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November 5, 2025

VIA ELECTRONIC FILING

Heather Joy Baker
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
P.O. Box 970
Trenton, NJ 08625-0970

Re: Kevin Moran, c/o Sea Point Condominium Association, Inc., v.
New Jersey Department of Environmental Protection, Land Use
Regulation
Docket No. 091188
Appellate Division Docket No. A-0804-23

Civil Action: On Petition for Certification from the Superior
Court, Appellate Division

Sat Below: Hon. Morris Smith, J.A.D.

Hon. Christine M. Vanek, J.A.D.

Letter Brief on Behalf of Respondent New Jersey Department of
Environmental Protection in Opposition to Petition for
Certification

Dear Ms. Baker:

Please accept this letter brief on behalf of Respondent New Jersey
Department of Environmental Protection (DEP) in opposition to the petition for
certification filed by Petitioner Kevin Moran, c/o Sea Point Condominium



Association, Inc. (Sea Point). DEP also submits its merits brief filed in the Appellate Division.

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PRELIMINARY STATEMENT

This case centers on the 2019 Public Access Law, N.J.S.A. 13:1D-140 to -156 (“Public Access Law” or “Law”), as applied by DEP to Sea Point’s proposed waterfront project. Sea Point sought a permit in 2020 under the Waterfront Development Law, N.J.S.A. 12:5-3, and Coastal Zone Management (CZM) Rules, N.J.A.C. 7:7-1.1 to -29.10. Because Sea Point expanded its development footprint along tidal waters of the State by pushing its land area

waterward, including certain development that Sea Point had completed without DEP approval, the application sought to permit and legalize various private, in-water structures. Given the incursion into tidal waters of the State, the plain terms of the Public Access Law required Sea Point to provide public access on its property. The Appellate Division analyzed the Law in relation to Sea Point's claims, applying settled interpretation principles, and upheld DEP's permit condition requiring Sea Point to provide additional public access.

Sea Point has identified no basis for this Court to grant certification. Sea Point disagrees with every tribunal's interpretation of the Public Access Law, but offers no justification for this Court's intervention. Sea Point rehashes its arguments raised below without disputing any specific findings or conclusions of the Appellate Division. The controlling question is whether the Appellate Division's independent review of the Law using settled interpretation principles deserves further inquiry by this Court. The answer is no.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

DEP regulates development of the waterfront, such as docks, piers, and bulkheads, under the Waterfront Development Law. N.J.S.A. 12:5-3(a). Any

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

development that occurs without DEP approval violates the statute. N.J.S.A. 12:5-6(a). DEP regulates use and development of the State's coastal resources, including the waterfront, through the CZM rules, which are used to review coastal permit applications in accordance with the legislative goals and standards of the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to -51, the Wetlands Act of 1970, N.J.S.A. 13:9A-1 to -10, and the Waterfront Development Law. N.J.A.C. 7:7-1.1(a). Specifically relevant here, a bulkhead replacement waterward of the mean high-water line requires a permit. N.J.A.C. 7:7-2.4(d)(6); N.J.A.C. 7:7-2.4(c)(2).

The public trust doctrine refers to the common-law principle that a state holds “in trust for the people” ownership, dominion and sovereignty over tidally flowed lands extending to the mean high-water mark. Susko v. Borough of Belmar, 458 N.J. Super. 583, 590 (App. Div. 2019); Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 326 (1984).² The Legislature built upon the common law public trust doctrine in the 2019 Public Access Law, which requires DEP to impose public access requirements on any permit it issues

² The Matthews decision provided four factors to consider in determining whether common law public access is required on private property: (1) the location of the dry sand area in relation to the foreshore; (2) extent and availability of publicly owned upland sand area; (3) nature and extent of public demand; and (4) usage of the upland sand land by the owner.

“consistent with the public trust doctrine.” N.J.S.A. 13:1D-151(a). The Public Access Law recognizes the public’s “longstanding and inviolable rights . . . to use and enjoy the State’s tidal waters and adjacent shorelines” and that those rights are “not fixed or static” but must be “molded and extended to meet changing conditions and the needs of the public it was created to benefit.” N.J.S.A. 13:1D-150(a) and (c). The Law entrusts DEP with the “authority and the duty to protect the public’s right of access to tidally flowed waters and their adjacent shorelines,” requiring DEP to “make all tidal waters and their adjacent shorelines available to the public to the greatest extent practicable.” N.J.S.A. 13:1D-150(e).

Key here, the Public Access Law requires that permits for projects, wherein the applicant proposes “a change in the existing footprint of a structure,” must include a permit condition which requires “additional public access to the tidal waters and adjacent shorelines consistent with the public trust doctrine” N.J.S.A. 13:1D-153(a) (emphasis added). The following factors are then used to determine the extent of access required: “the scale of the changes to the footprint or use, the demand for public access,” and any DEP-approved municipal public access plans. N.J.S.A. 13:1D-153(a). The Law contains no exceptions for projects that “change. . . the existing footprint of a

structure” and instead dictates that DEP “shall require as a condition of the permit . . . that additional public access to the tidal waters and adjacent shorelines . . . be provided.” *Ibid.* (emphasis added). In short, once an applicant changes a waterfront structure’s footprint, additional public access is required.

Sea Point is a homeowners’ association that owns a twenty-four-unit condominium development surrounding a boat basin on the north branch of Beaver Dam Creek in Point Pleasant Borough (the “Property”). (Aa80; Aa116; Ra2).³ The Property includes three two-story residential buildings, a swimming pool, walkways, driveways, parking lots, landscaping, two paved cul-de-sacs with parking spaces, and a boat basin with slips, finger piers, and mooring piles used exclusively by condominium residents. (Aa116; Ra2; Ra36; Ra44; Ra48). Though the public can reach the water through access points nearby, Sea Point has not permitted public access to its waterfront since the Property was developed as condominiums. (Ra3; Ra196).

On July 14, 2020, Sea Point applied for a permit to reconstruct a deteriorated bulkhead. (Ra2; Ra10). Sea Point proposed to replace 750 feet of

³ “Ab” refers to Sea Point’s merits brief filed in the Appellate Division; “Aa” refers to Sea Point’s appendix filed in the Appellate Division; and “Ar” refers to Sea Point’s reply brief filed in the Appellate Division. “Pb” refers to Sea Point’s amended Petition for Certification, and “Pt” refers to Sea Point’s Petition Appendix. “Ra” refers to DEP’s appendix filed in the Appellate Division.

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bulkhead twenty-four inches waterward of the existing structure, reconstruct 126 feet of bulkhead in the same footprint, and obtain after-the-fact authorization of twenty-two finger piers and forty-seven mooring piles totaling 478.2 square feet which had been constructed in the boat basin without a permit and were not available for public use. (Ra2; Ra13; Ra35; Ra195; Ra205). During the permit review process, DEP asked Sea Point to submit a public access proposal for the Property pursuant to the Public Access Law. (Aa119; Ra4–7). Sea Point disputed the requirement, instead noting that public access already existed at nearby locations, such as Slade Dale Sanctuary and Dorsett Dock Road,⁴ and attempted to satisfy any additional public access requirement by offering a monetary contribution to a nearby public access improvement project. (Ra5–6).

Ultimately, the parties could not agree on a public access proposal for the Property. Ibid. Rather than deny the application, on November 10, 2020, DEP issued the permit with a condition requiring Sea Point to provide an onsite public access plan before commencing construction and to construct any approved public access project either before or at the same time as the authorized

⁴ Sea Point cites to an undated press release concerning Dorsett Dock Road improvements to support its position that public access is satisfied (Pb4; Ab3; Aa40-42), which was not part of the record below and should be disregarded. R. 2:5-4(a).

waterfront development. (Aa1–2; Aa120; Ra7). Sea Point challenged the public access permit condition through a hearing before the Office of Administrative Law (“OAL”). (Aa86). At Sea Point’s request, DEP allowed Sea Point to begin reconstructing the bulkhead while reserving DEP’s right otherwise to require compliance with the disputed permit condition. (Ra8–9; Ra191; Ra193).

In the OAL, the parties filed cross-motions for summary decision with a Joint Stipulation of Facts. (Aa80; Ra1–196). Sea Point offered a number of theories, principle among them that the Public Access Law requires DEP to apply the four-factor Matthews test to determine whether Sea Point must provide public access. (Aa56–62). Sea Point also raised a constitutional taking claim, without clarifying whether its claim was as-applied or facial, arguing under the as-applied standard that there was an insufficient nexus between DEP’s public access requirement and the permitted expansion. (Aa76–77).

On October 5, 2022, Administrative Law Judge (“ALJ”) Dean Buono issued an Initial Decision denying Sea Point’s motion and granting the DEP’s motion, finding that Sea Point’s development would change the existing footprint of a structure on the Property, thus triggering the Public Access Law’s additional public access requirement. (Pt44–69; Aa79–114); Kevin Moran, c/o Petitioner Condo. Ass’n, Inc. v. N.J. Dep’t of Env’t Prot., No. ELU 04852-21,

2022 N.J. AGEN LEXIS 797 (October 5, 2022) (“Initial Decision”). ALJ Buono found that the plain language of the Law supported DEP’s decision to impose the public access permit condition and no genuine issue of material fact existed. (Pt60; Aa95). In addition, without deciding whether the OAL had jurisdiction over Sea Point’s constitutional claim, ALJ Buono determined that an as-applied challenge was premature because DEP had not yet determined the extent of required public access. (Pt67; Aa102).

On October 6, 2023, DEP Commissioner Shawn LaTourette issued a Final Decision concluding that the ALJ properly granted summary decision to the DEP. (Aa115–40); Kevin Moran, c/o Sea Point Condo. Ass’n, Inc. v. N.J. Dep’t of Env’t Prot., No. ELU 04852-21, 2023 N.J. AGEN LEXIS 621 (October 6, 2023) (“Final Decision”). The Commissioner concurred with the ALJ that the project “falls squarely within the scope of activities that require additional onsite public access as a condition of receiving a permit.” (Aa134). The Commissioner described the DEP’s duty under the Law as “wide in scope” and requires DEP to make access to the tidal waters and shores available “to the greatest extent practicable,” which includes not only “visual and physical access” but also “sufficient perpendicular access from upland areas to tidal waters and adjacent shorelines, and the necessary support amenities to facilitate

public access for all,” like parking and restrooms. (Aa127, citing N.J.S.A. 13:1D-150(e) and (f)). To effectuate these goals, the Legislature not only “codified the essence and fundamentals of the public trust doctrine” in the Law, but also “codified new public trust requirements to be triggered under specified circumstances” that “differ in part from those previously set forth in the common law public trust doctrine.” (Aa128). Thus, rejecting Sea Point’s “fundamental premise” that the Law only codifies the public trust doctrine, the Commissioner found “the plain language” of the Law “clearly indicates that the Legislature did in fact intend to expand upon the public trust doctrine.” (Aa130). The Commissioner also agreed that Sea Point’s as-applied takings claim was premature because DEP had not yet determined the extent of public access required. (Aa139). The Commissioner further determined that to the extent Sea Point brought a facial constitutional taking claim, the OAL lacked jurisdiction to adjudicate such a claim. (Aa139–40).

On November 14, 2023, Sea Point appealed the Final Decision. On appeal, Sea Point again offered, among other theories, that the Public Access Law requires DEP to apply the four-factor Matthews test to determine whether to impose a public access requirement here. (Pt8). Sea Point also again argued DEP’s public access requirement amounts to a constitutional takings claim, and

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clarified that it was bringing an as-applied, as opposed to facial, challenge. (Ab36–38; Ar22 (“Sea Point is not challenging the constitutionality of the Public Access Law, but rather DEP’s implementation of the Law under the circumstances presented” in its “as-applied takings claim”)).

On August 20, 2025, the Appellate Division affirmed the final agency decision “substantially for the reasons expressed” by the Commissioner. (Pt8). Applying the well-established de novo standard, the Appellate Division properly concluded that “[t]he legislature’s choice to create specific criteria for public access determinations, coupled with its silence regarding Matthews, demonstrates its clear legislative intent that Matthews does not control public access determinations under the Public Access Law.” (Pt8–10). Specifically, the Appellate Division noted that the Law “establishes comprehensive criteria for determining when public access is required” under N.J.S.A. 13:1D-153(a) and “imposes a mandatory duty on the DEP to review existing public access and require additional access consistent with the public trust doctrine when certain application relief is sought.” (Pt9–10). The Appellate Division further noted the factors the Law sets at N.J.S.A. 13:1D-153(a) to determine the public access required, and found that “had the Legislature intended the Matthews test to govern these determinations, it would have said so explicitly.” (Pt10).

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Accordingly, the Appellate Division was “not persuaded that the phrase ‘consistent with the public trust doctrine’ expressly incorporates the Matthews four-part test,” but rather that “the legislature meant to ensure that DEP aligns any public access” required “with the public’s well-settled right to access the tidal waters and adjacent shorelines of our state.” (Pt10).

The Appellate Division also correctly rejected Sea Point’s as-applied constitutional claim. (Pt15). Specifically, it noted that DEP had not issued a final decision on the extent of public access required, and until DEP has done so, any as-applied taking challenge remains premature and unripe for review. (Pt15–16). Additionally, the Appellate Division properly noted that, to the extent Sea Point raises a facial constitutional challenge—though Sea Point did not brief one—“neither the Office of Administrative Law nor the DEP possesses jurisdiction to adjudicate such claims.” (Pt15 (citing D.L. v. Bd. of Educ. of Bridgewater-Raritan Reg’l Sch. Dist., 176 N.J. 568, 583 (2003))). This petition for certification followed.

ARGUMENT

THE COURT SHOULD DENY CERTIFICATION BECAUSE THIS CASE PRESENTS NO SPECIAL REASON FOR ADDITIONAL REVIEW

This Court will grant a petition only for “special reasons.” R. 2:12-4.

Certification should not be granted if the case does not “present an unsettled question of general public importance.” In re Contract for Route 280, Section 7U Exit Project, 89 N.J. 1, 1 (1982). If the lower court’s decision “reflect[s] the application of established principles” of law “to an intensely factual situation,” certification is not warranted. Bandel v. Friedrich, 122 N.J. 235, 237 (1991); see also Fox v. Woodbridge Twp. Bd. of Educ., 98 N.J. 513, 516 (1985) (O’Hern, J., concurring) (certification not warranted when the lower court’s judgment “is essentially an application of settled principles to the facts of this case”). Likewise, though this Court reviews cases “in the interest of justice,” review is not warranted when the result “is not palpably wrong, unfair or unjust.” Mahony v. Danis, 95 N.J. 50, 52 (1983) (Handler, J., concurring). And, finally, certification should not be granted where the decision below “does not present a conflict among judicial decisions that requires clarification or calls for this Court’s supervision.” In re Contract for Route 280, 89 N.J. at 2.

A. The Law Does Not Codify Matthews v. Bayhead (Responding to Petitioner’s Point I)

Sea Point first contends that this Court must decide whether the Public Access Law codified the four-factor test under Matthews. (Pb7–15). Specifically, Sea Point again relies on its own interpretation of the words “consistent with the public trust doctrine” to signify codification of Matthews

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(Pb11–16), despite: (1) the Law’s silence as to Matthews; (2) the Law’s use of the phrase “[DEP] shall require as a condition of the permit . . . that additional public access . . . be provided”; and (3) the Legislature’s choice to create specific criteria for public access determinations. See N.J.S.A. 13:1D-153(a) (“in determining the public access that is required” DEP “shall consider the scale of the changes to the footprint or use, the demand for public access, and any department-approved municipal public access plan.”). Sea Point asserts only that the Appellate Division’s interpretation “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.” (Pb15–16).

However, Sea Point fails to satisfy any of the criteria for certification. Sea Point identifies no genuine conflict of case law on the subject. See In re Contract for Route 280, 89 N.J. at 2. Rather, the Appellate Division’s decision correctly applied “established principles” of law and regulations to the particular facts of this case, making it squarely the type of petition that warrants denial. Fox, 98 N.J. at 516. It first applied this Court’s familiar standard granting administrative agencies “substantial deference” in their interpretation of an act they are charged with enforcing to find that DEP properly included a permit condition requiring

Sea Point to provide additional public access. (Pt7–8). It also applied the general statutory construction standard by starting with an analysis of the plain language of the statute, which it found unambiguous. (Pt9–10).

DEP correctly imposed the public access condition and the Appellate Division properly found that Commissioner’s Final Decision affirming the permit requirement is owed deference and should be upheld. The record contains ample evidence to support the DEP’s determination that Sea Point’s project is subject to the Law, and Sea Point failed to meet its burden of proof to show that DEP’s decision was unreasonable. Under Sea Point’s theory, the phrase, “consistent with the public trust doctrine,” allows DEP to impose public access only after considering the four-factor test in Matthews for determining when public access is required across private property under the common law. This interpretation was rejected by the ALJ, the Commissioner, and the Appellate Division. Specifically, the ALJ determined that the plain language of the Law supported DEP’s decision to impose the public access permit condition. (Pt60; Aa95). The Commissioner agreed that the project “falls squarely within the scope of activities that require additional onsite public access as a condition of receiving a permit” and found “the plain language” of the Law “clearly indicates that the Legislature did in fact intend to expand upon the public trust

doctrine.” (Aa130, 134).

Then, applying a de novo standard as to whether the plain language of the Public Access Law codified the Matthews test, the Appellate Division properly concluded that “[t]he legislature’s choice to create specific criteria for public access determinations, coupled with its silence regarding Matthews, demonstrates its clear legislative intent that Matthews does not control public access determinations under the Public Access Law.” (Pt8–10). The court further found that “had the Legislature intended the Matthews test to govern these determinations, it would have said so explicitly.” (Pt10). Thus, the court sensibly found it was “not persuaded that the phrase ‘consistent with the public trust doctrine’ expressly incorporates the Matthews four-part test,” but rather concluded that “the legislature meant to ensure that DEP aligns any public access it may require of a permit applicant with the public’s well-settled right to access the tidal waters and adjacent shorelines of our state.” (Pt10). And 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. (Compare Pt9 with Pb12–13). On this record, the Appellate Division correctly applied settled interpretation principles to the particular facts of this case, and no further review by this Court is necessary.

B. Any Facial Constitutional Challenge Fails (Responding to Petitioner's Point II)

Next, Sea Point appears to modify its constitutional claim for the first time in this protracted litigation from an as-applied challenge to the Public Access Law to a facial challenge. (Pb16–20). Sea Point solely relies on the Nollan/Dolan doctrine, which both analyze as-applied takings claims when a development permit condition is not sufficiently related to the substance and extent of the development permit issued. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (holding there must be a substantial nexus between required public access and proposed development to overcome as-applied taking challenge); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (similar). The ALJ, the Commissioner, and the Appellate Division rejected Sea Point's as-applied takings claim as premature, and the Commissioner and Appellate Division noted that, to the extent Sea Point's claim may be interpreted as a facial challenge, neither the OAL nor DEP had jurisdiction to adjudicate such a claim. (Aa102; Aa139–40; Pt15–16; Pt67). Sea Point acknowledges as much, and asserts that this court should decide its facial constitutional challenge, although

no such claim was briefed below. (Pb19).⁵ Sea Point’s belated claim does not warrant review here for the following reasons.

First, Sea Point raises its facial constitutional challenge for the first time at this juncture. This Court has repeatedly declined to consider arguments not raised below. See J.K. v. N.J. State Parole Bd., 247 N.J. 120, 138 n.6 (2021) (quoting State v. Robinson, 200 N.J. 1, 19 (2009) (“we have recognized that if we allowed ‘late-blooming issues . . . to be raised for the first time on appeal, this would be an incentive for game-playing by counsel, for acquiescing through silence when risky rulings are made . . . unveiling them as new weapons on appeal”) (first alteration in original). Because Sea Point failed to raise this issue below, this Court should decline certification on that reason alone.

Even if this Court elected to address the facial takings claim, Sea Point fails to support a facial constitutional issue here. For a facial challenge, in New Jersey, a statute is “presumed constitutional and . . . ‘is not facially unconstitutional if it operates constitutionally in some instances.’” Whirlpool

⁵ Sea Point further asserts that OAL and DEP’s lack of jurisdiction over a facial constitutional claim “was no bar to the Appellate Division itself (let alone this Court) adjudicating the facial constitutional claim,” despite Sea Point’s clarification to the Appellate Division that it raised an as-applied challenge. (Pb20 n.6; Ar22 (clarifying that “Sea Point is not challenging the constitutionality of the Public Access Law, but rather DEP’s implementation of the Law under the circumstances presented” in its “as-applied takings claim”)).

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Props., Inc. v. Dir., Div. of Tax'n, 208 N.J. 141, 175 (2011) (quoting GMC v. City of Linden, 150 N.J. 522, 532 (1997) (additional citations omitted). Sea Point has not attempted to meet this standard, and instead relies on the same arguments and distinguishable caselaw it raised below that pertain to as-applied takings claims, where public access permit conditions had already been implemented. (Pb16–20). Nonetheless, Sea Point could not meet the requisite standard because the Law does not create an unconstitutional taking with every public access condition imposed, particularly given the public trust doctrine's own non-discriminatory underpinnings. See e.g., Van Ness v. Borough of Deal, 78 N.J. 174, 180 (1978) (municipality cannot restrict beach use to municipality residents under public trust doctrine). As the caselaw on which Sea Point relies demonstrates, the Supreme Court recognized that, depending on the circumstances of the particular development and the extent of public access required, public access does not necessarily create an unconstitutional taking. See, e.g., Dolan, 512 U.S. at 393. There are several scenarios in which the Law may be applied constitutionally, such as a permit condition requiring a waterfront condominium development to provide perpendicular access to the waterfront, so long as the extent of access is roughly proportional to the impact of the development. Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.,

185 N.J. 40, 43 (2005). Therefore, Sea Point’s facial constitutional challenge must fail.

Finally, this facial challenge fails to satisfy any of the certification criteria. As Sea Point raises this facial claim for the first time here, Sea Point fails to show that the Appellate Division’s decision is “palpably wrong, unfair, or unjust.” Mahony, 95 N.J. at 52. Sea Point also fails to demonstrate how its claim presents an unsettled question of general public importance. In re Contract for Route 280, 89 N.J. at 1. And Sea Point, once more, identifies no genuine conflict of case law on the subject. Id. at 2. The Appellate Division’s sound decision does not warrant certification.

CONCLUSION

For these reasons, the petition to review the decision should be denied.

Respectfully submitted,

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