

**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**

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**REPLY BRIEF OF  
PETITIONER-APPELLANT  
SEA POINT CONDOMINIUM ASSOCIATION, INC.  
IN FURTHER SUPPORT OF ITS PETITION FOR CERTIFICATION**

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## LEGAL ARGUMENT

### POINT I

#### **UNDER SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION, THE APPELLATE DIVISION’S INTERPRETATION OF THE PUBLIC ACCESS STATUTE – AS ABROGATING RATHER THAN CODIFYING THE COMMON LAW PUBLIC TRUST DOCTRINE -- IS INCORRECT AS A MATTER OF LAW**

By its brief in opposition to certification, DEP contends that the Appellate Division correctly held that the Public Access Statute did *not* codify the common law public trust doctrine. DEP Opp. Br., at 16. This is so, according to DEP, because “had the Legislature intended the Matthews<sup>1</sup> test to govern these determinations, *it would have said so explicitly.*” Id., at 16 (quoting Pt10) (emphasis added). In other words, the Legislature’s purported “silence” (ibid.) with regard to the question of the codification of the common law embodied in the Matthews decision is sufficient to support the conclusion that the Legislature did not intend to codify the common law public trust doctrine.

However, DEP’s contentions are incorrect as a matter of law. This is so for four reasons.

#### **A. 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 and DEP’s determination, the

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<sup>1</sup> The Matthews test is set forth in this Court’s landmark public trust doctrine decision in Matthews v. Bay Head Improvement Association, 95 N.J. 306 (1984).

Legislature was not “silent” with regard to its intention to codify the common law public trust doctrine. Instead, 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 (providing 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-150e (providing that “[DEP] [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>2</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.”).

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<sup>2</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., and the “Flood Hazard Area Control Act,” N.J.S.A. 58:16A-50 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.

**B. 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. 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) this rule of statutory construction cuts directly against the Appellate Division’s determination that the Legislature was required to *expressly adopt the Matthews common law doctrine* in order to avoid a judicial finding of the abrogation of the Matthews common law doctrine.**

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 -- 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. But the Appellate Division’s legal determination is precisely upside down.

As more fully set forth in our opening brief, 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). 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, legislative “silence” – with regard to the adoption of this Court’s decision in Matthews – is not, and cannot be, dispositive with regard to the question of statutory construction here presented. The White/Blackman rule of statutory construction cuts directly against the Appellate Division’s determination that the Legislature was required *to expressly adopt the Matthews common law doctrine* in the text of the statute in order to avoid a judicial finding of the abrogation of the Matthews common law doctrine. Under the White/Blackman rule, mere legislative “silence” to re-confirm the common law can never be a reason for a court to abrogate the common law.

**C. Remarkably, DEP contends 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, DEP states: "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 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 Point IA, supra.<sup>3</sup>

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<sup>3</sup> 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 DEP's view is 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 expressly

**D. 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 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

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so stating, 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.

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. Aa0142-171. 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.*” Aa0149. (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.

## **POINT II**

**CONTRARY TO DEP’S CONTENTION, PETITIONER’S FACIAL CHALLENGE OF THE PUBLIC TRUST STATUTE: (1) IS RIPE FOR ADJUDICATION BY THIS COURT; AND (2) RAISES A SUBSTANTIAL QUESTION OF PUBLIC IMPORTANCE REGARDING THE FACIAL CONSTITUTIONALITY OF THE PUBLIC ACCESS STATUTE UNDER THE UNCONSTITUTIONAL CONDITIONS DOCTRINE.**

Petitioner’s facial challenge to the constitutionality of the Public Access Statute is presented assuming, arguendo, that the Public Access Statute did *not* codify the common law but rather abrogated it and superseded it. In that event, the Public Access Statute – on its face – is constitutionally infirm.<sup>4</sup>

By its brief in opposition to certification, DEP makes two arguments with regard to Petitioner’s facial challenge of the Public Trust Statute. First, DEP argues that Petitioner’s facial challenge is not ripe for adjudication by this Court. Second,

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<sup>4</sup> Importantly, 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). 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/Dolan 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 doctrine.

DEP argues that Petitioner has failed to state a constitutional claim (under the Nollan/Dolan “unconstitutional conditions” doctrine) on the merits. Neither of DEP’s arguments withstand scrutiny.

Although DEP contends that Petitioner did not facially challenge the statute below, 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 (slip op., at 14). Therefore, the Appellate Division’s objection to Petitioner’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 tribunals below lacked jurisdiction to consider the facial challenge.<sup>5</sup>

With regard to the merits: Petitioner’s facial claim challenges 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*

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<sup>5</sup> In any event, as discussed in the Petition, the lack of jurisdiction of the administrative tribunals below to a facial challenge to the Public Access Statute was no bar to the *Appellate Division*’s consideration (or to this Court’s consideration) of the constitutional question. See Englewood Hosp. & Med. Ctr. v. State, 478 N.J. Super. 626, 642 (App. Div. 2024) (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.”).

*a structure.*” A facial challenge is warranted – because under no scenario can this statutory language be sustained.

As more fully discussed in the Petition, the United States Supreme Court’s decision in Nollan 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 v. California Coastal Commission, 438 U.S. 825, 841 (1987). The Court in Nolan 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 – which facially **requires** “additional public access” to private waterfront property based merely on a “change in the existing footprint of a structure” -- is no less unconstitutional than the permit in Nollan. The foregoing plainly raises a question of significant public importance involving the constitutionality of a statute affecting hundreds of miles of this State’s coastline. 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.

Respectfully submitted,

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By: /s/ Neil Yoskin  
Neil Yoskin

Dated: November 14, 2025