the owner of the tidelands, the State has absolute discretion in making any conveyances or granting licenses to these tidelands, subject to the governing statutory criteria. See Le Compte, 65 N.J. at 450-51; Atlantic City Elec. Co. v. Bardin, 145 N.J. Super. 438, 442-44 (App. Div. 1972); Taylor v. Sullivan, 119 N.J. Super. 426, 430 (App. Div. 1972) ("action or inaction by the [TRC] . . . in respect of grants of its riparian interests is not reviewable in terms of alleged abuse of discretion but solely on the basis of whether [its] action is within or without the bounds of the pertinent statutory limitations."). Consequently, the TRC has substantial discretion on whether, when, and under what conditions it may approve an application for a license/lease or grant of tidelands.²

² Licenses and leases cover rentals to use and occupy lands under set terms and conditions for a discrete period per a contract, and subject to a rental fee. There is no statutory or regulatory difference between a tidelands license or lease. A grant, on the other hand, constitutes a conveyance of the State's proprietary interest in tidelands for fair market value.

Anyone may apply for fee simple title to State-owned tidelands by applying to the TRC for a grant. Since approximately 1891, New Jersey has established procedures by which an individual or entity may obtain title through a grant of tidelands. The owner of the lands immediately landward of tidelands may apply for a grant of the tidelands in front of their property. Bailey, 19 N.J. 363; N.J.S.A. 12:3-7. Others may also obtain grants even if they were not the abutting upland owners. See N.J.S.A. 12:3-32; Leonard v. State Highway Dep't, 24 N.J. Super. 376 (Ch. Div. 1953), aff'd, 29 N.J. Super. 188 (App. Div. 1954).

If a municipality wishes to take fee simple title to the tidal lands within its borders it may submit an application to the TRC including an appraisal of the land's current value. The TRC reviews the application and assesses the applicant's appraisal against the TRC's own appraisal based on the fair market value of the land based on its current zoning and the highest and best use of the site. N.J.S.A. 12:3-10, -16. See also Le Compte v. State, 128 N.J. Super. 552, 561-62 (App. Div. 1974) (grant's valuation should be evaluated based on market value of property at time of conveyance). Upon a majority vote by the TRC the grant application and valuation is deemed "approved for a grant."

As part of DEP's duties, the DEP Commissioner, or their delegate, can approve TRC minutes, thereby approving the TRC's actions as required by N.J.S.A. 13:1B-13 ("No action shall be taken by the council except upon the

approval of the Commissioner of Environmental Protection”). However, the interim act of approving the meeting minutes is not the equivalent of a final approval from the DEP Commissioner of the substantive terms of the grant. The grant itself cannot be finalized until the TRC submits a draft of the grant for the DEP Commissioner’s approval, including any terms, conditions, or restrictions attached to the grant and transfer of title, along with approval of the valuation of the property. Ibid.

But, once the TRC has finalized the language in the grant including the agreed upon compensation, as a matter of established practice, the grant is sent to the DEP Commissioner to sign indicating their approval or veto (by not signing). See N.J.S.A. 13:1B-13; Le Compte, 128 N.J. Super. at 557. See generally Taylor, 119 N.J. Super. 426. If the DEP Commissioner does not sign the grant it is sent back to the TRC but the DEP Commissioner cannot dictate the contents of the grant as that is left to the TRC’s discretion.

If the DEP Commissioner approves of the grant it is then sent to the Attorney General, who in turn may sign or not sign the grant—with the same approval or veto authority as the DEP Commissioner. See N.J.S.A. 13:1B-13 (“no such leases or grants shall hereafter in any case be allowed except when approved and signed by the Commissioner of Environmental Protection and the Attorney General.”). Finally, the grant is sent to the Secretary of State to attest

to the signatures and give final approval of the grant. At this point the State has approved of the grant but the grant is not issued to the applicant until the applicant has paid the agreed upon compensation, as is true in typical transfers of property.

B. The History of Block 184, Lot 3.02.

The TRC (or its predecessor) issued a series of leases to the Borough beginning in 1940.³ The final historic lease became effective on June 1, 1952, for a fifteen-year term, and authorized the Borough to use the land for public parking. As with prior leases to the Borough, this lease permitted the Borough, upon application, to convert the lease to a grant for additional compensation but this lease allowed the Borough to convert the lease to a grant unencumbered by any restrictions on future use of the Property. This lease expired and was not renewed, although the Borough continued to use and occupy the lot for public parking without TRC authorization.

On March 6, 2018, the Borough applied for a riparian grant with the TRC (1321-02-003.3 TDG180001). However, TRC required payment of back rent

³ The Property was first leased to the Borough in 1940, but was cancelled two years later due to the Borough's violation of the covenant prohibiting use of the lot to generate income or for commercial enterprise. The parties entered into a second lease in 1943 which also prohibited the Borough from collecting fees associated with parking cars. Both leases offered the Borough the opportunity to convert the leases to grants for additional compensation.

for the Borough's historic unauthorized use and occupancy of the Property. The Borough consented, and to simultaneously address the back-payment issue and the Borough's ongoing use and occupation of the Property, the Borough filed a license application with TRC on March 20, 2019 (1321-02-0003.5 TDI190001). During that time in February 2019, the Borough subdivided the property from Block 184 Lot 3 to Lots 3.02 and 3.03. Lot 3.02 contains the original parking lot while Lot 3.03 contains dunes and the beach.

Thereafter, on May 1, 2019, the TRC held a public meeting during which they reviewed the Borough's application and determined the appropriate back pay and future rent for the Borough's use and occupation of the Property. The Appellant appeared as an objector during this meeting and presented arguments against the issuance of the license to the extent it could become a riparian grant. The Borough also appeared at the meeting to argue in support of its application for a tidelands license. After hearing both arguments and reviewing the TRC's assessed valuation of the property the TRC voted to approve a new fifteen-year license of Lot 3.02 to the Borough. (Pa057-059).⁴

This agreement requires the Borough to pay an annual rent along with back rent for the years where the lot was used without authorization. The license

⁴ Appellant's brief is referred to as "Ab" and Appellant's appendix is referred to as "Pa."

restricted the lot's continued use as a municipal public parking lot, and provided that "[a]ny development of the site contrary to [this use] will require a new license and new fee calculation." (Pa057). Any conveyance of the property or issuance of a grant requires the Borough to first pay back in full the back rent and/or any additional fees that have accrued. The TRC retained the ability to revoke the license at any time and for any purpose it deemed necessary and reasonable, and is not bound to renew the lease. The license was effectuated on January 9, 2020.

On December 7, 2022, the TRC by majority vote approved a grant to the Borough for Lot 3.02 without a restriction on the lot's future use. The sale price was determined based on assessing the lot's current zoning (commercial/residential), and the highest and best use of the site. The Appellant did not appear at the December 2022 meeting, however the TRC granted Appellant's request to make an appearance and speak to the TRC regarding the grant at the TRC's December 6, 2023, public meeting. The Borough also made an appearance and responded to the Appellant's statements at this meeting.

C. History of Litigation Regarding the Property.

On April 20, 2023, Appellant requested an adjudicatory hearing with the DEP appealing the TRC's decision to issue a grant to the Borough without a restriction on its further use to remain a parking lot. On February 7, 2024, the

DEP issued a letter denying Jersey Shore's request for an adjudicatory hearing noting that third-parties are generally not afforded a hearing before an administrative law judge. See N.J.S.A. 52:14B-3.2. As the Appellant is a third-party to the grant the request for an administrative hearing was denied.

On March 22, 2024, Jersey Shore filed an appeal of the DEP's denial with this court (see Dkt. No. A-2198-23), seeking a review of the DEP's hearing request denial and the merits of the grant terms including the sale price. The appeal is currently pending.

In the interim, Appellant also filed its initial complaint on January 22, 2024, in the Law Division, which they amended⁵ on April 2, 2024. It sought a series of mandamus orders against the State Respondents and declaratory judgments to have the trial court preemptively adjudicate the validity of claims it could bring if the grant was issued.

In May 2024 T&M Associates was voluntarily dismissed from the matter. State Respondents and the Borough filed motions to dismiss. Both arguing that the court lacked subject matter jurisdiction over the Amended Complaint. On September 24, 2024, the Honorable Judge Lougy dismissed the Amended Complaint with prejudice.

⁵ Those amendments did not alter the substance of their original complaint.

The Court determined it lacked the subject matter jurisdiction to hear the matter because it sought review of agency action over which the Appellate Division had sole authority. The court also found that to the extent the review was based on a preliminary agency action, such a claim would not be ripe for adjudication and the Appellant had failed to establish any hardship if judicial review was withheld. Jersey Shore timely appealed.

ARGUMENTS

POINT I

THE TRIAL COURT PROPERLY DISMISSED APPELLANT’S AMENDED COMPLAINT WITH PREJUDICE. (Responding to Point I & III)

The trial court properly dismissed Appellant’s Amended Complaint because the TRC’s actions are only reviewable in the Appellate Division under Rule 2:2-3(a)(2). Appellant cannot cure that jurisdictional defect by amending the complaint and so the court correctly dismissed it with prejudice.

An appellate court exercises plenary review of a trial court’s decision to grant a motion to dismiss under Rule 4:6-2. Bacon v. N.J. State Dep’t of Educ., 443 N.J. Super. 24, 33 (App. Div. 2015). Dismissal under this rule is proper when, as in this case, a plaintiff fails to state a claim upon which the subject court can grant relief due to that court’s lack of subject matter jurisdiction over the controversy. Gilbert v. Gladden, 87 N.J. 275, 281 (1981) (quoting Barker v.

Carr, 369 U.S. 186, 198 (1962)) (holding that when a court lacks subject matter jurisdiction its authority to consider the case is “wholly and immediately foreclosed.”)

Appellant’s Amended Complaint is based on the actions of the TRC, as approved by the DEP. See N.J.S.A. 13:1B-13.⁶ In other words, an appeal of a final administrative action. Per Rule 2:2-3(a)(2) such matters are within the exclusive jurisdiction of the Appellate Division to hear, consequently the court properly granted the State Respondents’ motion to dismiss for lack of subject matter jurisdiction under Rule 4:6-2(a). See Gilbert, 87 N.J. at 281.

**A. Judicial review of a final agency action
belongs in the Appellate Division.**

Superseding the prior practice of prerogative writs, New Jersey’s 1947 Constitution provides that “persons aggrieved by action or inaction of state or local administrative agencies could seek review . . . in the Superior Court ‘on terms and in the manner provided by the rules of the Supreme Court.’” Pascucci v. Vaggott, 71 N.J. 40, 52 (1976) (quoting N.J. Const. art. VI, § 5, ¶ 4). While

⁶ Due to the nature of the review process for issuing riparian grants and the specific facts involved in this matter the State Respondents have interpreted Appellant’s Complaint as seeking review of the Attorney General’s potential future actions. As discussed below, review of the Attorney General’s future actions is not ripe and thus the until the matter becomes ripe no court would have jurisdiction over that claim. However, a decision on which court would have jurisdiction to review the actions or inactions of the Attorney General is not necessary for deciding this case and is not briefed further.

the Law Division is also within the State's Superior Court, the Supreme Court adopted Rules 2:2-3 and 2:2-4 which provide that "every proceeding to review the action or inaction of a state administrative agency would be by appeal to the Appellate Division." Cent. R.R. Co. v. Neeld, 26 N.J. 172, 185 (1958). Specifically, Rule 2:2-3(a)(2) provides that the review of final decisions or actions by administrative agencies or officers "may be taken to the Appellate Division as of right."

There are limited exceptions to the Appellate Division's exclusive jurisdiction over state agency action, including condemnation or inverse condemnation actions where the venue is statutorily set; and cases where no agency hearing opportunity exists. Infinity Broad. Corp. v. N.J. Meadowlands Comm'n, 187 N.J. 212, 215 (2006); Pfleger v. State Highway Dep't, 104 N.J. Super. 289, 291-92 (App. Div. 1968). Neither of these exceptions apply in this case as there is no taking and a full approval process has been ongoing since 2019, including at least three public meetings held by the TRC where Jersey Shore was able to present their arguments against the issuance of a riparian grant.

The Appellate Division's exclusive authority may not be circumvented by instituting either actions in lieu of prerogative writs, declaratory judgment actions, or other actions where the relief sought is the review of a quasi-judicial,

ministerial, or discretionary agency action. Pressler & Vemiero, Current N.J. Court Rules, cmt. 3.2.1. on R. 2:2-3 (2024) (citing within Beaver v. Magellan Health Servs., Inc., 433 N.J. Super. 430, 422 (App. Div. 2013); Pascucci v. Vaggott, 71 N.J. 40, 52-54 (1976); Caporusso v. N.J. Dep’t of Health, 434 N.J. Super. 88, 93 (App. Div. 2014)).

In this instance, Jersey Shore challenged the TRC’s decision—as approved by the DEP (see N.J.S.A. 13:1B-13)—to approve of a riparian grant, without also including a permanent deed restriction that the property must always be used as a parking lot for approximately 300 vehicles. (Pa042). Jersey Shore sought relief in the form of a series of mandamus orders and declaratory judgements. Consequently, while not styled as such, the relief sought was in reality seeking a review of the TRC’s and DEP’s decisions, i.e., a review of final administrative agency decisions. Toll Bros., Inc. v. Dep’t of Env’t Prot., 242 N.J. Super. 519, 525 (App. Div. 1990) (“DEP is a state agency whose actions are properly reviewable by this court pursuant to Rule 2:2-3(a)(2) and not the Law Division.”); Equitable Life Mortg. v. N.J. Div. of Tax’n, 151 N.J. Super. 232, 238 (App. Div. 1977); Twp. of Neptune v. Dep’t of Env’t Prot., 425 N.J. Super. 422, 433 (App. Div. 2012).

The law is clear on this front. The Appellate Division has sole jurisdiction to hear an appeal of a final administrative agency action where there is no right

of review before an administrative agency. As Appellant filed their Complaint in the Law Division, which did not have the authority to hear the case, it was correctly dismissed and this court should uphold that decision.

B. Here, lack of subject matter jurisdiction warrants dismissal with prejudice.

As the court below lacked subject matter jurisdiction to hear Jersey Shore's Complaint, and this lack of jurisdiction could not be cured based on the claims brought against the State Respondents, the court correctly dismissed the Amended Complaint with prejudice.

Under Rule 4:9-1 motions for leave to amend should be granted liberally "even if the ultimate merits of the amendment are uncertain." G&W, Inc. v. Borough of East Rutherford, 280 N.J. Super. 507, 517 (App. Div. 1995). "One exception to this rule arises when the amendment would be futile, because the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor." Prime Acct. Dep't v. Twp. of Carney's Point, 212 N.J. 493, 511 (2013) (quoting Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (2006)). The lack of jurisdiction cannot be cured so long as Jersey Shore is seeking judicial review of a final agency action within the Law Division. Even if the Complaint was amended to remove the DEP and Attorney General, the lack of jurisdiction would still exist against the TRC.

As to Appellant's argument that the Amended Complaint "clearly 'suggested' valid causes of action at least against . . . the TRC" for injunctive relief (Ab23), this argument does not survive scrutiny. This argument is based on Appellant's claim that the TRC was unaware of the Borough's intention, after gaining title to the riparian land, to sell it to a private party to be developed into residential housing. (Ab26).

To be sure the relief sought is again seeking a mandamus order against the TRC, which the Law Division does not have jurisdiction to grant. See Loigman v. Twp. Comm. of the Twp. of Middletown, 297 N.J. Super. 287, 299 (App. Div. 1997); Switz v. Middletown, 23 N.J. 580, 588-89 (1957); Cohen v. Bd. of Trustees of U. of Med. & Dentistry of N.J., 240 N.J. Super. 188, 199-200 (Ch. 1989) (trial court can only hear claims for the inaction of a mandated ministerial obligation that is "wholly free from doubt," courts cannot order administrative agencies to take discretionary actions). Moreover, the TRC has been aware of the Borough's intention to sell the property to develop it into residential housing. See Borough of Keansburg, Beachway Avenue Waterfront Redevelopment Plan,

adopted June 21, 2017;⁷ State House Commission, Proposed Meeting Agenda, item 19, July 2, 2020;⁸ Pa061-65 (TRC meeting minutes for December 7, 2022).

Consequently, relief sought in this alternative reading of the Amended Complaint could not be granted by the lower court, and the alternative reading is based on facts that the record clearly shows are not true. Thus, Appellant's alternative reading of the Amended Complaint would still not justify ordering a dismissal without prejudice and the court's decision should be upheld.

POINT II

REVIEW OF FUTURE ACTIONS OR DECISIONS REGARDING THE GRANT ARE NOT RIPE AND WERE PROPERLY DISMISSED. (Responding to Point I)

Appellant acknowledges that the final issuance of a riparian grant is a multi-faceted review that is not yet complete. (Ab14-15). But in Appellant's view, that fact is why the trial court erred in dismissing the complaint. That logic would undermine the whole purpose of Rule 2:2-3(a) and the requirement that parties exhaust all administrative relief before seeking appellate review. Appellant is seeking review over a matter that by its definition is not final and

⁷ <https://keansburgnj.gov/wp-content/uploads/2023/04/Ord.-1667-Beachway-Avenue-Waterfront-Redevelopment-Plan-EXHIBIT-A-FINAL.pdf>.

⁸ <https://www.nj.gov/treasury/statehouse-commission/pdf/agenda-07-02-2020.pdf>.

thus is not yet ripe for judicial review and was properly dismissed. To be sure, any future actions by the TRC, DEP, or Attorney General that become finalized and ripe for review would—as discussed above—still not be heard in the Law Division as final agency actions belong exclusively in the Appellate Division.

A matter is ripe if (1) the issue is fit for judicial review, and (2) a hardship to the parties exists if judicial review is withheld at this time. 966 Video v. Mayor & Twp. Comm. of Hazlet Twp., 299 N.J. Super. 501, 515-16 (Law Div. 1995). A matter is fit for judicial review if the review would not require the development of additional facts for the record. K. Hovnanian Cos. of N. Cent. Jersey, Inc. v. N.J. Dep’t of Env’t Prot., 379 N.J. Super. 1, 10 (App. Div. 2005). Under the hardship prong, the party must show that there is a “‘real and immediate’ threat of enforcement against the plaintiff.” Id. at 9-10.

Appellant did not present any evidence to establish that it would face any hardship if judicial review was withheld, and it has frequently confirmed that the grant drafting process is not completed, and thus the record still needs to be developed before the matter is fit for judicial review. Consequently, to the extent Appellant’s Complaint involved an appeal of the contents of a future grant or action by the State Respondents, that claim is not ripe and was properly dismissed.

POINT III

**APPELLANT’S STANDING WAS NOT
CONTESTED AND IS NOT ON APPEAL.
(Responding to Point II).**

In their brief Appellant attempts to argue why they have standing to bring a claim in the Law Division. (Ab18-21). The State Respondents did not object to Appellant’s claim of standing in the matter below. While the State Respondents maintain the trial court lacked authority to hear the case, that position is based on jurisdictional issues, not questions of standing.

CONCLUSION

For the above reasons this court should affirm the order dismissing Appellant's Complaint with prejudice.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW
JERSEY

By: /s/ Charlie A. Stegner-Freitag

Charlie A. Stegner-Freitag
Deputy Attorney General
Attorney ID No. 327702021
Charlie.Stegner-Freitag@law.njoag.gov

Sookie Bae-Park
Assistant Attorney General
Of Counsel

JERSEY SHORE BEACH AND
BOARDWALK COMPANY, INC.
a/k/a JERSEY SHORE BEACH &
BOARDWALK INC.,

Plaintiff/Appellant,

v.

NEW JERSEY TIDELANDS
RESOURCE COUNCIL; NEW
JERSEY DEPARTMENT OF
ENVIRONMENTAL
PROTECTION; MATT PLATKIN,
ATTORNEY GENERAL;
BOROUGH OF KEANSBURG;
T&M ASSOCIATES; and
RAYMOND O'HARE,

Defendants/Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Appellant Docket No.:
A-000684-24

Sat Below:

Hon. Robert T. Lougy, J.S.C.
Docket No: MER-L-151-24

On appeal from the Order entered on
September 24, 2024 from the Superior
Court of New Jersey, Law Division,
Mercer County

**DEFENDANTS-RESPONDENTS, BOROUGH OF KEANSBURG AND
RAYMOND O'HARE'S, MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF-APPELLANT'S APPEAL**

Matthew R. Tavares, Esq.
(#076972013)
Of counsel and on the brief

**RAINONE COUGHLIN
MINCHELLO, LLC**
555 U.S. Highway 1 South, Suite 440
Iselin, NJ 08830
Tel: 732-709-4182
Fax: 732-791-1555
*Attorneys for Defendant-Respondents,
Borough of Keansburg and Raymond
O'Hare*

TABLE OF CONTENTS

TABLE OF JUDGMENT(S), ORDER(S), RULING(S), AND DECISIONS(S) ON APPEAL.....	ii
LIST OF PARTIES.....	iii
TABLE OF AUTHORITIES	iv
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY.....	3
COUNTERSTATEMENT OF FACTS.....	5
POINT I.....	8
ON APPEAL FROM A MOTION TO DISMISS IN LIEU OF AN ANSWER, THE APPELLATE COURT EMPLOYS THE SAME STANDARD OF REVIEW AS THE TRIAL COURT. (ISSUE NOT RAISED BELOW).....	8
POINT II	8
THE TRIAL COURT CORRECTLY DETERMINED THAT IT LACKED SUBJECT MATTER JURISDICTION. (Pa98-103).....	8
POINT III.....	12
“PRELIMINARY” DECISIONS OF AN AGENCY, IF THEY EXIST, ARE NOT SUBJECT TO REVIEW BY THE LAW DIVISION AND MUST RIPEN BEFORE APPELLATE REVIEW. (Pa102-103).....	12
POINT IV.....	16
THE REMAINING ARGUMENTS SET FORTH IN THE STATE DEFENDANTS OPPOSITION BRIEF ARE ADOPTED AND INCORPORATED HEREIN. (ISSUE NOT RAISE BELOW; see SDb 10-18).....	16

CONCLUSION16

**TABLE OF JUDGMENT(S), ORDER(S), RULING(S), AND
DECISION(S) ON APPEAL**

September 24, 2024 Order and Opinion.....Pa98

LIST OF PARTIES

Party Name	Appellate Party Designation	Trial Court/ Agency Party Role	Trial Court/Agency Party Status
JERSEY SHORE BEACH AND BOARDWALK CO., INC.	Appellant	Plaintiff	Participated Below
N.J. TIDELANDS RESOURCE COUNCIL	Respondent	Defendant	Participated Below
N.J. DEPARTMENT OF ENVIRONMENTAL PROTECTION	Respondent	Defendant	Participated Below
MATTHEW J. PLATKIN, ATTORNEY GENERAL OF NEW JERSEY	Respondent	Defendant	Participated Below
BOROUGH OF KEANSBURG	Respondent	Defendant	Participated Below
RAYMOND O'HARE	Respondent	Defendant	Participated Below
T&M ASSOCIATES	Respondent	Defendant	Did not participate/dismissed by stipulation

TABLE OF AUTHORITIES

Page(s)

Cases

<u>966 Video, Inc. v. Mayor & Twp. Comm. of Hazlet Twp.</u> 299 N.J.Super. 501 (Law.Div.1995).....	14
<u>Gilbert v. Gladden,</u> 87 N.J. 275 (1981)	8, 9
<u>K. Hovnanian Cos. Of N. Cent. Jersey, Inc. v. N.J. Dep't of Env't Prot.,</u> 379 N.J.Super 1 (App.Div.2005)	14
<u>Le Compte v. State,</u> 65 N.J. 447 (1974)	10, 11
<u>N.J. Election Law Enf't Comm'n v. DiViencenzo,</u> 451 N.J.Super. 554 (App.Div.2017)	9
<u>New Jersey Educ. Ass'n v. State,</u> 2013 N.J.	13
<u>Santiago v. New York & New Jersey Port Authority,</u> 429 N.J.Super. 150 (App.Div.2012)	8
<u>Sickles v. Cabot Corp.,</u> 379 N.J.Super. 100 (App.Div.2005)	8
<u>Toll Bros., Inc. v. Dep't of Env't Prot.,</u> 242 N.J.Super 519 (App.Div.1990)	11
<u>Twp. of Neptune v. Dep't of Env't Prot.,</u> 425 N.J.Super. 422 (App.Div.2012)	11
<u>Vas v. Roberts,</u> 418 N.J.Super. 509 (App.Div.2011)	9

Statutes

<u>N.J.S.A. 12:3</u>	10
----------------------------	----

N.J.S.A. 12:3-111

N.J.S.A. 12:3-12.110

N.J.S.A. 12:13-1011

N.J.S.A. 13:1B-13.....10, 11

Public Trust Law15

Other Authorities

Rule 2:2-3(a)(2).....9

Rules 2:2-3 and 2:2-49

Rule 4:6-2(a)8

PRELIMINARY STATEMENT

Before the lower court, the Plaintiff-Appellant, Jersey Shore Beach & Boardwalk Co., Inc., (“Plaintiff”) attempted to attack the decision of the Tidelands Resource Council to approve a tidelands grant application submitted by the Borough of Keansburg. This challenge was to a final agency decision, which by rule must be appealed to the Appellate Division, as of right. Rather than file a direct appeal to the Appellate Division, the Plaintiff sought a writ of mandamus and declaratory relief in the trial court. To persuade the trial court to exercise jurisdiction that it did not have, Plaintiff characterized the actions of the Tidelands Resource Council as “preliminary” and thus not final agency decisions subject to appellate review. Aside from the unsupported characterization, the Plaintiff’s claim did not support its position that the trial court had jurisdiction. Instead, Plaintiff’s theory created a new problem – ripeness. Ultimately, the Plaintiff’s case had no basis before the trial court. Either it represented a challenge to a final agency decision, thus requiring review by the Appellate Division or it was not a final agency decision and instead part of a process that was incomplete, thus rendering Plaintiff’s challenge unripe. The trial court saw clearly the Plaintiff’s dueling, but equally flawed theories and entered dismissal with prejudice for lack of subject matter jurisdiction.

On appeal, Plaintiff presents nothing of note to warrant a reversal of the trial court’s decision. Instead, Plaintiff relies upon the same flawed theories regarding

“final” agency decisions. Plaintiff offers no support through case law, rules, or statutes to suggest that a “preliminary” decision of an agency is even real thing let alone one that can be challenged through the Law Division. Moreover, Plaintiff relies upon misguided or plainly wrong facts to assert that a viable challenge exists. Plaintiff argues that the Borough’s tidelands grant application was misleading and failed to disclose the Borough’s desire to ultimately redevelop the property at issue. The only thing misleading here is the Plaintiff’s assertions. The Borough disclosed all of these facts to the Tidelands Resource Council and record bears this out. Accordingly, even the alleged basis for the challenge to the lower court is undermined by the record.

For the reasons set forth more fully below, it is respectfully requested that this Court affirm the trial court’s dismissal with prejudice.

PROCEDURAL HISTORY

On January 22, 2024, Plaintiff-Appellant, Jersey Shore Beach and Boardwalk Company (“Plaintiff” or “Jersey Shore”), filed a complaint (“Complaint”) against the Defendants, New Jersey Tidelands Resource Council (“TRC”), New Jersey Department of Environmental Protection (“NJDEP”), Matt Platkin, Attorney General of New Jersey (“Platkin” or “AG”) (collectively “State Defendants”), Borough of Keansburg (“Borough” or “Keansburg”), Borough Manager Raymond O’Hare (“O’Hare”) (collectively “Keansburg Defendants”), and T&M Associates (“T&M”). The Complaint seeks (i) declaratory judgment by way of mandamus directing the State Defendants to impose certain conditions upon the Tidelands Grant that was approved by the TRC and enjoining the Keansburg Defendants from altering the municipal parking lot use of the subject property and (ii) asserting that the TRC’s approval of the Tidelands Grant to the Borough was arbitrary, capricious, or unreasonable. Pa1.

On April 2, 2024, the Plaintiff filed an Amended Complaint. Pa25.

On May 6, 2024, the Plaintiff voluntarily dismissed T&M as a defendant in the matter.

Also on May 6, 2024, the Borough Defendants and the State Defendants filed their respective motions to dismiss pursuant to *R. 4:-6-2*. Pa51; Pa70. On September 24, 2024, Judge Lougy heard oral argument on the motions to dismiss. Following

oral argument, the Court entered an order granting the motions to dismiss the Plaintiff's Amended Complaint with prejudice. Pa98.

In the lower court's opinion, it was found that the court lacked subject matter jurisdiction. Specifically, the lower court found that the TRC's approval of the tidelands grant was "a final agency decision, which our caselaw establishes is subject to the exclusive jurisdiction of the Appellate Division." Pa101-102. The lower court further found that "to the extent that Plaintiff anticipates that the other State Defendants will approve the TRC decision, that, too, will be a final agency decision subject to appeal as of right to the Appellate Division." Pa102.

In addressing Plaintiff's claims that the decision of the TRC was not final and instead was "preliminary" the lower court found that such a distinction "does not pass muster." *Id.* The court found that such a claim would then be "not yet ripe for adjudication by Plaintiff's own admission as there has been no final agency decision..." *Id.* Finally, the trial court also found that "a claim based on preliminary action in the absence of a final agency decision is fundamentally based on agency inaction and the Appellate Division possesses exclusive jurisdiction over agency inaction." Pa103.

On November 7, 2024, Jersey Shore filed its notice of appeal. Pa104.

COUNTERSTATEMENT OF FACTS

The within Defendants rely upon the statement of facts as presented by the State Defendants in their brief filed on July 10, 2025 and incorporate same by reference herein. The Borough Defendants offer the following additional counterstatement of facts for the record on appeal.

Plaintiff is the owner of property located at Block 184, Lot 4 (“Lot 4”) on the Keansburg tax map and operates the Keansburg Amusement Park on Lot 4. Pa25-26. Jersey Shore leases a portion of Block 184, Lot 3.01 (“Lot 3.01”) from the Borough, which Plaintiff uses for amusement park purposes. *Id.*

On December 7, 2022, the Borough’s application for a tidelands grant was heard by the TRC. Pa61. Pursuant to the minutes of the meeting, the Borough of Keansburg was seeking a grant for an area of land off Beachway Avenue known as Block 184, Lot 3.02 (“Lot 3.02”). Pa62.¹ The meeting minutes detailed the history of the tidelands and leasehold interests in the area as are more fully discussed by the State Defendants. *Id*; *see also* SDb² 6-8.

On May 1, 2019, the TRC met and voted to approve a new 15 year license for the parking lot area as applied for by the Borough. Pa62. According to the TRC, “this resolved any outstanding Tidelands issues concerning the continued use of the

¹ Lot 3 was subdivided on February 11, 2019. Pa62.

² “SDb” shall be used to refer to the State Defendants brief.

parking lot and included annual rent going forward and a back rent payment plan...”

Id. At the time of the December 7, 2022 meeting, the Borough was up to date on payments and had a then current balance of \$264,146.00 remaining under the back rent payment plan. *Id.*

Notably, the TRC mentioned its awareness of the Borough’s redevelopment plans. Pa63. The meeting minutes state that “[i]n 2005/06, the Borough adopted the Beachway Avenue Waterfront Redevelopment Plan which declared the area along Bay and Beachway Avenues an area in need of redevelopment.” *Id.* Most importantly, the TRC acknowledged that “[t]he Borough intends to sell the lot subject to this grant application [Lot 3.02] for redevelopment into mixed-use housing and commercial development.” *Id.*

Further, the TRC’s meeting minutes state that “[t]he Borough subsequently subdivided former Lot 3 into new lots 3.02 and 3.03. Lot 3.02 consists of the parking lot and is the area proposed for redevelopment which is the subject of this grant application.” *Ibid.* (emphasis in original). Continuing, the TRC minutes indicated that the subdivision into lots 3.02 and 3.03 allowed the Borough to make Lot 3.02 the redevelopment area, which is then on a smaller size or area of Tidelands to be claimed. Lot 3.03 would then be utilized to satisfy the Borough Green Acres obligation for Recreational and Open Space Inventory. *Id.* The Borough further proposed a “water for land swap” as part of the compensation to offset the monetary

cost for the grant. *Id.* The minutes repeatedly note that the Borough has “always expressed” the desire to include the proposed swap as part of the grant request. Pa63-64.

The TRC again states in the minutes that:

the Borough’s appraisal was originally submitted in January 2021, and in the summer of 2021, the Borough Council approved a redevelopment plan with a higher density development to include mixed use commercial (retail) on the ground floor with multiple residential units...which would significantly increase the value.

Pa65. Ultimately, the TRC recommended approval of a grant for the unconveyed portions of Lot 3.02 in two tracts for \$1,591,173.00. *Id.* The recommendation included conditions: any fees due under the current Tidelands licensed be paid in full prior to delivery of the grant, which was \$264,146.00 at that time; Borough would have to execute the grant in a timely fashion; and if the Borough desired any reconsideration or proposed water for land swap, that it would require an updated appraisal to determine the appropriate value for the site at the time which could include the approvals for the redevelopment plan. *Id.* The Borough Attorney was present and agreed with the recommendation and conditions of approval. *Id.*

The TRC ultimately voted 7-0 to approve a grant to the Borough for Lot 3.02 without restriction on the lot’s future use subject to the conditions set forth at the meeting.

POINT I

STANDARD OF REVIEW

ON APPEAL FROM A MOTION TO DISMISS IN LIEU OF AN ANSWER, THE APPELLATE COURT EMPLOYS THE SAME STANDARD OF REVIEW AS THE TRIAL COURT. (ISSUE NOT RAISED BELOW).

In reviewing a motion to dismiss pursuant to *R. 4:6-2*, an appellate court reviews the matter with the same standard applied by the trial court. *Sickles v. Cabot Corp.*, 379 N.J.Super. 100, 106 (App.Div.2005). “Pursuant to *Rule 4:6-2(a)*, a party may raise the defense of lack of jurisdiction over the subject matter” by motion prior to filing any pleading. Whether subject matter jurisdiction exists presents a purely legal issue...which [the Appellate Division] reviews *de novo*.” *Santiago v. New York & New Jersey Port Authority*, 429 N.J.Super. 150, 156 (App.Div.2012) (internal citations omitted).

POINT II

THE TRIAL COURT CORRECTLY DETERMINED THAT IT LACKED SUBJECT MATTER JURISDICTION. (Pa98-103).

As the trial court properly found, Plaintiff’s claims cannot be considered by the trial court as it lacked subject matter jurisdiction. Whether a court lacks subject matter jurisdiction over claims is a “threshold determination.” *Gilbert v. Gladden*, 87 N.J. 275, 280-81 (1981). When a court lacks subject matter jurisdiction, its

authority to consider the case is “wholly and immediately foreclosed.” *Id.* at 281 (quoting *Baker v. Carr*, 369 U.S. 186, 198 (1962)).

Rule 2:2-3(a)(2) provides that the Appellate Division is vested with jurisdiction to review final decisions of State administrative agencies as of right:

to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer excepting matters prescribed by *R.* 8:2 (tax matters) and matters governed by *R.* 4:74-8 (Wage Collection Section appeals)n, except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise.

This Court has previously determined that *R.* 2:2-3(a)(2) contemplates “every proceeding to review the action or inaction of a state administrative agency would be by appeal to the Appellate Division.” *Vas v. Roberts*, 418 N.J.Super. 509, 516 (App.Div.2011). “[T]he Supreme Court adopted *Rules* 2:2-3 and 2:2-4, vesting the Appellate Division with exclusive jurisdiction for the review of administrative agency action and inaction.” *N.J. Election Law Enf’t Comm’n v. DiViencenzo*, 451 N.J.Super. 554, 569 (App.Div.2017)(citing *Prado v. State*, 186 N.J. 413, 422 (2006)).

At issue here is Plaintiff’s challenge to the decision of the TRC to approve the Borough’s tidelands grant application. This is fundamentally a final agency decision.

Thus, pursuant to *R. 2:2-3(a)(2)*, the court with exclusive jurisdiction over any such claim would be the Appellate Division, not the trial court.

As identified by the State Defendants, the TRC is governed by *N.J.S.A. 12:3; 13:1-B-10, -13*. “[T]idal lands, lying between mean high and low water marks, are owned by the State, to the extent they have not been validly conveyed to others.” *Le Compte v. State*, 65 N.J. 447, 450 (1974). “In large measure, the responsibility of overseeing and controlling tidelands has been allocated by the Legislature to the Department of Environmental Protection. Within that Department, the Natural Resource Council [now the TRC] has been empowered to negotiate leases and conveyances on behalf of the State.” *Id.* at 450-451; *see also N.J.S.A. 13:1B-13*. Further, under *N.J.S.A. 12:3-12.1*:

the [TRC] is the public body responsible for the stewardship of the State’s riparian lands; that it is the responsibility of the council to determine whether applications for the lease, license, or grant of riparian lands are in the public interest; that it is the responsibility of the council to determine, in assessing applications for the lease, license, or grant of riparian lands, whether the State may have a future use for such lands; that the council must obtain the fair market value for the lease, license, or grant of riparian lands in accordance with court decisions and legal opinions of the Attorney General...

Additionally, the TRC, through the State has absolute discretion in making conveyances or granting licenses to tidelands. *See* SDb 3 (citing *Le Compte, supra*, 65 N.J. at 450-51; *Atlantic City Elect. Co. v. Bardin*, 145 N.J. Super. 438, 444

(App.Div.1972); *Taylor v. Sullivan*, 119 N.J.Super. 426, 430 (App.Div.1972)). Of course, the TRC must operate within the confines of statutory requirements in assessing grant applications. *See N.J.S.A. 12:3-1, et al.* The owner of lands immediately landward of tidelands or, as in this case, the municipality in which tidelands borders falls, may make an application for a grant of the tidelands. *See N.J.S.A.12:13-10.* The TRC provides an appraisal of the lands and assesses the appraisal offered by the applicant. *See Le Compte, supra*, at 561-62. As noted by the State Defendants, this is part of a larger process in which the TRC must then vote on the grant application and valuation. SDb 4. For approval, a majority vote by the TRC is required. Then, a series of other approvals are necessary from the DEP Commissioner, the Attorney General, and finally to Secretary of State. *See SDb 4-5.*

Here, Plaintiff's challenge is to the TRC and DEP's final decisions on the approval of the tidelands grant and concurrently challenges their discretion in approving the grant without imposing a permanent deed restriction that the property must always be used as a parking lot for approximately 300 vehicles. The approval of the TRC, and ultimately DEP, was pursuant to *N.J.S.A. 13:1B-13*. Undeniably, these are final agency decisions. Thus, these challenges fall exclusively within the jurisdiction of the Appellate Division on appeal. *See Toll Bros., Inc. v. Dep't of Env't Prot.*, 242 N.J.Super 519, 525 (App.Div.1990); *see also R. 2:2-3(a)(2)*; *see also Twp.*

of Neptune v. Dep't of Env't Prot., 425 N.J.Super. 422, 433 (App.Div.2012). Plaintiff's appeal presents no argument that contradicts the trial court's findings that this is an attack on a final agency decision. Plaintiff fails to set forth any case law or rule that would place this situation into one of the few exceptions to *R. 2:2-3* or otherwise exempt its challenge from requiring Appellate review rather than Law Division review. Accordingly, the trial court's decision to dismiss this matter for lack of subject matter jurisdiction was warranted and should not be disturbed.

POINT III

"PRELIMINARY" DECISIONS OF AN AGENCY, IF THEY EXIST, ARE NOT SUBJECT TO REVIEW BY THE LAW DIVISION AND MUST RIPEN BEFORE APPELLATE REVIEW. (Pa102-103).

The Plaintiff attempts to forge new grounds for challenging the TRC's approval by declaring that the decision was not a "final" decision, but rather a "preliminary" decision. Thus, according to Plaintiff, the preliminary decision is not subject to the requirements of *R. 2:2-3(a)(2)* and therefore can be challenged in the Law Division of the Superior Court. Plaintiff presents no support for this conclusion.

By Plaintiff's own admission, the TRC's approval with respect to the Borough's tidelands grant is part of a multi-step process the requires approval from other entities including the DEP Commissioner and Attorney General. Pb 16³. But

³ "Pb" shall refer to Plaintiff's brief filed on April 8, 2025.

this fact alone does not make the TRC's approval of the tidelands grant "preliminary" for purposes of shoehorning a lawsuit into the trial court. Moreover, there is no support provided by Plaintiff to suggest that a preliminary decision of an administrative agency is subject to review by any court other than the Appellate Division. To do so would defy the intent and purpose of *R. 2:2-3(a)(2)* and allow piecemeal review of agency decisions to be subject to Law Division review where the Law Division would otherwise have no jurisdiction.

Moreover, if we agreed with Plaintiff's position that the decision of the TRC in this instant matter is only a "preliminary" and not a final decision, then any challenge would not yet be ripe for review. The trial court found that the Plaintiff's distinction of preliminary versus final only renders the challenge not ripe as there is no final decision eligible for review. *See* Pa102.

"Ripeness is a justiciability doctrine designed to avoid premature adjudication of abstract disagreements and to prevent courts from interfering with an agency's administrative decisions until the decision has been implemented and its effects felt in a concrete way by the challenging parties." *New Jersey Educ. Ass'n v. State*, 2013 N.J.Super.Unpub.LEXIS 1459, *34 (Law.Div.2013) (*citing Abbot Labs v. Gardner*, 387 U.S. 136, 148-49 (1967) and 966 *Video, Inc. v. Mayor & Twp. Comm. of Hazlet Twp.* 299 N.J.Super. 501, 515-16 (Law.Div.1995)). Pa75-96.

Ripeness is determined by assessing whether (1) the issue is fit for judicial review; and (2) a hardship to the parties exists if judicial review is withheld at this time. *See 966 Video, supra*, 299 N.J.Super. at 515-16. A matter is “fit for judicial review” if same would not require the development of additional facts while “hardship” requires a real and immediate threat of enforcement against the plaintiff. *K. Hovnanian Cos. Of N. Cent. Jersey, Inc. v. N.J. Dep’t of Env’t Prot.*, 379 N.J.Super 1 at 9-10 (App.Div.2005).

Plaintiff’s only supporting argument for overturning the trial court’s decision is the claim that the TRC and related agencies have not been fully appraised of the Borough’s desire to redevelop Lot 3.02. Therefore, Plaintiff claims that the TRC’s approval, while preliminary, was fundamentally flawed because of an alleged misrepresentation by the Borough. Pb 16-18. Not only does this not demonstrate that the matter is ripe for review, but it is also incorrect. Plaintiff contends that its complaint “seeks to require and insure that this non-disclosed, ultimate Keansburg intent and purpose be fully disclosed in the application process.” Pb 17. This “undisclosed plan” is the plan the redevelop Lot 3.02 by removing the 300 plus paid parking spaces and constructing a multi-story mixed used commercial and residential building on the property. Plaintiff’s position completely ignores the fact that the TRC is already well aware of the Borough’s redevelopment plan for Lot 3.02.

The TRC's meeting minutes of its December 7, 2022 meeting mention the Borough's plans to redevelop Lot 3.02 no less than 9 separate times. *See* Pa62-65. The first paragraph of page 2 of the minutes specifically says "[t]he Borough intends to sell the lot subject to this grant application[Lot 3.02] for redevelopment into mixed-used housing and commercial development." Pa63. The third paragraph of the same page emphasizes that Lot 3.02 "consists of the parking lot and is the area proposed for redevelopment which is the subject of this grant application." *Id.* The TRC notes that the subdivision of the area proposed for redevelopment "has the effect of reducing the size or area of Tidelands claim to be cleared for the grant..." *Id.* Further, the TRC identified that redevelopment plans and ultimate redevelopment could be a factor in determining the valuation of the purchase by the Borough. Pa65. These facts, coupled with the State Defendants' agreement that the Borough's redevelopment plans were well known to them belie Plaintiff's theory. SDb 17. As such, Plaintiff's basis for its request for declaratory and injunctive relief is entirely unmoored. Similarly, because Plaintiff has no basis to assert that the Borough acted misleadingly, there is no violation of the Public Trust Law or doctrine.

Accordingly, the trial court's decision to dismiss this case with prejudice was appropriate and should be affirmed.

POINT IV

**THE REMAINING ARGUMENTS SET FORTH IN
THE STATE DEFENDANTS OPPOSITION BRIEF
ARE ADOPTED AND INCORPORATED HEREIN.
(ISSUE NOT RAISE BELOW; see SDb 10-18).**

As all remaining arguments raised by the State Defendants take positions similar to the within Borough Defendants, same are adopted and incorporated by reference herein.

CONCLUSION

For the reasons set forth above, the trial court's decisions were soundly based in law and correctly determined. It is respectfully requested that this Court deny Plaintiff's appeal in its entirety and affirm the trial court's dismissal with prejudice.

Respectfully submitted,
RAINONE COUGHLIN MINCHELLO, LLC



By: _____
Matthew R. Tavares, Esq.

Date: July 18, 2025

GASIOROWSKI & HOLOBINKO

R.S. GASIOROWSKI, ESQ. - ID#244421968

54 Broad Street

Red Bank, New Jersey 07701

(732) 212-9930

Email: gasiorowskilaw@gmail.com

Attorney for Plaintiff/Appellant Jersey Shore Beach and Boardwalk
Company, Inc. a/k/a Jersey Shore Beach & Boardwalk Inc.

JERSEY SHORE BEACH AND	: SUPERIOR COURT OF NEW JERSEY
BOARDWALK COMPANY,	: APPELLATE DIVISION
INC., a/k/a JERSEY SHORE	: DOCKET NO. A-684-24
BEACH & BOARDWALK INC.	:
	: On Appeal from Order dated
Plaintiff/Appellant	: September 24, 2024
	:
vs.	: Superior Court of New Jersey
	: Law Division-Mercer County
NEW JERSEY TIDELANDS	: Docket No. MER-L-151-24
RESOURCE COUNCIL; NEW	:
JERSEY DEPARTMENT OF	: SAT BELOW:
ENVIRONMENTAL	: Hon. Robert T. Lougy, A.J.S.C.
PROTECTION; MATT	:
PLATKIN, ATTORNEY	:
GENERAL OF NEW JERSEY;	:
BOROUGH OF KEANSBURG;	:
T&M ASSOCIATES; and	:
RAYMOND O'HARE a	:
Municipal Corporation	:
	:
Defendant/Respondent	:

AMENDED REPLY BRIEF OF PLAINTIFF/APPELLANT JERSEY
SHORE BEACH AND BOARDWALK COMPANY, INC., a/k/a JERSEY
SHORE BEACH & BOARDWALK INC.

On the Brief:
R.S. Gasiorowski, Esq.

Dated: September 4, 2025

TABLE OF CONTENTS:

	<u>Page:</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
AMENDED SUPPLEMENTAL TABLE OF CONTENTS FOR APPENDIX	iii
STATEMENT OF FACTS AND PROCEDURAL HISTORY.....	1
POINT I	
THE TRIAL COURT HAD JURISDICTION.....	1
POINT II	
RESPONDENTS ALREADY ADMITTED THE TRC DECISION WAS NOT FINAL AND SHOULD NOT BE PERMITTED TO CHANGE THEIR POSITION BEFORE THE APPELLATE DECISION.....	9
CONCLUSION.....	14

TABLE OF AUTHORITIES:

Page:

Cases:

<u>Ferrari v. Melleby,</u> 134 <i>N.J. Super.</i> 583 (App. Div. 1975)	1, 5, 7
<u>Kelly v. Sterr,</u> 62 <i>N.J.</i> 105 (1973)	5, 7
<u>Sickles v. Cabot Corp.,</u> 37 <i>N.J. Super</i> 100 (App. Div. 2005).	3
<u>Wester v. City of Asbury Park,</u> 299 <i>N.J. Super.</i> 358 (Law Div. 1996)	1, 5, 7

Statutes:

<i>N.J.S.A.</i> 13:1B-13.	9, 10, 11
-----------------------------------	-----------

Administrative Regulations:

<i>N.J.A.C.</i> 7:14A-17.2.	5
-------------------------------------	---

Court Rules:

<i>R.</i> 2:2-3(a)(2)	8, 9, 11, 12, 13
---------------------------------	------------------

AMENDED SUPPLEMENTAL TABLE OF CONTENTS FOR
APPENDIX OF PLAINTIFF/APPELLANT,
JERSEY SHORE BEACH AND BOARDWALK COMPANY, INC. A/K/A
JERSEY SHORE BEACH & BOARDWALK, INC.

DOCKET NO. A-684-24

(PS001 – PS013)

Relevant portions of Defendants Borough of Keansburg and Raymond O'Hare's Brief in Support of Motion to Dismiss Plaintiff's Amended Complaint ¹	PS001
Relevant portions of State Defendants Letter Brief in Support of their Motion to Dismiss ²	PS004
Relevant portions of State Defendants Reply Brief to Plaintiff's Oppositional Brief ³	PS008
Appellate Division Decision for Docket No.: A-2379-22	PS013

¹ These are relevant pages of Court Briefs filed with the Trial Court and quoted in Appellant's Brief to demonstrate issue raised before the Trial Court, as permitted pursuant by Rule 2:6-1(a)(2)

² These are relevant pages of Court Briefs filed with the Trial Court and quoted in Appellant's Brief to demonstrate issue raised before the Trial Court, as permitted pursuant by Rule 2:6-1(a)(2)

³ These are relevant pages of Court Briefs filed with the Trial Court and quoted in Appellant's Brief to demonstrate issue raised before the Trial Court, as permitted pursuant by Rule 2:6-1(a)(2)

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Jersey Shore adopts its Statement of Facts and Procedural History as set forth in its Appellate Brief.

POINT I

THE TRIAL COURT HAD JURISDICTION

The law is established that if a review process is ongoing and is being conducted in violation of law/unfair and there are claims that the hearing process being used is contrary to law and is unfair and impartial, then the affected and interested parties have the right to go to the Superior Court and obtain a declaration and order directing how the process should properly and legally proceed so as to comply with law. This application may be brought during the ongoing process. See Wester v. Asbury Park, 299 N.J. Super. 358 (Law Div. 1996); Ferrari v. Melleby, 134 N.J. Super. 583, 586 (App. Div. 1975). In this case, the Attorney General has not yet approved and endorsed the New Jersey Tidelands Resource Council's ("TRC") recommendations, the process is not yet complete, and Jersey Shore has the right through this action to seek a Judicial Order compelling and requiring the New Jersey Department of Environmental Protection ("NJDEP") to follow the law. Jersey Shore sought a series of mandamus orders against the State Respondents and a series of declaratory judgments relative to an ongoing (*and still non-final and to date still ongoing) administrative evaluation, administrative review, administrative

recommendation and administrative approval process regarding an application filed by Respondent Keansburg before the TRC, NJDEP and Attorney General seeking a Riparian Grant (*a sale) of real property known as Block 184, Lot 3.02 (“Subject Property”) owned by the State of New Jersey and located in Keansburg.

Keansburg’s Riparian Grant Application (i.e. sale) relates to the Subject Property which consists of approximately 3.54 acres of what today is dry land. The Subject Property was formerly tidal waters that, through natural accumulation of sand and sediment over time, became dry land. It is not disputed that for many years the Subject Property – owned by the State – has been used as a *public* parking lot along the waterfront providing public parking (and parking for Jersey Shore’s customers) for 300+ vehicles along the waterfront, thereby allowing thousands of citizens fair and reasonable access to the beachfront, navigable waterways and other waterfront businesses including Jersey Shore’s.

The TRC Applicant, Keansburg, by Local Ordinance has long ago already approved a Second Amended Redevelopment Plan (“SRAP”) and now today seeks to obtain a Riparian Grant (i.e. sale) from the State of New Jersey to acquire title and ownership of this property presently owned by the State of New Jersey. A Riparian Grant (*unlike a Riparian Lease), if approved by the TRC, NJDEP and Attorney General, would transfer actual ownership of the Subject Property in Fee Simple to the Applicant Respondent, Keansburg. Proposed new owner Keansburg will then in

turn transfer ownership of the former State-owned property to an already designated third party private developer. This already chosen developer who is “waiting in the wings” but who is not named in the application and is not a party to the initial sought Riparian Grant – will, according to Keansburg’s SRAP, completely abolish the existing 300+ public parking spaces and will build on that site a “for profit” condominium complex with minimal *private* parking spaces that will be limited to use by the owners of the new condominiums and their guests. While Respondent, Keansburg argues the TRC was “well aware of the Borough’s development plan because the redevelopment plan was referenced in the December 7, 2022 TRC’s meeting minutes” (Db15); Jersey shore was not provided notice of that hearing and did not participate. Nothing in the minutes explains the number of public parking spaces that will be removed and/or replaced and without the benefit of Jersey Shore’s appearance and cross-examination, what the TRC knew or did not know cannot be stated. Respondents’ arguments as to what was before the TRC only serves to bolster the fact that it was error for the Trial Court to dismiss Keansburg from the case on a Motion to Dismiss. The Court was required to consider that the Plaintiff’s obligation is “not to prove the case, but only make allegations, which if proven, would constitute a valid cause of action.” Sickles v. Cabot Corp., 37 N.J. Super 100, 106 (App. Div. 2005). At Point III of its Appellate Brief, Jersey Shore points out at the very least the Trial Court should not have dismissed its claims with prejudice and if

necessary allowed Jersey Shore to amend its Complaint to further its claims against Keansburg's filing of an allegedly misleading Application (1T 10-3). Now, Respondents are improperly arguing about the veracity of the allegations which procedurally should not have been dismissed.

Jersey Shore opposed Keansburg's SRAP as it exists generally¹, and specifically opposes Keansburg's still pending Riparian Grant Application unless the approval and transfer of ownership to Keansburg contains a specific permanent Deed

¹ Jersey Shore brought an earlier related Action in Lieu of Prerogative Writs challenging Keansburg's SRAP in the Law Division, Civil Part, Monmouth County. The Judge in that earlier case did not address the substance of whether the SRAP's plan to abolish 300 public parking spaces along the waterfront violates the Public Trust Doctrine ("PTD") and Public Access Rule, ruling the issue would not be "ripe" until a development application is filed. Jersey Shore timely appealed this ruling as of right once the trial on other issues was completed and there was a final judgment on all issues as to all parties. The Appellate Division, in a *per curiam* unpublished opinion in *Jersey Shore Beach and Boardwalk Company, Inc. v. Borough of Keansburg*, Docket No. A-2379-22 ultimately affirmed the Trial Court on this "standing / ripeness" issue, holding in relevant part as follows:

[W]e conclude the issue of whether the SARP violates the PTD is not fit for review. Only after an actual development application is revealed can a meaningful PTD analysis be conducted. The analysis is not just a legal one, but instead, requires a factual analysis including an actual development application or permit. ... *** ... Therefore, we conclude there was no error in the trial court's determination that Jersey Shore's facial challenge to the SARP under the PTD was not ripe. Nothing in our opinion precludes an as-applied challenge to the SARP if a development permit or application is filed. (Emphasis added). (Ps 27, 28)

restriction prohibiting and preventing this public property from ever being used in the future by Keansburg successor in interest for any use other than as a 300+ space *public* parking lot. Jersey Shore does not maintain that the Riparian Grant (ie. Sale) of the Subject Property by the State to Keansburg *per se* violates the Public Trust Doctrine and Administrative Public Access Rule. Rather, Jersey Shore maintains that the sale of state owned property by the TRC and NJDEP and Attorney General where Keansburg will then be immediately re-selling the property to a third party developer who will destroy the public parking lot and 300+ public parking spaces to build high density housing without replacing the public parking, operates to directly and clearly violate the statutory and common law “Public Trust Doctrine” and the Administrative “Public Access Rule”.

This case is not Jersey Shore’s only effort to make the TRC, NJDEP and Attorney General acknowledge the Public Trust Doctrine and the Administrative Public Access Rule and follow the governing law. There is reference in this record to Jersey Shore’s filing with the NJDEP a timely formal request for a “third party adjudicatory hearing” under the claimed authority of N.J.A.C. 7:14A-17.2 and the precedents of Wester v. City of Asbury Park, 299 N.J. Super. 358 (Law Div. 1996); Ferrari v. Melleby, 134 N.J. Super. 583 (App. Div. 1975) and Kelly v. Sterr, 62 N.J. 105 (1973) (Which collectively hold that the public has right to fair and impartial hearing, and an application to challenge and correct the propriety of the legal

standards being followed during a public hearing may be brought during ongoing hearing itself). Those same precedents govern this case. On May 15, 2023 Borough of Keansburg filed formal written opposition to Jersey Shore's request for a third-party adjudicatory hearing. On February 7, 2024, almost a year later, the NJDEP Office of Legal Affairs issued a letter procedurally denying Jersey Shore's request for a third-party adjudicatory hearing and served a copy of this final decision on Jersey Shore by email. In denying the request, the NJDEP merely held that:

... [b]ecause the Tidelands Act does not provide a statutory right for third parties to request an adjudicatory hearing, and Petitioner has not demonstrated a particularized property interest of constitutional significance, Petitioner is not entitled to an adjudicatory hearing and Petitioner's hearing request is denied. (emphasis added) (Pa66)

Jersey Shore then timely appealed that *final* administrative decision to the Superior Court of New Jersey, Appellate Division where the case was assigned Appellate Docket No. A-002198-23. That case remains pending with Oral Argument scheduled for September 10, 2025. Respondents argued in this case that the Appellate matter would address Jersey Shore's issues. The Trial Court acknowledged that it "lacked the necessary factual record to verify that Plaintiff initiated an appeal" but "has no reason to doubt" the veracity of the State Defendants' assertion "that Plaintiff has submitted an appeal regarding this matter to the Appellate Division" (Pa102). This finding alone warrants a reversal of the Trial Court's decision because that appeal is only from the denial by the DEP of Jersey

Shore's request for an adjudicatory hearing that challenge is certainly not an adjudication of the Complaint filed in this case.

The TRC, NJDEP and Attorney General are specifically charged with enforcing and protecting public rights, and are specifically charged with considering the effect of any approval that may be sought by any applicant, on the rights of the public as otherwise protected in the common law and statutory Public Trust Doctrine and the related Administrative Public Access Rule. All Jersey Shore is seeking to do in this case is to force the TRC, NJDEP and Attorney General to do what the law requires them to do, but which they are failing to do. Jersey Shore maintains that any Riparian Grant must include a permanent Deed restriction limiting future use of the Subject Property to that of a public parking lot to comply with governing law. Jersey Shore thus far has been foreclosed from asserting this position.

During this ongoing Administrative process Jersey Shore brought the action below in this case in accordance with the precedents of Wester v. City of Asbury Park, 299 N.J. Super. 358 (Law Div. 1996); Ferrari v. Melleby, 134 N.J. Super. 583 (App. Div. 1975) and Kelly v. Sterr, 62 N.J. 105 (1973) which collectively hold that the public has right to fair and impartial hearing that complies with the Constitution and statutory law, and the Law Division has authority and jurisdiction to entertain an application to challenge the correctness and propriety of the legal standards being followed during a public hearing, and such application may be brought during the

ongoing hearing itself to protect the integrity of the legal or administrative process.

Jersey Shore specifically took action in this case because the administrative review and approval process was proceeding without any consideration by the TRC and NJDEP of the effect that unconditionally approving this Riparian Grant would have on the rights of Jersey Shore and the public whose rights are otherwise specifically protected by law, the common law and statutory Public Trust Doctrine and the Administrative Public Access Rule. All Jersey Shore did was bring an action in the Law Division seeking a declaration that the review process being followed by the TRC and NJDEP was violating the law by failing to consider the applicability and effect unconditional approval of the Riparian Grant Application would have on the rights of Jersey Shore and other members of the public under the common law and statutory Public Trust Doctrine and the Administrative Public Access Rule. The TRC and NJDEP are already required to be doing this. They are not doing this. The NJDEP has a specific statutory delegated and affirmative statutory mandate to do this. The TRC and NJDEP are ignoring the law and their duty to follow the law.

The Trial Court below cursorily ruled that it lacked the subject matter jurisdiction to hear the matter as the case sought review of “agency action” or “inaction” over which the Appellate Division had sole authority as per Rule. 2:2-3(a)(2). On this limited procedural basis, the Trial Court dismissed the case below. The precedents just cited and the text of Rule 2:2-3(a)(2) demonstrate that the Court

below was in error. Rule 2:2-3(a)(2) only applies to appeals from *final* administrative decisions or *final* administrative actions. To date, there still is not a “final” administrative decision or “final” administrative action on the challenged TRC Tidelands Grant Application as the Attorney General has not taken his required administrative approval action in the administrative process yet. Until the Attorney General completes their role in the Administrative Process nothing is final, so there is no right to appeal – and no exclusive jurisdiction under Rule 2:2-3(a)(2). The Trial Court should therefore be reversed.

POINT II

RESPONDENTS ALREADY ADMITTED THE TRC DECISION WAS NOT FINAL AND SHOULD NOT BE PERMITTED TO CHANGE THEIR POSITION BEFORE THE APPELLATE DECISION

In its opposition Brief, the Attorney General argues:

In this instance, Jersey Shore challenged the TRC’s decision – as approved by the DEP (*see N.J.S.A. 13:1B-13*) – to approve of a riparian grant, without also including a permanent deed restriction that the property must always be used as a parking lot for approximately 300 vehicles. (Pa042). **Jersey Shore sought relief in the form of a series of mandamus orders and declaratory judgements.** Consequently, while not styled as such, the relief sought was in reality seeking a review of the TRC’s and DEP’s decisions, i.e., **a review of final administrative agency decisions.** (Emphasis added).

In fact, the Attorney General previously admitted in submission to the Trial Court that Jersey Shore’s Complaint is based on a grant “that has not been approved by three of the necessary entities before it is valid” (PS3). The State Respondents

also admitted before the Trial Court “At the time of this Brief for filing, the Commissioner has not yet approved the grant, let alone the Attorney General and Secretary of State as is required by N.J.S.A. 13:1B-13. Consequently, absent all the State Officer’s approval required by the State, there is no final action to review” (Ps12). The Attorney General openly admits that Jersey Shore’s claims were “... *not styled* ...” as seeking review of a “... *final agency administrative decision*[] ...”, which is true, because Jersey Shore is not seeking review of a final decision or order as there is to date no such appealable final action. Jersey Shore seeks an Order, during the ongoing non-final administrative process, to force the TRC and NJDEP to follow the law, something the Attorney General should be doing. The Attorney General argues that: “The Appellate Division has sole jurisdiction to hear an appeal of a *final* administrative agency action ...[.]” (See Db13). Jersey Shore agrees. Actually, in the future when there is a final administrative decision and if there is notice to Jersey Shore, Jersey Shore will have the opportunity to appeal that to the Appellate Division within 45 days. But until such time as there is something final, simply quoting undisputed points of law that do not apply to the actual facts of the case should not be considered in any way as persuasive argument.

Respondents Keansburg and O’Hare maintain that there was never any jurisdiction in the Law Division to entertain Jersey Shore’s legal claims. (Db 8-12).

Citing Rule 2:2-3(a)(2), Keansburg argues that the Appellate Division is only vested with jurisdiction to review final decisions of State administrative agencies:

At issue here is Plaintiff's challenge to the decision of the TRC to approve the Borough's tidelands grant application. This is fundamentally a final agency decision. Thus, pursuant to R. 2:2-3(a)(2), the court with exclusive jurisdiction over any such claim would be the Appellate Division, not the trial court. (Emphasis added).

The nature of the actual administrative process at issue in this case is such that no decision of the TRC is actually a "final" agency decision unless and until the New Jersey Attorney General approves and "signs off" on the preliminary recommendation of the TRC. Until such time as Attorney General approval is given – if ever given – the views of the TRC and the NJDEP are merely non-final preliminary recommendations. Only after the Attorney General takes affirmative final administrative action and approves the TRC's preliminary recommendation is there "final" agency action from which Jersey Shore can challenge and appeal as of right to the Appellate Division under Rule 2:2-3(a)(2). That has not occurred yet. Before the Trial Court, Keansburg readily conceded that the grant identified in Plaintiff's Amended Complaint is not yet valid because it has not been approved by three of the required entities: "...Plaintiff's Amended Complaint hinges on a grant that has not been approved by three of the necessary entities before it is valid" N.J.S.A. 13:1B-10 (Ps001-003).

Keansburg Respondent readily acknowledged the above before the Trial Court, despite now “mincing” words. Indeed, the Attorney General could still reject the TRC’s recommendation and send the application back for further consideration by the TRC as to the applicability and impact of the Public Trust Doctrine and related Administrative Public Access Rule on the application, or the Attorney General could outright reject the TRC’s recommendation’s itself as violative of the Public Trust Doctrine and Public Access Rule. In the latter case then Keansburg would have a “final” agency decision on their application (*a rejection) which they themselves could then challenge under Rule 2:2-3(a)(2) before the Appellate Division. Indeed, were Jersey Shore to have earlier attempted to file a direct challenge with the Appellate Division before the TRC’s preliminary recommendation was approved by the Attorney General and before the agency decision became “final”, the Appellate Division would be duty bound to dismiss the appeal for lack of jurisdiction as premature as there would be (*and to date still is) no “final” agency decision. Point in fact, Keansburg implicitly recognizes this, as they do not unequivocally state in their argument that they believe that the TRC’s preliminary recommendation is indeed without reasonable dispute a “final” agency action subject to appeal of right to the Appellate Division. Rather, they argue without supporting citation that the TRC’s *preliminary recommendation* – still to this day as of this writing pending final approval by the Attorney General – is somehow “... *fundamentally a final agency*

decision.” (emphasis added). (Db9). There is no such thing as a “fundamentally final” decision: there are “final” agency decisions that may be challenged through an appeal as of right to the Appellate Division (*this is not such a decision), and there are “non-final” or “not-yet final” agency decisions that may *not yet* (*absent an Order granting Leave to Appeal) be challenged through an appeal of right to the Appellate Division (*this is just such a case).

Keansburg argues in Point III that: “PRELIMINARY” DECISIONS OF AN AGENCY, IF THEY EXIST, ARE NOT SUBJECT TO REVIEW BY THE LAW DIVISION AND MUST RIPEN BEFORE APPELLATE REVIEW.” (Kb12). In so arguing, Keansburg and O’Hare reveal that by design they are completely mischaracterizing the nature of Jersey Shore’s Law Division “challenge,” and alternatively argue under the guise of a “ripeness” argument the following:

The Plaintiff attempts to forge new grounds for challenging the TRC’s approval by declaring that the decision was not a “final” decision, but rather a “preliminary” decision. Thus, according to Plaintiff, the *preliminary decision* is not subject to the requirements of R. 2:2-3(a)(2) and therefore can be challenged in the Law Division of the Superior Court. (Db12)

Contrary to this argument, Jersey Shore is not challenging the substance of the TRC’s preliminary recommendation *per se*. Rather, Jersey Shore is arguing that *the legal procedures and legal standards used* by the TRC during the ongoing administrative review process that were used and followed in arriving at their

preliminary recommendation were in direct violation of law and were legally flawed because the TRC failed to include in their review and recommendation process due and full consideration of the now statutory Public Trust Doctrine and whether the TRC's preliminary recommendation would contribute to violation of the related Administrative Public Access Rule. Since the administrative process is not "final" but rather is still ongoing, this can be ordered corrected by the Law Division. During this ongoing and still not complete administrative process, Jersey Shore brought an action under the authority of the declaratory judgments act and case law to challenge the legality and propriety of the procedures being used during the ongoing review and recommendation process to compel the TRC and NJDEP to consider (or reconsider) the application in the context of whether the application and the designated proposed development it is meant to benefit actually violates the Public Trust Doctrine and the Public Access Rule. Jersey Shore filed this lawsuit because it clearly does, and none of the Respondents have argued substantively otherwise.

CONCLUSION

What is at issue in this appeal is whether affected members of the public such as Appellant Jersey Shore must sit back and be "muzzled" while the government agencies statutorily charged with enforcing clearly applicable law to protect the rights of the muzzled public not only ignore the law but do not even mention or acknowledge the clearly applicable law except in passing while raising (*Jersey

Shore maintains) non-applicable procedural arguments to prevent the Superior Court, Law Division, a court of general jurisdiction, from reaching questions in cases properly before them to ensure a fair and legal administrative process. Surely the rights of the public and affected parties such as Jersey Shore do not have less rights to protect themselves under the now statutory Public Trust Doctrine than they did under the formerly only common law Public Trust Doctrine. Moreover, it is clear that there is no existing right or procedure to challenge the process during the process itself before everything is final in the Appellate Division. Appellate Review is available only from “final” decision or after “final” action has been taken, which is still not present here in this case. The Declaratory Judgments Act and the cited cases support such a right by affected parties to assert and protect their own rights when the Attorney General fails to do so and supports the right to do this and to challenge the procedures and standards during the legal process, not only after the process has been completed and only once everything is final. For the foregoing reasons and authorities cited in support thereof, it is respectfully requested that this Appellate Court reverse the Law Division’s dismissal of plaintiff’s Complaint.

Respectfully submitted,

R. S. GASIOROWSKI, ESQ.