

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

Appellant,

v.

**NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL
PROTECTION, LAND USE
REGULATION,**

Respondent.

**SUPREME COURT OF NEW JERSEY
Docket No. 091188**

**On Appeal from a Final Judgment of
the Superior Court, Appellate Division**

**Appellate Division Docket No.
A-0804-23**

Sat Below:

**Hon. Morris Smith, J.A.D.
Hon. Christine M. Vanek, J.A.D.**

Civil Action

**MERITS BRIEF OF APPELLANT
SEA POINT CONDOMINIUM ASSOCIATION, INC.**

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PRELIMINARY STATEMENT

Appellant Sea Point Condominium Association, Inc. (“Appellant” or “Sea Point”) is a residential condominium association with waterfront property. Sea Point applied for a Waterfront Development Permit authorizing: (1) the reconstruction of approximately 750 feet of badly deteriorated and failing bulkhead; (2) the construction of a replacement bulkhead; and (3) after-the-fact authorization for and replacement of a number of small finger piers and mooring piles in their current locations within the boat basin.

The New Jersey Department of Environmental Protection (“Respondent” or “DEP”) ultimately granted Sea Point’s permit application – but subject to a permit condition that Sea Point provide public access to a portion of its waterfront residential property. DEP’s requirement of public access as a condition of its permit approval was based on the Public Access Law, L. 2019, c.81 (codified at N.J.S.A. 13:1D-150 to 156) (hereafter the “Public Access Statute”).

The first question presented by this appeal centers on the scope and application of the Public Access Statute. More particularly, the question presented is whether the Public Access Statute incorporated the long-established common law Public Trust Doctrine or whether, instead, the Statute abrogated the common law and created an entirely new legal regime governing public access to lands adjacent to tidal waterways.

As fully set forth herein, the Public Access Law codifies the common law Public Trust Doctrine. That Doctrine includes – as a condition precedent to the imposition of public access – four factors that must be considered and applied to the property at issue. See Matthews v. Bay Head Improvement Association, 95 N.J. 306 (1984). The Matthews factors are: (1) the location of the privately owned upland area (referred to in the decision as the “dry sand area” in relation to the public trust lands; (2) the extent and availability of publicly owned points of access in the vicinity of the property in question; (3) the nature and extent of public demand for access in the area; and (4) the manner in which the privately owned upland area is used by the owners. Id. at 326. *It is undisputed on this record that DEP did not consider and apply the four Matthews factors.*

Against this backdrop, the Appellate Division below held that: (1) this Court’s common law doctrine was *not* incorporated by the Statute; and (2) the current version of the Public Trust Doctrine is set forth exclusively in the text of the Statute. Pt8-10. The Appellate Division below declared that “[w]e are not persuaded that the [statutory] phrase ‘consistent with the public trust doctrine’ [N.J.S.A. 13:1D-153a], expressly incorporates the Matthews four-part test, as petitioner suggests.” Pt10. The Appellate Division concluded, “[h]ad the Legislature intended the Matthews test to govern these determinations, it would have said so explicitly.” Ibid.

For several reasons, the Appellate Division’s determination is erroneous.

First, contrary to the Appellate Division’s determination, the Legislature was by no means “silent” with respect to its intention to codify the common law public trust doctrine. Quite to the contrary: the Legislature clearly expressed its intent *to codify* the public trust doctrine. The Legislature said so not once but multiple times in the statute. See N.J.S.A. 13:1D-153a; N.J.S.A. 13:1D-150e; N.J.S.A. 13:1D-150d.

Second, the Appellate Division determined that the Legislature was required not merely to indicate its intent to codify the public trust doctrine – but also to go one step further and expressly reference and adopt, in particular, this Court’s common law decision in Matthews. However, the Appellate Division’s determination is manifestly incorrect – by reference to this Court’s rule of statutory construction that a “statute in derogation of the common law requires that the legislative intent be clearly and plainly expressed in order to effectuate a change.” Plainly, this rule of statutory construction compels a result directly opposite to the result reached by the Appellate Division below. That is to say: the Public Access Statute did *not* “clearly and plainly express” its intent to *abrogate* the common law public trust doctrine (which is what would be required to effect such abrogation). To the contrary: the Statute “clearly and plainly expressed” its intent *to codify* the public trust doctrine. Reversal of the determination of the Appellate Division below is warranted for this reason alone.

Third, the Appellate Division determined that the Public Access Statute is *not*

even ambiguous with respect to the question of whether the statute codifies the common law. That determination is also erroneous. At the very least, the Public Access Statute is *ambiguous* as to whether the Legislature intended to codify or abrogate the common law public trust doctrine. To reiterate: the Public Access Statute – far from “clearly and plainly express[ing]” its intent to *abrogate* the common law public trust doctrine -- instead “clearly and plainly expressed” its intent *to codify* the doctrine. The Legislature said so not once but multiple times in the statute.

Fourth, because the plain text of the Public Access Statute is – at the very least -- ambiguous, then, under well-established rules of statutory construction, this Court must consider extrinsic evidence of the Legislature’s intent. Resort to the legislative history of the Public Access Statute further confirms the Legislature’s intent to codify -- not abrogate -- the common law public trust doctrine. For example, the Committee Statement accompanying S. 1074 states that “this bill, as amended, would confirm in the statutes *the public rights under the public trust doctrine* to use and enjoy the State's tidal waters and adjacent shorelines.” Thus, consideration of the abundant extrinsic evidence of the Legislature’s intent compels the conclusion that the Legislature fully intended that the Public Access Statute codify – not abrogate – the common law embodied in the Public Trust Doctrine, including the four-part Matthews test of public access.

For these reasons, the decision of the Appellate Division below should be reversed.

This appeal also presents a second question regarding the scope, application and enforceability of the Public Access Statute. This second question assumes that the Public Access Statute did **not** codify the common law Public Trust Doctrine but rather abrogated it and superseded it. Assuming this to be so, then the Statute is constitutionally infirm.

If unbound by the common law, then the Statute – on its face – mandates DEP to secure “*additional* public access” to private waterfront property based merely on a “change in the existing footprint of a structure” or “a change in use of the property.” N.J.S.A. 13:1D-153. That statutory mandate – again, unbound by this Court’s Mathews test – amounts to a taking of property without just compensation under the doctrine of unconstitutional conditions recognized by the United States Supreme Court in Nollan v. California Coastal Commission, 438 U.S. (1987), and Dolan v. City of Tigard, 512 U.S. 374 (1994).

As fully discussed in Point II herein, Nollan itself arose from the issuance of a building permit for a change in the footprint of a house that was conditioned on a permit requirement to provide public access over private property to the waterfront. That is the precise condition set forth in the above-referenced language of N.J.S.A.

13:1D-153. The plain text of N.J.S.A. 13:1D-153 mandates DEP to secure “*additional* public access” to private waterfront property based merely on a “change in the existing footprint of a structure” or “a change in use of the property.”

The Court in Nollan found a virtually identical permit condition to be unconstitutional as lacking an “essential nexus” between a legitimate state interest and the beach-access condition that was imposed by the permit. The absence of an essential nexus converted a valid regulation of land use into “an out-and-out plan of extortion,” and thereby amounted to an unconstitutional taking of private property. The same is true here.

N.J.S.A. 13:1D-153 is nothing more than the legislative codification of the unconstitutional permit condition in Nollan. That being so, N.J.S.A. 13:1D-153 is facially invalid as an unconstitutional condition to the same extent and for the same reason as the permit condition in Nollan was held to be invalid.

For all of the foregoing reasons – any one of which is dispositive -- the decision of the Appellate Division below should be reversed and the matter should be remanded to the DEP with instructions to vacate the permit condition mandating public access to Appellant’s private property.

STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

The salient facts underlying this appeal are undisputed and may be succinctly stated. The Sea Point property (“the Property”) consists of twenty-four townhomes surrounding a boat basin in the Borough of Point Pleasant. Aa53. The Property is improved with three two-story buildings, a swimming pool, walkways, driveways and parking lots. The upland improvements surround a boat basin that was constructed prior to construction of the townhomes. Ibid.

On July 14, 2020, Sea Point applied for a Waterfront Development Permit authorizing the reconstruction of approximately 750 feet of badly deteriorated and failing bulkhead. The application sought approval for construction of a replacement bulkhead 24 inches waterward of the existing bulkhead, as allowed by DEP regulations. See N.J.A.C. 7:7-15.11(d). Sea Point’s application also requested permission to reconstruct another 126 feet of bulkhead in the same footprint as the existing bulkhead. The application also sought after-the-fact authorization for, and replacement of, a number of small finger piers and mooring piles in their current locations within the boat basin. Aa53.

Between October 5 and November 10, 2020, Sea Point’s consultant and DEP staff exchanged numerous emails concerning whether, and in what manner, public

¹ The Statement of Facts and Procedural History of this matter are presented together in this section, because the facts and procedural history of this matter are closely intertwined.

access to the shoreline on and across the Property might be required as a condition of the Waterfront Development Permit. The correspondence expressed competing opinions about what was required by the Public Access Statute. Aa14-39.

By letter dated October 5, 2020, Sea Point's agent set forth various reasons that public access across Sea Point's Property is not required under the Public Access Statute. Aa11-13. First, Sea Point's agent explained that the application of a mandatory public access requirement is inappropriate because "there are no changes proposed to the existing footprint of the buildings, parking areas or other land-based site improvements and only very minor changes to the location of the bulkhead to bump out 24 inches into the basin." Aa11. Second, Sea Point's agent noted that the original owner and developer of the development had dedicated a 12.93-acre open space parcel of land, the Slade Dale Sanctuary, immediately adjacent to Sea Point's property to the Borough of Point Pleasant as a condition of site plan approval. Aa025. Third, Sea Point's agent pointed out that demand for public access in the area is satisfied not only by the Slade Dale Sanctuary, but also by the publicly owned "Dorsett Dock Wharf" located immediately west of the Sanctuary.² Aa11.

² See Press Release, Borough of Point Pleasant, New Jersey, *Dorsett Dock Improvements Complete* (Mar. 20, 2019), <https://ptboro.com/dorsett-dock-improvements-complete/> (explaining that Dorsett Dock Wharf is a municipally owned public access point that is available to "anyone wishing to enjoy fishing, kayaking, or other recreational activities."). Aa40-42.

By e-mail dated November 4, 2020, Sea Point’s agent informed DEP that the Borough of Point Pleasant was of the opinion that the improvement of an existing public access area was preferable to access across Sea Point’s property. The Borough proposed that Sea Point instead make a monetary contribution toward a nearby public access improvement project. Aa20.

Notwithstanding the foregoing, DEP issued a Waterfront Development Permit to Sea Point that contained a pre-construction condition mandating public access to the residential property of Sea Point. The condition (hereafter “Pre-Construction Condition #1”) required that Sea Point

submit to the Division for review and approval a proposal for providing public access on the project site. The Division approved onsite public access project must be constructed prior to, or concurrent with, the construction of the project authorized by this permit.³ [Aa2.]

On November 24, 2020, Sea Point submitted a hearing request challenging Pre-Construction Condition #1. Aa43-46. Sea Point’s position was (and remains) that the Public Access Statute codifies the common law, which includes – as a condition precedent to the imposition of public access – four factors that must be considered and applied to the property at issue. See Matthews v. Bay Head Improvement Association, 95 N.J. 306 (1984). The Matthews factors are: (1) the

³ DEP later made clear that mandatory public access to Sea Point’s private residential property would be on a 24-hour basis and could not be restricted to daytime hours.

location of the privately owned upland area (referred to in the decision as the “dry sand area”) in relation to the public trust lands; (2) the extent and availability of publicly owned points of access in the vicinity of the property in question; (3) the nature and extent of public demand for access in the area; and (4) the manner in which the privately owned upland area is used by the owners. Id. at 326. It is undisputed on this record that DEP did not consider and apply these four Matthews factors that govern the public’s right of access over private property in order to reach public trust land.

. On November 24, 2020, Sea Point requested permission to begin construction of the replacement bulkhead (by reason of its poor condition) while its appeal of Pre-Construction Condition #1 was pending. On December 14, 2020, DEP granted permission to Sea Point to commence reconstruction of the bulkhead.

On June 2, 2021, DEP transmitted Sea Point’s request for an adjudicatory hearing to the Office of Administrative Law. Following motions for Summary Decision by both parties, Administrative Law Judge Dean Buono issued an Initial Decision granting DEP’s motion for Summary Decision and denying Sea Point’s motion for the same. Aa0079-104; Pt44-69. On October 6, 2023, the DEP Commissioner issued a Final Decision adopting the ALJ’s Initial Decision with modifications not relevant to this appeal. Aa0115-141; Pt17-43

Sea Point appealed the Commissioner's Final Decision to the Appellate Division. On August 20, 2025, the Appellate Division affirmed the decision of the DEP Commissioner. Pt2-25.

The Appellate Division held that this Court's common law doctrine was *not* incorporated by the Statute and that the current public access doctrine in this State is entirely statutory. Pt8-10. The Appellate Division so held notwithstanding that the Public Access Statute itself expressly provides that "the Department [of Environmental Protection] shall review the existing public access provided to tidal waters and adjacent shorelines and shall require that additional public access be provided *consistent with the public trust doctrine.*" N.J.S.A. 13:1D-153a.

On September 8, 2025, Sea Point filed a Notice of Petition for Certification with this Court. Pt1. On October 17, 2025, Sea Pont's filed its Petition for Certification. On March 16, 2026, this Court granted certification and set down the matter for briefing on the merits.

QUESTIONS PRESENTED

1. Does the Public Access Statute, L. 2019, c.81 (codified at N.J.S.A. 13:1D-150 to -156) codify the long-established common law Public Trust Doctrine or does the Statute abrogate the common law and create an entirely new legal regime governing public access to lands adjacent to tidal waterways?

2. Assuming, arguendo, that the Public Access Statute creates an entirely new legal regime governing public access to lands adjacent to tidal waterways, does this new regime -- *on its face* -- constitute a taking of property without just compensation, in light of the fact that the Statute's trigger of a "change in the existing footprint of a structure" or "change in use" as mandating "additional public access" runs afoul of the "essential nexus" requirement of the unconstitutional conditions doctrine recognized by the United States Supreme Court in Nollan v. California Coastal Commission, 438 U.S. 825 (1987), and Dolan v. City of Tigard, 512 U.S. 374 (1994)?

LEGAL ARGUMENT

POINT I

CONTRARY TO THE DECISION OF THE APPELLATE DIVISION BELOW, THE PUBLIC ACCESS STATUTE, N.J.S.A. 13:1D-150 TO -156, ADOPTS, AND INCORPORATES BY REFERENCE, THE PUBLIC TRUST COMMON LAW, INCLUDING THIS COURT'S DECISION IN MATTHEWS V. BAY HEAD IMPROVEMENT ASS'N, 95 N.J. 306 (1984).

A. Background: history of the Public Trust Doctrine

In 2019, the Legislature enacted the Public Access Law, L. 2019, c.81 (codified at N.J.S.A. 13:1D-150 to -156) (hereafter “the Public Access Statute”). In enacting the statute, the Legislature made the following findings (among others):

a. The public has longstanding and inviolable rights under the public trust doctrine to use and enjoy the State's tidal waters and adjacent shorelines for navigation, commerce, and recreational uses, including, but not limited to, bathing, swimming, fishing, and other shore-related activities;

b. The public trust doctrine establishes the rule that ownership of the State's natural resources, including, but not limited to, ground waters, surface waters, and land flowed or formerly flowed by tidal waters is vested in the State to be held in trust for the people, that the public has the right to tidal lands and waters for navigation, fishing, and recreational uses, and, moreover, that even land that is no longer flowed by the tide but that was artificially filled is considered to be public trust land and the property of the State;

c. This historic principle stems from Roman jurisprudence declaring that the air, running water, and shores of the sea are common to mankind. The concept was extended to English law so that public property became classified as one of two types, either property that was necessary for the state's use or property that was common and available to all citizens. The common property consisted of the air, tidally flowed waters, fish, and wild animals, and the King did not own this common

property as he owned other state property, but rather held it in trust for the people. After the Revolution, all royal rights in the land that was to become the State of New Jersey became vested in the people of the State of New Jersey. **In 1821, the seminal court case of Arnold v. Mundy was decided, outlining the history of the public trust doctrine and applying it to tidally flowed lands in New Jersey, and from the time it was decided, New Jersey courts have held that the State holds in trust for the people of the State those lands flowed by tidal waters to the mean high water mark ... [N.J.S.A. 13:1D-150 (emphasis added)]**

As these legislative findings make clear, the public trust doctrine – prior to 2019 – was exclusively an attribute of the common law of this State and traces its origins to Roman and later English law. Following the American Revolution, the English common law, including the public trust doctrine, was passed down to the newly created American states. In New Jersey, the doctrine was reaffirmed by the former Supreme Court’s decision in Arnold v. Mundy, 6 N.J.L. 1 (1821).

In the two centuries since the decision in Arnold, this Court has repeatedly affirmed and expanded the doctrine's application. See, e.g., Hyland v. Borough of Allenhurst, 78 N.J. 190 (1978); Van Ness v. Borough of Deal, 78 N.J. 174 (1978); Borough of Neptune v. Avon by the Sea, 61 N.J. 296 (1972) For example, the doctrine -- which originally protected the public's right of access to tidal waters and shorelines for fishing, navigation and commerce -- has been expanded to protect recreational uses and to require equal access to municipally owned beaches and restroom facilities by residents and non-residents alike. See id.

Of greatest significance to the question here presented is this Court’s decision

in Matthews v. Bay Head Improvement Association, 95 N.J. 306 (1984). At issue in Matthews was whether the public trust doctrine gave the public the right to traverse privately owned upland areas to gain access to the ocean and the adjacent beach in the Borough of Bay Head. At the time, members of the public who did not reside in Bay Head could access the beaches in the municipality only through the use of six street ends. In an effort to prevent non-residents from using the beach, the Borough of Bay Head sold the land comprising the street ends to the adjoining property owners. Control of the street ends was then turned over to the "Bay Head Improvement Association," a quasi-public organization. Access to the beach via the street ends was thereafter restricted to Borough residents. Id. at 314, 326-27.

On this record, this Court determined that the general public had a right to traverse privately owned property when to do so was "essential or reasonably necessary for the enjoyment of the ocean." Id. at 325. In so holding, the Court relied on the quasi-governmental nature of the Improvement Association and on prior case law that prohibited municipalities from excluding non-residents from using publicly owned land to gain access to the beach. Ibid.

The Matthews Court recognized that requiring public access on or across private property is an extraordinary remedy and should be invoked only in limited cases. To that end, the Court identified four factors to be considered before requiring a private party to allow public access on or across their property: (1) the location of

the privately owned upland area (referred to in the decision as the “dry sand area”) in relation to the public trust lands; (2) the extent and availability of publicly owned points of access in the vicinity of the property in question; (3) the nature and extent of public demand for access in the area; and (4) the manner in which the privately owned upland area is used by the owners. Id. at 326.

The Matthews four-part test provides the template for determining when public access across private property might be required. The touchstone of Matthews is that public access to the waterfront is not unlimited and is subject to a test of reasonableness:

This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea.

[Id. at 324].

Critically, the Matthews Court held that “where use of dry sand is essential or reasonably necessary for the enjoyment of the ocean, the doctrine warrants the public’s use of the upland dry sand area **subject to an accommodation of the interests of the owner.**” Id. at 325 (emphasis added). Thus, under Matthews, the “interests of the owner” is an essential component of a common law right of public access to the waterfront over private land.

This Court interpreted and applied the Matthews test in only one other decision: *i.e.*, Raleigh Avenue Beach Association v. Atlantis Beach Club, 185 N.J.

40 (2005). In Raleigh Avenue, the Court determined that the public has a right of access to the shoreline across an upland area occupied by a newly constructed condominium and private beach club in Cape May County. Id. at 59-60. Applying the Matthews factors, the Court relied on the undisputed fact that the beach area in question had been open and free to the public for decades prior to construction of the condominium and beach club. Id. at 56-57. Furthermore, the Court upheld the imposition of a public access requirement due to the upland structure's use as a business enterprise (*i.e.*, as a beach club), rather than as a residence.⁴ See Raleigh Avenue, 185 N.J. at 59-60.

The Matthews and Raleigh Avenue decisions reflect the state of the public trust doctrine in New Jersey as it applied to the use of private property when the Public Access Statute was enacted in 2019.

B. The Legislature's 2019 codification of the public trust doctrine

In 2019, the Legislature codified the public trust doctrine. See L. 2019, c.81 (codified at N.J.S.A. 13:1D-150 to -156) (hereafter the "Public Access Statute").

The Legislature's purpose in enacting the Public Access Statute -- codification of the Public Trust Doctrine -- is plainly set forth in its legislative findings. For example, the Legislature found that, "[p]ursuant to the public trust doctrine, the State of New Jersey has a duty to promote, protect, and safeguard the public's rights

⁴ Significantly, Petitioner Sea Point is exclusively a residential property.

and ensure reasonable and meaningful public access to tidal waters.” N.J.S.A. 13:1D-150d. The Legislature further found that “New Jersey courts have held that the State holds in trust for the people of the State those lands flowed by tidal waters to the mean high water mark.” N.J.S.A. 13:1D-150c. Accordingly, the Legislature declared that “the Department [of Environmental Protection] shall review the existing public access provided to tidal waters and adjacent shorelines and shall require that additional public access be provided *consistent with the public trust doctrine.*” N.J.S.A. 13:1D-153a (emphasis added).

Resort to the legislative history of the Public Access Statute further confirms the Legislature’s intent to codify the Public Trust Doctrine. The Committee Statement accompanying S. 1074 states that “this bill, as amended, would confirm in the statutes the public rights under the public trust doctrine to use and enjoy the State’s tidal waters and adjacent shorelines.” Statement of the Assembly Environment and Solid Waste Committee to Senate Bill No. 1074, Second Reprint. The Committee Statement further declares that “[t]he bill requires the DEP to ensure any approval, permit, administrative order or consent decree issued, or action taken, by the DEP pursuant to the above-cited laws or any other law is *consistent with the public trust doctrine.*” Id. (emphasis added).

An additional source of legislative history is the Report to Senator Robert Smith from the Public Access Task Force dated April 2016 (hereafter “Report”).

Aa142-171. The Public Access Task Force was convened by Senator Smith, who served as a principal sponsor of the Public Access Statute. The Task Force was charged with providing a set of recommendations regarding public access to tidal waterways and shorelines. The Report notes: “There is a need for legislation to direct the New Jersey Department of Environmental Protection with respect to public access to guide its actions, *and to ensure that its policies are consistent with the Public Trust Doctrine and relevant case precedent.*” Aa149 (emphasis added).

Hence, both the text of the Public Access Statute and its extensive legislative history make clear that the Statute codified the common law public trust doctrine.

C. The decision of the Appellate Division below – that the Public Access Statute does not codify the common law public trust doctrine (including the Matthews test) -- is incorrect as a matter of law.

A cardinal rule of statutory construction is that a “statute in derogation of the common law requires that the legislative intent be clearly and plainly expressed in order to effectuate a change.” White v. North Bergen Twp., 77 N.J. 538, 559 (1978). See also Katz v. Rahway Hosp., 214 N.J. Super. 379, 384 (App. Div. 1986); Blackman v. Iles, 4 N.J. 82, 89 (1950). Thus, “[i]f a change in the common law is to be effectuated, the legislative intent to do so must be clearly and plainly expressed.” Blackman, 4 N.J. at 89.

Here, the Public Access Statute – far from “clearly and plainly express[ing]” its intent to *abrogate* the common law Public Trust Doctrine -- instead “clearly and

plainly expressed” its intent *to codify* the Doctrine. See Point IB, supra,

Notwithstanding the foregoing, the Appellate Division below held that this Court’s common law doctrine was *not* incorporated by the Statute and that the current public access doctrine in this State is entirely statutory. Pt8-9. The court declared that “[w]e are not persuaded that the [statutory] phrase ‘consistent with the public trust doctrine’ [N.J.S.A. 13:1D-153a], expressly incorporates the Matthews four-part test, as petitioner suggests.” Pt10. The court pointed to the Legislature’s “silence regarding Matthews [as] demonstrate[ing] its clear legislative intent that Matthews does not control public access determinations under the Public Access Law.” Pt10. The court concluded, “[h]ad the Legislature intended the Matthews test to govern these determinations, it would have said so explicitly.” Pt10.

The Appellate Division’s determination – that the Public Access Statute does not codify the common law public trust doctrine (including the Matthews test) -- is incorrect as a matter of law. This is so for four reasons.

1. Contrary to the Appellate Division’s determination, the Legislature was not “silent” with regard to its intention to codify the public trust doctrine

Contrary to the Appellate Division’s determination, the Legislature was not “silen[t]” with regard to its intention to codify the common law public trust doctrine. Pt10. Instead, the Legislature clearly expressed its intent *to codify* the public trust doctrine. The Legislature said so not once but multiple times throughout the Public Access Statute.

We reiterate once more the Legislature’s clear expressions of its intent to codify the common law public trust doctrine. Thus:

- The Legislature declares that “the Department [of Environmental Protection] shall review the existing public access provided to tidal waters and adjacent shorelines and shall require that additional public access be provided *consistent with the public trust doctrine.*” N.J.S.A. 13:1D-153(a)

- The Legislature declares that the public’s rights to enjoy the shoreline arise “under the public trust doctrine.” N.J.S.A. 13:1D-150(a).

- The Legislature declares that the Public Trust Doctrine which “establishes the rule” regarding the State’s interests in tidal lands and waters. N.J.S.A. 13:1D-150(b).

- The Legislature declares that the Public Trust Doctrine is not a statutory invention, but rather “stems from Roman jurisprudence” “was extended to English law” and has been applied to New Jersey lands by “the seminal court case of *Arnold v. Mundy*” and thereafter recognized and further shaped by “New Jersey courts.” N.J.S.A. 13:1D-150(c).

- The Legislature declares that the State’s duty arises “pursuant to the public trust doctrine” and “to ensure reasonable and meaningful public access to tidal waters and adjacent shorelines.” N.J.S.A. 13:1D-150(d).

- The Legislature declares that the power vested in the DEP is to protect the right of public access “under the public trust doctrine and statutory law”⁵ and to provide public access “equitably.”

⁵ The reference to “statutory law” is properly understood as encompassing the numerous pre-existing New Jersey statutes that govern access to, and protection of, environmentally sensitive areas, including the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 *et seq.*; the Wetlands Act of 1970, N.J.S.A. 3:9A-1 *et seq.*; the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 *et seq.*; and the State’s implementation of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et*

N.J.S.A. 13:1D-150(e).

- The Legislature declares that the DEP must “ensure” that any permit, administrative order, and any other action taken by the NJDEP is “consistent with the public trust doctrine.” N.J.S.A. 13:1D-151(a).

In short, the plain language of the Public Access Statute confirms that the common law public trust doctrine was not abrogated and instead continues to bind DEP.⁶

seq. Indeed, the above statutes are expressly set forth in the operative section of the Public Access Statute granting DEP authority to approve permits for development projects adjacent to tidal waterways. See N.J.S.A. 13:1D-153.

⁶Not only is the Legislature’s intent to incorporate the common law public trust doctrine clearly and repeatedly stated in the text of the Public Access Statute, this same legislative intent is reaffirmed by DEP itself by way of its regulations implementing the Coastal Area Facilities Review Act, N.J.S.A. 13:19-1 et seq. (“CAFRA”).

For example, CAFRA Section 7:7-9.48(c) contains a long historical reference to the Public Trust Doctrine from at least 500 A.D. N.J.A.C. 7:7-9.48(c). The provision also specifically cites to Matthews and other Supreme Court decisions while stating that “the Public Trust Doctrine is an example of common law authority that is continually developing through individual court cases.” Id.

Furthermore, the CAFRA rule emphasizes that it is the duty of the State to ensure “adequate” access but does not say “unrestricted” access. Id. This provision quotes Matthews verbatim that “where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.” Id.

Similarly, N.J.A.C. 7:7-16.9(x) requires the NJDEP to be guided by the Matthews decision and related case law. In addition to containing many of the same references cited above, including the key Matthews passage, N.J.A.C. 7:7-16.9(x) states that

2. The Appellate Division determined that the Legislature was required not merely to indicate its intent to codify the public trust doctrine – but also to go one step further and expressly reference and adopt, in particular, this Court’s decision in Matthews. However, the Appellate Division’s determination is manifestly incorrect – by reason of: (1) the well-established rule of statutory construction that a “statute in derogation of the common law requires that the legislative intent be clearly and plainly expressed *in order to effectuate a change*”; and (2) the fact that the foregoing rule of statutory construction compels a result directly opposite to the result reached by the Appellate Division.

The Appellate Division’s determination is premised on its finding that the Legislature was required to not merely indicate its intent to codify the public trust doctrine – but instead go one step further and also expressly reference and adopt, in particular, this Court’s decision in Matthews (Pt10) -- again, this Court’s most important decision of at least the past half-century construing and applying the common law public trust doctrine. The Appellate Division further determined that the Legislature’s failure to expressly reference the Matthews decision in the text of the statute is decisive – in that such legislative “silence” conclusively establishes that the common law public trust doctrine was *not* codified into the Public Access Statute. Pt10. But the Appellate Division’s legal determination is precisely upside down.

A cardinal rule of statutory construction is that a “statute in derogation of the common law requires that the legislative intent be clearly and plainly expressed in

“[common law] decisions in these cases guide the Department in upholding the Public Trust Doctrine and providing adequate public access.” Id.

order to effectuate a change.” White v. North Bergen Twp., 77 N.J. 538, 559 (1978). Thus, “[i]f a change in the common law is to be effectuated, the legislative intent to do so must be clearly and plainly expressed.” Blackman v. Iles, 4 N.J. 82, 89 (1950). Thus, the White/Blackman rule of construction presumes the Legislature’s codification of the common law – *unless the Legislature clearly expresses a contrary legislative intent*.⁷

The Appellate Division below did more than just disregard the White/Blackman presumption; it turned the presumption on its head. The Appellate Division determined that the Legislature was required to *expressly adopt the Matthews common law doctrine in order to **avoid** a judicial finding* of the legislative abrogation of the Matthews common law doctrine. This was plain error.

The Public Access Statute did not “clearly and plainly express” its intent to *abrogate* the common law Public Trust Doctrine -- which is what is required, under the White/Blackman rule, in order to support a judicial finding of legislative

⁷ More recently, the Appellate Division underscored that when a statute “impose[s] a duty or ... establish[es] a right which was not recognized by the common law [it] will be strictly interpreted to avoid such change.” Matter of Gauthier, 461 N.J. Super. 507, 512 (App. Div. 2019) (citing Fivehouse v. Passaic Valley Water Comm'n, 127 N.J. Super. 451, 456 (App. Div. 1974); Carlo v. Okonite-Callender Cable Co., 3 N.J. 253, 265 (1949)).

See also State v. Western Union Tel. Co., 12 N.J. 468 (1953); State v. Ct. of Common Pleas of Mercer Cnty., 1 N.J. 14, 22 (1948); Evans-Aristocrat Indus., Inc. v. City of Newark, 75 N.J. 84, 93 (1977); Magierowski v. Buckley, 39 N.J. Super. 534 (App. Div. 1956); Sinnickson v. Johnsons, 17 N.J.L. 129 (Sup. Ct. 1839).

abrogation of the common law. White, *supra*, 77 N.J. at 559; Blackman, *supra*, 4 N.J. at 89. To the contrary: the Statute “clearly and plainly expressed” its intent *to codify* the common law public trust doctrine.

Moreover, even assuming *arguendo* that the Public Access Statute had failed to sufficiently express its intent to adopt the Matthews common law test (which is decidedly not the case), then -- *even in that event* -- under the White/Blackman presumption, mere legislative “silence” to re-confirm the common law can never be a reason for a court to find a legislative abrogation of the common law. Ibid.

In short, because the Appellate Division below failed to apply the White/Blackman rule of statutory construction, reversal of the decision below is warranted for this reason alone.

3. The Appellate Division below determined that the Public Access Statute is *not even ambiguous* with respect to whether the statute codifies the common law -- notwithstanding the fact that the statute expressly states that DEP “shall require that additional public access be provided *consistent with the public trust doctrine.*”

The principles of statutory interpretation -- and a court’s resort to extrinsic evidence of legislative intent -- are well-established. Briefly stated, “[if] the language of the statute clearly reflects the Legislature’s intent, then the court applies the law as written, affording the terms their plain meaning. State v. J.V., 242 N.J. 432, 442 (2020). However, if the language is ambiguous, courts “turn to extrinsic evidence for guidance.” State v. Gandhi, 201 N.J. 161, 177 (2010).

Therefore, a court's first task in construing a statute is to determine whether a statute is clear on its face or whether it is susceptible to multiple interpretations, i.e., is ambiguous. As this Court has observed, "ambiguity can arise when a statute is subject to varying plausible interpretations, or when literal interpretation of the statute would lead to a result that is ... at odds with ... public policy" Finkelman v. Nat'l Football League, 236 N.J. 280, 289-90 (2019).

Against this backdrop, the Appellate Division below determined the Public Access Statute is not even ambiguous with respect to whether the Statute codifies the common law. Pt10. As DEP stated in its brief in opposition to certification, "because the Appellate Division found the Law unambiguous, it did not need to resort to extrinsic sources, such as legislative history, to determine legislative intent." DEP Cert. Opp. Br., at 16. However, on this record, the Appellate Division's threshold determination -- that the Public Access Statute is *unambiguous* -- is fatally flawed.

At the very least, the Public Access statute is *ambiguous* as to whether the Legislature intended to codify or abrogate the common law public trust doctrine. To reiterate: the Public Access Statute -- far from "clearly and plainly express[ing]" its intent to *abrogate* the common law Public Trust Doctrine -- instead "clearly and plainly expressed" its intent *to codify* the Doctrine. The Legislature said so not once

but multiple times in the statute. See Points IA, IC(1), supra.⁸

4. Because the plain text of the Public Access Statute is – *at the very least* -- ambiguous, then, under well-established rules of statutory construction, the Court must consider extrinsic evidence of the Legislature’s intent. Here, consideration of the abundant extrinsic evidence of the Legislature’s intent compels the conclusion that the Legislature fully intended that the Public Access Statute codify – not abrogate – the common law embodied in the public trust doctrine, including the four-part Matthews test of public access.

As previously noted, “where the plain language of the statute is ambiguous, [courts] turn to extrinsic evidence for guidance.” State v. Gandhi, 201 N.J. at 177. More particularly, “[w]hen such [extrinsic] evidence is needed, [courts] look to a variety of sources [and] [c]entral among them is a statute’s legislative history.” Ibid.

Here, because the plain text of the Public Access Statute is – *at the very least* – ambiguous (with respect to the question of whether the Legislature intended to codify or abrogate the common law public trust doctrine), then the Court must consider extrinsic evidence of the Legislature’s intent, including the statute’s legislative history. See ibid.

Resort to the legislative history of the Public Access Statute further confirms

⁸ Furthermore, because a “statute in derogation of the common law requires that the legislative intent be clearly and plainly expressed in order to effectuate a change,” White v. North Bergen Twp., supra, 77 N.J. at 559, and because the Appellate Division below held that the Public Access Statute actually abrogated the governing common law standard of public access (as set forth in this Court’s decision in Matthews) without the Statute expressly so stating, Pt10, the conclusion is further bolstered that the Public Access Statute is – *at the very least* – ambiguous as to whether the Legislature intended that the State codify or abrogate the common law public access doctrine.

the Legislature’s intent to codify -- not abrogate -- the common law public trust doctrine. The Committee Statement accompanying S. 1074 states that “this bill, as amended, would confirm in the statutes *the public rights under the public trust doctrine* to use and enjoy the State's tidal waters and adjacent shorelines.” Statement of the Assembly Environment and Solid Waste Committee to Senate Bill No. 1074, Second Reprint (emphasis added). The Committee Statement further declares that “[t]he bill requires the DEP to ensure any approval, permit, administrative order or consent decree issued, or action taken, by the DEP pursuant to the above-cited laws or any other law is *consistent with the public trust doctrine.*” (emphasis added).

An additional source of legislative history is the Report to Senator Robert Smith from the Public Access Task Force dated April 2016. Aa142-171. The Task Force was charged with providing a set of recommendations regarding public access to tidal waterways and shorelines. The Report notes: “There is a need for legislation to ensure that [DEP’s] policies are *consistent with the Public Trust Doctrine and relevant case precedent.*” Aa149. (emphasis added).

In sum, under settled principles of statutory construction, the Appellate Division’s and DEP’s interpretation of the public access statute – as not codifying the common law public trust doctrine -- is incorrect as a matter of law. The court below: (1) failed to recognize in the statutory text the multiple statements of legislative intent to codify the common law public trust doctrine; (2) failed to

determine that the Public Access statute is – *at the very least* – ambiguous, in light of the express textual statements of legislative intent; (3) failed to apply established principles of statutory construction that require a reviewing court to consider extrinsic sources of legislative intent when a statute (as here) is ambiguous; and (4) failed to review and apply the legislative history of the Public Access statute which, in turn, further bolsters the conclusion that the Legislature intended to codify – not abrogate – the common law public trust doctrine.

For these reasons, this Court should reverse the decision of the Appellate Division below and hold that the Public Access Statute, N.J.S.A. 13:1D-150 to -156, adopts, and incorporates by reference, the public trust common law, including this Court’s decision in Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306 (1984).⁹

⁹ As discussed in the text above, the threshold legal question presented to the Court is whether the four Matthews factors are required to be applied in order to determine whether there is a public right of travel over private property as a means to access public trust land. If this Court were to answer this question in the affirmative, then it might elect to remand the matter to DEP with instructions to apply the Matthews factors to the Sea Point property (among other potential dispositions)..

Assuming the above-referenced disposition of this appeal, DEP, on remand, would be required to consider the material facts in the record regarding the Sea Point property and its construction project -- in light of the Matthews factors. The material facts in the record (which are undisputed) include the following:

- See Point is a private residential community.
- With regard to Sea Point’s construction project, the record reflects that “there are no changes proposed to the existing footprint of the buildings, parking areas or other land-based site improvements

D. When the common law Matthews factors are properly considered and applied as part of the statutory test of public access over private property, then the Matthews requirements of an “accommodation of the interests of the owner” and a standard of reasonableness may save the statute from constitutional challenge.

When the common law Matthews factors are properly considered and applied

and only very minor changes to the location of the bulkhead to bump out 24 inches into the basin.” Aa11

- The original owner and developer of Sea Point had dedicated a 12.93-acre open space parcel of land, the Slade Dale Sanctuary, immediately adjacent to Sea Point’s property to the Borough of Point Pleasant as a condition of site plan approval. Aa025.

- Demand for public access in the area is satisfied not only by the Slade Dale Sanctuary, but also by the publicly owned “Dorsett Dock Wharf” located immediately west of the Sanctuary. Aa11.

- The Borough of Point Pleasant was of the opinion that that the improvement of an existing public access area was preferable to access across Sea Point’s property. The Borough proposed that Sea Point instead make a monetary contribution toward a nearby public access improvement project. Aa20.

Under Matthews, “[t]he public interest is satisfied so long as there is reasonable access to the sea.” Id. at 324. And even “where use of dry sand is essential or reasonably necessary for the enjoyment of the ocean, the doctrine warrants the public’s use of the upland dry sand area **subject to an accommodation of the interests of the owner.**” Id. at 325 (emphasis added). Thus, under Matthews, the “interests of the owner” is an essential component of a common law right of public access to the waterfront over private land.

It is respectfully submitted that DEP, on remand, would reach a very different result (as compared to DEP’s public access decision at issue on this appeal) if the Mathews factors were required to be applied.

as part of the statutory test of public access over private property, the result is a balancing test that takes proper account of the right of property owners to control access to their property over the countervailing right of the public to access public trust land. This balancing test may save the statute from invalidation under the Takings Clause of the Fifth Amendment of the United States Constitution. See Point II, infra.

The enumerated factors of the Public Access Statute -- standing alone -- require consideration of *only* “the scale of the changes to the footprint or use, the demand for public access, and any department-approved municipal public access plan or public access element of a municipal master plan.” N.J.S.A. 13:1D-153(a). Therefore, the enumerated factors of the Public Access Statute do not account for the right of property owners to control access to their property. Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (holding that “the right to exclude others [is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.”)

Stated otherwise, if the enumerated factors of the Public Access Statute do *not* incorporate by reference the Matthews test, then the statutory factors, standing alone, do *not* properly take into account the “extent and availability of publicly-owned upland sand area,” the “usage of the sand by the owner” and the “location of the dry sand area.” Matthews, supra, 95 N.J. at 326. These are *all critical requirements of*

the Matthews test. Ibid.

Moreover, this Court in Matthews held that “where use of dry sand is essential or reasonably necessary for the enjoyment of the ocean, the doctrine warrants the public’s use of the upland dry sand area subject to an accommodation of the interests of the owner.” Matthews, supra, 95 N.J. at 325. In stark contrast, the bare statutory factors make no “accommodation” whatsoever to “the interests of the owner.” N.J.S.A. 13:1D-153(a).

It is well-settled that it is “[t]he duty of the court is to strain if necessary to save the act (rather than) to nullify it.” White v. North Bergen Twp., 77 N.J. 538, 543 (1978). Applying this principle, the Matthews requirements of an “accommodation of the interests of the owner” and a standard of reasonableness may save the statute from constitutional infirmity and invalidation. See Point II, infra.

POINT II

IN THE ALTERNATIVE, ASSUMING ARGUENDO THAT THE PUBLIC ACCESS STATUTE DID NOT CODIFY THE COMMON LAW BUT RATHER ABROGATED IT AND SUPERSEDED IT, THEN THE STATUTE – ON ITS FACE – CONSTITUTES A TAKING OF PROPERTY WITHOUT JUST COMPENSATION, IN LIGHT OF THE FACT THAT THE STATUTE’S TRIGGER OF A “CHANGE IN THE EXISTING FOOTPRINT OF A STRUCTURE” OR A “CHANGE IN USE OF THE PROPERTY” AS MANDATING “ADDITIONAL PUBLIC ACCESS” RUNS AFOUL OF THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS RECOGNIZED BY THE UNITED STATES SUPREME COURT IN NOLLAN V. CALIFORNIA COASTAL COMMISSION, 438 U.S. (1987), AND DOLAN V. CITY OF TIGARD, 512 U.S. 374 (1994).

Assuming, arguendo, that the Public Access Statute did **not** codify the common law (including the common law standard of public access recognized by this Court in Matthews) but rather abrogated it and superseded it, then the Statute is constitutionally infirm. If unbound by the common law, then the Statute – on its face – mandates DEP to secure “*additional* public access” to private waterfront property based merely on a “change in the existing footprint of a structure” or “a change in use of the property.” N.J.S.A. 13:1D-153. That statutory mandate – again, unbound by this Court’s Mathews test – amounts to an unconstitutional taking of property without just compensation. See Nollan v. California Coastal Commission, 438 U.S. (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

A. Overview of the unconstitutional conditions doctrine recognized by the United States Supreme Court in Nollan v. California Coastal Commission, 438 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994).

The United States Supreme Court has observed that the fundamental legal

concept of “property” is often described as a “bundle of sticks” -- with each stick representing an “individual right” inherent in the property. United States v. Craft, 535 U.S. 274, 278 (2002). Critically, “the right to exclude others [is] one of the most essential sticks in th[at] bundle of rights that are commonly characterized as property.” Dolan v. City of Tigard, supra, 512 U.S. at 384. At issue here is that most “essential stick” – the right to exclude others from one’s property.

In Nollan v. California Coastal Commission, supra, 438 U.S. 825, the owners of a beachfront property between two public beaches sought a development permit from the California Coastal Commission to replace a bungalow with a larger house. The Commission granted the permit on the condition that the property owners dedicate an easement for members of the public to pass across their property. Id. at 828. The property owners challenged the permit condition as a regulatory taking of its property. The Supreme Court determined that because the construction of the home did not in any way burden the public’s use of the adjacent beach, it lacked an “essential nexus” between a legitimate state interest and the condition imposed by the Commission, i.e., an easement across their property. Id. at 837. The absence of a nexus converted a valid regulation of land use into “an out-and-out plan of extortion.” Ibid. Hence, the permit condition amounted to an unconstitutional taking of private property. Id. at 841-42.

Less than a decade after it decided Nollan, the Court again considered the

constitutionality of a public access requirement attached as a condition to a building permit. In Dolan v. City of Tigard, *supra*, 512 U.S. 374. a property owner applied to the City of Tigard (“City”) for a building permit to expand a hardware store. *Id.* at 379. The City -- as a condition of the building permit -- required the applicant to dedicate a public greenway adjacent to the store. *Id.* at 379-80. Although the Court found that the condition of a public greenway had an “essential nexus” with legitimate public purposes (unlike in Nollan), the Court *nevertheless* found the permit condition of a public greenway to be constitutionally infirm. *Id.* at 395. Under the Court’s new formulation of the “unconstitutional conditions” doctrine, a permit condition required not merely an “essential nexus” but also a finding of a “reasonable relationship between the required dedication and the impact of the proposed development.” *Id.* at 390. The Court found that there was no such “reasonable relationship between the greenway and the petitioner's proposed new building.” *Id.* at 395.

Over the past thirty years the United States Supreme Court has repeatedly reaffirmed and extended Nollan/Dolan unconstitutional conditions doctrine.¹⁰ For

¹⁰Similarly, this Court also has referenced and applied the Nollan/Dolan doctrine. Just this past term, this Court stated that Nollan stands for the proposition that “a permit condition requiring private property owners to grant the public an easement across their beachfront property was an unconstitutional taking as a permanent physical occupation.” Englewood Hosp. & Med. Ctr. v. State, 261 N.J. 195, 221 (2025) (citing Nollan). See also Toll Bros. v. Bd. of Chosen Freeholders of Cnty. of Burlington, 194 N.J. 223, 244 and n. 2 (2008) (stating that – in the context of

example, in Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 612 (2013), the Court extended the essential nexus and rough proportionality requirements of Nollan and Dolan to “monetary exactions” that are imposed by a permitting authority in lieu of a mandatory physical dedication of land.

Most importantly, in 2024 the Supreme Court clarified that the Nollan/Dolan test applies to legislative acts as well as to administrative actions. See Sheetz v. County of El Dorado, California, 601 U.S. 267 (2024). In Sheetz, “[t]he California Court of Appeal declined to assess the County's traffic impact fee for an essential nexus and rough proportionality based on its view that the Nollan/Dolan test does not apply to “legislatively prescribed monetary fees.” Id. at 276 (citing 84 Cal.App.5th at 407). In a unanimous opinion, the Supreme Court soundly rejected the view of the state court below. Id. at 280. The Court held that “[n]othing in constitutional text, history, or precedent supports exempting legislatures from ordinary takings rules.” Ibid. The Court concluded:

In sum, there is no basis for affording property rights less protection in the hands of legislators than administrators. The Takings Clause applies equally to both -- which means that it prohibits legislatures and agencies alike from imposing unconstitutional conditions on

monetary exactions – the Nollan/Dolan “essential nexus/rough proportionality” doctrine is functionally equivalent to this Court’s case law arising under the Municipal Land use Law that holds that a developer “could be compelled only to bear that portion of the off-tract improvement cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision.”) (quoting Longridge Builders, Inc. v. Planning Bd. of Princeton Twp., 52 N.J. 348, 350 (1968)).

land-use permits.

[Id. at 279]

In the wake of Sheetz, there can be no doubt that the Nollan/Dolan doctrine applies to a legislative act -- and not merely to an administrative action -- that impermissibly “leverage[es] [government’s] permitting monopoly to exact private property without paying for it.” Id. at 275.

B. The Public Access Statute is facially invalid by operation of the United States Supreme Court’s decision in Nollan

Applying the Nollan/Dolan unconstitutional conditions doctrine, the Public Access Statute -- on its face -- constitutes a taking of property without just compensation. The plain text of the Statute mandates DEP to secure “*additional public access*” to private waterfront property based merely on a “change in the existing footprint of a structure” or “a change in use of the property.” N.J.S.A. 13:1D-153. This statutory provision is constitutionally infirm, because it mandates “additional public access” that is entirely untethered to the impact of the proposed development.

As discussed above, Nollan itself arose from the issuance of a building permit for a change in the footprint of a house that was conditioned on a permit requirement to provide public access over private property to the waterfront – *the precise condition set forth in the above-referenced language of N.J.S.A. 13:1D-153*. See Nollan, 438 U.S. at 841. The Court in Nollan found this identical permit condition

to be unconstitutional as lacking an “essential nexus” between a legitimate state interest and the beach-access condition that was imposed by the permit. *Id.* at 837. The absence of an essential nexus converted a valid regulation of land use into “an out-and-out plan of extortion,” and thereby amounted to an unconstitutional taking of private property. *Id.* at 841-42.

Similarly, N.J.S.A. 13:1D-153 facially **requires** “additional public access” to private waterfront property based merely on a “change in the existing footprint of a structure.” Hence, N.J.S.A. 13:1D-153 is nothing more than the legislative codification of the unconstitutional permit condition in Nollan. That being so, N.J.S.A. 13:1D-153 is facially invalid as an unconstitutional condition under the Nollan/Dolan doctrine.¹¹

¹¹ Although this appeal challenges N.J.S.A. 13:1D-153 on *facial* grounds rather than *as-applied* grounds, it is nevertheless instructive to consider the application of the challenged statute to Sea Point’s permit and DEP’s mandatory permit condition, in light of the Nollan/Dolan unconstitutional conditions doctrine.

The Supreme Court’s decision in Nollan was based on facts that are remarkably similar to the facts here presented. As previously discussed, in Nollan the owner of a beachfront property between two public beaches sought a development permit a larger house. The California Coastal Commission granted the permit on the condition that the property owners dedicate an easement for members of the public to pass across their property. *See Nollan*, 438 U.S. at 828. The Court found the permit condition to be unconstitutional -- because the construction of the home did not in any way burden the public’s use of the adjacent beach. *Id.* at 841-42. As the Court explained, the construction of the house lacked an “essential nexus” between a legitimate state interest and the condition imposed by the state agency. *Id.* at 837.

The same is true here. By its permit application, Sea Point sought permission for *far*

C. The question of the facial validity of the Public Access Statute is ripe for adjudication by this Court (assuming that -- as a threshold matter -- this Court were to determine that the Public Access Statute does not codify the common law Public Trust doctrine).

The Appellate Division below declined to address the merits of Sea Point’s Takings Claim – which included arguments with respect to both a facial takings claim and an as-applied takings claim.¹² Pt15-16. At issue before this Court is Sea Point’s facial claim challenging the validity of the Public Access Statute. More particularly, Sea Point challenges the facial constitutionality of N.J.S.A. 13:1D-153

less construction that the permit sought by the property owner in Nollan. The owner in Nollan sought permission to construct an entirely new home; here, Sea Point merely sought permission to construct a replacement bulkhead and a few other minor items. Aa2. See also A11 (stating that “there are no changes proposed to the existing footprint of the buildings, parking areas or other land-based site improvements and only very minor changes to the location of the bulkhead to bump out 24 inches into the basin.”). Given that the Supreme Court held in Nollan held that a new larger home could not give rise to a valid permit condition imposing mandatory public access to the waterfront, then a slightly altered replacement bulkhead unquestionably cannot give rise to a valid permit condition imposing mandatory public access to Sea Point’s waterfront.

¹² With regard to Sea Point’s as-applied Takings Claim, the Appellate Division below observed that because DEP has not issued a final decision as to the extent of public access required at Sea Point’s property, then an as-applied takings challenge is premature. Ibid. Note, however, that this prohibition on *as applied* takings challenges does not apply to *facial* takings challenges. See Englewood Hosp. & Med. Ctr. v. State, 478 N.J. Super. 626, 642 (App. Div. 2024), aff’d as modified, 261 N.J. 195 (2025) (holding that although “an as-applied constitutional challenge” requires the exhaustion of administrative remedies, “[t]his principle does not apply to facial claims, which are purely questions of law.”).

– which mandates that DEP secure “additional public access” to private waterfront property based merely on a “change in the existing footprint of a structure” or “a change in use of the property.”

With regard to Sea Point’s facial claim, the Appellate Division below noted only that “[t]o the extent petitioner presents a facial constitutional challenge to the access requirement, we observe that neither the Office of Administrative Law nor the DEP possesses jurisdiction to adjudicate such claims.” Pt15. However, as fully discussed below, that *administrative law* impediment (with regard to a state agency’s lack of jurisdiction to address a facial constitutional issue) is no bar to *this Court’s* consideration of Sea Point’s facial Takings Claim.

To be clear: contrary to the Appellate Division’s determination, the fact that the state agency below (i.e., DEP) could not adjudicate the facial constitutional claim was no bar to the Appellate Division itself (let alone this Court) adjudicating the facial constitutional claim. This is so for several reasons. *First*, the Appellate Division has plenary authority over (as here) the final decisions of state agencies. See R. 2:2-3(a)(2). *Second*, although the Law Division usually hears as-applied inverse condemnation claims against state agencies, an as-applied claim is not presently at issue here. *Third* – and most important -- questions of law (as here) involving a facial takings claim can and should be heard by the Appellate Division (as well as by this Court). See Englewood Hosp. & Med. Ctr. v. State, 478 N.J.

Super. 626, 642 (App. Div. 2024), aff'd as modified, 261 N.J. 195 (2025) (holding that although “an as-applied constitutional challenge” requires the exhaustion of administrative remedies, “[t]his principle does not apply to facial claims, which are purely questions of law.”) (emphasis added). See id. (“We have frequently held that in a case involving only legal questions, the doctrine of exhaustion of administrative remedies does not apply”).

Here, Sea Point’s Takings claim is a facial claim regarding the validity of N.J.S.A. 13:1D-153 – which mandates that DEP secure “additional public access” to private waterfront property based merely on a “change in the existing footprint of a structure” or “a change in use of the property.” That is a pure question of law. Hence, this facial challenge is ripe for adjudication by this Court.¹³

¹³ By its brief in opposition to certification, DEP argued that Sea Point did not facially challenge the statute below. However, the Appellate Division below found otherwise. With regard to Sea Point’s facial challenge to the Statute, the Appellate Division noted that “[t]o the extent petitioner presents a facial constitutional challenge to the access requirement, we observe that neither the Office of Administrative Law nor the DEP possesses jurisdiction to adjudicate such claims.” Pt15. Therefore, the Appellate Division’s objection to Sea Point’s facial challenge to the Public Access Statute was *not* that the claim was *not* presented to the Appellate Division – but rather only an objection that the administrative tribunal below lacked jurisdiction to consider the facial challenge. (See discussion in the text above as to why the Appellate Division’s identification of the jurisdictional issue in the agency below is irrelevant to the jurisdiction of appellate courts to consider a constitutional question.)

In any event, even assuming *arguendo* that the question of the facial constitutionality of the Public Access Statute somehow were not properly preserved for this appeal (which is not correct), that assumed circumstance *nevertheless* would not prevent

D. The constitutional claim here presented – which need be reached by this Court only if the Court first rejects Appellant’s non-constitutional challenge to the construction and application of the statute -- is consistent with this Court’s important prudential principle that the Court refrain from reaching constitutional questions if a matter can be disposed of on non-constitutional grounds.

We reiterate that Sea Point’s facial challenge to the constitutionality of the Public Access Statute need be reached by this Court *only* if the Court first rejects Appellant’s non-constitutional challenge to the construction and application of the statute. That is to say: If this Court were to hold that Public Access Statute did *not* adopt and incorporate by reference the common law public trust doctrine, then – in

this Court from adjudicating Sea Point’s facial takings claim. The cases are legion that an issue that was not specifically raised in a court or agency below may be considered for the first time on appeal by this Court (or by the Appellate Division) – *especially when (as here) the issue raises important questions of public policy or is of constitutional magnitude*. See, e.g., Picogna v. Board of Educ. of Tp. of Cherry Hill, 143 N.J. 391 (1996) (addressing an unappealed disposition because of the public importance of the tenure issue there involved); NJ Dept. of Envir. Prot. v. Huber, 213 N.J. 338, 372 (2013) (addressing constitutional issue raised for the first time on appeal); State v. Lenihan, 219 N.J. 251, 265 (2014) (considering issue not raised below "for the sake of completeness in disposing of all issues"); Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 230–31 (1998) (stating that “despite the matter having not been raised before the trial court or the Appellate Division, we reach the issue of [statutory interpretation]”); A. & B. Auto Stores of Jones St., Inc. v. City of Newark, 59 N.J. 5, 20 (1971) (stating that, “because of the public interest, we will accept the issue although it was not timely raised”); In re Frazier, 435 N.J. Super. 1, 7 (App. Div. 2014) (addressing issues raised on appeal for the first time “in the interest of justice” due to case’s “complicated procedural history” and “significant ramifications” for the parties and others); State v. O’Hagen, 380 N.J. Super. 133, 139 (App. Div. 2005), aff’d 189 N.J. 140 (2007) (considering, because of public interest, the constitutionality of statute under review).

that event -- the Public Access Statute is constitutionally infirm.

This procedural posture on this appeal is consistent with this Court's important prudential principle governing constitutional adjudication. More particularly, this Court refrains from reaching constitutional questions if a matter can be disposed of on non-constitutional grounds. See O'Keefe v. Passaic Valley Water Comm'n, 132 N.J. 234, 240 (1993). See also White v. North Bergen Twp., 77 N.J. 538, 543 (1978) (stating that "(t)he duty of the court is to strain if necessary to save the act (rather than) to nullify it.").

Here, the matter can be disposed of on non-constitutional grounds **if and only if** this Court were to determine that the Public Access Statute codified the Matthews common law standard – which would impose necessary guardrails on DEP's ability to take property while imposing unconstitutional conditions in violation of the Nollan doctrine. See Point I, supra. However, in the absence of those guardrails under Matthews, the Public Access Statute is facially unconstitutional under the Nollan/Dolan unconstitutional conditions doctrine.

CONCLUSION

For the reasons set forth above, the decision of the Appellate Division below should be reversed and the matter should be remanded to the Department of Environmental Protection with instructions to vacate the permit condition mandating public access to Appellant's private property.¹⁴

Respectfully submitted,

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By: /s/ Neil Yoskin
Neil Yoskin

Dated: April 23, 2026

¹⁴ If this Court were to determine that the Public Access Law – on its face – constitutes a taking of property without just compensation in violation of the Fifth Amendment of the United States Constitution, then the Court should remand this matter to the Law Division for adjudication of the quantum of counsel fee recovery pursuant to 42 U.S.C. §1988 and/or N.J.S.A 10:6-2. See Maisonet v. New Jersey Dep't of Human Servs., Div. of Family Dev., 140 N.J. 214, 227-28 (1995); J.A. v. Bd. of Educ. for Dist. of S. Orange & Maplewood, 318 N.J. Super. 512, 526 (App. Div. 1999).

R. 2:12-7(a) CERTIFICATION

I hereby certify, pursuant to R. 2:12-7(a), that this appeal presents a substantial question and is filed in good faith and not for purposes of delay.

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Dated: April 23, 2026