

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

**Petitioner-Appellant,**

**v.**

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

**Respondent-Respondent.**

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

**On Petition for Certification 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**

---

**PETITION FOR CERTIFICATION OF  
PETITIONER-APPELLANT  
SEA POINT CONDOMINIUM ASSOCIATION, INC.**

---

**Cullen and Dykman, LLP  
229 Nassau Street  
Princeton, NJ 08542  
(609) 279-0900  
Attorneys for Petitioner-Appellant**

**Neil Yoskin, Esq. (Attorney I.D.# 2091982)  
nyoskin@cullenllp.com  
Of Counsel and on the Brief**

**Steven Siegel, Esq. (Attorney I.D. #034141992)  
On the Brief**

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES ..... iii**

**STATEMENT OF THE MATTER INVOLVED .....1**

**QUESTIONS PRESENTED .....7**

**THE REASONS WHY CERTIFICATION SHOULD BE ALLOWED .....7**

**POINT I ..... 7**

**CERTIFICATION IS WARRANTED SO THAT THIS COURT MAY ADDRESS AND CLARIFY A QUESTION OF GENERAL PUBLIC IMPORTANCE REGARDING THE SCOPE AND APPLICATION OF THE PUBLIC ACCESS STATUTE, N.J.S.A. 13:1D-150 TO -156, INCLUDING THE CRITICAL QUESTION OF WHETHER THE STATUTE CODIFIED THE PUBLIC TRUST COMMON LAW OR ABROGATED THE PUBLIC TRUST COMMON LAW**

**A. Background: history of the Public Trust Doctrine .....7**

**B. The Legislature’s 2019 codification of the Public Trust Doctrine .....11**

**C. The decision of the Appellate Division below holding 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” .....13**

**POINT II.....16**

**IN THE ALTERNATIVE, CERTIFICATION IS WARRANTED SO THAT THIS COURT MAY ADDRESS AND CLARIFY A QUESTION OF GENERAL PUBLIC IMPORTANCE AS TO WHETHER THE PUBLIC TRUST 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 “ESSENTIAL NEXUS” REQUIREMENT OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE RECOGNIZED BY THE UNITED STATES SUPREME COURT.**

**CONCLUSION.....20**

**R. 2:12-7(a) CERTIFICATION.....21**

**TABLE OF AUTHORITIES**

**Cases**

Arnold v. Mundy,  
6 N.J.L. 1 (1821) ..... 9

Blackman v. Iles,  
4 N.J. 82 (1950)..... 13

Borough of Neptune v. Avon by the Sea,  
61 N.J. 296 (1972)..... 9

Dolan v. City of Tigard,  
512 U.S. 374 (1994) ..... 18, 19

Englewood Hosp. & Med. Ctr. v. State,  
478 N.J. Super. 626 (App. Div. 2024) ..... 19, 20

Hyland v. Borough of Allenhurst,  
78 N.J. 190 (1978)..... 9

Katz v. Rahway Hosp.,  
214 N.J. Super. 379 (App. Div. 1986) ..... 13

Matthews v. Bay Head Improvement Ass'n,  
95 N.J. 306 (1984)..... 9, 10, 15

New Jersey Civil Serv. Ass'n v. State,  
88 N.J. 605 (1982)..... 20

Nollan v. California Coastal Commission,  
438 U.S. (1987) ..... 17, 18, 19

Raleigh Avenue Beach Association v. Atlantis Beach Club,  
185 N.J. 40 (2005)..... 11

United States v. Craft,  
535 U.S. 274 (2002) ..... 17

Van Ness v. Borough of Deal,  
78 N.J. 174 (1978)..... 9

White v. North Bergen Twp.,  
77 N.J. 538 (1978)..... 13

**Statutes**

16 U.S.C. 1451 ..... 14

N.J.S.A. 3:9A-1 ..... 14

N.J.S.A. 13:1D-150..... 7, 11, 12, 14,

N.J.S.A. 13:1D-153..... 14, 16, 19

N.J.S.A. 13:19-1 ..... 14

N.J.S.A. 58:16A-50..... 14

**Constitutional provisions**

U.S. Const. amend. V .....17

N.J. Const. art. I, ¶ 20 ..... 17

**Administrative Regulations**

N.J.A.C. 7:7-15.11 .....3

## **STATEMENT OF THE MATTER INVOLVED**

The question presented by this Petition centers on the scope and application of the Public Trust Doctrine, as codified by the Legislature into the Public Access Law, L. 2019, c.81 (codified at N.J.S.A. 13:1D-150 to 156) (hereafter the “Public Access Statute”). A fundamental question arising from the enactment of the Public Access Statute is whether it 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.

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. Pt8-10 (slip op., at 7-9). 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.

Prior to the enactment of the 2019 Statute, this Court issued many significant decisions construing and applying the common law public trust doctrine. In its seminal decision in Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306

(1984), this Court recognized that requiring public access on or across private property is an extraordinary remedy and should be invoked only in limited cases. Id. at 324. The Matthews Court identified the following 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. Thus, the Matthews decision provided the template for determining when public access across private property would be required.

Against this backdrop, 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 (slip op., at 9). The court concluded, “[h]ad the Legislature intended the Matthews test to govern these determinations, it would have said so explicitly.” Ibid. For several reasons set forth herein, the Appellate Division’s decision is manifestly erroneous and ignores the clear statements of legislative intent that are directly to the contrary.

Certification is warranted so that this Court may address and clarify the

question of general public importance regarding the scope and application of the Public Access Statute, N.J.S.A. 13:1D-150 to -156, including the critical question of whether the Statute codified the public trust common law or abrogated the public trust common law. The resolution of this critical question has significant implications for the development and maintenance of many hundreds of miles of tidal lands in this State – as well as to the fundamental rights of tidal-adjacent property owners to exclude others from their property.

\*\*\*

The salient facts underlying this Petition 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. Aa0053. 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. Aa0053.

Between October 5 and November 10, 2020, Sea Point's consultant and DEP staff exchanged numerous emails concerning whether, and in what manner, public access to the shoreline on and across the Property might be required as a condition of the Waterfront Development Permit. The correspondence expressed competing opinions about what was required by the Public Access Statute. Aa0014-39.

By letter dated October 5, 2020, Sea Point's agent detailed why, from Sea Point's perspective, public access across the Property is not required under the Public Access Law. Aa0011-13. Sea Point's agent noted, among other things, that the original owner and developer of the development dedicated a 12.93 acre open space parcel of land, the Slade Dale Sanctuary, immediately adjacent to Sea Point's property to the Borough of Point Pleasant as a condition of site plan approval. Aa025. Sea Point's agent also pointed out that demand for public access in the area is satisfied not only by the Slade Dale Sanctuary, but also by the publicly owned "Dorsett Dock Wharf" located immediately west of the Sanctuary.<sup>1</sup> Aa0011.

---

<sup>1</sup> 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

By e-mail dated November 4, 2020, Sea Point's agent informed DEP that 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. Aa0020.

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

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

On November 24, 2020, Sea Point submitted a hearing request challenging Pre-Construction Condition #1. Aa0043-46. On the same date, 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

---

owned public access point that is available to "anyone wishing to enjoy fishing, kayaking, or other recreational activities."). Aa0040-42.

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 (slip op., at 7-9). 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. Sea Point thereafter filed a timely Notice of Petition for Certification with this Court. Pt1.

## **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)?

## **THE REASONS WHY CERTIFICATION SHOULD BE ALLOWED<sup>2</sup>**

### **POINT I**

**CERTIFICATION IS WARRANTED SO THAT THIS COURT MAY ADDRESS AND CLARIFY A QUESTION OF GENERAL PUBLIC IMPORTANCE REGARDING THE SCOPE AND APPLICATION OF THE PUBLIC ACCESS STATUTE, N.J.S.A. 13:1D-150 TO -156, INCLUDING THE CRITICAL QUESTION OF WHETHER THE STATUTE CODIFIED THE PUBLIC TRUST COMMON LAW OR ABROGATED THE PUBLIC TRUST COMMON LAW**

#### **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").

---

<sup>2</sup> Pursuant to R. 2:12-7(a) and in the interest of avoiding unnecessary repetition, the "Errors Complained Of" and "Comments on the Appellate Division Opinion" are incorporated into this section.

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 century 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 (the remaining beach frontage was all privately owned). In an effort to prevent non-residents from using the beach, the Borough of

Bay Head sold the land comprising the street ends to the adjoining property owners. Control of the street ends was then turned over to the "Bay Head Improvement Association," a quasi-public organization. Access to the beach via the street ends was thereafter restricted to Borough residents. Id. at 314, 326-27.

This Court -- citing the quasi-governmental nature of the Improvement Association and prior case law prohibiting municipalities from excluding non-residents from using publicly owned land to gain access to the beach -- determined for the first time that the general public had a right to traverse privately owned property when to do so was "*essential or reasonably necessary for the enjoyment of the ocean.*" Id. at 325.

The Matthews Court recognized that requiring public access on or across private property is an extraordinary remedy and should be invoked only in limited cases. To that end, the Court identified four factors to be considered before requiring a private party to allow public access on or across their property: (1) the location of the privately owned upland area (referred to in the decision as the "dry sand area") in relation to the public trust lands; (2) the extent and availability of publicly owned points of access in the vicinity of the property in question; (3) the nature and extent of public demand for access in the area; and (4) the manner in which the privately owned upland area is used by the owners. Id. at 326. In other words, the Matthews decision provides the template for determining when public

access across private property might be required, but nothing more.

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 critically 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.<sup>3</sup> See Raleigh Avenue, 185 N.J. at 59-60.

The Matthews and Raleigh Avenue decisions reflect the state of Public Trust Doctrine in New Jersey as it applied to the use of private property when the Public Access Law 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").

---

<sup>3</sup> Significantly, Petitioner Sea Point is exclusively a residential property.

The Legislature’s purpose in enacting the Public Access Statute – to codify 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 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.*” (emphasis added).<sup>4</sup>

**C. The decision of the Appellate Division below holding 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.”**

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. The Legislature said so not once but multiple times in the statute. See N.J.S.A. 13:1D-153a (providing that

---

<sup>4</sup> An additional source of legislative history is the Report to Senator Robert Smith from the Public Access Task Force dated April 2016 (hereafter “Report”). Aa0142-171. 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.*” Aa0149. (emphasis added).

“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-150e (providing that “[t]he Department of Environmental Protection has the authority and the duty to protect the public's right of access to tidally flowed waters and their adjacent shorelines *under the public trust doctrine* and statutory law”<sup>5</sup>); N.J.S.A. 13:1D-150d (stating that “[p]ursuant to the *public trust doctrine*, the State of New Jersey has a duty to promote, protect, and safeguard the public's rights and ensure reasonable and meaningful public access to tidal waters”); N.J.S.A. 13:1D-150c (declaring 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.”).

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 (slip op., at 7-

---

<sup>5</sup> The above reference to “statutory law” is properly understood as encompassing the numerous pre-existing New Jersey statutes that govern access 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 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.

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 (slip op., at

9). The court concluded, “[h]ad the Legislature intended the Matthews test to govern these determinations, it would have said so explicitly.” Pt10 (slip op., at 9).

This was error.

As previously noted, this Court in Matthews identified the following 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. Matthews v. Bay Head Improvement Ass'n, *supra*, 95 N.J. at 326. Thus, the Matthews decision provides the template for determining when public access across private property would be required. In the proceedings below, DEP declined to apply the Matthews standard.

The Appellate Division’s interpretation of the Public Access Statute has significant implications for the development and maintenance of many hundreds of miles of tidal lands in this State – as well as to the fundamental rights of tidal-

adjacent property owners to exclude others from their property. Certification is warranted so that this Court may address and clarify the question of general public importance regarding the scope and application of the Public Access Statute, N.J.S.A. 13:1D-150 to -156, including the critical question of whether the Statute codified the public trust common law or abrogated the public trust common law.

## POINT II

**IN THE ALTERNATIVE, CERTIFICATION IS WARRANTED SO THAT THIS COURT MAY ADDRESS AND CLARIFY A QUESTION OF GENERAL PUBLIC IMPORTANCE AS TO WHETHER THE PUBLIC TRUST 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 "ESSENTIAL NEXUS" REQUIREMENT OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE RECOGNIZED BY THE UNITED STATES SUPREME COURT.**

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 – on its face – 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 Matthews test – amounts to an

unconstitutional taking of property without just compensation. See U.S. Const. amend. V; N.J. Const. art. I, ¶ 20.

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, 512 U.S. 374, 384 (1994). At issue here is that most “essential stick” – the right to exclude others from one’s property.

In Nollan v. California Coastal Commission, 438 U.S. 825 (1987), the owners of a beachfront property between two public beaches sought a development permit from the California Coastal Commission 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, 512 U.S. 374 (1994), 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.

Applying the Nollan/Dolan 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. In other words, this statutory mandate -- on its face -- runs afoul of the Nollan/Dolan “essential nexus” test of the unconstitutional conditions doctrine.

Turning to our case: The Appellate Division below declined to address the merits of Sea Point’s Takings Claim. Pt15-16 (slip op., at 14-15). The court 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. However, 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.”).

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.<sup>6</sup>

And not only is this matter ripe, it plainly entails a question of significant public importance involving the constitutionality of a statute affecting hundreds of miles of this State's coastline and tidal waterways. Certification is warranted.

### CONCLUSION

For the reasons set forth above, it is respectfully submitted that Petitioner Sea Point's petition for certification should be granted.

---

<sup>6</sup> With regard to Sea Point's *facial* challenge to the Statute, the Appellate Division 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 (slip op., at 14). However, that is no impediment to *this Court's consideration* of Sea Point's facial Takings Claim – which (as a pure question of law) can and should be heard by this Court. As noted in the text above, 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." Englewood Hosp. & Med. Ctr. v. State, *supra*, 478 N.J. Super. at 642.

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*, questions of law (as here) involving a facial takings claim can and should be heard by the Appellate Division (as well as this Court). See Englewood Hosp., *supra*, 478 N.J. Super. at 642; see also New Jersey Civil Serv. Ass'n v. State, 88 N.J. 605, 613 (1982) ("We have frequently held that in a case involving only legal questions, the doctrine of exhaustion of administrative remedies does not apply").

Respectfully submitted,

**CULLEN AND DYKMAN LLP**  
Attorneys for Petitioner

By: /s/ Neil Yoskin  
Neil Yoskin

Dated: October 27, 2025

**R. 2:12-7(a) CERTIFICATION**

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

**CULLEN AND DYKMAN LLP**  
Attorneys for Petitioner

By: /s/Neil Yoskin  
Neil Yoskin

Dated: October 27, 2025