

IN THE MATTER OF:

***REQUEST FOR ADJUDICATORY
HEARING ON ACTION OF
TIDELANDS RESOURCE COUNCIL***

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002198-23**

Civil Action:

**BRIEF OF APPELLANT
JERSEY SHORE BEACH AND BOARDWALK, INC.**

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Dated: August 21, 2024

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PRELIMINARY STATEMENT:

On December 7, 2022, the New Jersey Tidelands Resource Council (“TRC”) within the New Jersey Department of Environmental Protection (“NJDEP”), voted to give preliminary approval of a Tidelands **Grant** pursuant to the authority of *N.J.S.A. 12:3-1 to -28* and *N.J.S.A. 13:1B-13* that if ultimately approved by the New Jersey Attorney General would authorize the sale and conveyance of ***unrestricted*** title to certain real property subject to the Common Law and Statutory Public Trust Doctrines (“the subject property”) presently owned by the State of New Jersey for the (grossly undervalued) sum of \$1,591,173.00.

Historically, the Borough of Keansburg has used the subject property for a public purpose pursuant to a Tidelands **Lease**, specifically as a paid public parking lot with approximately 500 public parking spaces which public parking spaces give the members of the general public fair and reasonable access to the navigable waters and the beachfront of the Raritan Bay and also to surrounding boardwalk and waterfront businesses. Appellant Jersey Shore Beach and Boardwalk, Inc. (“Appellant”) operates a large amusement business and boardwalk and has done so for more than 100 years. For years, the general public has used this public parking lot as a destination and parking point from which to obtain access to the Raritan Bay and also to the boardwalk and amusement business operated by Appellant. It is the

stated intention of the Borough of Keansburg to acquire *unrestricted* title to the subject property from the State of New Jersey pursuant to a Tidelands Grant, and to then in turn sell and convey the *unrestricted* title in the subject property to a designated developer who will then in turn permanently close, remove and destroy the 500+ space public parking lot and build a private for profit high density apartment complex on the site. No provisions are proposed to make up for the loss of 500+ public parking spaces. The “Public Trust Doctrine” has been part of the Common Law in New Jersey since 1776 and has been part of positive statutory (and regulatory) law in New Jersey since July 2019. In 2019 the Legislature unambiguously and specifically directed by statute that the NJDEP “*has the authority and the duty to protect the public's right of access to tidally flowed waters and their adjacent shorelines under the public trust doctrine and statutory law...*” and the Legislature further specifically unambiguously declared that: “*Public access includes ... the necessary support amenities to facilitate public access for all, including ... public parking.*” N.J.S.A. 13:1D-150(e) & (f). Moreover, the Legislature also specifically directed that “*The Department of Environmental Protection shall ensure that ... any action taken, by the department pursuant to ... any ... law, is consistent with the public trust doctrine.*” N.J.S.A. 13:1D-151(a). The NJDEP is fully aware of what is occurring and is fully aware of their legal duty to

stop and prevent it, yet, the NJDEP has, contrary to law and their statutory obligation, in fact endorsed and approved the TRC's agreement to sell an unconditional Tidelands Grant without a Deed restriction. To be clear, the Borough of Keansburg's plan to abolish and not replace 500 public parking spaces along the waterfront is a clear and *per se* violation of the Common Law and Statutory Public Trust Doctrines. The NJDEP's failure and refusal to act and satisfy the statutory mandate flagrantly violates *N.J.S.A.* 13:1D-150(e) & (f) and *N.J.S.A.* 13:1D-151(a). In short, the NJDEP is engaging in endorsing and granting approvals that are known to be contrary to law which makes the NJDEP overtly complicit with the Borough of Keansburg's illegal plan.

Appellant qualifies as an "interested person" entitled to enforce the statutory rights conferred by the Public Trust Doctrines and make the NJDEP abide by the law. Appellant therefore has a right to do this through use of an adjudicatory hearing on the issue of whether the proposed unrestricted Riparian Grant land sale to the Borough of Keansburg at issue and as proposed and as approved violates the Public Trust Doctrine and therefore violates law and to force the NJDEP to satisfy the statutory mandate. Therefore, the NJDEP's denial of Appellant's request for an adjudicatory hearing must be reversed.

PROCEDURAL HISTORY:

On or about March 2, 2018, the Borough of Keansburg filed a Tidelands Grant Application with the New Jersey Tidelands Resource Council (“TRC”) seeking to purchase by way of a “Riparian Grant” certain tidelands real property owned by the State of New Jersey which Keansburg already holds a “Riparian Lease” (**Pa1, 7, 15**) from the State of New Jersey for the tidelands real property. That Tidelands Grant Application is known as “Application 1321-02-0003.3 TDG180001 KEANSBURG BOROUGH, Tidelands Grant Application, Raritan River, Lot 3.02, Block 184, Keansburg Borough, Monmouth County”.

Appellants Jersey Shore Beach and Boardwalk, Inc. (“Appellants”) opposed Keansburg’s application for a new license application, Borough of Keansburg, File No. 1321-02-003.5 TDI190001 before the TRC. (**Pa1**)

At the December 7, 2022 public meeting of the TRC – without any notice to Appellant even though they previously participated in Keansburg’s application before the TRC - the members of the council voted to approve Keansburg’s Riparian Grant Application without a Deed restriction requiring continued compliance with the Common Law and Statutory Public Trust Doctrine. (**Pa60, 61**)

On February 8, 2023 the TRC approved the Official Minutes of the December 7, 2023 TRC Meeting. (**Pa60**)

On April 20, 2023 Appellant filed a completed “Adjudicatory Hearing Request and Tracking Form” along with a formal cover letter to the DEP requesting an “adjudicatory hearing”. **(Pa64)**

On May 15, 2023 the Applicant Borough of Keansburg objected to Appellant’s Request for an Adjudicatory Hearing. **(Pa72)**

On September 13, 2023 Appellant’s attorney R. S. Gasiorowski, Esq. sent a letter to the NJDEP again enclosing a copy of the April 15, 2023 “Adjudicatory Hearing Request and Tracking Form” along with a copy of the April 15, 2023 cover letter and inquired as to the status of a decision. **(Pa95)**

On September 19, 2023 the Applicant Borough of Keansburg’s attorney David A. Clark, Esq. sent a letter acknowledging the September 14, 2023 letter from Appellant’s attorney and inquired as to the status of a decision. **(Pa96)**

On February 7, 2024 the DEP Office of Legal Affairs sent a three-page letter formally denying Appellants request for an adjudicatory hearing. **(Pa97)**

On March 22, 2024, Appellants filed a Timely Notice of Appeal. **(Pa101)**

On May 16, 2024 the NJDEP filed the Statement of Items Comprising the Record. **(Pa105)** Items 4 through 11 of Respondents list **(Pa123)** are identified by the NJDEP as the record; however, Appellant was denied an Adjudicatory Hearing

and was deprived of the opportunity to be provided with documents, cross-examine and/or utilize these items.

On May 17, 2024 the NJDEP filed an Amended Statement of Items Comprising the Record.¹ (Pa123).

STATEMENT OF FACTS:

To be clear at the onset, on March 2, 2018 when Keansburg's Tidelands Grant Application was first filed, the common law "Public Trust Doctrine" had long been in effect and as a matter of fact, law and substance applied to the Borough of Keansburg's Tidelands Grant Application. Thereafter, on May 3, 2019 during the pendency and consideration of Keansburg's Tidelands Grant Application before the TRC, the Legislature and Governor enacted the New Jersey *Statutory Public Trust Doctrine Law, New Jersey Laws of 2019, Chapter 81* (effective July 2, 2019) which statutory legislation adopted the common law Public Trust Doctrine as now positive statutory law. That law is now codified at N.J.S.A. 13:1D-150, -151, -152, -153, -154, -155 and -156. The *Statutory Public Trust Doctrine Law* specifically authorized

¹ The NJDEP's initial Statement and Amended Statement of Items Comprising the Record (Pa118, 123) is not accurate and includes information well beyond the exchange of documents between the NJDEP and Appellants since Jersey Shore was denied an Adjudicatory Hearing. Reference to those items which are relevant to this Appeal is made only where relevant.

the New Jersey Department of Environmental Protection (“NJDEP”) to promulgate administrative rules and regulations for enforcement of the new – *now statutory* – mandate. And indeed, pursuant to the authority granted, the NJDEP quickly promulgated administrative rules and regulations to ensure enforcement of the new positive statutory mandate which administrative rules and regulations themselves are now published in the New Jersey Administrative Code, specifically at *N.J.A.C. 7:7-9.48* and the directly applicable “public access rule” found at *N.J.A.C. 7:7-16.9* which impose the obligation on all local municipalities to ensure that:

“... [p]ublic access to lands and waters subject to public trust rights shall be provided in accordance with public access rule, 7:7-16.9. *Development that does not comply with 7:7-16.9, Public access, is discouraged on lands and waters subject to the public trust rights.*” (Emphasis added).

[*N.J.A.C. 7:7-9.48(b)*].

More specifically, the Legislature unambiguously and specifically directed by statute that the NJDEP “*has the authority and the duty to protect the public's right of access to tidally flowed waters and their adjacent shorelines under the public trust doctrine and statutory law...*” (emphasis added) and the Legislature further specifically unambiguously declared that: “*Public access includes ... the necessary support amenities to facilitate public access for all, including ... public parking.*” (Emphasis added). *N.J.S.A. 13:1D-150(e) & (f)*. Moreover, the Legislature also

specifically directed that “*The Department of Environmental Protection shall ensure that ... any action taken, by the department pursuant to ... any ... law, is consistent with the public trust doctrine.*” (Emphasis added). *N.J.S.A.* 13:1D-151(a).

After the July 2, 2019 date of enactment and going forward all further use and development of public or tidelands adjoined navigable waters and lands abutting navigable waters that were formerly flowed by tides – including the property that is the subject of the Borough of Keansburg’s pending Riparian Grant Application – were now subject to limitations on development and use by virtue of the additional statutory and administrative limitations on use and requirements that had to be met and/or satisfied as a condition of any lawful approval of the future use and development of tidelands. To be clear this specifically requires compliance with all aspects of the long existing common law “Public Trust Doctrine,” the new statutory public trust doctrine statute, and the “public access rule” promulgated there under found in *N.J.A.C.* 7:7-16.9. The NJDEP “public access rule” contains detailed yet plain and easy to understand requirements that must be satisfied as a condition of a government approval of any actions involving riparian land used as a point of public access to waterways, including the pending Riparian Grant Application at issue herein.

Under the applicable promulgated Administrative Rules and Regulations, municipalities are encouraged – *but are not required* – to draft and file their own tailored “municipal public access plan” with the NJDEP. The way to prepare and submit such a document for NJDEP approval is outlined in the administrative rules. To date defendant Borough of Keansburg has not drafted and / or filed a “municipal public access plan” with the NJDEP. For those municipalities such as defendant Borough of Keansburg that did not draft and file their own “municipal public access plan” with the NJDEP, the governing statutes and mandatory administrative rules and regulations directly apply to any municipal action to be taken, and specifically include, but are not limited to, imposing on a municipality the affirmative statutory and administrative obligation to guarantee and protect public access to waterways consistent with an in compliance with the Common Law Public Trust Doctrine, the Statutory Public Trust Doctrine, and the administratively created “Public Access Rule”. So while the NJDEP has a very specific statutory mandate to make sure that the public’s right of access to navigable waterways is not violated and that the Public Trust Doctrines is otherwise complied with, Municipalities such as the Borough of Keansburg have an independent concurrent obligation not to take or engage in or participate in any action that will violate the public’s right of access to navigable

waterways of that will in any fail to comply with the requirements of the Public Trust Doctrine.

That all said, in their pending Tidelands Grant Application the Borough of Keansburg has, by plan and design, failed to honestly and openly disclose to the TRC, the NJDEP and the New Jersey Attorney General, their plan, specifically that once Keansburg has obtained an unrestricted fee simple “Riparian Grant” of the subject property from the State of New Jersey, the Borough of Keansburg is already legally obligated to then in turn immediately re-sell the subject property to a third party private developer. That private third-party developer will then permanently remove and abolish the existing approximately 500+ public parking spaces along the waterfront and replace the approximately 500+ public parking spaces with a private enterprise for-profit high-density housing apartment complex. An essential key to Keansburg’s plan and scheme is obtaining an *unrestricted and unconditional* “Riparian Grant”, which requires that the necessary State entities – the TRC, Tidelands Bureau within the NJDEP, NJDEP and Attorney General – to all somehow ignore the undisputed reality that such a plan is clearly prohibited by the Public Trust Doctrines, certain portions of the *Tidelands Act*, and the existing Tidelands Lease to

the Borough of Keansburg itself.² Appellant was not seeking to challenge the legal right of the State of New Jersey – acting through the TRC, Bureau of Tidelands, NJDEP and Attorney General – to sell a Riparian Grant of the subject property to Keansburg *per se*. Rather, Appellant maintains that the State of New Jersey – acting through the TRC, Bureau of Tidelands, NJDEP, and Attorney General – can only LEGALLY sell a Riparian Grant to Keansburg in a manner that does not violate the Public Trust Doctrines, the *Tidelands Act*, and the existing Tidelands Lease, all of which require that the State include as a condition of any sale of the subject property to Keansburg a specific Deed restriction that runs with the land and which clearly and unambiguously states that the subject property is being conveyed subject to the legal restriction that it cannot be used for anything other than a 500+ space public parking lot and point of access to the navigable waters of the Raritan Bay and shoreline.

² The existing operative Tidelands Lease provides in relevant part that:

“... the license authorizes the continued use of this area as a municipal parking lot. Any development of the site contrary to the use as a municipal parking lot will require a new license and new fee calculation (as appropriate). This document is for the area described as Block 184, Lot 3.01 only ...[.]
... *** (Pa130)

Notwithstanding all of the foregoing, the “minutes” of the December 7, 2022 public meeting (**Pa63**) of the TRC reflect that the members of the council completely ignored the issue and voted to approve the Borough of Keansburg’s Riparian Grant Application, and in so doing essentially fixing as the only requirements and conditions of the sale of a fee simple “Riparian Grant” to the Borough of Keansburg being: (1) a purchase price of \$1,591,173.00 to be paid to the State of New Jersey as consideration for the purchase; and (2) imposing the further requirement that the Borough of Keansburg pay back the State of New Jersey for the substantial monies that were still unpaid and due and owing for the existing Riparian Lease (**Pa60**).³ Jersey Shore had no notice of this proceeding and was not a participant. No restrictive covenant was proposed to be included in the Riparian Grant DEED prohibiting Keansburg or any successor in interest (*ie. the designated developer) from permanently removing the existing approximately 500+ public parking spaces generally, nor was any restrictive covenant included in the Riparian Grant DEED specifically prohibiting the future construction of a private for-profit entity high density apartment complex on the location of approximately 500+ public parking spaces.

³ Keansburg had been collecting daily parking fees for years, collecting literally hundreds of thousands of dollars, but Keansburg never actually paid the State of New Jersey for the “Riparian Lease” that they had (**Pa1**).

The only step remaining in the somewhat complicated approval process of the sale of a Tidelands Grant, once recommended by the TRC and approved by the Bureau of Tidelands Management within the NJDEP and NJDEP itself, is the final review and approval of the Attorney General, after which a closing may take place. To date the Attorney General has not yet taken any action on the proposed Tidelands Grant, warranting a decision to afford Jersey Shore a hearing.

It is undisputed and undisputable from the record that at no stages of the review and approval process did the TRC, the Bureau of Tidelands Management within the NJDEP, and the NJDEP itself, ever acknowledge and consider whether the effect of the Keansburg's application – that being Keansburg's plans to immediate re-sell the subject property to a private developer who will then abolish and remove and take away the 500+ public parking spaces along the waterfront and on the site then build for profit private enterprise high density apartments – operates to violate the Public Trust Doctrine, certain portions of the *Tidelands Act*, and the existing Tidelands Lease. The law is clear that the TRC, the Bureau of Tidelands Management within the NJDEP, and the NJDEP itself are all specifically legally obligated to ensure compliance with the Public Trust Doctrine and other laws, and it is not subject to reasonable dispute that approving the Tidelands Grant to the

Borough of Keansburg without a Deed restriction is a flagrant violation of such laws and administrative regulations.

Appellant Jersey Shore owns and operates “Keansburg Amusement Park” which has been an ongoing and substantial oceanfront seasonal recreational business for well over 100 years. Jersey Shore owns properties in Keansburg including but not limited to Block 184, Lot 4. Appellant Jersey Shore’s customers have long been able to use the 500+ public parking spaces located on tidelands land (Block 184, Lot 3.02) owned by the State of New Jersey operated by the Borough of Keansburg pursuant to a series of long term “Tidelands Leases” (**Pa61**). Keansburg’s planned permanent removal of approximately 500+ public parking spaces that have for years been routinely used by Appellant’s patrons at the Keansburg Amusement Park as a point of access to the navigable waters of the Raritan Bay and the shoreline vest Appellant as a business entity with status of one that has “... *particularized property interests ...*” and / or a business entity that is “... *directly affected by a permitting decision ...*” within the meaning of *N.J.S.A. 52:14B-3.1* of the *Administrative Procedure Act* -thereby in turn qualifying Appellant a “*person who has particularized property interest sufficient to require a hearing on constitutional or statutory grounds ...*” (*the Statutory Grounds being the *Statutory Public Trust Doctrine Law*) within the meaning of *N.J.S.A. 52:14B-3.2* of the *Administrative*

Procedure Act. As Appellant has “*particularized property interests*” and as Appellant would be “*directly affected*” by the administrative decision to sell a Tidelands Grant of the subject property to Keansburg without a Deed Restriction that would result in 500+ parking spaces being permanently removed without replacement, Appellant most certainly had a “*particularized property interest sufficient to require a hearing on ... statutory grounds*” within the meaning of the law. See N.J.S.A. 52:14B-3.1 and N.J.S.A. 52:14B-3.2. Cumulatively, the *Administrative Procedure Act* also provides in relevant part that: “...an agency [such as the DEP] upon the request of any interested person may in its discretion make a declaratory ruling with respect to the applicability to any person, property or state of facts of any statute or rule enforced or administered by that agency. (Emphasis added) ... N.J.S.A. 52:14B-8. Again, Appellant fits squarely within the definition of interested person so that Appellant has a specific statutorily recognized right to request of the DEP make a ruling on the applicability or non-applicability of the Public Trust Doctrines, certain portions of the *Tidelands Act*, and the existing Tidelands Lease and whether such laws and administrative regulations operate to prohibit Keansburg’s “Application 1321-02-0003.3 TDG180001 KEANSBURG BOROUGH, Tidelands Grant Application, Raritan River, Lot 3.02, Block 184, Keansburg Borough, Monmouth County” from being granted and the subject

property sold by the State of New Jersey to Keansburg without a Deed restriction that runs with the land preventing the subject property from ever being used as anything other than a 500+ space public parking lot.⁴

Moreover, Jersey Shore is also the Plaintiff in a matter currently pending in the Appellate Division (*Jersey Shore Beach and Boardwalk Company, Inc. v. Borough of Keansburg*, Docket No.: A-621-23); wherein Jersey Shore alleges ownership of Lot 3.01, Block 184. That property is identified in the DEP approved Summary Sheet, which the DEP asserts was a part of the record before it, and which was offered as an exchange for the parking lot (**Pa133**).

For these reasons, on April 20, 2023 Appellant filed a completed “Adjudicatory Hearing Request and Tracking Form” along with a formal cover letter request with the DEP requesting an “adjudicatory hearing”. The “Adjudicatory Hearing Request and Tracking Form” at ¶9 indicated the relief and remedy Appellants were seeking as follows:

⁴ Moreover, Appellant contends and would have argued at an Adjudicatory Hearing had it been afforded one, that the sale price of \$1,591,173.00 is well below fair market value in that the subject property was valued incorrectly as merely vacant waterfront land. Point in fact, the subject property should have been valued by the State as an ongoing pay for use public parking lot that generates hundreds of thousands of dollars per year with the land and sales price valued and determined by generated income. On information and belief, the actual proposed sales price is the equivalent of less than four years collected parking fees (**Pa143, 164**).

Either deny the request of the Borough of Keansburg or alternatively include a permanent deed restriction on future use of the property as anything other than a public parking lot so as to continue to comply with the Statutory and Common law Public Trust Doctrine.

[Pa71].

The Cover letter stated in relevant part as follows (**Pa67**):

I represent Jersey Shore Beach and Boardwalk, Inc., an objector of record in the above application having previously formally appeared and outlined objections to the Tidelands Resource Council at their May 1, 2019 Public Meeting (transcript submitted herewith at “Exhibit A” to Adjudicatory Hearing Request) and as an objector at the January 22, 2020 Public Meeting of the Mayor and Council of the Borough Council (transcript submitted herewith at “Exhibit B” to Adjudicatory Hearing Request).

In this application the Borough of Keansburg is seeking a grant for an area of land off Beachway Avenue (BLOCK: 184 LOT: 3.02) in Keansburg that is currently used as a paid public parking lot. The use of this property is required by the Statutory and Common Law Public Trust Doctrine to remain as public parking. Notwithstanding this legal and factual reality, the Borough of Keansburg intends to illegally do away with the parking use and then allow a private developer to utilize this otherwise public property as part of a high density housing project.

Despite prior objections being on record, and with no notification to objectors, on December 7, 2022 the Tidelands Resource Council took the following action as per the Minutes of that meeting which were not approved until February 8, 2023:

A motion by Councilmember DiBerardino, seconded by Councilmember Challoner, passed by a vote of 7-0 to approve a grant for the unconveyed portion of Lot 3.02 (which will be in two tracts) for \$1,591,173,00 with the requirement that any fees due under the current Tidelands license be paid in full prior (*sic*) delivery of the grant as referenced above and also contingent on the Borough executing the grant in a timely fashion, and if they desire any reconsideration or proposed water for land swap, that it may require an updated appraisal to determine the appropriate value for the site at the time which could include approvals for the redevelopment plan as noted above. Councilmember Grabas *recused* himself from this vote because of his affiliation with the applicant's agent.

[See Minutes of Tidelands Resources Council Meeting of December 7, 2022 approved on February 8, 2023 submitted herewith attached to the Adjudicatory Hearing Request at "Exhibit C"].

Enclosed please find objector Jersey Shore Beach & Boardwalk, Inc.'s ADJUDICATORY HEARING REQUEST CHECKLIST AND TRACKING FORM with "Exhibit A", "Exhibit B", and "Exhibit C" attached. Kindly file same.

(Pa64-67).

On February 7, 2024⁵ the DEP Office of Legal Affairs finally sent a three-page letter (**Pa97, 98-100**) formally denying Appellants request for an adjudicatory hearing, stating in relevant part as follows:

As previously acknowledged, the New Jersey Department of Environmental Protection (Department) has received your request for an adjudicatory hearing, by letter dated April 20, 2023, on behalf of your client Jersey Shore Beach & Boardwalk, Inc. (Petitioner) to challenge the Tidelands Grant (Grant), that the Tidelands Resource Council (TRC) approved for the Borough of Keansburg (Applicant) on December 7, 2022, pursuant to the Tidelands Act N.J.S.A. 12:3-1 to 28 and N.J.S.A. 13:1B-13.

The Grant authorizes the conveyance of Block 184, Lot 3.02 for \$1,591,173.00 with the requirement that any fees due under the current Tidelands license be paid in full prior to delivery of the grant, with the contingency that the Borough timely executes the Grant.

BACKGROUND:

The Applicant sought the Grant for an area of land off Beachway Avenue in Keansburg that has been historically used as a parking lot. This land was designated as Lot 3 and was subdivided to create Lots 3.02 and 3.03. The

⁵ The NJDEP only finally took action on THIS long languishing administrative application and denied Appellants request in direct response to yet another newly filed separate declaratory judgment and mandamus action Appellant filed against the NJDEP in the Superior Court of New Jersey, Law Division, Civil Part, Mercer County, *Jersey Shore Beach and Boardwalk Company, Inc. v. Borough of Keansburg*, MER-L-151-24, seeking to compel the NJDEP to comply with their legal obligations under the Public Trust Doctrines and either terminate the “Tidelands Grant” sale or include an appropriate Deed Restriction.

Grant pertains to Lot 3.02 (the Property). Petitioner is a nearby property owner, which operates an amusement park. The heart of Petitioner's concern surrounds whether the Property will be continued to be used as a parking lot or if it will be privately developed for another purpose.

Petitioner claims statutory right to an adjudicatory hearing ...[.]

DISCUSSION:

Third-party objectors to a decision by the Department do not have an automatic right to an adversarial, adjudicatory hearing before an administrative law judge. ...***...

Petitioner seeks a hearing on a TRC Grant issued pursuant to N.J.S.A. 13:1B-1 to 28 and N.J.S.A. 13:1B-13 to -13.14 (Tidelands Act). The Tidelands Act does not grant statutory hearing rights to third party objectors. Absent a statutory provision that expressly confers a right to a hearing, and administrative agency cannot create such a right by mere regulation. ... *** ... [A]ccordingly, Petitioner has no statutory right and must demonstrate a "particularized property interest" of constitutional significance. N.J.S.A. 52:14B-2. -3.1(b) to (d), -3.2.

...***...

Petitioner has challenged the Department's decision to approve the Grant but has not articulated any claim of a constitutionally protected individual property interest affected thereby. Petitioner alleges only generalized property rights, indistinguishable from those shared by other neighboring property owners, which do not provide constitutional standing. Property value and quality of life (use and enjoyment), as discussed above, do not rise to a particularized property interest sufficient to create a right to an adjudicatory hearing. Likewise, the Public Trust Doctrine ensures certain public access rights to all persons, generally.

CONCLUSION:

Because the Tidelands Act does not provide a statutory right for third parties to request an adjudicatory hearing, the Petitioner has not demonstrated a particularized property interest of constitutional significance, Petitioner is not entitled to an adjudicatory hearing and Petitioner's hearing request is denied.

(Pa100).

Appellant now appeals the NJDEP's denial of a right to an adjudicatory hearing **(Pa101).**

LEGAL ARGUMENT:

POINT I:

**THE ADMINISTRATIVE PROCEDURE ACT
STATUTORILY CONFERS ON APPELLANT THE
RIGHT TO AN ADJUDICATORY HEARING AS A
FORUM TO ADMINISTRATIVELY COMPEL THE
NJDEP TO ACKNOWLEDGE THAT THE
TIDELANDS GRANT, AS TENTATIVELY
APPROVED, VIOLATES THE PUBLIC TRUST
DOCTRINES AND THE PUBLIC ACCESS RULE
(Pa98, 100):**

**A. The Common Law Public Trust Doctrine, the Statutory Public
Trust Doctrine and the Administrative Public Access Rule:**

Generally stated, the Common Law Public Trust Doctrine establishes the rule that ownership of the State's natural resources, including, but not limited to, ground waters, surface waters, and land flowed or formerly flowed by tidal waters is vested in the State to be held by the State in trust for the people, and that the public has the right to access tidal lands and waters for navigation, fishing, and recreational uses, and, moreover, that even land that is no longer flowed by the tide but that was artificially filled over time and is now dry is considered to be public trust land and the property of the State.

The Public Trust Doctrine has existed and been recognized in modern civilization literally since Roman Times and has been recognized in New Jersey since before the Revolution. Starting in the 1970s the first of a series of legal

challenges and enforcement efforts were brought – most with a combination of both private party plaintiffs and public entity plaintiffs as co-plaintiffs – which legal challenges over time operated to define and refined the contours and scope and applicability of today’s Common Law Public Trust Doctrine.

First, there was *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296 (1972), which was brought by one Municipality and several private citizens from that municipality who collectively sued another municipality for violating the Public Trust Doctrine.

Thereafter, the New Jersey Department of the Public Advocate was created in 1974 by Governor Brendan Byrne, with the first Public Advocate appointed being Stanley Van Ness. The Office of the Public Advocate was structured as a Department within the Executive Branch of New Jersey State government that was charged with acting as a voice on behalf of the people of the state on public issues. All one need to do is to read the captions of the earlier modern (*ie.* post 1974) Public Trust Doctrine cases to quickly ascertain that – *at least for the subsequent 20 years until 1994* – most legal challenges brought seeking to enforce the rights of the people under the Common Law Public Trust Doctrine were either brought directly by the Public Advocate as named party plaintiff, or otherwise were heavily supported by the Department of Public Advocate. Indeed, in *Van Ness v. Borough of Deal*, 78

N.J. 174 (1978), the first major New Jersey Supreme Court published post 1974 Public Trust Doctrine case, the named plaintiff was literally Stanley Van Ness suing in his capacity as the Public Advocate.

After 20 years, in 1994 during the administration of Republican Governor Christine Whitman, the Department of Public Advocate was abolished and the Public Advocate therefore disappeared for the next 11 years. As such, as a practical matter, any legal challenges brought between 1994 and 2005 seeking to vindicate rights under the Common Law Public Trust Doctrine were pursued strictly by private party litigants. *See eg. Raleigh Avenue Association v. Atlantis Club*, 370 *N.J. Super.* 171 (App. Div. 2004).

In 2005, acting Democratic Governor Richard J. Codey signed legislation re-establishing and resurrecting the Department of the Public Advocate. However, the only major published Public Trust Doctrine case in the next five years – *City of Long Branch v. Liu*, 203 *N.J.* 464 (2010) – was prosecuted by a private individual against a Municipality, with the anemic participation of what remained of the now “resurrected” Department of Public Advocate being limited to a Letter Brief submitted in support of the private litigant’s position, submitted nu the Public Advocate not as a joined direct party but now rather in the very limited capacity as *amicus curiae*. The case was argued before the New Jersey Supreme Court on

December 9, 2009. A Month later Republican Governor Chris Christie took office and on June 29, 2010 he once again completely eliminated the Department of Public Advocate. The Supreme Court's opinion in *City of Long Branch v. Liu, supra*, argued on December 9, 2009 at a time when the Department of Public Advocate still existed, was actually issued and released by the New Jersey Supreme Court on September 21, 2010, now at a time when the Department of Public Advocate – who had only appeared in writing as *amicus curiae* anyway – had once again been abolished and ceased to exist as an entity or organ of government.

As of June 24, 2010 there was again no longer a Department of Public Advocate within the Executive Department of State government to be used as a vehicle to enforce the Common Law Public Trust Doctrine. The Governor of New Jersey, being the chief executive, is constitutionally charged with enforcing all laws. The Common Law Public Trust Doctrine most certainly qualifies as a “law” that the governor is charged with enforcing, notwithstanding the fact that there was no longer a Department of Public Advocate.⁶ To fill the vacuum left by the abolishing (*now

⁶ It is worthy of note that the majority of partisan political hostility over the years against the Office of the Public Advocate had nothing whatsoever to do with the Public Trust Doctrine enforcement lawsuits or related beach and water access issues. Rather, the majority of the hostility was focused against the Public Advocate as a direct result of that Office's bringing legal challenges to the legislative enactments of the state legislature attempting to address (some would say evade) the

for a second time) of the Department of Public Advocate, thereafter, the New Jersey Department of Environmental Protection (“NJDEP”), relying upon what the NJDEP maintained was a form of “implied authority” to enforce based upon the case law, enacted a series of administrative public access rules to seek to ensure municipal compliance with public access and other aspects of the Public Trust Doctrine. Essentially, to the extent that there was any will on the part of the Governor’s office to enforce the (still strictly Common Law) Public Trust Doctrine, rather than rely upon the Attorney General’s Office, the Governor sought to rely upon the NJDEP to enforce the doctrine on behalf of the State government. Therefore, at least in theory, the Executive Department of State Government (originally through the Public Advocate, now through the NJDEP), the County Governments (through their respective County Counsel), Local Municipalities (through their respective Municipal Attorneys or hired Special Counsel), and private parties (either acting *pro se* or through hired private counsel) all had the right to bring legal challenges against private or government action that in any way violated or otherwise infringed upon rights established by the Common Law Public Trust Doctrine.

State Constitutional affordable housing mandate announced in the line of so-called *Mount Laurel* housing cases.

Thereafter, in *Hackensack Riverkeeper, NY/NJ Baykeeper v. NJDEP*, 443 *N.J. Super* 293 (App. Div. 2015), the Appellate Division concluded that the NJDEP did not have the proper authority to adopt and enforce such and regulations pertaining to the Public Trust Doctrine, holding in part that:

... [c]ase law that has developed regarding the public trust doctrine, including those which have expanded its reach to privately owned property, do not support NJDEP's contention that the legislature implicitly delegated regulatory powers to the agency."

[*Id.*].

While the NJDEP had stepped in to fill the vacuum left by the permanent abolishment of the Public Advocate, the NJDEP was not seeking merely to take administrative or other legal action to vindicate rights that arose in individual cases, but rather has enacted unilaterally enacted comprehensive administrative regulations published in the Administrative Code - including the so-called "Public Access Rule" - which sought to administratively codify and protect the bundle of rights that had been identified in the many and various legal actions and court cases that had been litigated through the years by both private individuals, at times by the Public Advocate, and at times by both private individuals and the Public Advocate working together.

The New Jersey State Legislature and Governor Murphy quickly responded to the Appellate Division's *Baykeeper* case by immediately enacting comprehensive

now statutory legislation wherein the State of New Jersey, for the first time, codified by statute the host of common law rights – including the right of public access – as outlined by the Courts through the years that make up the “Common Law Public Trust Doctrine”. *See Laws of New Jersey* 2021, Chapter 81, approved May 3, 2019, effective July 2, 2019. That law is now codified at *N.J.S.A. 13:1D-150, N.J.S.A. 13:1D-151, N.J.S.A. 13:1D-152, N.J.S.A. 13:1D-153, N.J.S.A. 13:1D-154, N.J.S.A. 13:1D-155, N.J.S.A. 13:1D-156.*

B. The Legislature Has Declared Adequate Public Parking is an Essential Component of Meaningful Public Access Under the both the Common Law and Statutory Public Trust Doctrines and the NJDEP has an Affirmative Statutory Duty to Ensure Keansburg Complies with This Aspect of the Public Trust Doctrine:

Action by a municipality such as the Borough of Keansburg that would “... seriously impinge on, if not effectively eliminate, the rights of the Public Trust Doctrine” have long been characterized by the New Jersey Supreme Court as the equivalent of efforts to render Public Trust Doctrine rights meaningless and therefore any such action constitutes an actual violation of the Public Trust Doctrine itself. *Matthews v. Bayhead Improvement Association*, 95 N.J. 306, 324 (1984). While no published *Court case* has squarely and directly addressed whether a municipality’s reduced or restrictive parking measures at public access points to navigable waters violate the Public Trust Doctrine, as of 2017 it was as a general

principle “... *widely accepted that this is the case in New Jersey.*” See Susan M. Kennedy, *A Practical Guide to Beach Access and the Public Trust Doctrine in New Jersey*, Monmouth University – Urban Coast Institute (2017), at page 21. Moreover, a Court finding that reduced or restrictive parking measures operates to violate the Public Trust Doctrine:

... is also likely due to the fact that efforts to restrict parking are in violation of the three-way Local Cooperation Agreements for beach restoration projects entered into by the Federal government, the State and each benefitting municipality. Specifically, the federal policies governing such projects state:

“Lack of sufficient parking facilities for the general public (including non-resident users) located reasonably nearby, and with reasonable public access to the project, will constitute *de facto* restriction on public use, thereby precluding eligibility for Federal participation.”

U.S. Army Corps of Engineers, Engineer Regulation (ER)
1165-2-130, section (h)2, June 15, 1989.

[See Susan M. Kennedy, *A Practical Guide to Beach Access and the Public Trust Doctrine in New Jersey*, *supra* at 21].

Two years after the just cited *A Practical Guide* was published, on July 2, 2019 when New Jersey’s *Statutory Public Trust Doctrine Law* went into effect, there still was no published *Court case* on the issue, but now there was something actually even better: The Legislature settled the issue and specifically declared *by statute*

that reduced or restrictive parking measures at points of public access to navigable waters violate the Public Trust Doctrine, and moreover, it was henceforth to be the affirmative legal duty of the NJDEP to make sure no effort to reduce or restrict parking near public access points took place in violation of the Public Doctrine. The new *Statutory Public Trust Doctrine Law* provides in relevant part as follows:

e. The Department of Environmental Protection has the authority and the duty to protect the public's right of access to tidally flowed waters and their adjacent shorelines under the public trust doctrine and statutory law. In so doing, the department has the duty to make all tidal waters and their adjacent shorelines available to the public to the greatest extent practicable, protect existing public access, provide public access in all communities equitably, maximize different experiences provided by the diversity of the State's tidal waters and adjacent shorelines, ensure that the expenditure of public moneys by the department maximizes public use and access where public investment is made, and remove physical and institutional impediments to public access to the maximum extent practicable; and

f. Public access includes visual and physical access to, and use of, tidal waters and adjacent shorelines, sufficient perpendicular access from upland areas to tidal waters and adjacent shorelines, and **the necessary support amenities to facilitate public access for all, including,** but not limited to, **public parking** and restrooms.

[N.J.S.A. 13:1D-150(e) & (f)].

To be clear, in 2019 the Legislature unambiguously and specifically directed by statute that the NJDEP “*has the authority and the duty to protect the public's*

right of access to tidally flowed waters and their adjacent shorelines under the public trust doctrine and statutory law...” (emphasis added) and the Legislature further specifically unambiguously declared that: “Public access includes ... the necessary support amenities to facilitate public access for all, including ... public parking.” (Emphasis added). N.J.S.A. 13:1D-150(e) & (f). Moreover, the Legislature also specifically directed that “*The Department of Environmental Protection shall ensure that ... any action taken, by the department pursuant to ... any ... law, is consistent with the public trust doctrine.*” (Emphasis added). N.J.S.A. 13:1D-151(a). Lastly, the Legislature also directed that the NJDEP may adopt administrative rules and regulations necessary to implement the provisions of the *Statutory Public Trust Doctrine Law*. See N.J.S.A. 13:1D-156. As noted, pursuant to their delegated authority, the NJDEP “Public Access Rule” is found in N.J.A.C. 7:7-16.9 which itself is a detailed 21 page regulation. An integral part of the “Public Trust Doctrine” is providing for, or making provision for, adequate parking so that there can be access to the waterfronts.

Clearly there is and can be no question that the Borough of Keansburg’s plan to permanently remove the 500+ public parking spaces at issue is a direct violation of the literal terms and text of the Statutory Public Trust Doctrine. See N.J.S.A. 13:1D-150(f). And clearly the NJDEP has a specific statutory duty to take action

and intervene to prevent and prohibit this. *N.J.S.A.* 13:1D-150(e). And clearly, the NJDEP has an affirmative obligation, in their oversight capacity to the TRC, to prohibit Keansburg's Application for a Tideland's Grant from being approved and a sale to be consummated unless and until a permanent Deed restriction that runs with the land prohibiting the subject property from being used as anything other than a 500+ public parking lot. *N.J.S.A.* 13:1D-151(a).

Instead, the NJDEP is shirking, abdicating and ignoring their legal duty and are not stopping the TRC's approval of an unrestricted sale of the Tidelands Grant to the Borough of Keansburg.

C. Appellants have the Right to Force the NJDEP to Acknowledge and Satisfy their Statutory Obligation to Enforce the Common Law Public Trust Doctrine Through the Administrative Process:

Appellants have every right to force the NJDEP to acknowledge their statutory mandate and to abide by their statutory mandate, and Appellants have the right to do this through the administrative process.

The New Jersey *Administrative Procedure Act* ("APA"), *N.J.S.A.* 52:14B-1 to -24 "... prescribes the procedure to be followed in the even an administrative hearing is otherwise required by statutory law or constitutional mandate." *In re: Application of Modern Industrial Waste Services, Inc.*, 153 *N.J. Super.* 232, 237 (App. Div. 1977); *see also Cunningham v. Department of Civil Service*, 69 *N.J.* 13

(1975) (recognizing APA hearing right also based on administrative fairness when requestor demonstrates specialized property interest about which contested adjudicative facts are in dispute.)

The APA provides in relevant part in *N.J.S.A.* 52:14B-3.1 (Findings, declarations) as follows:

The Legislature finds and declares that:

a. Under the provisions of the "Administrative Procedure Act," P.L. 1968, c.410 (C.52:14B-1 et seq.) **all interested persons are afforded reasonable opportunity to submit data, views or arguments, orally or in writing, during any proceedings involving a permit decision;**

b. **Persons who have particularized property interests or who are directly affected by a permitting decision have constitutional and statutory rights and remedies ...[.]** (Emphasis added).

[*N.J.S.A.* 52:14B-3.1].

Under *N.J.S.A.* 52:14B-3.2(Definitions):

"Third party" means any person other than:

a. An applicant for any agency license, permit, certificate, approval, chapter, registration or other form of permission required by law;

b. A State agency; or

c. **A person who has particularized property interest sufficient to require a hearing on constitutional or statutory grounds.** (Emphasis added).

[*N.J.S.A.* 52:14B-3.2].

N.J.S.A. 52:14B-3.3 (Appeal of permit decision by third party) provides as follows:

a. Except as otherwise required by federal law or by a statute that specifically allows a third party to appeal a permit decision, a State agency shall not promulgate any rule or regulation that would allow a third party to appeal a permit decision.

b. *Nothing herein shall be construed as abrogating or otherwise limiting any person's constitutional and statutory rights to appeal a permit decision.* (Emphasis added).

[N.J.S.A. 52:14B-3.3].

N.J.S.A. 52:14B-8 (Declaratory rulings) provides as follows:

Subject to the provisions of section 4(b) and 4(e) of chapter 20, laws of 1944, as amended and supplemented (C. 52:17A-4b and 4e),

an agency upon the request of any interested person may in its discretion make a declaratory ruling with respect to the applicability to any person, property or state of facts of any statute or rule enforced or administered by that agency. A declaratory ruling shall bind the agency and all parties to the proceedings on the state of facts alleged. Full opportunity for hearing shall be afforded to the interested parties. Such ruling shall be deemed a final decision or action subject to review in the Appellate Division of the Superior Court. *Nothing herein shall affect the right or practice of every agency in its sole discretion to render advisory opinions.* (Emphasis added).

[N.J.S.A. 52:14B-8].

During the early initial stages of the Application process during the public hearing portion before the TRC, Jersey Shore was identified as interested parties/objectors (**Pa7**) to the license – as “owner of the adjacent amusement park” – and appeared and raised these “Public Trust Doctrine” objections during the public comment period of the hearing. *See N.J.S.A. 52:14B-3.1(a) (Pa1, 15-20)*. To wit, Counsel for Jersey Shore argued at that time:

“I represent Jersey Shore Beach & Boardwalk who are the objectors of the amusement park which, as you can see, is immediately adjacent to the subject property.

Before we start, let me just say that I appreciate the comments establishing the fact that for years going back, perhaps for decades, this has only been used for public use. The earlier leases contain the condition that it be used for public use, it always was used for public use, and it was improved with public funds.

So our objection is not to the continued use of this property for public parking or public use because that is the access to the beach. Our objection is founded upon the fact that this is really, we would submit, kind of an interim step on the part of the Borough. They do not intend to continue to utilize this property. They intend, once they secure this lease, to then sell the --- if they secure a grant --- to sell the property for private development.

There are anticipated plans for this property under the redevelopment plan to construct on this subject property approximately four multi-story buildings which would take up the entirety of the public parking and will impact the use of the beach. So rather than have it something that was designed for public use and paid for by public funds over the years, they want

to attempt to convert it to a private development which will vastly impact all of the surrounding areas as well as the beach...”
(Pa15, lines 10-25; Pa16, lines 1-12)

Moreover, at present time, the proposed “alternate site” for parking, Lot 3.01, is the subject matter of other litigation between Jersey Shore and the Borough of Keansburg wherein Jersey Shore is challenging the ownership of that area proposed for alternative parking. See Jersey Shore Beach and Boardwalk Company, Inc. v. Borough of Keansburg; Docket No.: A-621-23. If in fact Jersey Shore is successful in that litigation there will be no area available for “alternative” parking. Thus, this fact also warrants a determination that Jersey Shore has a “particular property interest” which mandates Jersey Shore is an interested party and/or particular property interest. Jersey Shore is the “litigant” identified at Page 6 of 7 of the Department of Environmental Protection SHC Approval Summary Sheet **(Pa139)**. At page 4 **(Pa136)** of the Summary Sheet, the DEP references:

“... Former Lot 3 consists of a large paved parking lot, the Baywalk West, an extensive beach and dune system and a portion of the Keansburg Amusement Park (containing a go-kart track). The go-kart track is operated by the Amusement Park under a lease that predates the Borough’s receipt of Green Acres Funding...

The Borough now proposes to remove part of the Green Acres encumbered portion of the parking lot from the park and replace it with the land currently leased to the

amusement park. This proposal is made under *N.J.A.C. 7:36-26.2(b)4*, which allows a disposal of parkland in exchange for other adjacent land which is of at least equal acreage and located adjacent to the disposal area in order to improve the functionality of a park. The Borough proposes to exchange a 0.669-acre portion of Lot 3.02 (the “disposal” area), in exchange for a 1.204-acre portion of Lot 3.03 (the “compensation parcel”). Both of the disposal area and the compensation parcel are Borough-owned. The attached aerial reference map (Exhibit 1) depicts the location of the proposed disposal area in relation to the compensation parcel.”

Jersey Shore is the owner of the Keansburg Amusement Park referenced therein.

The DEP Approved Summary Sheet also identifies the litigation as the January 22, 2020 Hearing:

“PUBLIC HEARING

Date: January 22, 2020

Comments: At the public hearing, several members of the public asked for clarification regarding the proposal’s impact to public parking for the park. The Borough explained that one of the purposes of the disposal application is to improve public access to the waterfront by providing a larger parking area.

At the public hearing, and in two follow up written comment letters, the attorney for the owner of the amusement park currently located on the compensation parcel questioned whether the Borough held proper title to the disposal area and compensation parcels. The Borough attorney responded by stating that this matter is the subject of pending litigation between the two parties and could not be discussed at the public hearing.” *Emphasis added*

Appellants have a “particularized property interest” as they themselves access the navigable waters of the Raritan Bay and beach at the access point of the 500-space parking lot, and literally thousands of Appellants customers access the navigable waters of the Raritan Bay and beach at the access point and also access Appellants business from the 500-space parking lot, giving Appellate the requisite “particularized property interest” within the meaning of *N.J.S.A. 52:14B-3.1(b)*. In addition, at present time, the proposed “alternate site” for parking for the subject matter of other litigation between Jersey Shore and the Borough of Keansburg wherein Jersey Shore is challenging the ownership of that area proposed for alternative parking *Jersey Shore Beach and Boardwalk Company, Inc. v. Borough of Keansburg*; Docket No.: A-621-23. If in fact Jersey Shore is successful in that litigation there will be no area available for “alternative” parking. Thus, this fact also warrants a determination that Jersey Shore has a “particular property interest” which mandates Jersey Shore as an interested party and/or particular property interest.

N.J.S.A. 52:14B-3.2(c) confirms that that any person who has “particularized property interest” sufficient to require a hearing on statutory grounds has the right to a hearing. The Statutory grounds in this matter are the requirements of the

Statutory Public Trust Doctrine that are inexplicably being ignored by the NJDEP, the very entity that the Legislature has declared is vested with the obligation to enforce such laws. There is no reasonable question but that the “Public Trust Doctrine” issue raised along with Jersey Shore’s interests in the pending appellate litigation regarding Lot 3.01 in the Borough’s proposal presents a significant substantive issue of law and fact that, if acknowledged, is likely to affect the ultimate decision on the Borough of Keansburg’s Application for a Riparian Grant.

D. The NJDEP’s Decision to Deny Appellant a Hearing Should be Reversed:

The NJDEP’s denial of Appellant’s right to an adjudicatory hearing was based upon a plainly incorrect finding that Appellant was a third party with no particularized property interests whose interests were being directly affected by the NJDEP’s failure to enforce the Public Trust Doctrine. The APA confirms that Appellant is entitled to a hearing, and the NJDEP’s decision to deny Appellant a hearing should be reversed.

E. Alternatively, This Court Should Remand the Case to the NJDEP to Treat Appellants’ Request as a Demand for a Declaration of Rights by an “Interested Party” With a “Particularized Property Interest” Under *N.J.S.A. 52:14B-8* of the Administrative Procedure Act:

Appellant is an “interested party” within the meaning of *N.J.S.A. 52:14B-3.1(a)* that also has a “particularized property interest” that is “directly affected”

within the meaning of *N.J.S.A.* 52:14B-3.1(a) & *N.J.S.A.* 14B-3.2(c) by an adverse decision of the TRC and the NJDEP.

N.J.S.A. 52:14B-8 (Declaratory rulings) provides as follows:

Subject to the provisions of section 4(b) and 4(e) of chapter 20, laws of 1944, as amended and supplemented (C. 52:17A-4b and 4e), *an agency upon the request of any interested person may in its discretion make a declaratory ruling with respect to the applicability to any person, property or state of facts of any statute or rule enforced or administered by that agency.* A declaratory ruling shall bind the agency and all parties to the proceedings on the state of facts alleged. Full opportunity for hearing shall be afforded to the interested parties. Such ruling shall be deemed a final decision or action subject to review in the Appellate Division of the Superior Court. *Nothing herein shall affect the right or practice of every agency in its sole discretion to render advisory opinions.* (Emphasis added).

[*N.J.S.A.* 52:14B-8].

Appellant has a statutory right under the New Jersey *Administrative Procedure Act* (“APA”), *N.J.S.A.* 52:14B-1 to -24 to demand that the NJDEP acknowledge the law and their legal obligation under the law and declare that the preliminary approval of the Tidelands Grant at issue, under the circumstances as known, operates to violate the Statutory and Common Law Public Trust Doctrines, the Administrative Public Access Rule, various provisions of the *Tidelands Act*, and the existing Tidelands Lease.

It appears that NJDEP is seeking to avoid and evade their legal obligations by trying to frame Appellants challenge as one that is procedurally barred while the law – *specifically the cited portions of the APA* – is clear that they may not do so. To the extent necessary, it is submitted that alternatively the application of the Appellant to the NJDEP should be treated not as a request for an adjudicatory hearing but rather as one under *N.J.S.A. 52:14B-8* for a declaration and acknowledgment of their legal obligation under the law that the approval of the Tidelands Grant at issue in the form tentatively approved, under the circumstances as known, operates to violate the Statutory and Common Law Public Trust Doctrines, the Administrative Public Access Rule, various provisions of the *Tidelands Act*, and the existing Tidelands Lease and must be prohibited.

CONCLUSION:

For the foregoing reasons and authorities cited in support thereof, it is respectfully requested that the Administrative Decision of the New Jersey Department of Environmental Protection denying Appellants an adjudicatory hearing be **REVERSED**.

Respectfully submitted,


R. S. GASIOROWSKI, ESQ.

IN THE MATTER OF:

REQUEST FOR ADJUDICATORY
HEARING ON ACTION OF
TIDELANDS RESOURCE
COUNCIL

SUPERIOR COURT OF NEW
JERSEY

APPELLATE DIVISION

DOCKET NO. A-002198-23

Civil Action

BRIEF OF RESPONDENT BOROUGH OF KEANSBURG

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PRELIMINARY STATEMENT

The appeal relates to a tidelands grant application that the respondent Borough of Keansburg (the “Borough”) filed with the Tidelands Resource Council (the “TRC”). Through its grant application, the Borough asked the TRC to release all tidelands claims to the Borough-owned property identified on the Borough’s tax map as Block 184, Lot 3.02 (“Lot 3.02”) which is currently used by the Borough as a municipal parking lot. The Borough indicated within its application that if the grant application was approved and all tidelands claims to Lot 3.02 were released, the Borough planned to convey Lot 3.02 to a redeveloper as part of a larger redevelopment project and to move the municipal parking lot to an adjoining lot.

On December 7, 2022, the TRC voted to approve the Borough’s tidelands grant application and to release all tidelands claims to Lot 3.02, subject to certain conditions (one of which was the payment by the Borough of \$1,591,173.00 to the TRC in consideration for the release of these claims). The appellant Jersey Shore Beach & Boardwalk, Inc. (“Jersey Shore”) subsequently filed a written request with the New Jersey Department of Environmental Protection (the “NJDEP”) seeking an adjudicatory hearing to challenge the TRC’s approval of the Borough’s tidelands grant application.

After considering the submissions filed by Jersey Shore and the Borough, the NJDEP issued a letter opinion on February 7, 2024 denying Jersey Shore’s

adjudicatory hearing request. The NJDEP concluded, among other things, that the statute governing tidelands grant applications does not confer a statutory right for third parties to have adjudicatory hearings challenging TRC tidelands grant determinations, and that Jersey Shore had not demonstrated any particularized property interest of constitutional significance warranting such a hearing.

This appeal is limited to one discrete issue—whether the NJDEP’s final agency action denying Jersey Shore’s adjudicatory hearing request was arbitrary, capricious, or unreasonable. A review of the record shows that the NJDEP’s decision was not arbitrary, capricious, or unreasonable, and instead was supported by substantial evidence in the administrative record and by applicable law. Therefore, this final agency action should be affirmed on appeal.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

The Borough initiated this administrative proceeding by filing an application with the TRC seeking the provision of a tidelands grant releasing all tidelands claims to Lot 3.02. Pa98; Pa61-63. Initially, the Borough proposed a land swap as the consideration for the tidelands grant, but due to certain legal disputes regarding the land which the Borough proposed to use in this land swap, the Borough later

¹ Since the procedural history and the facts relevant to this litigation are intertwined, they are presented together herein.

amended its grant application to simply request the TRC to determine the monetary consideration necessary for the TRC to release its tidelands claims to Lot 3.02. Pa63.

Before proceeding with the tidelands grant application, the TRC advised the Borough that the Borough needed to renew its expired license for the use of the tidelands portions of Lot 3.02. On May 1, 2020, the TRC held a public hearing on the Borough's license renewal application and voted to approve a tidelands license with the Borough for the Borough's use of the tidelands portions of Lot 3.02. Pa1-42. This approval was subsequently memorialized through a written license agreement between the Borough and the TRC authorizing the use of the tidelands portions of Lot 3.02 (i) retroactively, for a term beginning in 1967 and expiring on April 30, 2019, and (ii) prospectively, for a term of 15 years running from May 1, 2019 through May 1, 2034. Pa130-132. In consideration for the TRC's provision of this tidelands license to the Borough, the license agreement required the Borough to pay the TRC rental fees in accordance with the fee schedule set forth within the license agreement. Pa130-132.

Once the Borough's right to use the tidelands portions of Lot 3.02 was resolved through the execution of this license agreement, the Borough continued to prosecute its pending tidelands grant application with the TRC. The Borough's grant application indicated, among other things, that the Borough was seeking full ownership of Lot 3.02 so that this parcel could be conveyed by the Borough to a

private redeveloper as part of a larger redevelopment project, and that the Borough intended to provide public parking on an adjoining lot (Lot 3.03) which would be converted into a surface public parking lot with space for 150 or more vehicles.² Pa60-63.

At the same time that the Borough was pursuing a tidelands grant from the TRC, it was also simultaneously pursuing an approval from the NJDEP Green Acres Program asking the Green Acres Program to release the Green Acres restrictions on a specified number of parking spaces located in the municipal parking lot in Lot 3.02 and for those restrictions to be re-located to the Borough's proposed new municipal parking lot. Pa130-132; Pa43-59.³

Notably, Jersey Shore was aware of the Borough's pending application with the TRC seeking a tidelands grant and of the Borough's pending application with the Green Acres Program seeking to remove the Green Acres restrictions on the

² Jersey Shore contends in argument in its appellate brief in this matter and in its request for an adjudicatory hearing that the current municipal parking lot on Lot 3.02 has 500 parking spaces. There is no factual support for this allegation, and it is inconsistent with what Jersey Shore has asserted in previous briefs filed with the Appellate Division (particularly, see Jersey Shore's briefs filed in Docket Nos. A-2379-22 and A-621-23). It is the Borough's position that there are approximately 300 parking spaces in the municipal parking lot on Lot 3.02, and that they will be replaced by a new municipal parking lot to be located on Lot 3.03 that will have approximately 150 parking spaces.

³ Pa43-59 is incorrectly identified in Jersey Shore's appendix as a transcript of a TRC proceeding. It is actually a transcript of a public hearing held by the Borough at Borough Hall as part of its Green Acres application.

parking spaces on Lot 3.02 and to replace them with Green Acres restrictions on the proposed new municipal parking lot to be located on Lot 3.03. Indeed, Jersey Shore's counsel appeared at hearings on both applications. See Pa1-42 as to TRC application and Pa43-59 as to Green Acres application.

On December 7, 2022, the TRC held a public meeting where it considered the Borough's tidelands grant application. After hearing the recommendations from the Bureau of Tidelands Management staff, the information provided by Borough representatives, and any comments from the public, the TRC, by a 7-0 vote (with one abstention), approved a grant to the Borough for the unconveyed tidelands portions of Lot 3.02 for the sum of \$1,591,173.00 plus any fees due from the Borough under its license agreement. Pa060-063. The minutes for the December 7, 2022 TRC meeting were approved on February 8, 2023. Pa60.

Subsequently, on April 20, 2023—over four months after the TRC's December 7 vote to approve the tidelands grant and 71 days after the TRC's approval of the meeting minutes from the December 7 meeting—Jersey Shore filed a request for an adjudicatory hearing with the NJDEP seeking to challenge the TRC's approval of the Borough's tidelands grant application (the "Hearing Request"). Pa64-71. On May 15, 2023, the Borough filed papers with the NJDEP opposing Jersey Shore's Hearing Request. Pa72-94. On September 13, 2023, counsel for Jersey Shore submitted a follow-up to the NJDEP inquiring as to the status of the NJDEP's review

of the Hearing Request and re-submitting Jersey Shore's April 20, 2023 filing. Pa95. Shortly thereafter, on September 19, 2023, counsel for the Borough sent a follow-up letter to the NJDEP re-submitting the Borough's May 15, 2023 filing opposing Jersey Shore's Hearing Request. Pa96.

On February 7, 2024, the NJDEP issued a letter opinion to Jersey Shore and to the Borough denying Jersey Shore's Hearing Request (the "Letter Opinion"). Pa97-100. The Letter Opinion noted that Lot 3.02 has historically been used as a municipal parking lot, that Jersey Shore is a nearby property owner which operates an amusement park, and that the heart of Jersey Shore's concern ". . . surrounds whether the Property [i.e. Lot 3.02] will be continued [sic] to be used as a parking lot or if it will be privately developed for another purpose." Pa98. The Letter Opinion further indicated that Jersey Shore ". . . claims a statutory right to an adjudicatory hearing pursuant to the New Jersey Pollutant Discharge Elimination System (NJPDES) Rules, N.J.A.C. 7:14A-17.2, and asserts that the Applicant's Grant request must be denied or that any approval include a deed restriction requiring that the Property be used as a parking lot. Petitioner asserts if the Property is developed for another purpose, the public access to the beach and Petitioner's amusement park will be impacted." Pa98-99.

In analyzing the Hearing Request, the NJDEP noted that "Third-party objectors to a decision by the Department do not have an automatic right to an

adversarial, adjudicatory hearing before an administrative law judge.” Pa99. To the contrary, in order for a party to have standing to request such a hearing, they must demonstrate either “. . . (1) a right to a hearing under the applicable statute, or (2) a ‘particularized property interest’ of constitutional significance.” Pa99. The NJDEP concluded that the NJPDES Rules cited by Jersey Shore as the basis for its Hearing Request were inapplicable as this matter involves a tidelands grant application and the NJPDES Rules only apply to permits for Pollutant Discharge Elimination Systems. The NJDEP further noted that the tidelands grant was governed by N.J.S.A. 12:3-1 to -28 and N.J.S.A. 13:1B-13 to -13.14 (collectively, the “Tidelands Act”) and that “[t]he Tidelands Act does not grant statutory hearing rights to third party objectors.” Pa99.

Since there was no statutory right to an adjudicatory hearing, the NJDEP indicated that Jersey Shore had to demonstrate a particularized property interest of constitutional significance warranting the granting of an adjudicatory hearing. Pa99. In analyzing this issue, the NJDEP noted that this is a rigorous review standard and that “. . . Courts have consistently held that proximity or any type of generalized property right shared with other property owners, such as recreational interests, traffic, views, quality of life, and property values, is insufficient to demonstrate a particularized property right required to establish third-party standing for a hearing.” Pa99. The NJDEP concluded that Jersey Shore had failed to demonstrate “a

particularized property interest of constitutional significance” since the rights that it asserted (i.e. the right to public parking) was shared by other neighboring property owners and that “the common law Public Trust Doctrine ensures certain public access rights to all persons, generally”. Pa100. For these reasons, the NJDEP denied Jersey Shore’s Hearing Request.

Following the denial of the Hearing Request, Jersey Shore filed a Notice of Appeal. Pa101. On May 16, 2024, the NJDEP filed a Statement of Items Comprising the agency record. The following day, on May 17, 2024, the NJDEP filed an Amended Statement of Items Comprising the agency record. Pa123. None of the other parties to this appeal filed anything challenging this agency record or seeking to add documents to it.

LEGAL ARGUMENT

POINT I

THE FINAL AGENCY ACTION TAKEN BY THE NJDEP DENYING JERSEY SHORE’S HEARING REQUEST SHOULD BE AFFIRMED ON APPEAL

The Supreme Court of New Jersey has previously held that judicial review of administrative agency determinations is limited. Russo v. Bd. of Trs., PFRS, 206 N.J. 14, 27 (2011) (“An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or

unreasonable, or that it lacks fair support in the record.” quoting In re Herrmann, 192 N.J. 19, 27 (2007)). On appellate review, a court should only examine:

(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (in matter where MVC made a final agency determination to deny a request for a hearing, Supreme Court of New Jersey reviewed the agency’s denial through this three-part analysis).

A reviewing court “must be mindful of, and deferential to, the agency's ‘expertise and superior knowledge of a particular field.’” Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 10 (2009) (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)). Moreover a, “reviewing court ‘may not substitute its own judgment for the agency's, even though the court might have reached a different result.’” In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 483 (2007)). However, a reviewing court is “in no way bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue.” Dep't of Children & Families, DYFS v. T.B., 207 N.J. 294, 302, (2011).

When the NJDEP's final agency action is reviewed under these standards, it should be affirmed because the NJDEP's denial of the Hearing Request was not arbitrary, capricious, or unreasonable and was supported by credible evidence in the record and by applicable law.

A. The NJDEP's Denial Of Jersey Shore's Hearing Request Did Not Violate Any Express Or Implied Legislative Policies And Followed The Law

The first prong of the appellate review of the NJDEP's final agency action is "whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law." Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. at 157. As set forth more fully below, the NJDEP did follow the law as its action was consistent with the laws applicable to the Hearing Request and did not violate any express or implied legislative policies.

1. The Administrative Procedure Act Does Not Create A Substantive Right To An Administrative Hearing

The Administrative Procedure Act (the "APA"), N.J.S.A. 52:14B-1 to -31, "provides a road map for navigating administrative proceedings" but "does not create a substantive right to an administrative hearing." In re Fanelli, 174 N.J. 165, 172 (2002) (citing Valdes v. State Bd. of Med. Exam'rs, 205 N.J. Super. 398, 404 (App. Div. 1985)). As it relates to third parties to administrative agency permitting decisions, the APA prohibits agencies from promulgating "rules and regulations which would allow third party appeals of permit decisions **unless specifically**

authorized to do so by federal law or State statute.” N.J.S.A. 52:14B-3.1

(emphasis added). The APA defines “Third party” to mean any person other than:

(a) An applicant for any agency license, permit, certificate, approval, chapter, registration or other form of permission required by law; (b) A State agency; or (c) A person who has particularized property interest sufficient to require a hearing on constitutional or statutory grounds.

N.J.S.A. 52:14B-3.2. For that reason, as recognized by the NJDEP within the Letter Opinion, in order “[f]or parties other than the applicant or the agency to have standing, they must demonstrate: (1) a right to a hearing under the applicable statute, or (2) a ‘particularized property interest’ of constitutional significance.” Pa99.

2. There Is No Statutory Basis For An Adjudicatory Hearing Challenging The TRC’s Approval Of A Tidelands Grant

The statutory basis that Jersey Shore cited within its Hearing Request in support of its alleged right to an adjudicatory hearing was the New Jersey Pollutant Discharge Elimination System (NJPDES) Rules (specifically, Jersey Shore cited to N.J.A.C. 7:14A-17.2, which is entitled “request for an adjudicatory hearing”). The New Jersey Pollution Discharge Elimination System (“NJPDES”) Program protects New Jersey's ground and surface water by assuring the proper treatment and discharge of wastewater and stormwater from various types of facilities and activities. Thus, although Jersey Shore is correct that N.J.A.C. 7:14A-17.2 does set forth a process by which a person or entity may be considered to be a party for purposes of requesting an adjudicatory hearing, that rule only applies to adjudicatory

hearings on NJPDEP permitting actions. The NJDEP correctly concluded in the Letter Opinion that the NJDPES Rules are “. . . inapplicable to the TRC’s decision as the Grant [i.e. the tidelands grant] was made pursuant to the Tidelands Act . . .”. Pa99.

Since the agency action which is the subject of this adjudicatory hearing action is an action taken by the TRC to approve a tidelands grant, the question is whether there is a statutory right to an adjudicatory hearing under the Tidelands Act. The Tidelands Act generally empowers the TRC, in conjunction with the NJDEP and the Attorney General, to delineate tidelands, to lease or license the use of tidelands, and to issue tidelands grants releasing all claims to tidelands upon consideration as approved by these entities. While the Tidelands Act empowers the TRC to issue licenses or grants for the use of tidelands based upon specified standards, “[t]he Tidelands Act does not grant statutory hearing rights to third party objectors.” Pa99. Thus, rather than seeking an adjudicatory hearing before an administrative law judge, a person or entity who alleges that they were aggrieved by a TRC decision to approve a tidelands grant has the remedy of filing a timely appeal from this final agency action in accordance with law. The NJDEP correctly concluded that Jersey Shore does not have a statutory right to an adjudicatory hearing challenging the TRC’s decision to approve the tidelands grant to the Borough.

3. Jersey Shore Did Not Meet Its Burden Of Proof To Demonstrate That It Has A Particularized Property Interest Of Constitutional Significance Sufficient To Warrant An Adjudicatory Hearing Challenging The TRC's Decision To Approve The Borough's Tidelands Grant Application

Since Jersey Shore did not have a legislatively-conferred right to an adversarial adjudicatory hearing challenging the TRC's decision to approve the Borough's tidelands grant application, Jersey Shore had to demonstrate that it has a particularized property interest of constitutional significance sufficient to warrant such a hearing. The NJDEP correctly concluded that Jersey Shore had not met this burden in its Hearing Request. This Court should likewise conclude that Jersey Shore has not met this burden.

In order to be entitled to an adjudicatory hearing under this standard, a third party must demonstrate that it has a "particularized property interest" (i.e. an interest unique to that party and not shared with the public) which is of "constitutional significance" (i.e. where the deprivation of that interest without due process would be a constitutional violation). The Supreme Court of New Jersey has recognized that "third parties generally are not able to meet . . . this rigorous review standard [particularized property interest]". In re NJPDES No. NJ0025241, 185 N.J. 474, 482 (2006).

Jersey Shore has cited to two reasons why it believes that it meets this standard—(i) that it is the owner of a nearby business whose customers use the

municipal parking lot on Lot 3.02 that the Borough is proposing to re-locate if the tidelands grant is consummated, and (ii) that the public parking provided in the municipal parking lot on Lot 3.02 is protected under the Public Trust Doctrine. The NJDEP correctly concluded that neither of these reasons demonstrated that Jersey Shore has a particularized property interest of constitutional significance sufficient to warrant granting the Hearing Request.

The NJDEP noted in the Letter Opinion that:

Courts have consistently held that proximity or any type of generalized property right shared with other property owners, such as recreational interests, traffic, views, quality of life, and property values, is insufficient to demonstrate a particularized property right required to establish third-party standing for a hearing. See Spalt, 237 N.J. Super, at 212 (close residency, fear of resultant injury to property, damage to recreational interest or shared generalized property rights are not particular property rights); In re Riverview Dev., 411 N.J. Super at 437-438 (general claims of adverse aesthetic and traffic impacts did not create sufficient property interest to entitle neighboring homeowners to hearing); In re AMICO/Tunnel Carwash, 371 N.J. Super 199, 211 (App. Div. 2004)(anticipated adverse traffic impacts and effect of use and enjoyment of properties did not entitle neighboring residents to a hearing); In re Thomas Orban/Square Props., LLC, 461 N.J. Super 57, 61 (App. Div. 2019)(claims that commercial development would lead to flooding did not create sufficient property interest to entitle adjacent property owners to an adjudicatory hearing to contest a freshwater-wetlands general permit). As the court stated in Amico, citing Spalt, “simply because some of the plaintiffs reside close to the . . . site and are fearful of resultant injury to their property, does not mean that they are entitled to an adjudicatory hearing. Fear of damages to one’s . . . generalized property rights shared with other property owners is insufficient to demonstrate a particularized property right.” Amico, 371 N.J. Super, at 212. See also Musconetcong Watershed Ass’n v. N.J. Dep’t of Env’t Prot., 476 N.J. Super. 465 (App. Div. 2023)(Proximity to the permitted site and a general fear of future

development are insufficient to trigger a right to an adjudicatory hearing).

Pa99-100.

The NJDEP correctly concluded that both of the reasons cited by Jersey Shore as reasons why it was entitled to a hearing—the concern about the removal of public parking and the concern that the approval of the tidelands grant may restrict beach access in violation of the Public Trust Doctrine—were generalized rights shared with others and were not a particularized property right of constitutional significance. For example, the potential elimination of the public parking lot on Lot 3.02 was something that would impact any member of the public wishing to park in that location, and there is no particularized property right that Jersey Shore has in that parking lot. Likewise, even if it is assumed that the elimination of the public parking lot on Lot 3.02 would restrict beach access and potentially violate the Public Trust Doctrine (which is a stretch since the Borough intends to replace the 300 space public parking lot on Lot 3.02 with a 150 space public parking lot on Lot 3.03 and there is nothing in the record to demonstrate that this would violate the Public Trust Doctrine), this is not a particularized property interest that is unique to Jersey Shore. Rather, “the common law Public Trust Doctrine ensures certain public access rights to all persons, generally”. Pa100.

Since Jersey Shore failed to demonstrate that it has a particularized property interest of constitutional significance with regard to the Borough’s tidelands grant

application, the NJDEP properly concluded that Jersey Shore did not have a right to an adjudicatory hearing challenging the TRC's approval of the Borough's tidelands grant application, and this Court should affirm this final agency action.

4. The NJDEP's Denial Of Jersey Shore's Hearing Request Did Not Violate Any Express Or Implied Legislative Policies

The APA expressly indicates that it does not create any substantive right to an administrative hearing and that such right must come from other applicable statutes or from a particularized property interest of constitutional significance. The Tidelands Act does not provide a statutory right to an adjudicatory hearing and, as set forth in Section 3 above, Jersey Shore did not demonstrate that it had a particularized property interest of constitutional significance sufficient to warrant a hearing challenging the TRC's decision to approve the Borough's tidelands grant application. Thus, the NJDEP's final agency action denying Jersey Shore's Hearing Request was consistent with these laws and did not violate any express or implied legislative policies.

Additionally, although it is not clearly articulated within Jersey Shore's brief, to the extent (if at all) that Jersey Shore is arguing that the TRC's decision to deny Jersey Shore's Hearing Request is in violation of the legislative policies set forth within the Public Trust Doctrine statutes (N.J.S.A. 13:1D-150 through 156) and its related regulations (N.J.A.C. 7:7-9.48 and N.J.A.C. 7:7-16.9)(collectively, the "Public Trust Doctrine Laws"), it is wrong. The Public Trust Doctrine Laws

encourage municipalities to consider and to adopt Public Access Plans governing public access to the municipal waterfronts (see N.J.A.C. 7:7-16.9(c)). The Public Trust regulations go on to establish different procedures for permit applications for development within municipalities that have an adopted Municipal Public Access Plan and for those that do not. Significantly, this review process only occurs if there is a **development application** requiring an NJDEP permit or approval. See N.J.S.A. 13:1D-151 (providing that the Public Trust Doctrine Laws are triggered by the NJDEP's review of any "approval, permit, administrative order, or consent decree issued, or other action taken, by the department" pursuant to Coastal Area Facility, Waterfront Development Act, the Wetlands Act of 1970, the Flood Hazard Area Control Act, and the federal Coastal Zone Management Act of 1972 is consistent with the public trust doctrine).

Here, there has not been any development application. Rather, the administrative agency action that Jersey Shore is seeking to challenge is the TRC's approval of a tidelands grant application. Thus, the NJDEP's denial of the Hearing Request was consistent both with the Tidelands Act (which does not grant any adjudicatory hearing rights to third parties) and with the Public Trust Doctrine Laws (which only require NJDEP review of development applications for consistency with the Public Trust Doctrine and do not require NJDEP review of tidelands grants for consistency with the Public Trust Doctrine).

For all of these reasons, the NJDEP's denial of the Hearing Request was consistent with applicable law and did not violate any express or implied legislative policies.

B. The Record Contained Substantial Evidence To Support The Findings On Which The NJDEP Based Its Decision

The second prong of the appellate review of the NJDEP's final agency action is "whether the record contains substantial evidence to support the findings on which the agency based its action". Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. at 157. There was substantial evidence in the record herein to support the findings on which the NJDEP based its decision to deny Jersey Shore's Hearing Request.

Specifically, prior to issuing its Letter Opinion denying the Hearing Request, the NJDEP was provided with a letter brief and supporting documents by Jersey Shore, a letter brief and supporting documents by the Borough, and the record before the TRC when it approved the Borough's tidelands grant application. All of these documents are listed within the NJDEP's Amended Statement of Items Comprising the agency record. Pa123. None of the other parties to this appeal filed anything challenging this record or seeking to add documents to it.

This record demonstrated, among other things, that:

- (1) the Borough is the owner of the uplands portions of Lot 3.02 and that the Borough has used Lot 3.02 for many years as a municipal parking

lot (with the number of spaces in the parking lot being disputed between the parties and never being established by the agency);

- (2) that the Borough filed an application with the TRC seeking a tidelands grant releasing all tidelands claims to Lot 3.02;
- (3) that the Borough is proposing to convey Lot 3.02 to a private redeveloper in the future as part of a larger redevelopment project in the area and that this redevelopment project will include the construction of a 150 space municipal parking lot in another location;
- (4) that Jersey Shore is the owner and operator of an amusement park located near Lot 3.02 and is concerned about the impact that the removal of the parking lot from Lot 3.02 will have upon its business and upon whether this proposed future development will violate the Public Trust Doctrine.

The NJDEP concluded that even though Jersey Shore, as a neighboring property owner, may have a general interest in the tidelands grant application, Jersey Shore does not have a particularized property interest of constitutional significance warranting the granting of an adjudicatory hearing. Pa99. That determination was supported by the evidence in the record.

C. The NJDEP Properly Applied Legislative Policies To The Facts And Did Not “Clearly Err” In Reaching Its Conclusion

The third (and final) prong of the appellate review of the NJDEP’s final agency action should be “whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors”. Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm’n, 234 N.J. at 157. A review of the record and applicable law reveals

that the NJDEP properly applied legislative policies to the facts existing herein and did not “clearly err” in denying Jersey Shore’s Hearing Request.

Specifically, the legislative policy of the APA is that there is no adjudicatory hearing right unless such right is conferred under other statutes or by the constitution, and the legislative policy of the Tidelands Act is that third parties do not have a right to seek adjudicatory hearings challenging TRC licensing or grant decisions. The NJDEP’s final agency action denying Jersey Shore’s Hearing Request was consistent with these legislative policies.

A third party may also be entitled to an adjudicatory hearing if it demonstrates that it has a particularized property interest of constitutional significance in the agency action. The NJDEP determined that Jersey Shore had failed to demonstrate that it met this rigorous review standards as the concerns that it raised (i.e. the impact of the removal of public parking on its business and on the Public Trust Doctrine) were generalized concerns shared by other members of the public and were not unique to Jersey Shore. The NJDEP did not “clearly err” in making this determination. For that reason, its final agency action denying Jersey Shore’s Hearing Request should be affirmed on appeal.

CONCLUSION

For all of the foregoing reasons, the NJDEP's final agency action denying Jersey Shore's Hearing Request should be affirmed on appeal.

Dilworth Paxson LLP

*Counsel for Respondent, Borough of
Keansburg*

By: /s/ David A. Clark
David A. Clark

Dated: November 20, 2024

SUPERIOR COURT OF NEW
JERSEY
APPELLATE DIVISION
DOCKET NO.: A-2198-23T1

IN THE MATTER OF
REQUEST FOR
ADJUDICATORY HEARING
ON ACTION OF TIDELANDS
RESOURCE COUNCIL.

:
: CIVIL ACTION
:
: ON APPEAL FROM
: FINAL DECISION OF THE NEW
: JERSEY DEPARTMENT OF
: ENVIRONMENTAL PROTECTION
:
:
:
:

BRIEF OF STATE RESPONDENTS
Date Submitted: November 21, 2024

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PRELIMINARY STATEMENT

The matter before this court is whether the Department of Environmental Protection (DEP) properly denied a third party's request for an adjudicatory hearing on the Tidelands Resource Council's (TRC) decision to issue a grant to a riparian (i.e., landward) owner of the property at issue. Also before this court, is whether the TRC and DEP's decisions were within the statutory limitations to grant such land without requiring a permanent deed restricting its use to a public parking lot and for the assessed current market value based on the land's highest and best use considering applicable zoning. The record shows that they were.

In support of the adjudicatory hearing request, the third-party Appellant cites to generalized interests shared by the general public, neighbors, and nearby business owners which, per long established case law, do not constitute a particularized property interest entitling them to a hearing. Appellant also mistakenly read the above statutes and regulation as providing Appellant a statutory right to hearing. As there is no language in these statutes expressly affording third-parties an adjudicatory hearing right, Appellant's argument also fails on this front. Consequently, as Appellant did not meet the high burden necessary to be granted an adjudicatory hearing, the DEP was correct in denying their request.

As to the underlying merits of the TRC agency action, the Tidelands Act provides the TRC with broad discretion whether to convey land currently or formerly tidally flowed and under what conditions, so long as it is for adequate consideration (i.e., fair market value). Appellant has not shown that the TRC or DEP (in authorizing the TRC's decision) acted outside the statutory limitations. These decisions should be affirmed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

A. Tidelands Resource Council & Conveyance of Tidelands

The Tidelands Resource Council (TRC) acts as the steward for the State's tidelands, also called riparian lands. Tidelands are lands now or formerly flowed by the tide up to the high-water line or mark, or the mean-high-water line, with the exception of those lands that have been conveyed via the issuance of a Tidelands grant. See N.J.S.A. 12:3-2 to -4; O'Neill v. State Highway Dep't, 50 N.J. 307, 323 (1967). New Jersey's ownership of tidal waters derives from the English Common Law principle that all of the land covered by tidal waters belongs to the sovereign, held in trust for the people to use. Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, 303 (1972). As part of this

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

proprietary interest, the Legislature created the TRC and delegated the stewardship and management of these riparian lands to the TRC.

The TRC is a public body wholly within the DEP and through its various iterations has acted as “the public body responsible for the stewardship of the State’s riparian lands” and has been given broad discretion in conveying this land through a riparian license, lease, or grant for adequate compensation, i.e., fair market value. N.J.S.A. 12:3-12.1; N.J.S.A. 13:1B-13. See generally Bailey v. Driscoll, 34 N.J. Super. 228 (App. Div. 1995) (providing an extensive history of the TRC and its statutory authority). More specifically, the TRC has stewardship, on behalf of the public, over all lands currently or formerly flowed by tidal waters within the State’s boundaries, meaning all lands currently or historically below the mean high-water mark, commonly known as tidelands. LeCompte v. State, 65 N.J. 447, 450-51 (1974). See also N.J.S.A. 12:3-4, -7, -8; Bailey v. Driscoll, 19 N.J. 363 (1955) (title to these lands was vested in the State by virtue of the sovereignty derived from Britain after the revolution).

As the agency tasked with managing the State’s proprietary interest over the State’s tidelands, the TRC has the absolute discretion in making any conveyances or granting licenses to these tidelands on such terms as the TRC may choose, subject to any governing statutory criteria. See N.J.S.A. 12:3-4, -7; Taylor v. Sullivan, 119 N.J. Super 426, 430-31 (App. Div. 1972); Atlantic

City Elec. Co. v. Bardin, 145 N.J. Super. 438, 442-44 (App. Div. 1972); LeCompte, 65 N.J. at 450-51. Although, this discretion is tempered by the equally absolute discretion of the Department’s Commissioner and the Attorney General. See N.J.S.A. 12:3-7, -12, -16, -23; N.J.S.A. 13:1B-13 (also requiring the attestation from the Secretary of State for some conveyances to tidelands). And see Taylor, 119 N.J. Super. at 430-31 (the Commissioner and Attorney General also have “complete discretion” in approving a Council action). This discretion is also limited by the State Constitution, which established a perpetual trust dedicating the tidal lands to the support of free public schools, including all conveyances of these lands. N.J. Const., art. VIII, § 4, ¶ 2; N.J.S.A. 18A:56-5, -6; Atlantic City Elec. Co., 145 N.J. Super. at 445.

Upon request to the TRC, one may obtain fee simple title to State-owned tidelands (i.e., a riparian grant). The owner of the lands immediately landward of tidelands (i.e., riparian owner) may apply for a grant of these State-owned tidelands, which includes a preemptive right over any other individual. N.J.S.A. 12:3-7; Bailey, 19 N.J. at 372. Individuals that are not the riparian owner may also take title to tidelands; however, they must provide written notice to the riparian owner—who in turn has six months to apply for a riparian grant or license and pay the compensation set by the Council, or lose their preemptive right to the tidelands. N.J.S.A. 12:3-7; Bailey, 34 N.J. Super. at 253. But see,

Leonard v. State Highway Dep't, 24 N.J. Super. 376, 383-84 (Ch. Div. 1953), aff'd, 29 N.J. Super. 188 (App. Div. 1954) (“The riparian owner has a preemptive right to such a grant as against any individual but not as against the State itself.”). Public bodies are also permitted to obtain restricted title to tidelands which are set aside for a public purpose. N.J.S.A. 12:3-33. See also Op. Att’y Gen. no. 56 (1953) (this provision allows for municipalities that are not the riparian owner to construct or finish public works that would otherwise end at the tidelands or be limited to the riparian owner’s interest).

One wishing to take title to tidal lands must submit an application for a Tidelands Grant providing the square footage of the lot and the area to be conveyed. The applicant is required to submit an appraisal report to provide an estimate of market value for the subject parcel. TRC staff appraisers review the applicant’s appraisal report. The purpose of the review is to determine if the opinion of market value stated in the applicant’s appraisal report of the subject property (land only as vacant) is credible and adequately supported and if that market value is within the current range of market value for the subject site. This review includes an independent analysis of their report and may require additional market research and analysis. All appraisers are instructed to perform a land value only analysis (i.e., to not factor in the value of any improvements

to the land) based on the highest and best use of the site (HBU) based on current zoning. N.J.S.A. 12:3-10, -16.

At the public meeting of the TRC, staff makes a recommendation to the TRC for the grant fee or cost based on the market value. A recommendation may also include certain terms and conditions as applicable depending on the circumstances. The TRC ultimately determines the cost and terms and conditions. Upon a majority vote in a public meeting, the Council makes a ruling to approve the riparian grant application and the appropriate compensation or grant cost based on the appraisal valuation. The Council's actions are memorialized in the meeting minutes which state that the Council determined the actions taken were in the public interest. (See e.g., SRa19).² To be finalized, these minutes must be approved by the DEP Commissioner, or their delegate pursuant to N.J.S.A. 13:1B-13. This approval of Council action is not the Commissioner's approval of the grant itself.

Afterwards, the Council will provide a draft riparian grant to the Commissioner who, as a matter of established practice, will sign or not sign the draft indicating the Commissioner's approval or veto respectively. See N.J.S.A. 13:1B-13; LeCompte v. State, 128 N.J. Super. 552, 557 (App. Div. 1974). See

² Throughout, "SRa" refers to the State Respondents' appendix, "Aa" refers to the Appellant's appendix and "Ab" to Appellant's brief.

generally Taylor v. Sullivan, 119 N.J. Super. 426 (describing the process in context of determining when the applicant takes title to the tidal land). If the Commissioner vetoes the grant it is sent back to the TRC, but in doing so the Commissioner cannot dictate the contents of the grant, this is left to the Council's discretion.

Otherwise, if the Commissioner approves the grant document it is sent to the Attorney General, who in turn may sign or not sign the grant—with the same broad approval or veto authority as the Commissioner and Council. Finally, the grant is sent to the Secretary of State to attest to the signatures and give final approval of the grant. N.J.S.A. 12:3-7. At this point the State has officially approved the grant, its terms, conditions, and sale price, but the grant is not issued to the applicant—nor does the applicant have title to the property—until the applicant has paid the agreed upon compensation. Taylor v. Sullivan, 119 N.J. Super. at 430-31.

B. History of the Property at Block 184 Lot 3.02

Historical Conveyances

On August 8, 1940, the Council (then the Board of Commerce and Navigation) issued a fifteen-year lease to the Borough of Keansburg, as the riparian owners of the adjacent upland to the tidal lands on the northeastern border of the Borough and the Raritan Bay, known on the Keansburg tax map as

Block 184, former Lot 3. (SRa23). The lease allowed for filling certain tidelands to the Bulkhead Line³ or a fill limit established by the lease and subject to the terms and conditions of the lease. Ibid. The land was leased for the purpose of being improved and maintained as a public park, highway, or place for public use, resort, and recreation but could “not be used for any concession or enterprise involving a commercial return or profit.” (SRa25). The TRC subsequently canceled the lease on June 8, 1942, for violation of the park restrictive covenants.

TRC and the Borough entered into a second fifteen-year lease on December 13, 1943 (retroactive to July 1, 1943), for use as a free park, again, with the condition that the Borough would not collect fees for the parking of cars or host any enterprise that would yield a monetary return. (SRa37). The Council also issued a riparian grant to the Borough for a narrow strip of land running perpendicular from the prior shoreline, and extending further outshore to a separate Bulkhead Line and Pierhead Line⁴ established by that grant. (SRa32). This grant overlapped a narrow portion through the leased area. There

³ The Bulkhead Line is the line along navigable water beyond which no solid fill is permitted.

⁴ The Pierhead Line is a line beyond which no structure may extend into tidal waters.

were no special conditions or public use provisions applied to the narrow strip of granted land. Ibid.

On June 2, 1954, the Borough and TRC entered into a third fifteen-year lease for the property. (SRa47). Again, the lease restricted the property for public use, resort, and recreation, but now authorized the collection of parking fees. (SRa49). The annual lease for this conveyance was set at \$674.80, and expired on June 1, 1967. (SRa47-48). The Borough never executed another lease or, per the terms of the 1954 lease, convert the lease into a riparian grant. Sometime in the 1960s the area was subject to a United States Army Corps of Engineers (ACOE) beach fill project. (Aa006). Based on aerial photographs, sometime prior to 1977 the parking lot was expanded beyond the limits of the Bulkhead Line / limit of fill boundary limit of the prior lease. (Pa6).

On February 11, 2019, the property was subdivided from Block 184, Lot 3 to Block 184, Lots 3.02 and 3.03.⁵ The property at issue in this matter, Lot 3.02, fully contains the parking lot licensed to the Borough of Keansburg. (See

⁵ Upon information and belief Lot 3.03 may have been further subdivided or otherwise a portion thereof is sometimes referred to as Lot 3.01 in the parties' papers and the record. For consistency, and as the specific lot number is not material to this case all references to these properties is hereafter made to Lot 3.03. It is the TRC's understanding that new Lot 3.02 is the existing parking lot area within former Lot 3, new Lot 3.03 contains the dunes portion of former Lot 3, and/or may also now contain the area currently occupied by the go-kart tract which was part of former Lot 3.01.

Pa46). Appellant is the parent company of the seasonal Keansburg Amusement Park and Runaway Rapids waterpark located and/or operated at a nearby property at Block 184, Lot 3.01 and Lot 4. (Ab14). These parks are located to the northeast of the property under dispute. One portion of the Keansburg Amusement Park, at Block 184, Lot 3.01, is used as a go-kart track and is adjacent to the property at issue. Ownership of this Lot is part of ongoing litigation between the Borough and Appellant (Ab16), and Appellant cited to their potential ownership as a reason for which Appellant is entitled to an adjudicatory hearing on the granting of Lot 3.02. (Ab36).

Green Acres Program & Recreational and Open Space Inventory

Although not strictly part of the matter before this court, some background on this issue is provided for context as to Appellant's argument that Appellant has a particularized property interest through this portion of Lot 3.03.

Around 1995, the Borough received funding through the Green Acres Program to construct Waterfront Park Baywalk West, an elevated wooden walkway crossing a dune system waterward of the parking lot which leads to the ACOE filled beach. (Pa46; Pa135). At this time this area was all listed under designated Block 184, Lot 3. (Pa46). As part of receiving this funding, the Borough listed Block 184, Lot 3 in its Recreational and Open Space Inventory (ROSI) as funded parkland. Ibid. Listing land in a ROSI restricts future

residential and commercial development. See generally N.J.A.C. 7:36-25 (restrictions on construction or use of land for anything but outdoor recreation or natural resources conservation and procedures for limited exceptions). The land listed in the Borough's ROSI included the pre-existing parking lot, dunes, and wooden walkway. (Pa46). Around 2005 the Borough adopted a redevelopment plan that included a plan to develop the area of Lot 3 that is used as a parking lot for mixed-use development. Ibid.

In 2010, the Borough submitted a ROSI amendment to the Green Acres Program to exclude the parking lot area from the ROSI. (Pa135). In 2013, the Program approved removing a portion of the parking lot but required around 0.6 acres, about thirty-six parking spaces, remain in the ROSI to support public access to the recreational amenities. (Pa135; Pa49). Shortly afterwards, the Borough subdivided Lot 3 into Lots 3.02 and 3.03. New Lot 3.02 contained the existing parking lot area; new Lot 3.03 contained the dunes and the portion of former Lot 3.01 consisting of the go-kart track area. (Pa135).

In early 2020, the Borough proposed a second amendment to its ROSI, this time to dispose of the parkland reserved for parking within the existing parking lot area in exchange for adjacent land currently occupied by the go-kart track. The Borough proposed exchanging 0.669 acres of Lot 3.02 (the disposal area) for 1.204 acres (the compensation parcel) in new designated Lot 3.03—the

portion used as a go-kart track within a portion of former Lot 3.01—and convert that land into approximately 170 parking spaces. This was done to meet Green Acres standards. (Pa138-39).

The State House Commission approved this exchange on the following conditions: (1) the approval was void if the Borough was not the legal title holder to either property; (2) the approval was void if the TRC claims were not resolved; and (3) the Borough must keep the disposal area as a parking lot until the parking lot on the compensation parcel was completed. (Pa139-40; SRa11).

Current License Over Block 184, Lot 3.02

The Borough originally sought a riparian grant for Block 184, Lot 3.02 on or about March 6, 2018. However, upon learning of the historic unauthorized and continued use of the parking lot after the original leases expired, the Borough sought a license with the TRC on or about March 20, 2019, to continue using the land as a parking lot. (Pa3-4). This license includes an annual rent payment along with a calculated back-payment to compensate the State for the past use and occupancy or historic use of the lot based on the adequate compensation set in the last active lease. (Pa7-8).

During its May 1, 2019, public meeting the Council reviewed the Borough's license application. The Council heard arguments from both the Appellant and Borough on the future use of the land and any intended riparian

grants. (Pa2). The Council approved of the license application for its continued use as a parking lot with a condition restricting the lot's use as a municipal parking lot, and providing that "[a]ny development of the site contrary to [this use] [would] require a new license and new fee calculation." (Pa130). Further, the remaining back rent would be due prior to any transfers of the property's ownership. Ibid. The license was effective on January 9, 2020. (Pa131).

Riparian Grant Request and Adjudicatory Hearing Request

On December 7, 2022, the TRC, by majority vote, approved the Borough's request for a riparian grant to obtain title to Lot 3.02. (SRa12). The grant cost or fee was set at \$1,591,173 based on an appraisal of the lot's highest and best use (HBU) and the applicable zoning. (SRa11; Pa165-66; Pa159-60). The minutes were certified on February 8, 2023, by the Manager of the Bureau of Tidelands Management and approved by the Assistant Commissioner of the Department's Watershed and Land Management division on February 13, 2023. (SRa19). Appellant did not appear at the December 2022 meeting; however, the TRC allowed Appellant's attorney to appear and object to the terms or price of the riparian grant at the TRC's December 6, 2023, public meeting.

On April 20, 2023, Appellant submitted a request to the DEP for an adjudicatory hearing on the TRC's decision to approve the Borough's application for a riparian grant without restricting the property's use as a public

parking lot. (Pa64-71). While its request was pending with the DEP, in January 2024, Appellant filed a complaint in the Mercer County Law Division seeking relief in the form of a series of mandamus orders and declaratory judgments against the Department of Environmental Protection, the Tidelands Resource Council, and Attorney General of New Jersey, Matthew J. Platkin⁶ (collectively “State Respondents”) and the Borough of Keansburg. The State Respondents and Borough each filed motions to dismiss, which were eventually granted with prejudice on September 9, 2024.

In the intervening time, the DEP issued a letter on February 7, 2024, denying Appellant’s request for an adjudicatory hearing finding it was not entitled to a third-party hearing under N.J.S.A. 52:14B-3.2, because Appellant failed to demonstrate (1) a right to a hearing under the applicable statute or (2) a particularized property interest of constitutional significance. (Pa99-100). On March 22, 2024, Appellant filed the present appeal with this court.

⁶ Attorney General Platkin is not a respondent in the present appeal.

ARGUMENTS

POINT I

RESPONDENT DEP CORRECTLY DENIED APPELLANT’S REQUEST FOR A THIRD-PARTY ADJUDICATORY HEARING. (Responding to Appellant’s Point I(A), (B), & (C)).

DEP correctly denied Appellant’s request for an adjudicatory hearing because Appellant does not have a statutory or constitutional right to such a hearing.

Courts may only reverse an agency decision if the challenging party can show the decision is arbitrary, capricious, or unreasonable; meaning the decision (1) violates express or implied legislative policies; (2) offends the State or Federal Constitutions; or (3) is based on findings not supported by substantial, credible evidence in the record. In re Petition for Rulemaking, 117 N.J. 311, 325 (1989); Univ. Cottage Club of Princeton N.J. Corp. v. New Jersey Dept. of Env’t Prot., 191 N.J. 38, 48 (2007); Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995). Appellant has not met that high standard.

Case law has long established that the right to a trial-type adjudicatory hearing is not allowed “except to an appellant who can show a statutory right or a constitutionally protected property interest.” In re Riverview Dev., LLC. Waterfront Dev. Permit No. 0908-050004.3 WFD 060001, 411 N.J. Super. 409, 434 (App. Div. 2010). Further, the Administrative Procedure Act (APA),

N.J.S.A. 52:14B-1 to -31, prohibits State agencies from promulgating “any rule or regulation that would allow a third-party to appeal a permit decision” unless “specifically authorized to do so by federal law or State statute.” N.J.S.A. 52:14B-3.1, -3.3(a).

Under the APA, a third-party is anyone other than the applicant, a State agency, or a person “who has a particularized property interest sufficient to require a hearing on constitutional or statutory grounds.” N.J.S.A. 52:14B-3.2. It is rare for a third-party to “meet the stringent requirements for constitutional standing in respect of an adjudicatory hearing.” In re NJPDES Permit No. NJ0025241, 185 N.J. 474, 482 (2006). There are two tests to determine whether the agency’s administrative procedures are “constitutionally sufficient”—the three-part test set forth by the U.S. Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1975), and the “particularized property interest” test (see Cunningham v. Dep’t of Civil Service, 69 N.J. 13, 23-24 (1975)). In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 463-64, 467 (2006).

Here, the DEP correctly determined that neither Appellant’s cited statutory authority,⁷ nor the applicable tidelands statutes (N.J.S.A. 12:3-1 to -28

⁷ As a note, Appellant’s original request for an adjudicatory hearing cites to N.J.A.C. 7:14A-17.2, as providing a statutory right to a hearing. This regulation is part of the New Jersey Pollution Discharge Elimination System (NJPDES) and as stated in the DEP’s denial letter, is not implicated in the TRC’s or DEP’s decisions in this matter. (Pa66-67; Pa71; Pa98-99).

& N.J.S.A. 13:1B-13 to -13.14) provide a right to an adjudicatory hearing, and that the asserted property interests are generalized property rights that do not rise to the level of being constitutionally significant. N.J.S.A. 52:14B-3.3(b). Therefore, Appellant does not have a right to an adjudicatory hearing on this matter, and should have appealed this final agency action directly to this court. R. 2:2-3(a)(2). See also In re Riverview, 411 N.J. Super. 409, 424-25 (“the APA does not foreclose such third parties from seeking judicial review of the merits of a permit once it is issued by an agency.”); In re Amico/Tunnel Carwash, 371 N.J. Super. 199, 208 (App. Div. 2004) (“[T]he Legislature's intent was not to interfere with the constitutionally protected right to appeal an agency decision to [the Appellate Division.]”). And see Musconetcong Watershed Assoc. v. N.J. Dep’t of Env’t Prot., 476 N.J. Super. 465, 479 (App. Div. 2023) (Appellant’s administrative remedies were exhausted when the Department denied their request for an adjudicatory hearing).

A. DEP correctly determined Appellant does not have a statutory right to an adjudicatory hearing.

Appellant cites generally to the public trust doctrine and the Public Access Law (PAL), N.J.S.A. 13:1D-150 to-156, in support of their claim of a statutory right to an adjudicatory hearing before an Administrative Law Judge. (Ab30-

36). However, Appellant misunderstands the standard for establishing a right to an adjudicatory hearing under that path.

The APA states that third-parties may only receive an adjudicatory hearing when “required by federal law or by a statute that specifically allows a third party to appeal.” N.J.S.A. 52:14B-3.3(a). The Legislature’s goal in adopting the APA was to avoid unnecessary delays which would occur if third parties were given automatic rights to adjudicatory hearings. N.J.S.A. 52:14B-3.1(a) (third-party hearings would “give rise to a chaotic unpredictability and instability”). See also In re Riverview, 411 N.J. Super. at 424 (limits on third party hearings is to prevent agencies processing permit applications “from being bogged down by time-consuming and costly formal hearings” that “consume substantial public and private resources.”).

Thus, it is clear that the Legislature intended State agencies to grant third-parties an adjudicatory hearing only when a statute includes express language creating this right. Neither the PAL or Tidelands Act, N.J.S.A. 12:3-1 to -28 and N.J.S.A. 13:1B-13 to -13.14, contain any language regarding third-party hearing rights. Because there is no statutory authority allowing third-parties an adjudicatory hearing, Appellant’s sole recourse under those statutes was to appeal the decision as a final agency action. Consequently, the DEP was correct in determining that Appellant had no statutory right to a hearing.

B. Appellant has no particularized property right to a hearing.

The other route by which a third-party may obtain an adjudicatory hearing is showing they have a particularized property interest of constitutional significance such that due process requires a hearing to protect the interest. N.J.S.A. 52:14B-3.2. Appellant, in their hearing request and brief, claimed a particularized property right as (1) a business entity whose patrons use the Property as an access point both to the State's waterfront and adjacent shore as well as the Appellant's business, (2) as an entity that, like its customers, accesses the waters and adjacent shores via the property, and (3) as the potential owner of Block 184 Lot 3.03, specifically the portion to the north of the property that is currently utilized as a go-kart track by the Appellant. (Pa65; Pa67; Ab14; Ab16; Ab35; Ab38). None of these interests rise to the level of a constitutionally significant particularized property interest.

Appellant's stated interests are based on an undesired change in the property's current use as a parking lot. (Ab14-15). Appellant specifically alleges a potential impact to customers at its neighboring amusement park business, and interference with both the public and their individual ability to access the waters and adjacent shores via the property. (Ab14; Ab38) (citing to the public trust doctrine and PAL). These interests are generalized interests shared by other property owners and are based on proximity to the permitted

property. Courts have consistently held that those factors are insufficient to demonstrate a particularized property interest. See Spalt v. N.J. Dep't of Env't Prot., 237 N.J. Super. 206, 211-12 (App. Div. 1989) (addressing neighboring property, fear of injury to recreational interest, and generalized property rights shared with other property owners); In re Amico/Tunnel Carwash, 371 N.J. Super. at 212 (concerning increased traffic in front of property); In re Freshwater Wetlands, 185 N.J. 452, 456 (2006) (regarding possibility of increased flooding conditions on nearby properties). And see Musconetcong, 476 N.J. Super. at 485-86 (affirming prior decisions that proximity to the permitted site or a general fear of future development is insufficient).

More to the point, Appellant's stated property interest is that public parking is required by the PAL and public access regulation. (Ab30-32). While the public has a constitutional right to access our State's waters and adjacent shores, N.J. Const., art. VIII, § 4, ¶ 2; N.J.S.A. 13:1D-150, neither the public nor Appellant has an ownership right or interest in this parking lot specifically. A property interest is one that by statute, ordinance, or regulation "substantively limit[s] official discretion to bestow or revoke the benefit at issue." In re Appeal of NJDEP's Denial of Request for Adjudicatory Hearing under N.J.A.C. 7:26-9.10, 477 N.J. Super. 618, 626-27 (App. Div. 2024) (quoting Thomas Mukach, LLC v. Twp. of Jackson, 476 N.J. Super. 169 (App. Div. 2023)). There must be

a legitimate claim of entitlement, which must be “more than an abstract need or desire for it. They must have more than a unilateral expectation of it.” Id. at 626 As explained further below, public access does require public parking, only that the access be “reasonable and meaningful.” N.J.S.A. 13:1D-150.

Further, the mere intent by the TRC to convey State-owned tidal land, which is the final agency action at issue, does not establish a particularized property interest for Appellant because, by definition, the State owns that land even if it is held in trust for the public. Thus, neither the Appellant, nor any other third-party, can claim a constitutionally significant property interest over land owned by the State, even if it is currently authorized to be used as an accessory service for furthering the public’s access to our State’s waters and adjacent shores.

As to Appellant’s claim of ownership over a portion of Lot 3.03, this interest is contingent on a number of factors, but none of those factors are part of the TRC or DEP’s review and approval of Keansburg’s riparian grant application concerning Lot 3.02, nor of the DEP’s hearing request denial. As described previously, the portion of Lot 3.03 in dispute may be the location of a ROSI preserved land. Neither the outcome of the ongoing ownership litigation, nor the ROSI amendment, have any impact on whether the TRC and DEP were within the statutory limitations to approve of a riparian grant to the Borough for

Lot 3.02. Nor does it establish a particularized property right for the decision being appealed.

The Appellant's property interest in Lot 3.03 does not extend to Lot 3.02 which is the property subject to the final agency action Appellant has appealed. As stated previously, close proximity to the permitted location is not enough to establish a constitutionally significant particularized property interest. Spalt, 237 N.J. Super. at 211-12.

As Appellant has not articulated a constitutionally significant property interest that would be impaired if the TRC conveys the property to its riparian owner, Keansburg, it is not necessary to reach Appellant's due arguments. In re Appeal of Request for Hearing, 477 N.J. Super. at 629 (holding that a Mathews due process analysis is required only when there is a liberty or property interest). However, it should be noted that Appellant has been involved in the process of approving the riparian license and riparian grant, and was afforded the opportunity to present their opposition to the Borough's request at TRC meetings and a Borough public meeting on the Green Acres diversion. (Pa2; Pa15-20; Pa28-29; Pa44; Pa46-49).

C. Appellant's hearing request should not be remanded as an order for a declaratory ruling.

Appellant alternatively asks the court to remand to the DEP as a demand for a declaratory ruling under N.J.S.A. 52:14B-8. (Ab39). Appellant claims a

specific statutory right to demand that DEP “acknowledge the law and their legal obligation under the law and declare” that the DEP and TRC’s approval of the riparian grant application violates the public trust doctrine, PAL, public access regulation, unspecified provisions of the Tidelands Act, and the existing riparian license with the Borough. (Ab15; Ab40). This is an improper request.

Appellant did not file a petition for a declaratory ruling per N.J.A.C. 13:69-3.7, nor did Appellant ever petition for a declaratory ruling at any point. See e.g., Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 230 (1998) (an appellate court generally does not hear matters not raised properly below) (internal citations omitted). Finally, regardless of whether Appellant had made a proper petition for a declaratory ruling to the DEP and/or TRC, it is fully within the DEP and TRC’s discretion on whether it will issue such a ruling and this court does not have the authority to grant the relief sought in the alternative. See N.J.S.A. 52:14B-8 (“an agency upon the request of any interested person may in its discretion make a declaratory ruling”). See also Moss v. Shinn, 341 N.J. Super. 327, 338, 341 (Law Div. 2000) (the court cannot order the exercise of an agency’s discretion, including the discretion to not act).

POINT II

RESPONDENTS DEP AND TRC CORRECTLY APPROVED THE BOROUGH'S RIPARIAN GRANT APPLICATION. (Responding Generally to Appellant's Point I).

Appellant's arguments make the mistaken assumption that the law required a permanent deed restriction in the conveyance of Block 184, Lot 3.02 that would limiting its use as a public parking lot indefinitely. Neither the PAL nor the public access regulation (that the Appellant cites to as supporting authorities) mandates that a conveyance of the Tidelands property to the riparian owner include a permanent use restriction, or more specifically that it remain as a parking lot.

A final agency action is entitled to "substantial deference" and should not be overturned unless "it is clear that the agency action is inconsistent with its mandate." In re Petition for Rulemaking, 117 N.J. at 325; Univ. Cottage Club, 191 N.J. at 48; N.J. Highlands Coal. v. N.J. Dep't of Env't Prot., 456 N.J. Super. 590, 602 (App. Div. 2017). Although courts are not bound by an agency's interpretation of a statute or of a purely legal issue, Mayflower Sec. Co. v. Bureau of Sec., Div. of Consumer Affairs, 64 N.J. 85, 93 (1973), administrative agencies are afforded a certain level of deference in interpreting and implementing the statutes for which it is responsible. In re Freshwater Wetlands

Prot. Act Rules, 180 N.J. 478, 488-89 (2004) (citing In re Distribution of Liquid Assets, 168 N.J. 1, 10-11 (2001)).

Agency deference is appropriate due to the agency’s specialized expertise and superior knowledge in the particular field they regulate. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm’n, 234 N.J. 150, 158 (2018) (quoting Circus Liquors, Inc. v. Middletown Twp., 199 N.J. 1, 10 (2009)). C.f. N.J. Chapter of Nat’l Ass’n of Indus. & Office Parks v. N.J. Dep’t of Env’t Prot., 241 N.J. Super. 146, 165 (App. Div. 1990) (“While [the court] must defer to the agency’s expertise, [the court] need not surrender to it.”). A court should not reverse an agency decision “because of doubt as to its wisdom or because the record may support more than one result.” In re N.J. Pinelands Comm’n Resol., 356 N.J. Super. 363, 372 (App. Div. 2003).

The TRC’s authority to act is subject to the approval of the Commissioner and/or Attorney General. N.J.S.A. 13:1B-13. The TRC, subject to the above review, “may grant or lease such lands to whom it will and for such consideration and on such terms as it may fix within the strict limits laid down by the Legislature.” Bailey v. Driscoll, 34 N.J. Super. at 252, rev’d on other grounds, 19 N.J. 363 (1955). Unlike other administrative agency decisions, the court does not review a TRC action under the abuse of discretion standard, “but rather whether the Council acted within or without the statutory limitations[,] .

. . [as] the Council is entrusted with complete discretion as to whether it will convey anything and, if so, at what price.” Id. at 253. Further, as any grant of land is only effective when approved and signed by the Commissioner and Attorney General, N.J.S.A. 13:1B-13, the “complete discretion” of the Council is in turn subject to the complete discretion of the Commissioner and Attorney General. Taylor v. Sullivan, 119 N.J. Super. at 430.

A. The Tidelands Act does not require the riparian grant include a permanent deed restriction.

While not specifically addressed by Appellant, a decision or action taken by the TRC would be governed by the Tidelands Act, thus a review of the applicable law is warranted.

The Tidelands Act provides that riparian owners (i.e., those that own land currently or formally tidally flowed) may obtain a lease or grant to the that land upon application to the Council. N.J.S.A. 12:3-10. See also N.J.S.A. 12:3-7 (authorizing grant of lands currently under water); N.J.S.A. 12:3-12 (affirming the Council’s authority to grant title to land currently and formally flowed). If the Council approves of the conveyance, it must determine the appropriate compensation that must be paid to the State. This conveyance “shall vest all the rights of the State in said lands in said lessee or grantee.” Ibid. As the State owns these lands in fee simple, this right is transferred to the grantee. See

O'Neill v. State Highway Dep't, 50 N.J. at 323; Hoboken v. Pennsylvania R.R. Co., 124 U.S. 656, 690-91 (1888) (a riparian grant conveys the land on the same terms as those held by private persons under absolute titles). See generally Panetta v. Equality One, Inc. 190 N.J. 307, 318-19 (2007) (discussing the nature of a riparian grant versus riparian right).

Thus, when conveying land to the riparian owner the TRC is not required to impose a permanent deed restriction, and the sale price of the land must be based on the rights conveyed.

Appellant claims that the appraisal price of the property was not proper as it was valued as a vacant lot. (Ab16, n.4). Arguing that instead it should have been valued based on the income generated from its current use as a parking lot. The TRC was within the statutory limits in estimating the land's fair market value by using a sales comparison approach rather than an income generated one. See generally, (Pa164-252) (Gagliano's appraisal report); (Pa143-63) (DEP's appraisal review report). The TRC was also within its authority to base the appraisal price on the HBU analysis of the property as a residential development when considering the applicable zoning restrictions to arrive at the recommended grant cost or fee. Ibid. Determining the current market value based on income generated is an option for assessing the value of a property. (See Pa191).

However, the TRC has licensed appraisers on staff who review and provide recommendations on the estimated or concluded value to determine the appropriate compensation for the cost of the grant. In this case, the staff appraiser used a HBU analysis, and the sales comparison approach to arrive at the final recommended estimate or concluded market value as the more appropriate method rather than considering the revenue generating potential of the subject parcel.

B. The laws cited by Appellant do not require a permanent deed restriction.

Appellant claims the law requires the property be sold with a permanent deed restricting its use to a public parking lot. (Ab3-4; Ab30-32). The laws cited by the Appellant do not require a permanent deed restriction or any deed restrictions when the Tidelands Resource Council chooses, in its broad discretion, to deed tidal land to the riparian owner for fair market value. While any future development of the property could require public parking as “reasonable and meaningful” public access, this does not apply to a conveyance of tidal land by the TRC.

In support of their argument Appellant cites to the PAL and public access regulations.⁸ For context, the PAL is a statute which codifies and expands upon

⁸ Appellant incorrectly claims the public access regulations were adopted

the common law public trust doctrine regarding the public’s right to use and enjoy the State’s tidal waters and adjacent shorelines for navigation, commerce, and recreational uses. N.J.S.A. 13:1D-150. Land currently or formally flowed by tidal waters are part of the State’s natural resources and are the property of the State but are held in trust for the people. The public trust doctrine and PAL obligates DEP to “promote, protect, and safeguard the public’s right and ensure reasonable and meaningful public access to tidal waters.” Ibid. What constitutes “reasonable and meaningful” public access is not a static, bright line test, but rather fluid and depends on the situation and the needs of the public. See N.J.A.C. 7:7-1.1(c)-(e) (discussing application of the Coastal Zone Management Rules and public access regulations).

PAL specifically requires DEP to ensure that any approvals or permitting decisions it makes under the Coastal Area Facilities Review Act (CAFRA), the Wetlands Act of 1970, the Flood Hazard Area Control Act, or implementation of the Coastal Zone Management Act (CZMA), or any other law are consistent with the public trust doctrine. N.J.S.A. 13:1D-151. What qualifies as “consistent with the public trust doctrine” is not specified in the statute, however

pursuant to the PAL. In fact, these regulations were first adopted in 1978. 17 N.J.R. 1466(a), 1467.

the DEP relies on the public access regulation promulgated under the Coastal Zone Management Rules (CZMR) found at N.J.A.C. 7:7-16.9.

Under that regulation, public access to the waterfront includes the ability to pass physically and visually to and from the waterways and their shores, for navigation, fishing, and recreational activities such as swimming and sunbathing. Public accessways and access areas includes streets, paths, walkways, dune walkovers, and other rights-of-way. Id. at -16.9(a). Developments must include or preserve opportunities for public access, such as accessways to the shoreline parallel to the shore with perpendicular access, boat ramps or piers, waterfront pocket parks, fishing access and associated amenities like night parking, public restrooms, and additional parking to accommodate those utilizing public access. Id. at -16.9(b). The regulation details when access must be provided on or offsite, if at all, based on the kind of development, whether it is new or existing, the size, whether a Municipal Public Access Plan has been approved by the Department and incorporated into the town's Master Plan, and whether the ACOE is involved for any shore protection related developments. See id. at -16.9 (c), (k)-(p).

Under both the PAL and public access regulation, public parking is a potential means of providing reasonable and meaningful public access, neither mandate its inclusion. What kind of access must be included is very location

and development specific. Further, the PAL is triggered when there is a change in the existing footprint of a structure or change in use of the property, not merely the transfer of title to those lands. N.J.S.A. 13:1D-153(a). If the Borough of Keansburg takes title to the Property, and if it or a future owner chooses to develop the property from a parking lot into residential units or a mixed-use development, that proposed development must first receive approval from the Department as part of its Coastal Management Program, which may require the preservation or addition of public access to the tidal waters and shoreline. What that may entail is a future agency decision, highly dependent on facts not yet certain and is thus not before the court at this time.

Consequently, Appellant has misunderstood the PAL and public access regulation, and neither require that the TRC or DEP impose a permanent deed restriction as part of a riparian grant of the Property to the Borough. Thus, the TRC and DEP were within the statutory limitations in approving the application for a riparian grant without requiring a permanent deed restriction.

Thus, neither the law and regulations cited by the Appellant, nor the Tidelands Act require that this conveyance include a permanent deed restricting Block 184 Lot 3.02 to forever remain as a public parking lot.

CONCLUSION

For the above reasons this court should uphold the DEP's denial of Appellant's request for an adjudicatory hearing on the TRC and DEP's riparian grant application.

Respectfully submitted,

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December 4, 2024

Superior Court, Appellate Division
Hughes Justice Complex
25 West Market Street
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Trenton, New Jersey 08625-0006

**Re: In the Matter of Request for Adjudicatory Hearing on Action of
Tidelands Resource Council
Docket No. A-002198-23
Reply Letter Brief on Behalf of Appellant Jersey Shore
Beach and Boardwalk, Inc.**

TO THE HONORABLE JUDGES OF THE APPELLATE COURT:

This is the Appeal by the substantially affected adjoining property owner challenging the Denial of an “adjudicatory hearing” to establish a record related to the Tidelands Resource Council’s approval of a Riparian Grant to the Respondent Borough of Keansburg of an approximate 3.54 acre State Riparian parcel located in central Keansburg adjacent to the beach and Raritan Bay. The parcel has long been filled uplands and used by the Borough since the 1940’s as a 400/500 space public parking area servicing the public for access to beach and boardwalk area and facilities.

As per the Case Scheduling Order, the Appellant Jersey Shore's Brief and ~~Appendix were filed on or about August 21, 2024, the Briefs of the Respondent~~ New Jersey Department of Environmental Protection/Tidelands Resource Council and Respondent Borough of Keansburg were filed on or about November 21, 2024. Kindly accept this Letter Reply Brief as per R. 2:6-2 (b) on behalf of Appellant Jersey Shore.

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PRELIMINARY STATEMENT

This Appeal presents an important issue as to the process and ability of a substantially impacted and interested property owner to challenge a Riparian Grant by the Tidelands Resource Council and for that objector to have a proper record made in the administrative process before that Riparian Grant is approved by the DEP Commissioner and the Attorney General and conveyed by the State. The Appellant's position is that --- as an impacted adjoining property owner and with

Public Trust compliance being at issue and implicated --- there is a constitutionally sufficient right to an “adjudicatory hearing” at this stage of the administrative process to have the public trust issues and facts clearly presented for a proper administrative determination, and ultimately to be available for a proper judicial review. The Respondent’s position is that appellant/objector has no right to an “adjudicatory hearing” --- so as to build the record or for any purpose --- and the administrative process can and should proceed without further notice or hearing to the finalization of the Grant, at the total discretion of the administrative agencies. It is submitted that the Respondent’s position is not valid.

As outlined in the initial Briefs, the available facts and intentions as to this Tidelands Grant are important and must be emphasized. The Grant parcel (Lot 3.02), approximately 3.54 acres, is filled and has been used for many years as a public parking lot, serving as an access to the adjacent Raritan Bay public beach and related water amenities as well as the nearby beach-related Boardwalk businesses, including the Appellant’s amusement park business. The Borough has in recent years been actively promulgating and adopting variations of a proposed Redevelopment Plan for that area, inclusive of the Grant Parcel. The Redevelopment Plan proposes and intends for the existing Grant Parcel and its approximately 500 space parking area to be used for the location of several multi-

story residential buildings, with parking for project residents/occupants but negligible public parking. The Plan is for the Grant Parcel and other surrounding municipal land to be conveyed to a private developer, and for the Redevelopment Project to then be constructed, owned and operated by that private developer. Thus, although the Grant Application is in the name of Keansburg Borough, the Grant Parcel is ultimately intended to be thereafter conveyed to and used by the private developer, with the public parking accessibility to the beach and water related amenities substantially eliminated.

Appellant Jersey Shore asserts that the proposed Plan has not been fully disclosed, and that such proposal and ultimate use, to be facilitated and fostered by an unrestricted Tidelands Grant, would be and is in contravention and violation of the Public Trust Doctrine, and should not be authorized or allowed.

The problems highlighted and presented by this case --- under the position espoused by the Respondents --- are that the Appellant (nor anyone else) is allowed or entitled to an “adjudicatory hearing” at which the background and facts can be fully exposed and presented. Denying the requested hearing at this stage means that nowhere in the administrative process, through the further consideration or action by the DEP Commissioner and Attorney General, will the Appellant (or any objector) be noticed or heard prior to Final Approval and Conveyance by the State.

Presumably, at the point of final approval by the DEP Commissioner/Attorney General, ~~a right to judicial review in the Appellate Division~~ would exist, but that right of potential appeal would be illusory as no adequate record would exist for judicial review.

As has been detailed, the Appellant has proper standing as an “interested person” entitled to champion and enforce the rights and policies established by the Public Trust Doctrine and State Riparian Laws. The Respondent’s Denial of a hearing to even establish a record for further administrative review, and ultimately judicial review if necessary, is arbitrary, not in accord with proper administrative process, and constitutionally defective.

POINT ONE

APPELLANT JERSEY SHORE HAS A STATUTORY AND CONSTITUTIONAL RIGHT TO AN “ADJUDICATORY HEARING” TO CHALLENGE THE TIDELANDS GRANT AND ESTABLISH A PROPER RECORD FOR JUDICIAL REVIEW

As detailed in the initial Briefs, the Respondents’ position as asserted will result in there practically and actually being no forum, either administrative or judicial, for a proper review and determination as to the merits of Appellant’s position --- that the Riparian Grant of the State-owned parcel to be ultimately conveyed to a private developer for construction of multi-story buildings, with the

elimination of beach-access public parking, is in contradiction to the Public Trust Doctrine and arbitrary. Further, the Appellant asserts that the tentatively approved consideration (\$1,591,173) is arbitrary and grossly inadequate.

Under the administrative procedure as asserted by the Respondents, the Riparian Grant --- after having now been authorized and approved by the Tidelands Resource Council, --- is now subject to the approval of the DEP Commissioner and/or the Attorney General as per N.J.S.A. 13:4B-13 (see SB 25). However, that Commissioner/Attorney General Approval process takes place without public notice, input, or hearing and, as per the Respondent's analysis, that process and determination is within the "complete discretion" of the Commissioner and Attorney General, citing Taylor v. Sullivan, 119 N.J. Super. 426, 430 (App.Div.1972). See also Bailey v. Driscoll, 34 N.J. Super. 228 (App.Div.) aff. in part reversed in part 19 N.J. 363 (1955). However, as made clear in Taylor, the "discretion" as resting in the TRC and those officials is not absolute; it is subject to judicial review "on the basis of whether their action is within or without the bounds of the pertinent statutory limitations." Taylor at 430. As held in Le Compte v. State of New Jersey, 65 N.J. 447, 451 (1976), the State possesses title/ownership of riparian lands, but that ownership is "subject to the demands of the public trust doctrine" and the limitations and requirements thereunder. See also BP Oil, Inc. v.

State, 153 N.J. Super. 389 (Law Div. 1977) (discusses statutory Riparian Grant conveyance process); Atlantic City Electric Co. v. Barden 145 N.J. Super. 438 (App.Div.1976) (discusses broad discretion vested in Tidelands Grant conveyance agencies); In re Tidelands License 96-0174T, 326 N.J. Super. 209, 212 (App.Div. 1999) (actions or inactions of the Tidelands Council with respect to Grants are not reviewable in terms of alleged abuse of discretion, but are reviewable on the basis of whether the action is within or without the bounds of pertinent statutory limitations).

Thus, the point is that the Tidelands Resource Council and the other State officers in the process to approve a Riparian Grant do have broad discretion, but that power and discretion is not unlimited and is subject to adherence to pertinent statutory provisions and limitations. The Grant process and approval is specifically mandated to respect and comply to the Public Trust Doctrine and Statute, in particular now the Statutory Public Trust Doctrine Law, N.J.S.A. 13:1B-150 to 156, and the Regulations thereunder. The assertion by appellant before the Tidelands Resource Council was that the Grant does not conform to or respect the Public Trust Doctrine or its requirements, as it is the purpose and intent of Keansburg Borough in applying for the Riparian grant is to thereafter convey the Grant Parcel to a private developer to use the parcel for a private multi-story,

multi-building development and, to that end cause the removal and elimination of essentially all the public parking and public accessibility to the Keansburg beach and waterfront related use and amenities. That is certainly a facially valid claim and cause of action, and requires both a factual record and a judicial analysis and interpretation of the Public Trust Doctrine and Statute.

Much of Respondents' assertions in reply is that the Tidelands Resource Council's determination is not subject to challenge and/or have such a high level of discretion that no right to an adjudicatory hearing exists, particularly by reason of the TRC and other State officials' expertise in such matters. It is submitted that such claim and position has been emasculated by the recent United States Supreme Court's analysis and decision of Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024). There the Supreme Court overruled the doctrine of reliance and presumption of correctness of agency interpretations of statutes, known as the Chevron doctrine, and held that Courts have the obligation to independently interpret ambiguous or conflicting statutes and effectuate the will and intent of the Legislature, subject to constitutional limitation. The Courts are not to be bound by agency interpretations, but are best equipped to make such legal judgments, and should do so. That same analysis would seem to apply under the New Jersey Administrative Procedure Act N.J.S.A. 52: 14B-3.1 et seq. Such a

proper judicial review, as now directed by Loper Bright, can only occur if there is proper record established by an “adjudicatory hearing,” and there is a full administrative fact-finding and decision by the agency based on that record for the reviewing Court.

It is recognized that a number of New Jersey Court decisions as to objections to approvals of DEP Permits have held that generalized interests or claims shared or claimed by property owners nearby to the permit approved property, asserting alleged adverse impacts to their property to arise from the permit/development, do not generally provide a sufficient property or constitutional justification for an “adjudicatory hearing” on the DEP Permit. See e.g. In the Matter of Riverview Development LLC, 411 N.J. Super. 409 (App. Div. 2010) (and cases cited therein); Musconetcong Watershed Assoc. v. N.J. Dept. of Env. Prot. 476, N.J. Super. 465 (App. Div. 2023). However, it is submitted and asserted that this particular case differs in that the interest and claim asserted by the Appellant is not simply a personal or parochial claim of damage to its neighboring property values and impact thereon. The interest and claim asserted here is that the grant and uses intended and to be facilitated on the Grant Parcel will be in direct contravention to the policies and terms of the Public Trust Doctrine/Statute. That claim/assertion can only be established and available for judicial review if an adjudicatory hearing

is conducted to permit a full record to be made by the objector, the applicant, and the TRC and State Officials, and then for the TRC to provide proper fact-finding and analysis for consideration by a reviewing Court. That the objector may obtain a personal benefit from championing or obtaining adherence to the State Law or policy --- such as compliance to the Public Trust Doctrine --- does not invalidate that there is a valid basis and grounds for an adjudicatory hearing to vindicate the proper State Law or policy.

As detailed, the proposed Plan to be furthered by the Keansburg Application --- to convey the Grant Parcel to a private developer for use as a private profit redevelopment for multi-story structures and eliminating public parking accessibility for beach and ocean uses and amenities --- presents obvious issues as to compliance or furtherance of the Public Trust Doctrine, and even issues as to legality and legitimacy of that reconveyance and use of the Grant Parcel itself. The claims asserted by the objector Jersey Shore are obvious and legitimate issues as to the legal propriety of an unconditional Riparian Grant being conveyed --- for what appears to be inadequate consideration --- to facilitate or allow that Plan. Certainly, given the limited known facts, an “adjudicatory hearing” to have a full record, a proper administrative determination on that record with fact-finding and legal conclusions by the TRC, and then if necessary a proper judicial review, is

absolutely warranted and necessary. If such record is not allowed or created at this point, it will not occur at the further levels before the DEP Commissioner and/or Attorney General as there is no formal process at all before those officials. The Appellant in this request is not and will not be arguing its private interest; the assertion and claim is that the Plan and Grant will be in contravention of the Public Trust Doctrine/Statute. That Appellant's private interest coincides with the recognition and enforcement of the Public Trust Doctrine is incidental; it certainly does not disqualify the Appellant or its entitlement to have this public policy issue fully and properly presented.

CONCLUSION

For the reasons and authorities as detailed herein and in our initial Appellate Brief, it is submitted that the administrative decision by the Department of Environmental Protection, by its Director of Legal Affairs (Pa98-100), denying the Request by Appellant Jersey Shore for an “adjudicatory hearing” be invalidated and reversed. It is requested that the Court remand the Request to the Tidelands Resource Council and the Department of Environmental Protection with proper instructions for an adjudicatory hearing.

Respectfully submitted,

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RSG*ts

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