KEVIN MORAN, C/O SEA POINT CONDOMINIUM ASSOCIATION, INC., **Appellant,** **v.** **NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAND USE REGULATION,** **Appellee.**	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** **DOCKET NO. A-00804-23T1** **Civil Action** ON APPEAL FROM FINAL ACTION OF: NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

REPLY BRIEF OF APPELLANT SEA POINT CONDOMINIUM ASSOCIATION, INC.

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I. PRELIMINARY STATEMENT

Appellant Sea Point Condominium Association, Inc. (hereinafter "Sea Point" or "Appellant") offers this reply brief in response to the Opposition Brief of Respondent New Jersey Department of Environmental Protection ("DEP"). The case at bar involves whether and under what circumstances DEP can compel public access to the shoreline on and across privately owned property. The following matters are at issue:

1. Whether the "Public Access Law," N.J.S.A. 13:1D-150 through -156, abrogated or modified New Jersey's common law public trust doctrine;

2. Assuming *arguendo* that the Public Access Law expanded on DEP's existing authority to require public access on and across Appellant's property as a condition of a coastal permit authorizing the replacement of a failing bulkhead, whether the agency properly applied the Law;

3. Whether DEP can require Sea Point to provide public access on and across its property, notwithstanding its failure to adopt regulations within 18 months of the Public Access Law's effective date, as explicitly required by that Law;

4. Whether the Public Access Law allows monetary contributions for offsite public access to satisfy any obligation incurred under the Law;

5. Whether DEP should have conducted a plenary hearing to supplement and clarify the record below, particularly with respect to the application of the

statutory criteria against which the requirement for and reasonableness of any proposal for public access at Sea Point's property can be assessed; and

6. Whether DEP's requirement that Sea Point provide public access to the shoreline on and across its property under the circumstances presented constitutes a taking of private property in violation of the Constitutions of the United States and of the State of New Jersey, respectively.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Appellant relies upon the procedural history and statement of facts as set out in its Initial Brief.

III. ARGUMENT: DEP'S IMPOSITION OF THE PUBLIC ACCESS CONDITION ON SEA POINT'S WATERFRONT DEVELOPMENT PERMIT WAS NOT IN ACCORDANCE WITH LAW AND IS NOT ENTITLED TO DEFERENCE.

A. The Public Access Law Did Not Abrogate or Modify the Common Law Public Trust Doctrine and Did Not Delegate to DEP New Authority to Impose Public Access Conditions (Replying to Respondent's Point A).

The Public Access Law, by its plain terms, codified New Jersey's common law public trust doctrine. See Appellant's Initial Brief ("Ab__") at 7-15. The Public Access Law's codification of the public trust doctrine is consistent with New Jersey's canons of statutory interpretation: "No statute is to be construed as altering the common law, farther than its words import." Velazquez v. Jiminez, 172 N.J. 240,

257 (2002) (quoting Oswin v. Shaw, 129 N.J. 290, 310 (1992)); accord Marshall v. Klebanov, 188 N.J. 23, 37 (2006). Accordingly, "[a] statute enacted in derogation of the common law must be construed narrowly." Velazquez, supra, 172 N.J. at 257, citing Oswin, supra, 129 N.J. at 310. When a statute appears to alter the common law, courts must adopt the most circumscribed reading of the statute that achieves its purpose, and must resolve any doubt about such a statute's meaning in favor of

> the effect which makes the least rather than the most change in the common law. The rule has been declared by the United States Supreme Court as follows: "No statute is to be construed as […] making any innovation upon the common law which it does not fairly express."
>
> Oswin, supra, 129 N.J. at 310 (quoting 3 Norman J. Singer, Sutherland Statutory Construction § 61.01, at 77 (4th ed. 1986) (footnote omitted) (quoting Shaw v. Railroad Co., 101 U.S. 557, 565 (1880)).

When statutory language clearly modifies the common law, then "the sole function of the courts is to enforce it according to its terms." Marshall, supra, 188 N.J. at 37 (quoting Hubbard ex. rel. Hubbard v. Reed, 168 N.J. 387, 392 (2001). But the Public Access Law contains no such clear language that reflects the Legislature's intent to abrogate the common law. DEP, rather than identify any language which reflects an intention to alter the common law, instead claims that the Legislature's intent to modify the common law is supported by its routine reshaping of common-law doctrine in other areas of law. See DEP Opposition Brief ("Rb__") at 19.

First, in support of this position, DEP cites to Wyzykowki v. Rivas, 132 N.J. 509 (1993), where the New Jersey Supreme Court observed that the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 to -22.25, influenced the common law concerning local public officials. Rb19; see id. at 529. However, tat decision does not discuss how to discern the Legislature's intent to abrogate the common law. In fact, Wyzykowski identifies other statutes that the Legislature has enacted to codify common law principals, such as the Municipal Land Use Law, N.J.S.A. 40:55D-23(b). See id. at 523. As such, DEP's argument that this Court should read an implicit abrogation of the common law into the Public Access Law because the Legislature "routinely" abrogates the common law is misleading and without merit.

Allen v. Fauver, 167 N.J. 69, 75 (2001), which DEP also cites in support of its position, likewise falls short in this regard. Allen concerned state corrections officers who sought overtime wages under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 to § 219, and New Jersey's Wage and Hour Law, N.J.S.A. 34:11-56(a)(l) to -56(a)(30). There, the New Jersey Supreme Court affirmed the Appellate Division's determination that the Wage and Hour Law did not apply to the corrections officers because the statute does not include the State of New Jersey in its definition of "employer," N.J.S.A. 34:11-56(a)(1)(g). See Allen, supra, at 72. The Court likewise held that plaintiffs could not bring an action under the FLSA because the State had not waived its sovereign immunity and consented to suit under the

FLSA. Akin to Wyzykowski, neither the Fauver decision nor the case law it treats positively include any analysis about discerning legislative intent to abrogate the common law. Thus, to the extent that Allen is relevant to the matter at hand, it merely reaffirms that this Court should enforce the plain text of the Public Access Law and decline to read into it an implicit abrogation of the common law public trust doctrine.

The New Jersey case law that is most relevant to the issue of the discerning the Legislature's intent to abrogate the common law is Peterson v. Ballard, 292 N.J. 575 (App. Div. 1996). In Peterson, the Appellate Division considered an argument that the Law Against Discrimination, N.J.S.A. 10:5-12(d), abrogated a common law litigation privilege on the basis that abrogation was "implicit in the language and the intent of the statute." Id. at 584. The Court rejected that argument, and instead explicitly agreed with the trial court's refusal to read an implicit abrogation of common law into the statute on the basis that "[i]f the Legislature intended to have N.J.S.A. 10:5-12d override common law privileges, it did not explicitly say so." Id. The Public Access Law similarly lacks any explicit indication of the Legislature's intent to override the common law public trust doctrine, and this Court must therefore decline DEP's request to read such an intent into the statute here.

The Legislature's intent to codify rather than abrogate the public trust doctrine through the Public Access Law is further confirmed by the statute's repeated use of the phrase "consistent with the public trust doctrine." Ab13-15. DEP offers no

definition of "consistent" from any dictionary that supports its position that the Legislature repeatedly invoked this language to signify an intent to abrogate the common law public trust doctrine with which consistency is required, rather than to codify it. Rb15-19. Black's Law Dictionary, 2nd edition, defines "consistent" as "(1) an order done logically with a pattern; *(2) anything that doesn't change*; (3) following the rules of standards."[1] Emphasis added. By contrast, Black's defines "inconsistent" as "[m]utually repugnant or contradictory; contrary, *the one to the other so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other*."[2] Emphasis added. Thus, the Public Access Law's repeated use of the phrase "consistent with the public trust doctrine" plainly evidences the Legislature's intent to codify, rather than to abrogate, the scope and application of the public trust doctrine through the Public Access Law.

The Legislature's intent to codify the public trust doctrine through the Public Access Law is also evident from one of the statutory terms upon which DEP relies heavily in claiming it was delegated expanded authority to impose new public access conditions; that is, the term "additional." Akin to DEP's unsupported interpretation of the term "consistent with," the agency asks this Court to uphold an interpretation of "additional" that has no basis in any definition offered by objective sources

[1] The Law Dictionary (feat. Black's Law Dictionary, 2nd Ed.), https://thelawdictionary.org/consistent/ (last visited August 29, 2024).
[2] The Law Dictionary (feat. Black's Law Dictionary, 2nd Ed.), https://thelawdictionary.org/inconsistent/ (last visited August 29, 2024).

beyond the Commissioner's self-serving assurances about the term's plain meaning. Rb21. To place this issue in context, the parties agree that there is currently no public access provided at Sea Point's property, and that public access does not need to be provided at the property under current DEP rules. See N.J.A.C. 7:7-16.9(k)(2)(i);[3] Returning to Black's Law Dictionary, "additional" is defined as

> the idea of joining or uniting one thing *to another*, so as thereby to form one aggregate. Thus, 'additional security' imports a security, which, *united with or joined to the former one*, is deemed to make it, as an aggregate, sufficient as a security from the beginning.[4]
>
> Emphasis added.

Consequently, DEP's claim that the Law's use of the term "additional" granted the agency new authority to require the creation of public access where no public access existed before cannot be reconciled with the plain meaning of the term "additional" as used in the Public Access Law, especially where this usage of the term is consistent with the application of the public trust doctrine under the very same common law that the Law codified. In fact, by limiting DEP's authority to the creation of "additional" public access, rather than to instances in which "additional or new" public access must be created, the Legislature demonstrated its familiarity

[3] N.J.A.C. 7:7-16.9(k)(2)(i) expressly provides that public access is not required as a permit condition for activities consist solely of accessory development or structural shore protection at an existing residential development if there is no existing public access onsite. See Ab21-22.
[4] The Law Dictionary (feat. Black's Law Dictionary, 2nd Ed.), https://thelawdictionary.org/additional/ (last visited August 29, 2024).

with the common law public trust doctrine as it existed upon the Law's enactment, and its intention that DEP continue to apply the public trust doctrine in this manner.

Finally, DEP chides Sea Point for failing to address the conclusion in the Commissioner's Final Decision that the Legislature evidenced its intent to abrogate the public trust doctrine by referencing only Arnold v. Mundy, 6 N.J.L. 1 (1821), in the Public Access Law, but not any later court decisions, notably Matthews v. Bay Head Improvement Assoc., 95 N.J. 306 (1984). Rb16. DEP asserts that "[s]ince the public trust doctrine pre-existed the [Public Access] Law, the Legislature necessarily included the doctrine as a starting point within the broader command that DEP ensure that any permit it issues is 'consistent with the public trust doctrine'." Rb18. The Commissioner's Final Decision observed that the Legislature describes the Arnold case as "seminal" in outlining "the history of the public trust doctrine and appl[ying] it to tidally flowed lands in New Jersey," Rb16, thereby underscoring the more likely conclusion that the Legislature referenced Arnold solely to establish the "starting point" for the Law's discussion of the common law public trust doctrine. The Legislature was also fully aware of the Matthews decision, as evidenced by the many references to it in the 2016 Public Access Task Force that informed the Legislature's deliberations on the Public Access Law. See Appellant's Initial Brief Appendix at Aa0142-171. This context makes it even more unlikely that the

Legislature expressed its intent for the Public Access Law to overturn post-Arnold case law by declining to acknowledge it at all.

In light of the presumption against reading an abrogation of common law into a statute, and the corresponding need to narrowly interpret statutes that appear to abrogate the common law, DEP's argument that it is incumbent on Sea Point to reconcile the Public Access Law's reference to Arnold v. Mundy with an intention to codify the common law public trust doctrine is backward. Had the Legislature intended to abrogate the common law public trust doctrine as most recently developed through Matthews and its progeny (including Raleigh Ave. Ass'n v. Atlantis Club, 370 N.J. Super. 171 (2004)), then it needed to say so explicitly in the Public Access Law, yet it declined to do so.

Furthermore, DEP makes no effort to explain how the Law's reference to Arnold v. Mundy as a "starting point" for its discussion of the public trust doctrine reflects an intent to nullify or otherwise abrogate later decisions, including Matthews. To the contrary; given that Arnold is the only court decision referenced in the Public Access Law, taking DEP's argument to its logical extreme under the applicable canons of statutory interpretation would suggest that it was the Legislature's intent to revert the public trust doctrine to its substance as it existed in 1821 when the New Jersey Supreme Court issued the Arnold decision. This would not only produce the kind of absurd outcome that courts must avoid when

interpreting statutes, see N.J. Republican State Comm. v. Murphy, 243 N.J. 574, 613 (2020), but would also yield an outcome that would deprive DEP of the new authority to require public access it claims to have under the Public Access Law.

B. Even if the Public Access Law Abrogated the Common Law Public Trust Doctrine and Delegated to DEP New Authority to Impose Public Access Conditions, DEP Failed to Properly Apply the Law to Sea Point's Application (Replying to Respondent's Point B).

DEP argues that even "[i]f…the public access requirement is triggered," which Sea Point continues to dispute under the circumstances presented,[5] "then the Law requires DEP as a next step to consider three factors to determine 'the public access that is required at a property,'" but goes on to claim that "the extent of public access 'that is required' at the Property is not an issue in this appeal." Rb24. This characterization could not be further from the truth.

C. DEP Cannot Enforce the Public Access Law Until DEP Complies with the Law's Express Requirement that It Adopt Implementing Regulations (Replying to Respondent's Point C).

N.J.S.A. 13:1D-153(b) requires that within 18 months of the Public Access Law's effective date DEP adopt rules and regulations concerning the permits for which public access would be required "consistent with the public trust doctrine," as

[5] Sea Point reminds the Court that the "circumstances presented" involve nothing more than the reconstruction of a failing bulkhead, which DEP characterizes as a change in footprint that gives rise to new public access obligations under the Public Access Law. See Appellant's Initial Brief ("Ab__") at 2.

well as projects for which individual review of public access will be required. The effective date of the Public Access Law was July 2, 2019. 18 months following July 2, 2019, was January 2, 2021. DEP's Opposition Brief asks this Court to allow DEP to nevertheless interpret ambiguous provisions in a statute to the agency's preference, and without prior rulemaking, while ignoring an explicit mandate from the Legislature in the same statute that it adopt implementing regulations more than three-and-a-half years ago.

Implementing regulations provide the public with notice of an agency's approach to interpreting and enforcing otherwise ambiguous statutory provisions. Section 153(b) of the Public Access Law expressly reflects the Legislature's intention that the public have an opportunity to participate in the rulemaking process to ensure that any unclear terms in the Public Access Law are interpreted and enforced reasonably. DEP has not afforded the public the courtesy of any such participation or notice here, in open violation of a statutory mandate that the agency do so. Were this Court to endorse this practice, it would set a dangerous precedent which not only encourages state agencies to ignore explicit rulemaking directives from the Legislature, but also leaves permit applicants to DEP's absolute mercy once it determines, in its own unchecked discretion, that applicants have incurred new public access obligations under the Public Access Law. As such, this Court must set aside the DEP Commissioner's October 6, 2023 Final Decision under appeal.

DEP concedes in its Procedural History and Counterstatement of Facts that it last revised its public access rules in September 2017, which was approximately two years before the Legislature enacted the Public Access Law. See Rb3. DEP argues in its brief that because the Law contains no provision *prohibiting* its implementation if DEP does not adopt regulations with the prescribed time period, that it is free to do so. Rb27. While Sea Point agrees that DEP has existing authority, and in fact the obligation, to require public access under long-established principles of common law,[6] DEP's applicable regulations are unambiguous in preventing DEP from requiring an applicant to provide onsite public access as a condition of approval under the circumstances presented by Sea Point's permit. Ab21-22. DEP nevertheless asserts that "without a legislative bar to implementing the Law without new regulations, the Law obligates DEP to protect the public's right to access tidal waters and impose public access conditions on permits." Rb28. DEP, by offering this argument, takes the extraordinary step of asking this Court to allow DEP to begin enforcing its preferred interpretations of the statute without any prior notice to the regulated community or the public, even where the Legislature has explicitly articulated a specific timeline for the agency to do so.

[6] The Legislature most recently confirmed DEP's authority and obligation to require public access as a condition of permits when and where appropriate in N.J.S.A. 13:19-10, P.L. 2015, C.260, which it enacted in response to Hackensack Riverkeeper, Inc. v. New Jersey Dept. of Environmental Protection, 443 N.J. Super. 293 (App. Div. 2015). See Ab17-18.

Section 153(b) of the Public Access Law directs DEP to adopt rules establishing the types of permits that would and would not require public access, and the categories of projects that will not require public access. See N.J.S.A. 13:1D-153(b). Despite DEP's inevitable assurances to the contrary, Sea Point's reconstruction of its failing bulkhead may very well have been the type of project that would have been addressed by the required rulemaking had DEP complied with the Legislature's mandated timeline, rather than manufacturing an opportunity to enforce its preferred interpretation of the Law. Ab21-22.

DEP, in support of its assertion that state agencies enjoy broad discretion with respect to the timing of rulemaking required by statute, relies on In re Failure by the Dep't of Banking & Ins., 336 N.J. Super. 253 (App. Div. 2001). In re Failure is distinguishable from the matter at hand in several respects. In re Failure involved a statute that requires the Department of Banking & Insurance to update a dental fee schedule every two years to reflect inflation. The agency first adopted the fee schedule in 1990 as required and updated it again in 1996, but did not do so in 1999. The New Jersey Dental Association ("NJDA") thereafter sought a writ of mandamus requiring the agency failed to update the fee schedule.

The Appellate Division ultimately declined to compel the agency to engage in rulemaking, largely because of the possibility that inflation data may not always indicate that costs have risen enough to justify updating the dental fee schedule. See

In re Failure, 336 N.J. at 264. But, in doing so, the In re Failure Court cautioned that "[o]ur Supreme Court has held that undue delay in administrative proceedings may result in a denial of 'fundamental procedural fairness." Id. at 268, citing In re Arndt, 67 N.J. 432, 436 (1975); Johnson v. New Jersey State Parole Bd., 131 N.J. Super. 513, 517-18 (App. Div. 1974), cert. denied, 67 N.J. 94 (1975). The Court also observed that, under the circumstances presented, the agency was "pressing upon the limits of reasonableness." In re Failure, 336 N.J. Super. at 269. Thus, to the extent that In re Failure is applicable to the case at bar, it only serves to underscore just how unreasonable DEP was in imposing a public access requirement on Sea Point before engaging in the rulemaking required by N.J.S.A. 13:1D-153(b).

In re Failure is also distinguishable from the facts presented by Sea Point's permit application because it involved a request that the Appellate Division require an agency to engage in rulemaking. Here, however, Sea Point is not asking this Court to compel DEP to engage in the statutorily mandated rulemaking required by the Public Access Law, but rather to prevent DEP from enforcing its preferred interpretations of unclear terms and provisions prior to engaging in the mandated rulemaking process. Additionally, unlike DEP in this matter, the Department of Banking & Insurance had previously completed two separate rounds of rulemaking to create and update the dental fee schedule at issue before the Dental Association sued over the agency's inaction. Again, this dynamic is not analogous to the

circumstances presented in the case at bar, where DEP has not so much as proposed—let alone adopted—a single regulation to date upon which the public can reasonably rely when navigating the potential implications of ambiguous statutory terms on prospective permit applications.

Ironically, on August 22, 2024, just one week ago, DEP finally convened a stakeholder meeting for the stated purpose of informing the public of the possible contents of the regulations required by the Public Access Law. DEP, despite arguing in this matter that the Public Access Law is sufficiently clear to be self-executing, acknowledged in the materials provided to stakeholders that the Public Access Law affords ample room for interpretation and leaves much to be explained through rulemaking. See Appellant's Reply Brief Appendix ("ARa__") at 001-11. Most notably, DEP indicated that it will exercise its authority under the Public Access Law to require the creation of onsite public access at certain residential properties only when it will facilitate public access that is "meaningful" and "feasible." The materials indicate that DEP intends for its "meaningfulness assessment" to consider the following criteria: (i) characteristics of the potential for onsite access; (ii) impact on surrounding development; (iii) location of site in relation to other public access points; (iv) parking availability nearby; and (v) needs in the town. See ARa003.

Incredibly, DEP concluded that if it determines that onsite public access at a particular property would be neither reasonable nor meaningful, it would allow

applicants to make a monetary contribution for offsite public access. Not only is this conclusion incompatible with the position DEP has taken in this case, it also affirms the agency's authority to approve the monetary contribution toward offsite public access that Sea Point has offered from the outset.

D. Monetary Contributions Can and Should Satisfy Public Access Requirements Under the Public Access Law In Appropriate Circumstances (Replying to Respondent's Point D).

DEP asserts in this case that it cannot accept monetary contributions to satisfy public access obligations under the Public Access Law. Rb29-31. This notion should be rejected because it is premised on a double standard that DEP has conjured from thin air. From the outset, it is uncontested that DEP currently allows permit applicants to make monetary contributions for offsite public access improvements where onsite access is not feasible or reasonable. See N.J.A.C. 7:7-16.9(k)(2)(i)-(iii); Aa0029-35. Consistent with this practice, upon being informed by DEP that Sea Point's permit application triggered a public access requirement under the Public Access Law, Sea Point proposed to make a monetary contribution for the improvement of nearby facilities. DEP rejected that offer out of hand and continues to insist that it is not appropriate.

DEP acknowledges that any new or expanded public access on or across private property must be reasonable and meaningful, see Rb4, but makes no effort to reconcile its approach in applying the Public Access Law to Sea Point's permit

application with the statute's requirement that all new or expanded public access be "reasonable and meaningful." See N.J.S.A. 13:1D-150(d). DEP fails to offer any explanation as to how the new onsite public access that it seeks to impose on Sea Point's property is either meaningful or reasonable. To the contrary, and despite the Public Access Law's requirement that DEP consider "the demand for public access" when assessing the extent of access to be required, DEP has made no such finding.

Even under a charitable interpretation of the record below, the closest that DEP has come to justifying its decision to require public access on and across Sea Point's property was in the November 10, 2020 In-Water Waterfront Development Permit Environmental Report that accompanied the issuance of the permit (Aa0007-010), where the agency wrote:

> The Borough of Point Pleasant has about 18,000 residents and is bounded by the Manasquan River on its northern border and the Beaverdam Creek along its southern border. There are limited public access points along the Beaverdam Creek near the applicant's property. The Borough does not have a Department-approved Municipal Public Access Plan.
>
> Aa0009.

While it is true that the Borough does not have a DEP-approved municipal access plan, Sea Point disputes DEP's claim that there are limited public access points near Sea Point's property (a claim for which DEP offers no maps or narrative geographic analysis in support). And merely reciting the total population of a

municipality that covers 3.49 square miles of land does nothing to characterize the demand for public access at Sea Point's property in particular. Put simply, the reasoning that DEP offers in support of its conclusion that onsite public access must be provided at Sea Point's property is cursory and circular, and represents a flimsy attempt at establishing DEP's credibility at providing analysis where there is none.

DEP claims that Sea Point's challenge to the reasonableness of any public access requirement on the Property, including its requested inquiry into whether nearby existing facilities already provide sufficient public access, is somehow premature and beyond the scope of the case. Rb31. DEP argues that "[c]ontrary to Sea Point's assertions, the statutory factors do not include 'the relative benefits' of public access, whether access is 'convenient,' or whether the public 'would be inclined to use the access point.' N.J.S.A. 13:1D-153(a)." Rb31, footnote 11.

This is non-sensical. First, Sea Point concedes that public access is an inherently beneficial use of land that is favored by the common law. However, existing common law and the Public Access Law both require that it be provided in a manner that it is both reasonable and meaningful. This statutorily mandated inquiry into reasonableness and meaningfulness must necessarily be informed by the relative benefits afforded to the public by any new access that DEP requires as a condition of a permit. In addition, DEP would be hard-pressed to reconcile this position with

the factors that it has proposed for making a "meaningfulness assessment,"[7] ARa003, as well as the factors explicitly enumerated by the Public Access Law.[8] Indeed, DEP's position that the statutory factors do not include "whether the public 'would be inclined to use the access point'" conflicts directly with the statutory obligation to consider "the demand for public access" before requiring it. N.J.S.A. 13:1D-153(a). This underscores just how unreasonably DEP is applying the Public Access Law to Sea Point's permit application, and why the Legislature's express rulemaking mandate must be honored by DEP before the agency begins to enforce the Public Access Law.

E. This Court Should Remand This Matter for Further Fact-Finding (Replying to Respondent's Point E).

DEP argues that a remand is not necessary or appropriate in this matter because "[t]he sole issue is whether DEP properly imposed a general public access condition on Sea Point's Permit pursuant to N.J.S.A. 13:1D-153(a) [and] the record below is robust on this issue […]." Rb32. DEP justifies this conclusion on the basis that the scope of this appellate review does not include the extent of public access required at Sea Point's property, which DEP characterizes as the next step of analysis. This characterization of the scope of this Court's review is inaccurate.

[7] *i.e.*, the characteristics of potential onsite access, the impacts of surrounding development, the location of the site in relation to other public access points, the availability of parking nearby, and need within the municipality.
[8] *i.e.*, the scale of the changes to the footprint or use, the demand for public access, and any department-approved municipal public access plan or public access element of a municipal master plan. See N.J.S.A. 13:1D-153(a).

Should this Court conclude that the Public Access Law modified the common law public trust doctrine, which Sea Point maintains it did not, this matter must be remanded for a plenary hearing to supplement the record below to ensure the adequacy of DEP's review and approval process for Sea Point's public access plan moving forward.

Moreover, New Jersey case law is clear that DEP must not only identify the current demand for public access at the Property, see N.J.S.A. 13:1D-153(a), but must also articulate a sufficient analysis with respect to current demand for public access to dispel any concerns that the agency's assessment of demand "(a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment." See State v. Shackelford, 2015 N.J. Super. Unpub. LEXIS 842, at *7 (App. Div. 2015), citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). As DEP's record below does not contain any analysis upon which a court can meaningfully review the agency's conclusion that there is currently sufficient demand for public access in the vicinity of Sea Point's property such that onsite access is required, a remand for a plenary hearing is the most appropriate procedure by which this Court can ensure that DEP has not abused, nor will abuse, the discretion afforded to it by N.J.S.A. 13:1D-153(a) in its dealings with Sea Point.

F. DEP's Imposition of the Public Access Condition on Sea Point's Waterfront Development Permit is a Taking of Private Property In Violation of the United States Constitution and the Constitution of the State of New Jersey (Replying to Respondent's Point F).

The United States Constitution and the New Jersey Constitution both prohibit the taking of private property for public use "without just compensation." U.S. Const. amend. V; N.J. Const. art. I, ¶ 20. New Jersey courts apply the same analysis for state and federal takings claims, viewing the constitutional provisions as "coextensive." Englewood Hosp. & Med. Ctr. v. State, 478 N.J. Super. 626, 640 (App. Div. 2024), citing Klumpp v. Borough of Avalon, 202 N.J. 390, 405 (2010). While "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property," these constitutional protections also guard against certain kinds of regulatory interference with a private party's interest in their property. See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537-38 (2005); see Cedar Point Nursery v. Hassid, 594 U.S. 139, 147-48 (2021).

DEP, by requiring Sea Point to create a public access point at its property under the circumstances presented, has effectively appropriated private property for public use without just compensation and, as such, engaged in a *per se* taking in violation of the respective Constitutions of the United States and the State of New Jersey. To this end, regulations are considered per se takings when they "result[] in a physical appropriation of property." Id. at 149. Simply stated, if DEP's

requirement for providing access at Sea Point's property is determined to be lawful (i.e., determined to be meaningful and reasonable under the circumstances), then it is not a taking. If, however, the Court cannot discern from the facts before it whether DEP has engaged in an as-applied taking of Sea Point's property, then a remand of this matter for a plenary hearing is necessary to supplement the record below.

The administrative agency responsible for enforcing a regulation must be the first to hear an as-applied constitutional challenge to the implicated regulatory scheme because evidence must be proffered to support the challenge. See Englewood Hosp., supra, at 642; see also Fred Depkin & Son, Inc. v. Dir., New Jersey Div. of Tax'n, 114 N.J. Super. 279, 284-86 (App. Div. 1971). On the other hand, this principle does not apply to facial constitutional challenges, which are purely questions of law. See Fred Depkin, supra, at 284-86; see also Matter of Comm'r of Ins.'s Issuance of Ords. A-92-189 & A-92-212, 274 N.J. Super. 385, 404 (App. Div. 1993). Here, Sea Point is not challenging the constitutionality of the Public Access Law, but rather DEP's implementation of the Law under the circumstances presented. As such, Sea Point is legally justified in raising its as-applied takings claim before DEP and the Office of Administrative Law in the proceedings below, and the takings claim remains ripe for review by this Court.

The facts of this case are analogous to those in Cedar Point, supra. There, the plaintiff property owners challenged a regulation which required them to open their

private agricultural businesses, which were not open to the public, to third-party union organizers 120 days per year for three hours per day. The plaintiffs argued that this imposition not only disturbed their operations, but also infringed upon their right to exclude others from their property. The U.S. Supreme Court agreed and concluded that the regulation in question was a per se physical taking. 549 U.S. at 143.

Like the plaintiffs in Cedar Point, Sea Point is faced with an agency action that requires it to forsake its right to exclude others from property that is not currently open to the public, without any compensation in return. In fact, the circumstances presented here by Sea Point's permit application are more egregious than those in Cedar Point; namely, DEP is requiring Sea Point to open its property to the public indiscriminately, rather than only to a specific subset thereof (*e.g.*, union organizers). Additionally, the U.S. Supreme Court found a *per se* taking where the plaintiff was required to open its private property to the public for a total of 360 hours per year, while the public access that DEP is now requiring Sea Point to provide at its property would allow any member of the public to enter and enjoy Sea Point's property at any time of day, 365 days per year.

Meanwhile, Sea Point is easily distinguishable from the plaintiffs who unsuccessfully alleged *per se* takings in Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 82 (1980) and Englewood Hosp., supra. Even when accounting for New Jersey's public trust principles concerning public access to the shoreline, the

presence of the public is in no way a natural element of the Sea Point residents' ownership and quiet enjoyment of their homes. Compare Pruneyard, supra, at 87-88; Englewood Hospital, supra, at 645. The right of exclusion is "one of the essential sticks in the bundle of property rights," see Pruneyard, supra, at 82, citing Kaiser Aetna v. United States, 444 U.S. 164, 179-180 (1979), and the essentiality of the right of exclusion is particularly pronounced in residential contexts. The residents of Sea Point continue to assert theirs unambiguously, making this more consistent with the facts presented by Cedar Point than those of Pruneyard or Englewood Hospital.

In sum, the public access requirement that DEP now attempts to impose on Sea Point goes beyond the agency action that the U.S. Supreme Court found to be a *per se* taking in Cedar Point. Application of Cedar Point to the matter at hand, as well as the clear distinction between the circumstances presented by Sea Point and those presented by plaintiffs whose takings claims were denied in Pruneyard and Englewood Hospital, renders the inescapable conclusion that DEP has engaged in a *per se* taking of Sea Point's property through its flawed and premature implementation of the Public Access Law.

IV. CONCLUSION

DEP, in its Opposition Brief, never addresses Sea Point's observation that the need to balance public access rights with the privacy, safety and quiet enjoyment of seashore-adjacent habitations is a seminal component of the common law dating

back to the earliest formulations of the public trust doctrine in the Institutes of Justinian, which declares, "No one […] is forbidden to approach the seashore, *provided that he respects habitations*, monuments, and the buildings, which are not, like the sea, subject only to the law of nations."[9] Emphasis added. The manner in which DEP required that public access be provided in this case is inconsistent with this seminal principle of common law that was codified by the Public Access Law.

For the foregoing reasons, DEP's effort to impose an onsite public access requirement across Sea Point's property under the facts presented is not authorized by or otherwise in accordance with the laws of the State of New Jersey. As such, this Court must set aside the Commissioner's Final Decision dated October 6, 2023.

Respectfully submitted,

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Dated: August 30, 2024

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[9] J. Inst. 2.1.1, *in* The Institutes of Justinian, with Notes 67 (Thomas Cooper ed. & trans., 3d ed. 1852).

KEVIN MORAN C/O SEA POINT CONDOMINIUM ASSOCIATION, INC. Appellant, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-00804-23T1 <u>CIVIL ACTION</u> ON APPEAL FROM FINAL DECISION BY THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEF ON BEHALF OF RESPONDENT NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Date Submitted: August 7, 2024

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PRELIMINARY STATEMENT

This case centers on the 2019 Public Access Law, N.J.S.A. 13:1D-140 to -156 ("Public Access Law" or "Law"), as applied by the New Jersey Department of Environmental Protection ("DEP") to Sea Point Condominium Association, Inc. ("Sea Point") when it requested a permit in 2020 under the Waterfront Development Law, N.J.S.A. 12:5-3, and Coastal Zone Management ("CZM") Rules, N.J.A.C. 7:7-1.1 to -29.10. Since Sea Point expanded its development footprint along tidal waters of the State by pushing its land area waterward and legalizing various private in-water structures, the plain terms of the Public Access Law required Sea Point to provide public access on its property.

Notwithstanding the DEP's statutory obligation to ensure that its permitting decisions recognize the public's right to meaningful access to the State's tidal waters, Sea Point challenged the express permit condition that required Sea Point to submit a public access plan to DEP for review and approval before constructing the project authorized by the permit. Following cross-motions for summary decision, and a detailed Initial Decision in DEP's favor, the DEP Commissioner issued a Final Decision affirming the ALJ's finding that Sea Point's development fell squarely within the scope of activities that require additional onsite public access as a condition of receiving a permit.

In this appeal from the Final Decision, Sea Point rehashes the arguments

raised below without disputing any specific findings or conclusions in the Final Decision. But for the reasons explained below, the Commissioner's decision is reasonable, supported by the facts in the record and the Law, and should be affirmed.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

A. The Property

Sea Point is a homeowners' association that owns property along the tidal waters of the North Branch of the Beaverdam Creek in the Borough of Point Pleasant Beach, identified as Block 362, Lot 84 (the "Property"). (Aa80; Aa116; Ra2).[2] The Property includes three residential condominium buildings, a swimming pool, walkways, driveways, parking lots, landscaping and associated improvements. (Aa116; Ra2; Ra36). Along the waterfront, the Property includes two paved cul-de-sacs each with several parking spaces, and a boat basin with boat slips dedicated for condominium residents. (Aa116; Ra2-3; Ra44; Ra48). Currently, there is no public access to the waterfront on the Property, nor has there been any since the Property was developed as

[1] Because they are closely related, the procedural history and statement of facts relevant to this motion are combined to avoid repetition and for the court's convenience.

[2] "Aa" refers to Appellant's appendix, "Ab" refers to Appellant's brief, and "Ra" refers to Respondent's appendix.

condominiums. (Ra3). "Private Property" and "No Trespassing" signs appear at the sole entrance to the complex. (Ra3; Ra196).

B. DEP's Applicable Statutory and Regulatory Authority

Under the Waterfront Development Law, any proposed development of the waterfront requires prior DEP approval. N.J.S.A. 12:5-3(a). The Waterfront Development Law explicitly applies to waterfront structures, such as docks, piers, and bulkheads. Ibid. Conversely, any development that occurs without DEP approval violates the statute. N.J.S.A. 12:5-6(a).

The DEP regulates use and development of the State's coastal resources, including the waterfront, through the CZM rules, which are used to review coastal permit applications in accordance with the legislative goals and standards of the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to -51, the Wetlands Act of 1970, N.J.S.A. 13:9A-1 to -10, and the Waterfront Development Law, N.J.S.A. 12:5-3. N.J.A.C. 7:7-1.1(a). Public access is one of the numerous substantive CZM rule requirements, N.J.A.C. 7:7-16.9, and development must also comply with the public trust doctrine rule. N.J.A.C. 7:7-9.48(a) to (b).[3] Also relevant here, under the existing CZM rules, in certain circumstances, a bulkhead replacement in the same location as a preexisting bulkhead used for residential purposes does not require a permit, whereas a bulkhead replacement waterward

[3] The DEP's public access rules were last revised in September 2017.

of the mean highwater line does require a permit. N.J.A.C. 7:7-2.4(d)(6); N.J.A.C. 7:7-2.4(c)(2).

In 2016, the Legislature amended the Waterfront Development Act and CAFRA to expressly authorize the DEP to include permit conditions requiring the applicant "to provide on-site public access to the waterfront and adjacent shoreline . . . ." N.J.S.A. 12:5-3(d); N.J.S.A. 13:19-10(h). This legislation was intended to "enable the DEP to continue to assure that the public's right of access to tidally flowed water and their adjacent shorelines under the public trust doctrine is protected." Assembly Statement to A. 4927 (January 7, 2016) (L. 2015, c. 260).

The Legislature further expanded the DEP's authority to impose public access requirements in the 2019 Public Access Law that requires any permit the DEP issues to impose public access requirements "consistent with the public trust doctrine." N.J.S.A. 13:1D-151(a). The Law recognizes the public's "longstanding and inviolable rights . . . to use and enjoy the State's tidal waters and adjacent shorelines" and that those rights are "not fixed or static" but must be "molded and extended to meet changing conditions and the needs of the public it was created to benefit." N.J.S.A. 13:1D-150(a) and (c). The Law requires the DEP to ensure "reasonable and meaningful public access to tidal waters and adjacent shorelines," including "visual and physical access to, and use of, tidal

waters and adjacent shorelines, sufficient perpendicular access from upland areas to tidal waters and adjacent shorelines" and amenities to facilitate public access, such as parking. N.J.S.A. 13:1D-150(d) and (f).

Relevant here, the Public Access Law requires that individual permits for projects wherein the applicant proposes "a change in the existing footprint of a structure" must include a permit condition which requires "additional public access to the tidal waters and adjacent shorelines consistent with the public trust doctrine . . . ." N.J.S.A. 13:1D-153(a). To determine the extent of access required on a site, the DEP must consider "the scale of the changes to the footprint or use, the demand for public access," and any DEP-approved municipal public access plans. N.J.S.A. 13:1D-153(a). While that section allows the DEP to consider other factors with respect to the amount of public access required, the section contains no exceptions for projects that "change . . . the existing footprint of a structure" and instead dictates that the DEP "shall require as a condition of the permit . . . that additional public access to the tidal waters and adjacent shorelines . . . be provided." Ibid. In short, once an applicant changes a waterfront structure's footprint, that applicant must provide additional public access.

The Law exempts some development from public access requirements too. For instance, the Law requires only that marinas maintain "the existing degree

of public access," but if there was no prior public access to the waterfront, "the [DEP] shall not impose new public access requirements to the waterfront or adjacent shoreline as a condition of the permit . . . ." N.J.S.A. 13:1D-154(a). The Law also precludes the DEP from requiring public access at facilities with security issues, like airports, railroad yards, and other enumerated facilities. N.J.S.A. 13:1D-152. These contrast with the "additional" public access mandate set forth in N.J.S.A. 13:1D-153(a).

C. The Permit

On July 14, 2020, Sea Point submitted a Waterfront Development Individual In-Water Permit application for the Property to the DEP. (Ra2; Ra10). Sea Point's application described the proposed project as "reconstruction of a bulkhead 24 inches waterward of its current location and request for after-the-fact authorization of finger piers and mooring piles which had been constructed in the boat basin over time without a permit." (Ra2; Ra13; Ra35).

During the permit review process, the DEP asked Sea Point to submit a public access proposal for the Property and Sea Point disputed the requirement. (Aa119; Ra4-7). Sea Point instead noted that public access already existed at nearby locations, such as Slade Dale Sanctuary and Dorsett Dock Road,[4] and

[4] Sea Point erroneously cites to an undated press release (Aa40-42), concerning

that it was willing to make a monetary contribution to the municipality to enhance public access at another location in lieu of onsite access. (Ra5-6). Ultimately, the parties discussed but could not agree on a public access proposal for the Property. Ibid. Rather than deny the permit application because Sea Point had not yet demonstrated compliance with the Public Access Law, the DEP agreed to issue the permit with a condition requiring Sea Point to provide an onsite public access plan before commencing construction. (Aa120; Ra7).

On November 10, 2020, the DEP issued the permit to Sea Point which authorized, among other things, the "construction of approximately 750 linear feet of replacement bulkhead within the boat basin using vinyl 24 inches waterward of the existing bulkhead alignment . . . ." (Aa1). The permit also legalized preexisting "catwalks," or finger piers, "and mooring piles within the boat basin in their existing dimensions and configuration." Ibid. According to the Permit-approved plans (Ra195), these structures included twenty-two finger piers and forty-seven mooring piles which were not available for public use. (Ra205). The total area of the finger piers that extend into the water in the boat basin is 478.2 square feet. Ibid.

With respect to the bulkhead, the Permit required that the replacement

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Dorsett Dock Road improvements in its brief (Ab3), which was not part of the record below and should be disregarded. Rule 2:5-4(a).

bulkhead "be constructed within 24 inches of the existing bulkhead alignment as measured from the waterward face of the existing bulkhead to the waterward face of the replacement bulkhead as indicated on the approved plans." (Aa3). To fill the void left when the bulkhead was moved waterward of its pre-existing alignment, the Permit required that "[a]ll backfill material for the proposed bulkhead shall be from an upland source and be free from any toxic contaminants." Ibid.

The Permit condition at issue here requires Sea Point to "submit to the Division for review and approval a proposal for providing public access on the project site" before commencing construction. (Aa2).

D. The Administrative Process

Following issuance of the Permit, Sea Point requested an administrative hearing to challenge the public access permit condition and the matter was filed in the Office of Administrative Law ("OAL"). (Aa86). Sea Point also requested permission to begin constructing the replacement bulkhead while its appeal was pending, citing the existing bulkhead's poor condition. (Ra8-9; Ra191). The DEP granted permission to Sea Point to commence reconstructing the bulkhead while reserving DEP's right otherwise to require compliance with the disputed permit condition. (Ra9; Ra193).

In the OAL, the parties filed cross-motions for summary decision[5] with a Joint Stipulation of Facts. (Aa80; Ra1-196). On October 5, 2022, Administrative Law Judge ("ALJ") Dean Buono issued an Initial Decision denying Sea Point's motion and granting the DEP's motion, finding that Sea Point's development would change the existing footprint of a structure on the Property, thus triggering the public access condition required by the Public Access Law. (Aa79-114); Kevin Moran, c/o Sea Point Condo. Ass'n, Inc. v. N.J. Dep't of Env't Prot., No. ELU 04852-21, 2022 N.J. AGEN LEXIS 797 (October 5, 2022) ("Initial Decision"). The ALJ determined that the plain language of the Law supported DEP's decision to impose the public access permit condition. (Aa95).

On October 6, 2023, NJDEP Commissioner Shawn LaTourette issued a twenty-seven-page Final Decision concluding that the ALJ properly granted summary decision to the DEP. (Aa115-40); Kevin Moran, c/o Sea Point Condo. Ass'n, Inc. v. N.J. Dep't of Env't Prot., No. ELU 04852-21, 2023 N.J. AGEN LEXIS 621 (October 6, 2023) ("Final Decision"). The Commissioner concurred with the ALJ that the previously unauthorized catwalks and mooring piles were changes to the footprint of development, and concluded that Sea Point's project

[5] Contrary to Rule 2:6-1(a)(2), Sea Point includes its summary decision brief below it its appendix. (Aa47-78).

"falls squarely within the scope of activities that require additional onsite public access as a condition of receiving a permit." (Aa134).

In reaching his conclusions, the Commissioner noted that the DEP's duty under the Law is "wide in scope" and requires the DEP to make access to the tidal waters and shores available to "to the greatest extent practicable," which includes not only "visual and physical access" but also "sufficient perpendicular access from upland areas to tidal waters and adjacent shorelines, and the necessary support amenities to facilitate public access for all," like parking and restrooms. (Aa127, citing N.J.S.A. 13:1D-150(e) and (f)). To effectuate these goals, the Commissioner acknowledged, the Legislature not only "codified the essence and fundamentals of the public trust doctrine" in the Law, but also "codified new public trust requirements to be triggered under specified circumstances" that "differ in part from those previously set forth in the common law public trust doctrine." (Aa128). Thus, rejecting Sea Point's "fundamental premise" that the Law only codifies the public trust doctrine and no more, the Commissioner found "the plain language" of the Law "clearly indicates that the Legislature did in fact intend to expand upon the public trust doctrine." (Aa130).

The Commissioner also soundly rejected Sea Point's other sundry arguments as to the public access condition requirement itself. First, the Commissioner affirmed well-established precedent that the mandates of the Law

governed over any conflicting pre-existing provisions in the CZM rules. (Aa133). Second, the Commissioner determined that the Law and existing definitions in the CZM rules were "sufficient to determine what constitutes a 'change in footprint of a structure,'" and did not require new rulemaking. (Aa134). Third, the Commissioner dismissed Sea Point's challenge that the bulkhead footprint was "significant" and instead concurred with the ALJ's plain reading of the Law which "applies to development activities that simply 'change' the existing footprint of a structure, whether that change is significant or not." (Aa135, citing Initial Decision at (Aa96)). Instead, the degree of change to the footprint is a factor only in determining "the extent of public access to be provided, which in this matter has yet to be determined." (Aa135). Fourth, the Commissioner rejected Sea Point's argument that N.J.S.A. 13:1D-153(a) precluded DEP from requiring public access where there is no existing public access. (Aa136-37). The Commissioner found instead that Sea Point's reading of the Law is contrary to its plain terms, and would undermine the Law's mandate to expand public access, particularly as the Law exempted other development – such as marinas – from providing public access where none was provided before. Ibid. Fifth, based on the "plain text of N.J.S.A. 13:1D-153(a)," the Commissioner concluded that there was "no room for the [DEP] to consider

alternative arrangements, such as monetary contributions" in lieu of onsite access, as Sea Point had urged. (Aa138).

Finally, as to Sea Point's claim that the public access requirement constitutes an unconstitutional taking, the Commissioner modified the ALJ's decision that Sea Point's claim was not ripe "[w]ithout deciding whether the OAL would have jurisdiction to address the . . . as-applied takings claim," finding instead that "the OAL lacks jurisdiction to adjudicate [Sea Point's] facial constitutional challenge." (Aa139-40) (first alteration in original). The Commissioner reasoned that Sea Point "appears to be challenging the constitutionality of the [Law] itself, which gives the Department authority to require public access as a condition of a permit." (Aa139). As such, the Commissioner concluded that Sea Point's takings claim "could not be decided" by the ALJ or the Commissioner. Ibid.

On November 14, 2023, Sea Point filed this appeal of the Commissioner's Final Decision. By Order dated May 14, 2024, this court denied Sea Point's motion for a stay of the disputed permit condition. By Order dated May 14, 2024, this court also denied Sea Point's motion for a remand to the DEP for further fact-finding.

ARGUMENT

DEP APPROPRIATELY ISSUED THE PERMIT WITH A PUBLIC ACCESS CONDITION AND ITS DECISION IS ENTITLED TO DEFERENCE.

DEP correctly imposed the public access condition on Sea Point's Permit and the Commissioner's Final Decision affirming the Permit requirement is owed deference and should be upheld. While Sea Point purports to challenge the Final Decision in this appeal, it makes no effort to articulate specifically how the Decision is arbitrary, capricious, and unreasonable. Nor can it. Indeed, the record contains ample evidence to support the DEP's determination that Sea Point's project is subject to the Public Access Law, and Sea Point has failed to meet its burden of proof to show that the DEP's decision was unreasonable. Thus, the DEP's decision to issue the Permit with the public access condition should be affirmed.

The court's review of agency decisions is limited. Capital Health Sys., Inc. v. N.J. Dep't of Banking & Ins., 445 N.J. Super. 522, 535 (App. Div. 2016) (citing In re Stallworth, 208 N.J. 182, 194 (2011)); In re N.J. Dep't of Env't Prot. Conditional Highlands Applicability Determination, Program Int. No. 435434, 433 N.J. Super. 223, 235 (App. Div. 2013). An agency is owed "[s]ubstantial deference" regarding the scope of a law that it implements, In re

Adopted Amend. to N.J.A.C. 7:7A-2.4, 365 N.J. Super. 255, 264 (App. Div. 2003), "stem[ming] from [our courts'] recognition that agencies have the specialized expertise necessary to enact regulations dealing with technical matters . . . ." N.J. State League of Muns. v. Dep't of Cmty. Affs., 158 N.J. 211, 222 (1999); see also, e.g., In re Election L. Enf't Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010) (agencies bring "experience and specialized knowledge" to the task of administering and regulating legislation within its field of expertise). That principle applies particularly well here given DEP's long-standing expertise in coastal land use matters, including public access, and its important charge under the Law.

A final agency decision should not be overturned "unless: (1) it was arbitrary, capricious, or unreasonable; (2) it violated express or implied legislative policies; (3) it offended the State or Federal Constitution; or (4) the findings on which it was based were not supported by substantial, credible evidence in the record." Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep't of Env't Prot., 191 N.J. 38, 48 (2007) (citing In re Taylor, 158 N.J. 644, 656 (1999)). The burden of proving arbitrary, capricious or unreasonable action is upon the challenger. Bueno v. Bd. of Trs., Tchrs.' Pension & Annuity Fund, 422 N.J. Super. 227, 234 (App. Div. 2011).

Here, as explained in detail below, the DEP reasonably determined that Sea Point's project is subject to the mandates of the Public Access Law and imposed a public access permit condition. Thus, DEP's decision, which is supported by substantial, credible evidence in the record, is owed deference and should be affirmed.

A. The Public Access Law Requires DEP to Impose Permit Conditions Requiring Public Access (Responding to Appellant's Points IA & IB)

As described above, the Commissioner's conclusions in the Final Decision flow directly from the Law's plain language. But as it did in OAL and again before the Commissioner, Sea Point urges this court to ignore the plain terms of the Public Access Law. (Ab14-15). Sea Point contends that the Law only codifies the public trust common law (and does not expand it) because the Law uses the phrase, "consistent with the public trust doctrine" in N.J.S.A. 13:1D-153(a). (Ab13-15). Under Sea Point's theory, this phrase requires DEP to impose public access only after considering the four-factor test in Mathews v. Bay Head Improvement Association, 95 N.J. 306, 326 (1984),[6] for determining when public access is required across private property. (Ab16).

[6] The Matthews factors include "[l]ocation of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner . . . ." Matthews, 95 N.J. at 326.

The Commissioner rejected Sea Point's premise that the Law merely codifies the common-law public trust doctrine, finding that the premise "is undermined by the plain language of the [Law] . . . , which clearly indicates that the Legislature did in fact intend to expand upon the public trust doctrine." (Aa130, citing N.J.S.A. 13:1D-153(a)). Citing the Initial Decision, the Commissioner concurred with the ALJ's finding that the Law "does not reference Matthews at all, let alone the four-factor test in Matthews, but instead expressly lists specific requirements to guide the Department's public access determinations that 'touch upon, but do not mirror'" the Matthews test. Ibid. The Commissioner explained "[t]he omission of any reference to Matthews is even more noteworthy considering the Legislature instead specifically chose to reference a different case, Arnold v. Mundy, 6 N.J.L. 1 (1821), in its legislative findings and declarations." Ibid. The Commissioner further explained that the Legislature described the Arnold case as "seminal" in outlining "the history of the public trust doctrine and appl[ying] it to tidally flowed lands in New Jersey." Ibid. (citing N.J.S.A. 13:1D-150(c)). Sea Point does not address this point.

Instead, Sea Point's arguments disregard basic principles of statutory construction that require courts to effectuate the fundamental purpose of legislation and "interpret the statute sensibly," Alderiso v. Med. Ctr. of Ocean Cnty., Inc., 167 N.J. 191, 199 (2001), consistent with a common-sense

understanding of its underlying subject matter. Dynasty, Inc. v. Princeton Ins. Co., 165 N.J. 1, 19 (2000). Moreover, "[w]e must presume that every word in a statute has meaning and is not mere surplusage, and therefore we must give those words effect and not render them a nullity." N.J. Highlands Coal. v. N.J. Dep't of Env't Prot., 236 N.J. 208, 214 (2018) (quoting In re Attorney Gen.'s "Directive on Exit Polling: Media & Non-Partisan Pub. Int. Grps.", 200 N.J. 283, 297-98 (2009). Again, Sea Point does not address these tenets.

If, for example, as Sea Point contends, the DEP is bound to apply only common-law public trust doctrine principles under the Law, the mandate in N.J.S.A. 13:1D-153(a) that DEP "shall require as a condition of the permit . . . additional public access" would be rendered extraneous and a nullity. Similarly, Sea Point's position reads out numerous terms in the Law's purpose, including the DEP's "duty to make all tidal waters and their adjacent shorelines available . . . to the greatest extent practicable" and "provide public access in all communities equitably" under both "the public trust doctrine and statutory law." N.J.S.A. 13:1D-150(e). However, Sea Point does not explain how its public trust codification theory "sensibly" interprets any of this plain statutory language, or how its theory comports with the legislative purpose directing the DEP to "remove physical and institutional impediments to public access to the maximum extent practicable." N.J.S.A. 13:1D-150(e). The plain language and

structure of the Law confirm the Commissioner's finding that "the Legislature did in fact intend to expand upon the public trust doctrine." (Aa130).

Sea Point's narrow focus on the phrase "consistent with the public trust doctrine" (Ab14; Ab16), effectively ignores portions of the very sentences it purports to quote as well as provisions of the Law. Sea Point references the "change in footprint" and public trust doctrine references in the Law numerous times. (Ab8; Ab14; Ab16; Ab26-27; Ab33). But the Law is clear that the DEP "shall require as a condition of the permit or other approval that additional public access to the tidal waters and adjacent shorelines be provided consistent with the public trust doctrine . . . ." N.J.S.A. 13:1D-153(a). That language forms the heart of this dispute and is necessary to understand the legislative intent as to DEP's permitting requirements. Further, since the public trust doctrine pre-existed the Law, the Legislature necessarily included the doctrine as a starting point within the broader command that DEP ensure that any permit it issues is "consistent with the public trust doctrine" and then require "additional public access to the tidal waters and adjacent shorelines consistent with the public trust doctrine" when a structure's footprint expands. N.J.S.A. 13:1D-151(a) and -153(a).

Likewise, Sea Point's narrow legislative history review – which again focuses solely on the phrase "consistent with the public trust doctrine" – fails to

support its myopic interpretation of the Law. (Ab16-19). Indeed, the Senate Statement cited by Sea Point also discusses the additional public access requirements adopted in the Law. (Ab16-17 n.12, citing Assembly Environment and Solid Waste Committee Statement to Senate No. 1074 (March 11, 2019). Similarly, the 2016 Task Force Report, issued three years before the Law by a non-legislative body, acknowledged the tension among the Task Force participants between the "need to improve and expand public access along all of New Jersey's coast," and "a Matthews-type analysis in permitting decisions." (Aa150). In this context, the Commissioner properly applied the plain language of the entire Law here, consistent with the Law's broad purpose, N.J.S.A. 13:1D-150(e), and history to expand public access afforded by the public trust doctrine to tidal waters and adjacent shorelines.

Sea Point's other arguments are also without merit. For instance, Sea Point's unsupported contention that the Legislature did not intend to "broaden the scope" of the common-law public trust doctrine (Ab15), is refuted by the legislative practice in New Jersey to routinely reshape common-law doctrines. See Wyzykowski v. Rizas, 132 N.J. 509, 529 (1993) (common-law doctrines relating to the office of local public officials influenced by enactment the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 to -22.25); Allen v. Fauver, 167 N.J. 69, 75 (2001) (the Legislature responded to the common-law issue of

sovereign immunity abrogation by passing the Tort Claims Act, N.J.S.A. 59:1-1 to 12-3, and the Contractual Liability Act, N.J.S.A. 59:13-1 to 13-10). Likewise, Sea Point's citation to a 2016 CAFRA amendment authorizing the DEP to condition a permit on on-site public access, or off-site public access if on-site access is not feasible (N.J.S.A. 13:19-10(h)) (Ab18), does not negate the express mandate in the 2019 Law to require on-site public access, particularly given the principle that when "construing statutes relating to the same subject matter," courts "must strive to harmonize them." Burt v. W. Jersey Health Sys., 339 N.J. Super. 296, 304 (App. Div. 2001).[7]

Relying on its narrow interpretation of Matthews, 95 N.J. at 322, and Raleigh Avenue Beach Association v. Atlantis Beach Club, 185 N.J. 40, 59-60 (2005), Sea Point also argues that where an application proposes to change the structure's footprint or the Property's use, the DEP can only require public access where there is already existing public access. (Ab14). But, as the Commissioner properly concluded, the Law's plain language does not support such a broad public access exemption, which would be contrary to the clear,

[7] To the extent the 2016 CAFRA amendment is relevant at all, it is because that statutory language is limited by the feasibility concept, rather than by any common law public trust doctrine limits. See N.J.S.A. 13:19-10(h) (requiring "off-site public access" if the DEP determines "on-site public access is not feasible as determined by the department.").

expansive legislative design. (Aa136-37).[8] The statute says that, for existing development, when a property owner proposes such changes, the DEP "shall review the existing public access . . . and shall require as a condition of a permit . . . additional public access to tidal waters and adjacent shorelines . . . ." N.J.S.A. 13:1D-153(a). See Harvey v. Bd. of Chosen Freeholders, 30 N.J. 381, 391 (1959) (use of "shall" in legislation reflects that a provision is mandatory). Refuting Sea Point's contention that public access must have been present in the first instance, the Commissioner noted that "by its plain meaning, 'additional' merely indicates the additive nature of any newly required public access, the sum of which represents the 'additional' access." (Aa136). Notably, Sea Point does not contest that finding here.

Finally, the Commissioner concurred with the ALJ's observation that, if the Legislature intended to exclude public access requirements from properties with no existing public access, it could have expressly included such language. (Aa137). For example, N.J.S.A. 13:1D-154(a) is another provision of the Law where "the Legislature expressly excluded certain marinas from the requirement of providing public access where there is no existing public access." (Aa137).

[8] Similarly, the common-law under Matthews, 95 N.J. at 322, and Raleigh, 185 N.J. at 59-60, acknowledged an expansive reading of the public trust doctrine and did not require pre-existing public access, only that prior access was a consideration in determining the appropriate level of accommodation.

But, where, as here, the Legislature "includes particular language in one section of the statute but omits it in another section of the same [a]ct, it is generally presumed that [the Legislature] acts intentionally and purposely in the disparate inclusion or exclusion." Ibid. (citing Shipyard Assocs., LP v. City of Hoboken, 242 N.J. 23, 38 (2020) (alterations in original)). Thus, the Commissioner reasonably concluded that when the public access requirement in N.J.S.A. 13:1D-153 is triggered by a change in footprint, the DEP must impose a public access condition "regardless of whether public access currently exists at the property in question." (Aa137).

B. The DEP Properly Applied the Law to Sea Point's Application (Responding to Appellant's Point II)

After the DEP followed the plain language and expansive purpose of the Law, the DEP then applied the undisputed facts regarding Sea Point's proposed project to its permit application and included a general public access requirement in the Permit. (Ra1-9). As previously noted, project permit applications that seek a "change in the existing footprint of a structure" now "require as a condition of the permit or other approval . . . additional public access to the tidal waters and adjacent shorelines consistent with the public trust doctrine . . . ." N.J.S.A. 13:1D-153(a). The use of the word "shall" means the DEP has no discretion as to whether to condition the permit on public access, though the DEP does have discretion regarding the form the public access takes.

Harvey, 30 N.J. at 391. Here, rather than deny the permit application altogether because Sea Point disagreed that public access was required, the DEP instead issued the permit with a condition requiring Sea Point to submit a plan to provide public access. (Ra7).

The ALJ found that "[t]here is no genuine issue of material fact whether Sea Point's activities – 'reconstruction of a bulkhead 24 inches waterward of its current location and request for after-the-fact authorization of finger piers and mooring piles' – change the existing footprint of structures on the Site." (Aa96; Ra13). Indeed, the record reflects that "the entire 750-linear foot bulkhead will be moved 24-inches waterward of its existing location along the shore" thereby "extend[ing] the dry land area on the site by 1,500 square feet and [reducing] the existing water area by the same amount." (Aa87; Aa96; Ra205). Likewise, the Permit legalizes preexisting "catwalks" (or finger piers) "and mooring piles within the boat basin in their existing dimensions and configuration." (Ra181).

According to the Permit-approved plans (Ra195), these structures include twenty-two private fingers piers and forty-seven mooring piles, which take away a total area of 478.2 square feet from the waterfront. (Ra205). These structures were previously constructed without required DEP permits, and are thus "legally new because they were built without a permit and must be authorized in the first instance." (Aa133). See N.J.S.A. 12:5-3(a) (no "improvement shall be

commenced or executed without the approval of" DEP). On this record, both the reconstructed bulkhead and the legalized structures extend out into the water and therefore expand Sea Point's overall existing footprint, necessitating a public access condition. (Aa134); N.J.S.A. 13:1D-153(a).

If, as here, the public access requirement is triggered, then the Law requires the DEP as a next step to consider three factors to determine "the public access that is required at a property." Ibid. On appeal, Sea Point contends that DEP failed to satisfy the "analytical obligations" under N.J.S.A. 13:1D-153(a) to determine the degree of public access on the Property. (Ab21; Ab23-25). Although the record contains information about public access near the Property for background purposes (Ra207-10), the extent of public access "that is required" at the Property is not an issue in this appeal. The only regulatory issue considered at the OAL and by the Commissioner is whether the DEP properly imposed the public access condition in Sea Point's permit at all. See (Ab1) ("At issue in this matter is whether an under what circumstances the [DEP] can require private individuals and entities to provide public access across their lands . . . as a condition of a permit authorizing the reconstruction of bulkheads.").

Next, Sea Point points out, and the DEP does not dispute, that current public access regulations do not expressly require public access on the Property

in this particular fact pattern. (Ab21). Specifically, N.J.A.C. 7:7-16.9(k)(2)(i) provides that "no public access is required if there is no existing public access onsite" for accessory development or structural shore protection at an existing residential development. That regulation was last amended roughly two years before the Law's enactment. 49 N.J.R. 3145(a) (September 18, 2017). Similarly, Sea Point cites to a coastal engineering rule, N.J.A.C. 7:7-15.11,[9] that it claims, without support, "prohibits the Department from requiring public access on Sea Point's Property as a condition of the permit" (Ab22), even though the regulation does not speak to public access at all. But despite the preexisting regulations' language, the DEP must implement the Legislative mandate of the Public Access Law, which expressly requires it to ensure that, among other things, after July 2, 2019, all permits it issues include "additional" access when a proposed development's footprint changes. N.J.S.A. 13:1D-153(a).

As the Commissioner correctly acknowledged, "[s]tatutes, when they deal with a specific issue or matter, are the controlling authority as to the proper disposition of that issue or matter. Thus, any regulation or rule which contravenes a statute is of no force, and the statute will control." (Aa132, citing Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ., 226 N.J. 297, 314 (2016)).

[9] N.J.A.C. 7:7-15.11(d)(2)(ii) provides that reconstruction of a bulkhead up to twenty-four inches outshore of an existing bulkhead is "conditionally acceptable" under certain circumstances.

Here, though there is an older regulation that exempts existing residential development from public access requirements, since the Law requires "additional" access and does not exempt residential development, the Law conflicts with the rule. N.J.A.C. 7:7-16.9(k)(2)(i); N.J.S.A. 13:1D-153(a). Accordingly, the Commissioner properly concluded that "the Public Access Law, not the CZM rules, governed the DEP's public access determination." (Aa133).

Finally, Sea Point contends that the DEP's conclusion that reconstruction of the bulkhead twenty-four inches waterward of its current location is a "significant change" in the location of a structure (Ra205), is inconsistent with the coastal engineering rule, N.J.A.C. 7:7-15.11(d)(2), which allows such bump-outs in certain circumstances. (Ab22-23; Ab27-28). But whether reconstruction of the bulkhead is a significant change or not, as the Commissioner observed, the Law's plain language applies to any change in footprint of a structure, and a certain degree of change is not necessary to trigger the public access requirement under N.J.S.A. 13:1D-153(a). (Aa135). Also, simply because reconstruction of a bulkhead may meet the separate requirements of the CZM's coastal engineering rule does not mean that reconstruction of a bulkhead does not constitute a "change in the existing footprint of a structure" for purposes of N.J.S.A. 13:1D-153(a). Thus, to comply with the Law, the DEP properly added

the condition that Sea Point provide a public access plan to the DEP in the Permit here.

C. The Public Access Law Does Not Prohibit the DEP from Applying the Law Before New Regulations Are Adopted (Responding to Appellants' Point III).

With this point, Sea Point argues that the DEP is prohibited from applying the Public Access Law because the DEP has not adopted regulations within eighteen months of the Law's effective date, as required by N.J.S.A. 13:1D-153(b). (Ab25). The Law, however, contains no provision prohibiting its implementation if the DEP does not adopt regulations within the prescribed time period. See N.J.S.A. 13:1D-150 to -156.

Specifically, the statute requires the DEP to adopt rules within eighteen months of its effective date to establish the types of permits that would and would not require public access, and the categories of projects that will not require public access. N.J.S.A. 13:1D-153(b). Elsewhere, the Law provides that the DEP "may adopt . . . rules and regulations necessary to implement" the Law. N.J.S.A. 13:1D-156 (emphasis added). Though N.J.S.A. 13:1D-153(b) provides for certain rulemaking to be adopted within eighteen months of the effective date of the Law, courts have recognized that rulemaking is a largely discretionary function and the appropriate remedy for agency inaction is by direct appeal to the Appellate Division pursuant to Rule 2:2-3(a)(2). In re

Failure by the Dep't of Banking & Ins., 336 N.J. Super. 253, 261 (App. Div. 2001). However, Sea Point has not pursued such a remedy and courts are reluctant to direct agencies to implement a legislatively assigned discretionary task out of respect for the separation of powers between branches of government. See Id. at 262 (court declined to issue mandamus to compel the DEP to complete the statutorily mandated fee schedule).

Here, the Commissioner properly found that "the absence of [public access] rules does not preclude the action taken by the [DEP] in this matter." (Aa134). Stated another way, without a legislative bar to implementing the Law without new regulations, the Law obligates DEP to protect the public's right to access tidal waters and impose public access conditions on permits. But cf. N.J.S.A. 13:1D-160 (environmental justice statute implemented "immediately upon the adoption of the rules and regulations required pursuant to" N.J.S.A. 13:1D-161).

Sea Point also contends that, to apply the terms of the Law, the DEP needed to provide guidance through rulemaking to determine what constitutes a "change in footprint of a structure." (Ab26). However, the DEP's application of a plain meaning of the terms of the statute was reasonable and did not require rulemaking. See Airwork Serv. Div. v. Dir., Div. of Tax'n, 97 N.J. 290, 301 (1984) (assessment of taxes sufficiently clear and directly inferable from the tax

statute and not invalid for lack of rulemaking). In this case, as the Commissioner reasonably determined, the existing definitions in the DEP's CZM Rules "were sufficient to guide the [DEP]'s analysis of whether there was a change in footprint under N.J.S.A. 13:1D-153." (Aa134).

For example, the CZM Rules define "footprint of development" as "the vertical projection to the horizontal plane of the exterior of all exterior walls of a structure," and the definition of "structure" includes "any assembly of materials above, on, or below the surface of the land or water," which logically includes piers, pilings, and bulkheads. N.J.A.C. 7:7-1.5. Accordingly, the Commissioner correctly determined that the Public Access Law's terms, combined with the CZM Rules, "was sufficient to determine what constitutes a 'change in footprint of a structure,'" and thus "no additional guidance was necessary." (Aa134). For these reasons, Sea Point's rulemaking challenges should fail.

D. Under the Public Access Law, Monetary Contributions Cannot Satisfy Public Access Requirements (Responding to Appellants' Point IV)

Sea Point argues that any public access to its Property will not be reasonable or meaningful and that making a monetary contribution to the municipality for off-site public access is more appropriate in this case. (Ab23). But, contrary to Sea Point's assertions, monetary contributions cannot satisfy

public access requirements either under the Law or per the existing public access regulation, N.J.A.C. 7:7-16.9(k).[10] As the Commissioner noted, the text of N.J.S.A. 13:1D-153(a), which requires the DEP to review existing public access at the Property and then require additional public access, "leaves no room for the [DEP] to consider alternative arrangements, such as monetary contributions." (Aa138). In fact, the Commissioner noted that previously, in Hackensack Riverkeeper, Inc. v. New Jersey Department of Environmental Protection, 443 N.J. Super. 293, 313-314 (App. Div. 2015), the Appellate Division held that municipalities were not authorized to accept monetary contributions from permit applicants to satisfy DEP's then-existing public access requirements. (Aa138 n.10). Due to that decision, the DEP amended its regulations to remove the provision allowing monetary contributions to satisfy public access requirements. Ibid. (citing 49 N.J.R. 3145(a) (September 18, 2017)). Thus, since the Law neither authorizes municipalities to accept monetary contributions from permit applicants nor authorizes the DEP to impose monetary contribution permitting requirements, Sea Point cannot make a monetary contribution to the municipality to satisfy the Law's public access

[10] Indeed, contrary to Sea Point's assertion, the provision it cites for new, multi-family development (Ab30-31), requires onsite public access, not offsite access or a monetary contribution. N.J.A.C. 7:7-16.9(k)(2)(iv).

requirement.

Also, Sea Point's challenge to the reasonableness of any public access requirement on the Property, including whether neighboring properties ought to provide sufficient public access alone (Ab29-32), is premature and beyond the scope of this case. Quite simply, Sea Point has only recently submitted a public access plan to DEP to assess "the public access that is required" at the Property using the N.J.S.A. 13:1D-153(a) factors.[11] Thus, any challenge to the reasonableness of the required access is premature.

E. Sea Point Is Not Entitled to a Remand (Responding to Appellants' Point V).

With its merits brief, Sea Point reiterates its request for a remand that this court rejected in May 2024. Sea Point again urges this court to remand this matter to the DEP to do an "analysis of the present demand for public access," whether nearby public access satisfies the demand, and other considerations not reflected in the Law. (Ab34-35). But, as noted above, the sole issue in this appeal is whether the DEP properly imposed a general public access condition on Sea Point's Permit pursuant to N.J.S.A. 13:1D-153(a). Further, the parties cross-moved for summary decision in OAL, which included a Joint Stipulation

[11] Notably, contrary to Sea Point's assertions (Ab31), the statutory factors do not include "the relative benefits" of public access, whether access is "convenient," or whether the public "would be inclined to use the access point." N.J.S.A. 13:1D-153(a).

of Facts, and led both the ALJ and the Commissioner to find there were no material issues of fact about the project. (Aa122). "When both parties to an action 'move[] for summary judgment, one may fairly assume that the evidence was all there and the matter was ripe for adjudication.'" Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 450 (2007) (quoting Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am., 266 N.J. Super. 300, 323 (App. Div. 1991) (alteration in original)). Since the record below is robust on this issue, there is no need for a remand.

Moreover, the issues raised by Sea Point for remand relate to the next step, which is the extent of public access needed on the site. The DEP is in the process of evaluating the adequacy of Sea Point's recently-submitted public access proposal and the extent of public access required on the Property, by considering "the scale of the changes to the footprint or use, the demand for public access, and any department-approved municipal public access plan . . . ." N.J.S.A. 13:1D-153(a). But this process has not been completed and is not ripe for appellate review. Because the record in this matter is robust on the narrow issue addressed in the Final Decision, Sea Point's request for remand should be denied.

F. The Commissioner Did Not Err in Concluding that OAL Lacked Jurisdiction to Hear Sea Point's Takings Claim (Responding to Appellants' Point VI).

Finally, without specifying whether it contends that the ALJ or Commissioner erred on this issue, Sea Point reiterates its argument that the public access requirement constitutes an unconstitutional taking. (Ab36-38).

In the Initial Decision, the ALJ noted that Sea Point's "as-applied takings claim . . . is not ripe for adjudication because the DEP has not yet determined the extent of public access that will be required on the [Property]," but he did not decide whether the OAL "would have jurisdiction to address the substance of Sea Point's as-applied takings claim." (Aa102). Then, in the Final Decision, the Commissioner modified the ALJ's finding that Sea Point's constitutional claim was not ripe, determining instead that Sea Point's "takings claim is a facial - rather than as-applied - constitutional challenge and, as such, cannot be adjudicated by the OAL." (Aa140). The Commissioner reasoned that Sea Point "appears to be challenging the constitutionality of the [Law] itself, which gives the Department authority to require public access as a condition of a permit." (Aa139). As such, the Commissioner correctly noted that Sea Point's takings claim could not be decided by the ALJ or the Commissioner. Ibid. (citing Christian Bros. Inst. of N.J. v. N. N.J. Interscholastic League, 86 N.J. 409, 416 (1981)). See also In re Jersey Cent. Power & Light Co., 166 N.J. Super. 540,

544 (App.Div.1979) (a constitutional takings claim is a legal claim "cognizable only by a court of law."); N.J.S.A. 20:3-5 and 3-2(e) (the Superior Court, Law Division has jurisdiction of all condemnation matters).

Alternatively, even if this court wanted to address the takings claim independently, Sea Point has neither demonstrated a facial nor an as-applied constitutional issue here. For a facial challenge, in New Jersey, a statute is "presumed constitutional and . . . 'is not facially unconstitutional if it operates constitutionally in some instances.'" Whirlpool Props., Inc. v. Dir., Div. of Tax'n, 208 N.J. 141, 175 (2011) (quoting GMC v. City of Linden, 150 N.J. 522, 532 (1997) (additional citations omitted)). Though Sea Point has not attempted to meet this standard, it could not do so as the Law does not create a taking with every public access condition imposed, particularly given the public trust doctrine's own non-discriminatory underpinnings. See Van Ness v. Borough of Deal, 78 N.J. 174, 180 (1978) (municipality "cannot frustrate the public right by limiting" beach use to the municipality's residents). For an as-applied challenge, in evaluating petitioner's claim, a court must first determine whether the "essential nexus" exists between the "legitimate state interests" and the permit condition exacted by the government. Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987) (citations omitted). If a court finds an essential nexus exists, it must then determine whether there is a rough

proportionality between the legitimate state interest and the permit condition. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994). But here, it is impossible to decide whether the condition is an unconstitutional exaction as the exact contours of the public access to be provided have not yet been determined and that determination is necessary for the "individualized determination" inherent in exaction analyses. Id. at 391.

Since Sea Point has not attempted to demonstrate a facial or an as-applied constitutional issue here, the claim must fail. The Commissioner's sound decision is reasonable and consistent with applicable law, it should be affirmed.

CONCLUSION

For these reasons, the DEP's Final Decision should be affirmed.

Respectfully submitted,

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ATTORNEY GENERAL OF NEW JERSEY

By: __/s/Kathrine M. Hunt _____
Kathrine M. Hunt
Deputy Attorney General

Dated: August 7, 2024

KEVIN MORAN, C/O SEA POINT CONDOMINIUM ASSOCIATION, INC., **Appellant,** **v.** **NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAND USE REGULATION,** **Appellee.**	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** **DOCKET NO. A-00804-23T1** **Civil Action** ON APPEAL FROM FINAL ACTION OF: NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEF OF APPELLANT SEA POINT CONDOMINIUM ASSOCIATION, INC.

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PRELIMINARY STATEMENT

At issue in this matter is whether and under what circumstances the Department of Environmental Protection (hereinafter "the Department" or "NJDEP") can require private individuals and entities to provide public access across their lands to tidally flowed waters and shorelines as a condition of a permit authorizing the reconstruction of bulkheads. The specific bulkheads at issue in this case protect the Sea Point townhome community in the Borough of Point Pleasant, New Jersey, which is situated along a tidal waterway adjacent to Barnegat Bay.

The Department contends that a 2019 statute, the "Public Access Law", N.J.S.A. 13:1D-150 through -156, authorizes it to require public access across Sea Point's property. Appellant Sea Point Condominium Association ("Sea Point") recognizes and supports the broad public access rights afforded by New Jersey's Public Trust Doctrine but, for the reasons set forth below, nevertheless contends the Department cannot impose a public access requirement either as a matter of law or on the facts presented.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Sea Point offers the following combined procedural history and statement of material facts with references to its Appendix ("Aa___").

The Sea Point property ("the Property") consists of twenty-four (24)

[1] The facts and procedural history are closely intertwined, and they are combined here for the sake of clarity.

townhomes surrounding a boat basin on the north branch of Beaver Dam Creek in Point Pleasant Borough, Ocean County. Aa0053. The Property is developed with three two-story buildings, a swimming pool, walkways, driveways, parking lots, landscaping and associated site improvements. The upland improvements surround a boat basin that was constructed prior to construction of the townhomes and prior to the enactment of the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq. in 1973.

On July 14, 2020, Sea Point applied for a Waterfront Development Permit authorizing the reconstruction of approximately 750 feet of badly deteriorated and failing bulkhead. The application sought approval for construction of a replacement bulkhead 24 inches waterward of the existing bulkhead, as allowed by NJDEP regulations. See N.J.A.C. 7:7-15.11(d).[2] Sea Point's application also requested permission to reconstruct another 126 feet of bulkhead in the same footprint as the existing bulkhead, and sought after-the-fact authorization for and replacement of a number of small finger piers and mooring piles in their current locations within the boat basin.[3]

Between October 5 and November 10, 2020, Sea Point's consultant and

[2] The 24-inch shifting of the bulkhead was proposed specifically to conform to the wording of the Rule, which explains that the reconstruction of a bulkhead does not qualify as "new construction" as long as the replacement bulkhead is located no more than 24 inches outshore of the existing bulkhead. See N.J.A.C. 7:7-15.11(d).

[3] The Waterfront Development Law, N.J.S.A. 12:5-1 et seq., requires a permit from NJDEP for all plans and activities that result in the development of any waterfront upon any navigable water or stream of the State. See N.J.S.A. 12:5-3.

NJDEP staff exchanged numerous emails concerning whether, and in what manner, public access to the shoreline on and across the Property might be required as a condition of the Waterfront Development Permit by what was then the newly enacted Public Access Law. The correspondence expressed competing opinions about what was required by the Public Access Law, and included proposals and counter-proposals for onsite and off-site access.

By letter dated October 5, 2020, Sea Point's agent detailed why, from Sea Point's perspective, public access across the Property is not required under the Public Access Law. Aa0011-13. Sea Point's agent noted, among other things, that the original owner and developer of the development dedicated a 12.93 acre open space parcel of land, the Slade Dale Sanctuary, immediately adjacent to Sea Point's property to the Borough of Point Pleasant as a condition of site plan approval. Aa025. Sea Point's agent also pointed out that demand for public access in the area is satisfied not only by the Slade Dale Sanctuary, but also by the publicly owned "Dorsett Dock Wharf" located immediately west of the Sanctuary. [4] Aa0011. The correspondence also addressed the legal aspects and implications of the Public Access Law, although neither correspondent was an attorney.

By e-mail dated October 22, 2020, NJDEP staff advised Sea Point's agent that

[4] See Press Release, Borough of Point Pleasant, New Jersey, *Dorsett Dock Improvements Complete* (Mar. 20, 2019), https://ptboro.com/dorsett-dock-improvements-complete/ (explaining that Dorsett Dock Wharf is a municipally owned public access point that is available to "anyone wishing to enjoy fishing, kayaking, or other recreational activities."). Aa0040-42.

an NJDEP supervisor had been brought into the conversation about on-site public access, and that the supervisor "*agrees that this is exactly the type of situation the public access bill was aimed to address.*" Aa0028. The supervisor in question was not an attorney, nor is there any indication the Department sought the advice of the Attorney General's office before responding.

By e-mail dated November 4, 2020, Sea Point's agent informed NJDEP that the Borough of Point Pleasant, feeling that the improvement of an existing public access area was preferable to access across Sea Point's property, proposed that Sea Point instead make a monetary contribution toward a nearby public access improvement project. Aa0020.

The Department ultimately agreed to issue the requested Waterfront Development Permit to Sea Point with a pre-construction condition (hereinafter "Pre-Construction Condition #1") requiring that Sea Point

> submit to the Division for review and approval a proposal for providing public access on the project site. The Division approved onsite public access project must be constructed prior to, or concurrent with, the construction of the project authorized by this permit.
>
> [Aa0002.]

On November 24, 2020, Sea Point submitted a hearing request challenging Pre-Construction Condition #1. Aa0043-46. On the same date, citing the poor condition of the existing bulkhead, Sea Point requested permission to begin construction of the replacement bulkhead while its appeal of Pre-Construction

Condition #1 was pending. On December 14, 2020, NJDEP granted permission to Sea Point to commence reconstruction of the bulkhead. Sea Point did not ask that the requirement for submission of a plan be stayed at that time because its reading of the applicable NJDEP regulation, N.J.A.C. 7:7-28.3, does not require compliance with a contested permit condition until the appeal is resolved.

On June 2, 2021, NJDEP transmitted Sea Point's request for an adjudicatory hearing to the Office of Administrative Law. Following motions for Summary Decision by both parties,[5] Administrative Law Judge Dean Buono issued an Initial Decision on October 5, 2022 granting NJDEP's motion for Summary Decision and denying Sea Point's motion for the same. Aa0079-104. The ALJ did so without benefit of oral argument or a site visit, both of which Sea Point had argued was critical to any adjudication of the public access requirement.

On October 6, 2023, NJDEP Commissioner Shawn LaTourette issued a Final Decision adopting the ALJ's Initial Decision with modifications not relevant to this appeal.[6] Aa0115-141. Sea Point subsequently filed a timely appeal of the Commissioner's Final Decision to the Appellate Division of the Superior Court, which assigned the matter to the Civil Appeal Settlement Program ("CASP"). The CASP session before Judge Paulette Sapp-Petersen on January 17, 2024 proved unsuccessful, and Judge Sapp-Petersen referred the proceedings back to this Court

[5] Appellant Sea Point's Motion for Summary Decision is reproduced in the Appendix at Aa0047-78.
[6] Appellant's Exceptions to the October 5, 2020 Initial Decision are reproduced in the Appendix at Aa0105-114.

for creation of a briefing schedule.

By letter dated December 20, 2023, NJDEP notified counsel for Sea Point that Sea Point must immediately prepare and submit to the Department an onsite public access plan as required by Pre-Construction Condition #1. On January 17, 2024, following receipt of the December 20, 2023 letter from NJDEP, Sea Point filed a motion with NJDEP pursuant to N.J.A.C. 1:1-12.1 requesting that it stay the requirement for submission of an engineering plan pending the resolution of this appeal. On January 31, 2024, NJDEP issued a letter rejecting the stay request.

On February 15, 2024, Sea Point filed a motion with this Court requesting a stay of Pre-Construction Condition #1 pending the outcome to Sea Point's appeal. On March 6, 2024, DEP filed its brief in opposition to Sea Point's request for stay. On March 14, 2024, this Court denied Sea Point's motion for stay of Pre-Construction Condition #1.

On April 2, 2024, Sea Point filed a motion to remand this matter for further fact-finding. On April 15, 2024, DEP filed its brief in opposition to Sea Point's motion. On April 22, 2024, this Court denied Sea Point's motion for remand.

ARGUMENT

I. THE DEPARTMENT'S IMPOSITION OF A REQUIREMENT FOR ONSITE PUBLIC SHORELINE ACCESS ONTO AND ACROSS THE APPELLANT'S PROPERTY UNDER THE FACTS PRESENTED IS AN ULTRA VIRES AGENCY ACTION. (Aa0131.)

Any action exceeding an agency's grant of authority from the Legislature is

considered *ultra vires*. Gonzalez v. N.J. Prop. Liab. Ins. Guar. Ass'n, 412 N.J. Super. 406, 417 (App. Div. 2010). New Jersey courts must set aside *ultra vires* agency actions, as the courts' "role is to enforce the will of the Legislature because [s]tatutes cannot be amended by administrative fiat." Hackensack Riverkeeper, Inc. v. New Jersey Dept. of Environmental Protection, 443 N.J. Super. 293, 302 (App. Div. 2015), citing In re Agric., Aquacultural, & Horticultural Water Usage Certification Rules, 410 N.J. Super. 209, 223 (App. Div. 2009) (alterations in original) (citations and internal quotation marks omitted). By requiring Sea Point to create new public access onto and across its property as a condition of reconstructing its failing bulkhead, NJDEP plainly violated this principle by claiming authority that was not delegated to it—neither expressly nor implicitly—under the Public Access Law. Since the Public Access Law codified, rather than expanded, the Public Trust Doctrine in New Jersey, NJDEP lacks the authority to require Sea Point to create new public access as a condition of reconstructing its bulkhead under the facts presented.

A. Contrary to the Department's assertion, N.J.S.A. 13:1D-150 through 156 ("the Public Access Law") codified, rather than expanded, the Public Trust Doctrine in New Jersey. (Aa0130-131.)

1. Introduction and Background

The Public Access Law, P.L. 2019, c.81, entitled "An Act Concerning Public Access to Certain Public Trust Lands" was enacted on May 3, 2019 and codified at N.J.S.A. 13:1D-150 to 156. The Public Law authorizes the Department to require

public access on or across private property if the issuance of a coastal permit would result either in a "*change in the existing footprint of a structure on the property or a change in use of that property*."[7] The Department argues that this provision authorized it to require public access on and across Petitioner's property as a condition of the Waterfront Development Permit authorizing the repair and replacement of the existing bulkheads on the Property. However, as discussed herein, Sea Point respectfully submits that the Public Access Law does no such thing.

In order to understand why the Public Access Law codified, rather than expanded, New Jersey's Public Trust Doctrine, it is important to review the scope and extent of the Doctrine as it existed when the Public Access Law was enacted.

2. The Public Trust Doctrine

The common law Public Trust Doctrine affords the citizens of New Jersey longstanding and inviolable rights of access to the tidal waters and adjacent shorelines of the State. Public access is generally understood to mean the ability of the public to pass physically and visually to, from and along public trust lands and waters (*i.e.*, those lands that are now or formerly flowed by the tide). N.J.A.C. 7:7-16.9(a). The Doctrine is an ancient principle that was first articulated by the Institutes

[7] The coastal permit programs to which the Public Access Law applies are the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq., the Waterfront Development Law, N.J.S.A. 12:5-3, the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq. and the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq. See N.J.S.A. 13:1D-15la.

of Justinian, a sixth century codification of Roman civil law, which declares, "By the law of nature these things are common to all mankind: the air, running water, the sea, and consequently the shores of the sea."[8] The Doctrine has, throughout its history, consistently been interpreted as imposing upon a sovereign the obligation to create and preserve public rights of access and use of tidalways, such as oceans, bays, and tidal rivers, as well as their respective shores, for purposes of navigation, fishing and commerce.

However, the public rights created and protected by the Public Trust Doctrine are not limitless. In fact, the Institutes of Justinian immediately proceed to state, "No one, therefore, is forbidden to approach the seashore, *provided that he respects habitations*, monuments, and the buildings, which are not, like the sea, subject only to the law of nations."[9] As such, the Doctrine has from its inception recognized that, to the extent that the public may use the resources protected by this principle, this use must be carefully balanced against the rights of residents of tidally adjacent dwellings to use and enjoy their property, as well as their privacy and their safety more generally.

The Doctrine was maintained through English common law and inherited by the original thirteen colonies after the Revolution, when the rights to tidal waterways and their shores—which were previously reserved to the Crown— passed to the

[8] J. INST. 2.1.1, *in* THE INSTITUTES OF JUSTINIAN, WITH NOTES 67 (Thomas Cooper ed. & trans., 3d ed. 1852).
[9] Id. Emphasis added.

newly created American states. In New Jersey, the Doctrine was officially enshrined in the common law by the Supreme Court's 1821 decision in Arnold v. Mundy, 6 N.J.L. 1 (1821). The courts of our State have since affirmed and expanded the Doctrine's application. The Doctrine, which originally protected the public's right of access to tidal waters and shorelines for fishing, navigation and commerce, has been expanded to protect recreational uses and to require equal access to municipally owned beaches and restroom facilities by residents and non-residents alike. See Hyland v. Borough of Allenhurst, 78 N.J. 190 (1978); Van Ness v. Borough of Deal, 78 N.J. 174 (1978); Borough of Neptune v. Avon by the Sea, 61 N.J. 296 (1972).

The Supreme Court decision of greatest relevance to the matter before this Court is Matthews v. Bay Head Improvement Association, 95 N.J. 306 (1984). The issue in Matthews was whether the Public Trust Doctrine gave the public the right to traverse privately owned upland areas to gain access to the Ocean and the adjacent beach in Bay Head, Monmouth County. At the time, members of the public who did not reside in Bay Head could access the beaches in the municipality only through the use of six street ends (the remaining beach frontage was all privately owned). In an effort to prevent non-residents from using the beach, the Borough of Bay Head sold the land comprising the street ends to the adjoining property owners. Control of the street ends was then turned over to the "Bay Head Improvement Association," a quasi-public organization. Access to the beach via the street ends was thereafter restricted to Borough residents.

Our Supreme Court, citing the quasi-governmental nature of the Improvement Association and prior case law prohibiting municipalities from excluding non-residents from using publicly owned land to gain access to the beach, determined for the first time that the general public had a right to traverse privately owned property when to do so was "*essential or reasonably necessary for the enjoyment of the ocean.*" Matthews, 95 N.J. at 322.

The Court, in establishing the principle that public access across privately owned land might be justified if needed to allow the public to exercise its public trust rights, was careful to emphasize that its ruling was (1) limited in scope, (2) fact-sensitive, and (3) based in large part on the quasi-governmental nature of the Improvement Association. The Court explained:

> The record in this case makes it clear that a right of access to the beach is available over the quasi-public lands owned by the Association, as well as the right to use the Association's upland dry sand. It is not necessary for us to determine under what circumstances and to what extent there will be a need to use the dry sand of private owners who either now or in the future may have no leases with the Association. *Resolution of the competing interests, private ownership and the public trust, may in some cases be simple, but in many it may be most complex. In any event, resolution would depend upon the specific facts in controversy*.
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> Id. at 333. Emphasis added.

The Matthews Court recognized that requiring public access on or across private property is an extraordinary remedy and should be invoked only in limited

cases. To that end, the Court identified four factors to be considered before requiring a private party to allow public access on or across their property: (1) the location of the privately owned upland area (referred to in the decision as the "dry sand area") in relation to the public trust lands; (2) the extent and availability of publicly owned points of access in the vicinity of the property in question; (3) the nature and extent of public demand for access in the area; and (4) the manner in which the privately owned upland area is used by the owners. Id. at 326. In other words, the Matthews decision provides the template for determining when public access across private property might be required, but nothing more.

The New Jersey Supreme Court has interpreted and applied the Matthews test in only one decision to date: Raleigh Avenue Beach Association v. Atlantis Beach Club, 185 N.J. 40 (2005). In Raleigh Avenue, the Court determined that the public has a right of access to the shoreline across an upland area occupied by a newly constructed condominium and private beach club in Lower Township, Cape May County. The Court, noting that the beach area in question had been open and free to the public for decades prior to construction of the condominium and beach club, determined that application of the Matthews factors required public access to the beach. In particular, the Court observed that the beach in question had already been used by the public for decades and there was an absence of public beach access nearby; furthermore, the Court upheld the imposition of a public access requirement due to the upland structure's use as a business enterprise (*i.e.*, as a beach club), rather

than merely as a residence, as is the case with Sea Point in the matter at hand. See Raleigh Avenue, 185 N.J. at 59-60.[10]

The Matthews and Raleigh Avenue decisions reflect the state of Public Trust Doctrine in NJ as it applied to the use of private property when the Public Access Law was enacted in 2019.

3. The Public Access Law

The Public Access Law begins with a lengthy declaration of legislative findings, including numerous references to the importance of the Public Trust Doctrine and to the public's long-standing rights under the Doctrine to use the State's tidal waters and adjacent shorelines. N.J.S.A. 13:10-150. However, notably absent from the plain language of the Law's legislative findings or other provisions is any language to suggest that the Legislature intended to expand, rather than codify, the scope of the Public Trust Doctrine. To the contrary, the Legislature's findings that the State has a duty to promote, protect and safeguard the public's rights and ensure reasonable and meaningful public access to tidal waters and adjacent shorelines are, in every instance, qualified by the phrase "pursuant to the Public Trust Doctrine" or "consistent with the Public Trust Doctrine." N.J.S.A. 13:1D-150(d). Similar language in Subsection (e) of the Law's legislative findings, N.J.S.A. 13:1D-150(e), explains that the Department has the authority and duty to protect the public's right

[10] Pages 51 and 52 of the Raleigh Avenue decision provide a thorough discussion of the Public Trust Doctrine.

of access "under the public trust doctrine and statutory law."

The operative provisions of the Public Access Law begin with Section 4(a) (N.J.S.A. 13:10-153), which provides that if a coastal permit application proposes a change in the existing footprint of a structure or a change in the use of the property,

> [T]he Department shall review the existing public access provided to tidal waters and adjacent shorelines and shall require that additional public access be provided *consistent with the public trust doctrine*.
>
> Emphasis added.

This provision, by its plain language, limits the Department's ability to require public access to *only* those cases where there is existing public access and only when doing so is consistent with the Public Trust Doctrine. This limitation also did not arise in a vacuum; it is a testament to the Legislature's understanding of the facts of the Matthews and Raleigh Avenue decisions, the latter of which hinged in large part on the longstanding prior use of the property by the public.

The Public Access Law subsequently goes on to reiterate, once again, that additional public access can only be required *consistent with* and *to the extent authorized by* the Public Trust Doctrine. There is nothing to suggest that the public's rights under the Public Trust Doctrine were in any way redefined, nor does the Law indicate what the new scope of redefined rights may be. This is because, as its plain language dictates, the Public Access Law does not provide the Department with any new authority to impose public access requirements. Instead, the Law codifies and

clarifies the Department's authority to require public access across private property in a manner consistent with the New Jersey Supreme Court's rulings in Matthews and Raleigh Avenue. In fact, and as those decisions confirm, the Department's authority to require a private party to create new public shoreline access at their property is limited to only those instances where public access already exists at the site in question.[11]

B. THE PUBLIC ACCESS LAW, HAVING CODIFIED RATHER THAN EXPANDED THE PUBLIC TRUST DOCTRINE IN NEW JERSEY, DOES NOT AUTHORIZE THE DEPARTMENT TO IMPOSE PUBLIC ACCESS ON APPELLANT'S PROPERTY IN THE CIRCUMSTANCES PRESENTED. (Aa0131.)

As a general rule of legislative construction, the intent to change the common law must be clearly and plainly expressed because an intent to alter the common law rule further than clearly expressed is not to be implied. Katz v. Rahway Hosp., 214 N.J. Super. 379, 384 (App. Div. 1986). "If a change in the common law is to be effectuated, the legislative intent to do so must be clearly and plainly expressed." Blackman v . Iles, 4 N.J. 82, 89 (1950), citing Carlo v. Okonite-Callender Cable Co., 3 N.J. 253 (Sup. Ct. 1949).

In this case, both the plain language of the Public Access Law and its legislative history make it clear that the Legislature intended to codify, rather than to expand, the Public Trust Doctrine. This is made clear from the outset of the Public

[11] This notwithstanding, Appellant has offered to provide monetary compensation for the improvement of an existing public access facility.

Access Law's legislative findings, which, as noted above, speak to the importance of the Doctrine, but say nothing about an intent to expand its meaning or application. Section 2 of the Law (N.J.S.A. 13:10-151) makes equally clear that any authority to require public access as a condition of an approval must be "*consistent with* the public trust doctrine" (emphasis added). Absent any indication in the Law that the Legislature intended to broaden the scope or application of the Doctrine relative to the common law, the Public Access Law allows the Department to require public access across private property only when the Matthews test dictates that such an outcome is required.

The wording of Section 4 of the Public Access Law further clarifies that the Department may require public access on private property only if (i) the public already has access to the shoreline; (ii) the applicant proposes a change in the existing footprint of a structure or a change in the use of the property; and (iii) only if the imposition of a new access requirement is "... consistent with the public trust doctrine." The repeated use of the phrase "consistent with the public trust doctrine" throughout the Law underscores the codification, rather than the expansion, of the common law Public Trust Doctrine. Had the Legislature intended a different result, it would have said so, and new NJDEP authority cannot be read into this statutory silence.

The legislative history of the Public Access Law supports this conclusion. The Assembly Environment and Solid Waste Committee's Statement to Senate Bill No.

1074 [Second Reprint], which would later be enacted as the Public Access Law, states that "this bill, as amended, would confirm in the statutes the public rights under the public trust doctrine to use and enjoy the State's tidal waters and adjacent shorelines." [12] The Committee Statement goes on to explain that

> The bill requires the DEP to ensure any approval, permit, administrative order or consent decree issued, or action taken, by the DEP pursuant to the above-cited laws or any other law is *consistent with the public trust doctrine*.
>
> Emphasis added.

This is yet another clear and unambiguous statement that the purpose of the Public Access Law was to codify the common law, and nothing more. Again, had the Legislature intended to expand the Public Trust Doctrine by giving the Department authority that goes beyond the common law, the Public Access Law's legislative history would reflect this objective; however, it is silent on the issue, which only further underscores the Legislature's will to preserve the status quo as it existed at the time—not alter it.

Although not mentioned in the Public Access Law's legislative findings, the Legislature was also motivated to enact the Public Access Law due to legal action in the New Jersey courts. More specifically, in 2012, two organizations challenged the Department's adoption of amendments to its Public Access rules then in effect.

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[12] New Jersey Assembly Environment and Solid Waste Committee, Statement to Senate, No. 1074 [Second Reprint] with committee amendments 1 (Mar. 11, 2019), https://pub.njleg.gov/bills/2018/S1500/1074_S3.PDF?bcs-agent-scanner=50b4da6b-f63c-ae42-9012-a02bfa46436b [hereinafter "the Committee Statement"].

That challenge resulted in a ruling by the Appellate Division that, contrary to long-standing practice, the Department had no authority to require public access as a condition of a permit. See Hackensack Riverkeeper, 443 N.J. Super. at 314-15.

The Legislature responded to the Riverkeeper decision with a bill that was enacted into law on January 19, 2016, P.L. 2015, C.260, N.J.S.A. 13:19-10. The statute abrogated the Riverkeeper decision by confirming DEP's authority to require public access as a condition of a permit when and where appropriate. This Act also amended the Waterfront Development Law (N.J.S.A. 12:5-3) and the Coastal Area Facility Review Act (N.J.S.A. 13:19-10) by providing as follows:

> The Department of Environmental Protection may, as a condition of an approval, require pursuant to Subsection a) of this section, and pursuant to standards established by rule or regulation adopted pursuant to the "administrative procedure act", P.L. 1968, c.410 (C.52:14B-l et seq.), require a person or municipality to provide on-site public access to the waterfront and adjacent shoreline, *or off-site public access to the waterfront and adjacent shoreline* if on-site public access is not feasible as determined by the department.
>
> P.L. 2015, c. 260, Section d, emphasis added.

An additional source of legislative history is the Report to Senator Robert Smith from the Public Access Task Force dated April 2016.[13] The Public Access Task Force was convened by Senator Smith, who was (and remains) the Chair of the

[13] Sarah Bluhm, et al., *Report to Senator Robert Smith from the Public Access Task Force* (Apr. 2016) (unpublished). Aa0142-171.

Senate Environment and Energy Committee, and was also a principal sponsor of the Public Access Law. The Task Force was charged with providing a set of recommendations regarding public access to beaches, tidal waterways and their adjacent shorelines. The following passage is of particular relevance to the question of legislative intent:

> Consent Position: There is a need for legislation to direct the New Jersey Department of Environmental Protection with respect to public access to guide its actions, *and to ensure that its policies are consistent with the Public Trust Doctrine and relevant case precedent*.
>
> [Aa0149. Emphasis added.]

This clear statement of intent is further confirmation that the Legislature enacted the Public Access Law to codify, rather than to expand, the common law Public Trust Doctrine in New Jersey.

The Department cannot simply read new authority and new powers for itself into a statute by administrative fiat, let alone in connection with a longstanding common law doctrine. The Public Access Law upon which the Department relies does not include any language that expressly or implicitly provides the Department with authority that it did not previously enjoy under New Jersey's common law. Instead, the plain language and the legislative history of the Public Access Law unambiguously confirm that the Law codified, rather than expanded, the Public Trust Doctrine in New Jersey common law. That being the case, the Department can only require public access across the Sea Point's property in the manner

contemplated by the Supreme Court in the Matthews and Raleigh Avenue decisions. Nevertheless, as discussed below, the Department not only exceeded its legal authority under the Matthews standards by requiring public access in the circumstances presented; it did so in violation of its own regulations.

II. ASSUMING *ARGUENDO* THAT THE PUBLIC ACCESS LAW PROVIDES THE DEPARTMENT WITH EXPANDED AUTHORITY INDEPENDENT OF THE PUBLIC TRUST DOCTRINE, THE DEPARTMENT FAILED TO APPLY THE PUBLIC ACCESS LAW CORRECTLY. (Aa0131-132.)

Sea Point maintains that the Public Access Law codified, but did not in any way expand, the scope of Public Trust Doctrine, meaning that the Department could only conduct an analysis under Matthews and Raleigh Avenue or its own regulations when it reviewed Sea Point's application to repair and replace the bulkheads at the Property. However, because the Department is claiming expanded authority under the Public Access Law that is independent of the Public Trust Doctrine, the basis on which the Department reached its position requires analysis.

Section 4 of the Public Access Law says that, in determining whether and to what degree public access is required as a condition of a coastal permit, the Department must consider four factors: (i) the scale of the changes to the footprint of any structures; (ii) any proposed change in use; (iii) the demand for public access in the vicinity of the Property; and (iv) the provisions of any Department-approved municipal access plan or public access element of a municipal master plan. N.J.S.A. 13:1D-153a. The Department's analysis of these factors in its justification for

imposing Pre-Construction Condition #1 was so cursory and superficial that the Department effectively failed to satisfy its analytical obligations under Section 4 of the Public Access Law.

Department staff prepared an Environmental Report to accompany the issuance of the Permit.[14] Aa0007-10. The Report's discussion of public access begins with an acknowledgement that the Department's Coastal Zone Management Rules,[15] and the Department's Public Access Rule in particular (N.J.A.C. 7:7-16.9(k)(2)), do not require public access when the only activity being undertaken is the construction of a shore protection structure (such as a bulkhead) or accessory development at an existing residential property. The provision in question reads in full as follows:

> At an ***existin***g residential development, where the proposed activities consist solely of accessory development or ***structural shore protection***, no public access is required if there is no existing public access on site. Any existing public access shall be maintained. If it is necessary to permanently impact the ***existing*** public access in order to perform the activities, equivalent access shall be provided on site.
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> N.J.A.C. 7:7-16.9(k)(2)(i), emphasis added.

NJDEP's Coastal Engineering Rule, N.J.A.C. 7:7-15.11, expressly the term

[14] The Report is dated November 10, 2020 but includes a notation that the public access discussion was updated on February 23, 2021. This was more than three months after the Permit was issued. The reason for this has not been explained.

[15] The Coastal Zone Management Rules, N.J.A.C. 7:7-1 et seq., include the substantive standards used by the Department to review permit applications under the Coastal Area Facility Review Act, the Coastal Wetlands Act of 1970, the Waterfront Development Law and various funding programs.

"structural shore protection" to include bulkheads. Consequently, by virtue of Sea Point seeking approval for nothing more than the repair and replacement of its bulkheads and the legalization of small accessory structures, the Coastal Engineering Rule clearly prohibits the Department from requiring public access on Sea Point's property as a condition of the permit. This Rule was in place when the Permit was issued in 2020 and is still in place, but the Environmental Report nevertheless asserts that the Law mandates the creation of public access at Sea Point's property even where Rule does not.

The Environmental Report in question ultimately concludes, without benefit of explanation or discussion, that the reconstruction of the existing bulkhead twenty-four (24) inches waterward of its current location represents a "significant change" in the location of a structure. Aa0009. The Department reached this conclusion even though the Coastal Engineering Rule, N.J.A.C. 7:7-15.11(d), expressly indicates that the reconstruction of an existing bulkhead 24 inches outshore of the existing structure does *not* qualify as "new construction," and is presumptively acceptable to the Department. Nevertheless, the Department summarily claimed that the bulkhead reconstruction authorized by the Permit results in a "significant change" to the footprint of the structure without providing any acknowledgement, let alone any discussion, of the Coastal Engineering Rule and its 24 inch allowance for the reconstruction of structural shore protection.

After asserting that the placement of the new bulkhead 24 inches outshore of

the old bulkhead not only constitutes a "change" for purposes of the Public Access Law, and in fact a "*significant*" change , the Report turns to the next prong in Section 4, which requires an analysis of the demand for public access in the surrounding community. The entirety of the Report's "analysis" in that regard reads as follows:

> Currently, there is very little access to the waterfront for the residential development in the surrounding community due to the occupation of the water frontage primarily by single-family homes. Thus, there is a demand for additional public access in the area. The Borough does not have a Department-approved municipal public access plan or public access element of a municipal master plan. In sum, considering the proposed site changes, the lack of existing public access on the site, [and] the minimal existing public access in the immediate project vicinity, the Department concludes that a reasonable level of public access is warranted at the site in order to comply with the new Public Access Law.

There is nothing in the record that supports any of these findings. The Department ignore the presence of the Slade Dale Sanctuary and Dorsett Dock Wharf, and provided no analysis or quantification of the availability of public access at or near the Property. The Department's analysis is likewise silent with respect to how it quantifies or analyzes the need or demand for additional public access when appropriate. Ironically, in reaching its conclusion, the Department rejected an offer from Sea Point, which was endorsed by the Borough of Point Pleasant, to contribute money in lieu of onsite access for the improvement of a municipally owned public access project near the Property.

Finally, even though the Public Access Law did not make reference to the

fourth prong of the Matthews test (*i.e.*, the manner in which the privately owned upland area is used by the property owner), the Report states that "*onsite public access can easily be provided on the site with minimal intrusion to the existing condominium residents due to the large size of the lot, the availability of water access from numerous portions of the property, and the existence of large common areas on the property*." Whether the staff was mindful of the requirements of the Matthews decision when it included this discussion in the Environmental Report is not clear, but this portion of the Environmental Report crucially evidences the Department's recognition that its review of Sea Point's application remained bound by the Matthews factors, rather than a new paradigm ushered in by the Public Access Law.

Moreover, it is impossible to understand from the record how the Department arrived at its decision to require new public access at Sea Point's property, especially in light of (1) the absence of any objective criteria as to what constitutes "unreasonable interference" with the use of the upland area, and (2) the safety and privacy concerns expressed by Sea Point during the permit application process. The apparent disregard for the safety and privacy concerns expressed by Sea Point residents is particularly troubling because, as noted above, the public's right to access the shoreline under the Public Trust Doctrine is explicitly conditioned on respecting the habitations situated adjacent to tidalways subject to the principle. By requiring onsite public shoreline access onto, through and across Sea Point's

residential community, DEP is necessarily infringing upon Sea Point residents' quiet enjoyment of and privacy within their homes, and the Department must explain how it reached the conclusion that such access is "reasonable" given this apparent contravention of the Public Trust Doctrine's most basic tenets.

III. THE PUBLIC ACCESS LAW CANNOT BE APPLIED IN THE MANNER PROPOSED BY THE DEPARTMENT IN THIS CASE UNLESS AND UNTIL THE DEPARTMENT ADOPTS IMPLEMENTING REGULATIONS AS REQUIRED BY THE PUBLIC ACCESS LAW. (Aa0133-134.)

A fundamental of principle of administrative law is that an agency must act through rulemaking procedures "when an action is intended to have a wide-spread, continuing and prospective affect, deals with policy issues, materially changes its existing laws, or when the action will benefit from rulemaking's flexible fact-finding procedures." Columbia Fruit Farms Inc. v. Department of Community Affairs, 470 N.J. Super. 25, 37 (App. Div. 2021), citing In re Provision of Basic Generation Serv. for Period Beginning June 1, 2008, 205 N.J. 339, 349-50 (2011).

Section 4(b) of the Public Access Law (N.J.S.A. 13:lD-153) expressly requires that the Department adopt rules and regulations establishing public access requirements for various categories of permits and uses within 18 months of the Law's enactment. The Department has not adopted, nor even proposed, any such regulations , and the Department does not dispute its failure to comply with this explicit statutory mandate. Despite the Department's nonchalance in this regard, its adoption of rules and regulations for the enumerated permits and uses is necessary

for ensuring that the public has adequate notice of the requirements for, and implications of, pursuing a change in footprint of eligible coastal structures. As such, the Department's failure to promulgate implementing regulations is, in and of itself, sufficient reason to prohibit the Department from relying on the Public Access Law as a source of authority in this matter.

Nevertheless, this failure to adopt regulations notwithstanding, Section 4 of the Law doe authorize the Department to decide whether or not to require additional public access on a case-by-case basis when an application calls for "a change in the existing footprint of a structure or a change in the use of a property". Even if this provision is self-executing, which Sea Point does not concede, the Department cannot proceed directly to *ad hoc* decision-making. The Department's application of the Public Access Law, as this very case attests, must be accompanied by clarification in the form of rulemaking. There is no guidance in the Law, for example, as to what constitutes a "change in footprint of a structure," leaving potential permittees to navigate the contradiction between this statutory language and the Coastal Engineering Rule's allowance for reconstruction of a bulkhead within 24 inches of its original location.

In the same vein, no legal authority or available guidance supports the Department's conclusion in the aforementioned Environmental Report accompanying the permit that that the reconstruction of a deteriorated bulkhead 24 inches constitutes a "significant" change. In fact, the "significant change" standard

appears nowhere in the Public Access Law, but instead appears to have been made up by the Department out of whole cloth. The Department's failure to provide any notice regarding the circumstances that would qualify a change in footprint as "significant," nor the significance and/or implications of a change in footprint being deemed significant.

It is not unreasonable for the Department to distinguish "significant" changes to a structure's footprint from, say, "minor" changes, but it is unreasonable to bind members of the public by making such a distinction without any providing notice or explanation thereof in the form of rulemaking, especially when rulemaking was explicitly required by the Legislature in the very same statute from which the Department is attempting to derive new authority. Therefore, the context in which this dispute arises further confirms that the Department's consideration of Sea Point's application was fundamentally flawed for one of two reasons: namely, either (1) implementation of the Public Access Law does not require new rulemaking because NJ's common law Public Trust Doctrine already provides the framework for decision-making with respect to the potential creation of new public access to the beach on or across private property, thereby binding staff to the Matthews standards; or (2) the Public Access Law did in fact expand the scope of NJ's Public Trust Doctrine, but the Department proceeded to enforce a new policy of requiring the creation of public access to the waterfront on private property where no access previously existed without having first promulgated rules that clarify when this

unprecedented result would be appropriate, nor what the relationship is (if any) between the relative significance of footprint change and the nature or type of new public access points to be provided. Such an outcome is contrary to the public interest.

It bears repeating that the Department's current Public Access Rule does not allow the Department to require public access on an existing residential property when the only regulated activity is the re-construction of a shore protection structure (in this case, a bulkhead). N.J.A.C. 7:7-16.9(k)(2)(i). This regulation was in place when the Permit was issued and *is still on the books.* Despite the Department's claim that this regulation was superseded by the Public Access Law, almost five years have passed since the Law was enacted, meaning that the Department has had ample time to notify the public of the Department's position by updating its regulations to meaningfully clarify or facilitate the administration of the Public Access Law. The Department nevertheless has not done so. Punishing a private party for NJDEP's inaction in this respect, and in particular for making a reasonable effort to comply with its public access obligations despite the uncertainty resulting from the NJDEP's inaction, would be a gross miscarriage of justice.

IV. A PROPOSAL FOR MONETARY CONTRIBUTION FOR OFF-SITE ACCESS IS A MORE REASONABLE AND MEANINGFUL MANNER TO PROVIDE PUBLIC ACCESS IN THIS CASE. (Aa0138.)

The Public Access Law explains that the State has a duty to promote, protect and safeguard the public's rights under the Public Trust Doctrine and to ensure

"*reasonable and meaningful* public access to tidal waters and adjacent shorelines." N.J.S.A. 13:1D-150(d), emphasis added. As such, a fundamental consideration in this dispute is whether the Department's requirement that Sea Point provide onsite public access at the Property is reasonable or meaningful, especially as compared to a monetary contribution to improve an existing public access point.

The aforementioned Environmental Report issued alongside Sea Point's Waterfront Development Permit describes the Department's intentions for public shoreline access at Sea Point's property, which entails a public pathway leading from the entrance of the Property to the water's edge, as well as the use of a kayak launch and the provision of dedicated parking spaces. The Department has never so much as attempted to explain how it arrived at the conclusion that Sea Point's alleged obligation to provide meaningful and reasonable public access under the Law can be satisfied only through such extensive use of Sea Point's property.

Even without the benefit of additional context, the Public Access Law's plain language requirement that public access provided under its authority be reasonable and meaningful provides clear guidelines for the Department's execution of its statutory responsibilities. For example, the Department would plainly be acting contrary to its legislative mandate by requiring the creation of public access in areas that are unsafe for pedestrians or that serve as habitat for endangered and threatened wildlife. In addition to these considerations, convenience must also factor into the Department's analysis when deciding whether the creation or expansion of public

access is appropriate under the Public Access Law. After all, the Department could not, for example, justify the creation of an elaborate, lengthy zig-zagging path to a public access point as "meaningful and reasonable" if a much shorter and more direct path to the same access point already exists in the immediate vicinity; indeed, such an exercise of the Department's authority would be directly counter-productive to the spirit and the letter of the Public Access Law.

Although the facts present here are not quite as extreme as the hypothetical above, the same rationale must apply to the Department's extensive plans for Sea Point's property when a shorter, more direct public access path to the same waterfront area already exists at the nearby Slade Sanctuary and Dorsett Wharf Dock (the former of which sits upon land that the developer of Sea Point donated as a condition of obtaining the permits to build the residences that Sea Point now comprises). As such, it only stands to reason that, when given the choice between improving the short walk from a public road to an established public access area (in this case, the Slade Sanctuary or Dorsett Wharf Dock) or traversing upwards of 200 feet through the driveway and parking lot of a townhome community to a yet-to-be established access point, any member of the public will recognize that the former results in far more meaningful and reasonable public access than the latter.

The Department already recognizes this common-sense approach elsewhere in its rules concerning public access. Most notably, the existing Public Access Rule for new multi-family development at N.J.A.C. 7:7-16.9(k)(2)(iv) provides that the

Department must consider off-site access and/or a monetary contribution if onsite access is infeasible. This Public Access Rule at N.J.A.C. 7:7-16.9(k) is also important here because it only applies to new development, whereas the rules for existing development—to which the reconstruction of Sea Point's bulkhead is most analogous—do not require new on-site access, off-site access, or a monetary contribution under any circumstances. Nevertheless, the Public Access Rule at N.J.A.C. 7:7-16.9(k) illustrates the Department's recognition that feasibility and convenience must be considered when contemplating the reasonableness and meaningfulness of new public access points, as well as what the contours of "reasonable or meaningful" public access are under common law and the Public Access Law (to the extent, if any, that the Law altered the Public Trust Doctrine in New Jersey).

In this case, the Department's approach toward the provision of reasonable or meaningful public access is woefully inadequate. There is nothing in the record below suggesting that Department gave any consideration to, at a minimum: (1) whether the relative benefits outweigh the potential risk to the public and to Sea Point residents from encouraging public pedestrian access through and across a large residential parking lot and driveway; (2) whether the proposed access point is one which would be convenient to anyone other than the residents of Sea Point; and/or (3) whether the public would even be inclined to use the access point. If the answer to any of these questions is "no," then requiring Sea Point to provide onsite access

would be neither meaningful nor reasonable. Sea Point maintains that the Department's proposal for the Property would result in public access that is neither reasonable nor meaningful, and the Department's failure to introduce any analysis of the three above-identified inquiries into the record renders it impossible to verify the merit of Department's assertion to the contrary.

The Court should also note that under the Department's Public Access Rule, N.J.A.C. 7:7-16.9(k), the requirement for reasonable and meaningful public access applies only to new residential development and is described purely for illustrative purposes. It must be emphasized that the corresponding public access rule for existing development, which applies when the proposal is limited to structural shore protection and/or accessory development, provides that the Department cannot require new public access where none previously existed. See N.J.A.C. 7:7-16.9(k)(2)(i). Therefore, the Department's imposition of a new public access requirement at the Property under the circumstances presented directly contradicted its own established policies.

V. THIS COURT SHOULD HAVE CONDUCTED A PLENARY HEARING TO CLARIFY AND SUPPLEMENT THE RECORD BELOW, AND IT WAS ERROR NOT TO DO SO. (Aa0138.)

Under N.J.A.C. 1:1-12.5(b), summary decision is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. This standard is substantially similar to the standard governing civil motions for summary judgment under R. 4:46. See E.S. v. Div. of Med.

Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010). The New Jersey Supreme Court set forth the standard governing motions for summary judgment in Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995). There, the Court held:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The judge's function is not […] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.
>
> Brill, supra, 142 N.J. at 540 (citation omitted).

This is a matter of first impression concerning the application of the Public Access Law. As noted above, Section 4 of the Public Access Law and NJDEP's existing Public Access Rule[16] jointly provide that the Department may require public access on private property only if (i) the public already has access to the shoreline; (ii) the applicant proposes a change in the existing footprint of a structure or a change in the use of the property; and (iii) the imposition of a new access requirement is "consistent with the public trust doctrine." See N.J.S.A. 13:1D-153; N.J.A.C. 7:7-16.9(k)(2). Nevertheless, the Department proceeded to require Sea Point to create new public access to the waterfront on and across its property as a condition of

[16] N.J.A.C. 7:7-16.9(k)(2) unambiguously provides that at an existing residential development, such as Sea Point, where the proposed activities consist solely of accessory development or structural shore protection (*e.g.*, a bulkhead), no public access is required if there is no existing public access onsite.

authorizing the reconstruction of a bulkhead, which neither changed the use of the Property nor expanded the footprint of a structure thereat in a manner that would allow for the imposition of additional conditions without violating established Department regulations. See N.J.A.C. 7:7-15.11(d)(2) and N.J.A.C. 7:7-16.9(k)(2).

Of equal importance is the fact that NJDEP's Public Access Rule, N.J.A.C. 7:7-16.9(k)(2), expressly provides that at an existing residential development, such as Sea Point, where the proposed regulated activities consist "*solely of accessory development or structural shore protection*" (in this case, a bulkhead), no public access is required if there is no existing public access onsite. Crucially, when considered jointly, the Engineering Rule expressly indicates at N.J.A.C. 7:7-15.11(d)(2)(ii)-(iii) that the reconstruction of an existing bulkhead does not qualify as new construction and is conditionally acceptable to NJDEP when the replacement bulkhead is located no more than 24 inches outshore of the existing bulkhead. N.J.A.C. 7:7-16.9(k)(2), in turn, provides that new public access need not be created for permitted activities at an existing residential development if there is not already public access onsite and the proposed activities consist solely of accessory development or structural shore protection.

Sea Point's request to reconstruct its failing bulkhead plainly satisfies both of these conditions. To the extent, if any, that the Public Access Law authorizes the imposition of a public access requirement as a consequence of Sea Point reconstructing its failing bulkhead, NJDEP's record below does not include (i) any

analysis of the present demand for public access at or near Sea Point's property; (ii) the extent to which the public access that already exists at Slade Dale Sanctuary and Dorsett Dock Wharf satisfies this demand; or (iii) why the creation of new public access to the waterfront at Sea Point's property would result in public access that is more meaningful and reasonable than the public access that would result from improving the existing public access options at Slade Dale Sanctuary and Dorsett Dock Wharf.

Lastly, consistent with the argument set forth in Section III *supra*, the record below provides insufficient explanation of the interface between DEP's imposition of public shoreline access on and across Sea Point's property with the Public Trust Doctrine's fundamental respect for the rights of individuals residing along tidalways and their property. This is particularly true in light of the DEP's cursory conclusion that the public access it endeavors to require at Sea Point would be reasonable. Aa0009. At best, the Department's analysis can generously be said to interpret the creation of public shoreline access at Sea Point's property as reasonable from the public's perspective; however, the total absence of any discussion as to the reasonableness of new public shorelines access at Sea Point's property from the perspective of Sea Point's residence underscores DEP's dereliction of its obligations under the Public Trust Doctrine and, thus, under the Public Access Law.

As such, given the paucity of findings in the administrative record that support NJDEP's determinations, the Court should remand this matter to NJDEP with

detailed instructions for further investigation and analysis concerning the shortcomings in the administrative record identified above.

VI. THE DEPARTMENT'S REQUIREMENT TO PROVIDE PUBLIC ACCESS CONSTITUTES A TAKING OF PRIVATE PROPERTY IN VIOLATION OF THE UNITED STATES AND NEW JERSEY CONSTITUTIONS. (Aa0139-140.)

The Takings Clause of the Fifth Amendment of the U.S. Constitution, which applies to the States through the Fourteenth Amendment, dictates that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V.; see U.S. Const. amend. XIV.; Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 239 (1897). Co-extensive with the protections afforded by the U.S. Constitution, the Constitution of the State of New Jersey provides, "Private property shall not be taken for public use without just compensation." N.J. Const. art 1. In turn, there are just two U.S. Supreme Court decisions that examine whether a State engaged in a taking of private property in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution by requiring the creation of public access on or across private property in the absence of an "essential nexus" between the activity being regulated and the access requirement at issue.

In Nollan v. California Coastal Commission, 438 U.S. 825 (1987), the owners of a beachfront property between two public beaches sought a development permit from the California Coastal Commission ("the Commission") to replace a bungalow with a larger house. The Commission granted the permit on the condition that the

property owners dedicate an easement for members of the public to pass across their beach. The property owners proceeded to challenge the permit condition as a regulatory taking of its property by the Commission. The Supreme Court ultimately determined that because the construction of the home did not in any way burden public's use of the adjacent beach, it lacked an essential nexus between a legitimate state interest and the condition imposed by the Commission. See Nollan, 438 U.S. at 837-42. Consequently, the Court determined that the permit condition in question amounted to an unconstitutional taking of private property.

The Supreme Court then had the opportunity to revisit its taking jurisprudence in the context of public access just a few years later in Dolan v. City of Tigard, 512 U.S. 374 (1994). There, a private party applied to the City of Tigard, Oregon ("the City") for a building permit to expand a hardware store. The City, as a condition of the building permit, required the applicant to dedicate a public greenway adjacent to the store, which would have included a pedestrian walkway and bicycle path adjacent to a nearby stream. Upon review, however, the Supreme Court again found that the permit condition in dispute was unconstitutional. In particular, the Court observed that while flood protection (which was one of the stated purposes of the greenway) was a legitimate state interest, that interest did not extend to requiring public access across the property. Thus, because the greenway upon which store expansion was conditioned did not border any existing public access, there was no essential nexus between the store expansion and the requirement for public access.

Accordingly, akin to Nollan, 438 U.S. 825, the City's permit condition was found to be a taking in violation of the Fifth and Fourteenth Amendments.

The same principles that were articulated by the U.S. Supreme Court in Nollan and Dolan are present here. There is no existing public access on or across the Petitioner's Property, and there is no evidence that the activities for which the permit was sought will in any way burden public access. The Department's argument may be that the original construction of the development—which occurred decades ago—in and of itself made access across the site impossible but, even then this argument fails because there is no evidence in the record below which supports this conclusion. In the matter at hand, the Department has never invoked nor articulated any public legitimate state interest related to public access that has an essential nexus to the reconstruction of Sea Point's bulkhead, which is a very limited activity that indisputably will not interfere with existing public access near the Property. As such, the Department's imposition of a requirement to provide a public access easement across Sea Point's property amounts to an unconstitutional taking.

CONCLUSION

For all of the foregoing reasons, Appellant Sea Point Condominium Association respectfully submits that the Public Access Law does not provide NJDEP with the authority to impose new public access under the circumstances presented by Sea Point's permit application. As such, Sea Point respectfully requests that this Court vacate the Department's October 6, 2023 Final Decision and declare

Pre-Construction Condition #1 of Sea Point's Waterfront Development Permit to be void *ab initio* or, in the alternative, to remand this matter to the Department for a plenary hearing to clarify and supplement the record below.

Respectfully submitted,

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