Penn State Environmental Law Review

Volume 13 | Number 2 Article 2

6-1-2005

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Recommended Citation

Robert Polis & Leslie MacRae, *Back to the Beach: Will It Ever Be Safe to Buy Dry Sand Again*, 13 *Penn St. Envtl. L. Rev.* 147 (2005).

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ARTICLE

Back to the Beach: Will It Ever Be Safe to Buy Dry Sand Again?

Robert Polis* and Leslie MacRae**

I. Introduction

On June 22, 2002, an estimated 250 people congregated on the New Jersey shore in a tiny community known as Diamond Beach.[1] Carrying

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* Robert A. Polis II would like to thank Professor Leslie Macrae not only for all his guidance during the research and writing of this article, but also for his support and encouragement while he was a law student at Dickinson.

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Mr. Polis is a graduate of the Dickinson School of Law of the Pennsylvania State University (J.D. 2003) and the College of William and Mary (B.A. History, 2000) and has been a lifelong resident of the Jersey Shore area. Coincidentally, he grew up in Wildwood Crest and spent his summers preparing for high school cross-country and track by running on the beaches adjacent to the Atlantis Beach Club. However, unlike many of the protesters residing in Diamond Beach, he never seemed to have a problem accessing the five miles of free public beaches adjacent to the Beach Club.

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American flags and singing "God Bless America," this group of people was protesting what it believed was the deprivation of one of the most fundamental rights of a citizen of New Jersey.[2] They were not being deprived of the right to carry a gun. They were not protesting the denial of school prayer. They were protesting the denial of their most prized right: the right to recreate on someone else's property.[3] The assembled throng (not thong) was well-prepared for its protest.[4] The people were planning to lay siege to the property that they believed they had a right to seize and use as they saw fit.[5] They even had a powerful ally in the New Jersey Attorney General.[6]

The crowd was armed. It was well-fortified with beach chairs, suntan lotion, and boom boxes.[7] This crowd was ready to take back the dry sand area of the beach that the Atlantis Beach Club Enterprise (Atlantis Beach Club) was foolish enough to believe it owned.[8] The Atlantis Beach Club's policies force beachgoers to go six blocks out of their way to reach the beach.[9] The Atlantis Beach Club limits beach access to club members who are charged as much as $700 annually for the privilege of using the beach.[10] The $700 fee was a $400 increase from the previous year's fees.[11] The increase in fees was the proverbial straw. Relying on a modern interpretation of an ancient doctrine, the outraged former members decided to reclaim their purported heritage.[12]

The Public Trust Doctrine is as old as the United States and is even older than the colony of New Jersey.[13] In fact, the doctrine originated in ancient Rome and migrated to New Jersey through England.[14] The rather well-behaved crowd at Diamond Beach was attempting to utilize a very modern and unique interpretation of the public trust to gain access to the wet and dry sands on the Atlantis Beach shore.[15] Lost on the protesters

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Generals' offices from 1977-1981. He received an LL.M. degree in Legal Education from Temple Law School in 1983. From 1983 to the present he has taught at Dickinson.

1. Richard Degener, *Two Sides of the San/Cape May County Protestors Cite N.J. Constitution in Beach Dispute*, THE PRESS OF ATLANTIC CITY, June 23, 2002, at 1, A-9.
2. *Id.* at 1.
3. *Id.*
4. *Id.* at 1.
5. *Id.* at A-9.
6. *Id.*
7. *Id* at 1.
8. *Id.* at A-9.
9. *Id.*
10. *Id.* at A-9.
11. *Id.*
12. *Id.*
13. Arnold v. Mundy, 6 N.J.L. 1 (1821).
14. JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW 3 (2d ed. 2002).
15. In a case that will be discussed at length below, the New Jersey Supreme Court held in dicta that the public may have rights in privately held dry sand along the beach as

was the irony that they now wanted to receive for free the benefits of exclusion of the public that they paid $300 to obtain only a year before.

The New Jersey Attorney General's reason for joining forces with the suntanned mob, which at first blush appeared to be made up of trespassers, was based on the New Jersey Supreme Court case *Matthews v. Bay Head Improvement Association.*[16] In the *Matthews* case, the court extended the public trust's reach onto private land for the first time.[17] Dicta in the case was even more startling, suggesting that the public could have inherent rights to cross privately owned uplands to reach trust property, including the dry sand.[18] While the sun-screened gaggle in Diamond Beach did not claim the upland easement, it clearly was intent on establishing rights in the dry sand. After all, it is the dry sand area of a beach that is the optimum area for recreation. The wet sand or intertidal zone is inundated completely twice a day and is wet the entire day. It offers a great area for walking without shoes and building temporary sand castles while providing the only avenue for reaching the water without a boat. The area has limited use for modern recreation like sunbathing, volleyball, and bonfires.

The slightly humorous march in Diamond Beach represents a legal struggle that has been almost twenty years in the making. The *Matthews* decision has cast a shadow over beachfront property since its announcement. Issues involving private property, the public trusts, and regulatory takings are at stake in the litigation that will inevitably result from the march.

For example, at least one marcher was cited for trespass as he entered the grounds of the Atlantis Beach Club.[19] The case was to be heard in the municipal court and undoubtedly would be appealed to the highest courts of New Jersey by the losing party.[20] The parties agreed to dismiss the complaint in municipal court and to allow the matter to be heard in the Law Division of the Superior Court of New Jersey. The Diamond Beach case came to a head on May 8, 2004.[21] The Superior Court, Appellate Division, determined that the public has unfettered access to all of Atlantis Beach Association's dry sand area, along with horizontal access to the property and ocean.[22] Furthermore, not only did

well as some access perpendicular to the beach to reach the dry sand. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365-66 (N.J. 1984).

16. *Matthews*, 471 A.2d at 365-366.

17. *Id.* at 363-66.

18. *Id.* at 365-66.

19. Degener, *supra* note 1, at A-9.

20. *Id.*

21. Order on Motion, A2194-03T5 Superior Court New Jersey Judge King presiding.

22. *Id.*

the Appellate Division rule that the Atlantis Beach Club had to open its property to the entire public, the Court also held that even if the Atlantis Beach Club decided to close and no longer operate as a beach club, the private owners of the property could not fence off their private lands from members of the general public.

Subsequent decisions by the New Jersey Department of Environmental Protection have restricted the Atlantis Beach Club from charging more than fifty dollars for a seasonal beach tag and three dollars for a daily beach tag. These rates are not only substantially lower than what the Atlantis Beach Club was previously charging its members, but are also lower than what many municipalities in New Jersey charge for access to public beaches.

The decisions by the New Jersey courts and administrative agencies are a terrible blow to private property owners along the beach in New Jersey. The "backyards" of thousands of land owners have been appropriated by the court. There will be those who seek to limit the application of these decisions to the facts of the case. Such a limitation is misguided. If the movie Jaws[23] terrified beachgoers when it was released,[24] then a similar terror will result by this decision for landowners everywhere. Although the case's ultimate future is unknown since it is currently being appealed to the New Jersey Supreme Court, beachfront owners across the nation can only hope that the United States Supreme Court appraises the role of Sheriff Brody and terminates this unreasonable threat to the right of private landowners.

II. The Public Trust in New Jersey: A Doctrine That Has Spread Like a Beached Jellyfish

The New Jersey Attorney General's (Attorney General) office threatened to join the sandy protestors in a suit against the Atlantis Beach Club for denying to the public use of the dry sands and intertidal zone in front of the club's uplands.[25] The Attorney General's legal theory was and is the public trust. The New Jersey Supreme Court in *Matthews* had apparently expanded the trust beyond its original geographic limits to include the dry sands. Prior to the *Matthews* decision, the court had expanded these limits in a number of cases involving municipal

23. JAWS (Universal Pictures 1975).

24. *See* Lana Whited, *Shark!*, Roanoke.com Columnist, *at* http://www.roanoke.com/columnists/whited/2948.html (Aug. 3, 2001); Jonathan L. Bowen, *Jaws* (1975), Orbital Reviews, *at* http://www.orbitalreviews.com/pages/full/Jaws.shtml (last visited Feb. 14, 2005).

25. Richard Degener, *Court Asked to Draw Line in the Sand on Diamond Beach*, THE PRESS OF ATLANTIC CITY, Aug. 16, 2002, at D1.

beaches.[26] An understanding of the trust and its place in national and state jurisprudence is required before *Matthews* can be placed in proper perspective.

The Public Trust Doctrine was first established through Roman law.[27] This doctrine grew from the inability of mankind to occupy and own the sea and seabed.[28] The Romans described such areas as being common to all citizens for fishing, navigation, and commerce.[29] The property subject to such common rights included: air, running water, the sea, and the seashore up to the highest winter tide.[30] The Romans called these features *res nullius*.[31] As the Roman Empire marched north, it spread its jurisprudence with it. The trust came to England and established itself in the common law of the realm.[32] In fact, there is mention in the Magna Carta of the trust and the rights guaranteed to English citizens.[33] The Public Trust Doctrine was transported, with its own American twists, to the colonies and eventually to the United States as the nascent nation began to accept the English common law.[34]

Perhaps the first interpretation of the trust in the United States was by the court in the New Jersey case *Arnold v. Mundy*.[35] The case involved a mari-culturist who had planted oysters adjacent to his farm in the Raritan River.[36] The cultivated oysters extended 150 feet beyond the mean tide line; the tide ebbed and flowed over the oysters.[37] Before the grower was ready to harvest the oyster, the defendant took them and claimed a right to take them under the public trust.[38] The court engaged in a complete discussion of the origins of the trust, its uses, and the property subject to it.[39] The court reiterated the idea of a common public

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26. A number of decisions extended the general public's rights to municipally owned beaches, which had limited or banned non-residents. *See* Borough of Neptune City v. Borough of Avalon by the Sea, 294 A.2d 47 (N.J. 1972), *and* Van Ness v. Borough of Deal, 352 A.2d 599 (N.J. Super. Ct. Ch. Div. 1975).

27. KALO ET AL., *supra* note 14, at 3.

28. *See* EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 106, (Charles G. Fenwick trans., Oceana Publications 1964) (1758); MARCIANUS, THE ENACTMENTS OF JUSTINIAN, INSTITUTES BOOK III 243 (Samuel Parsons Scott trans., 1973).

29. MARCIANUS, *supra* note 28, at 243.

30. THE INSTITUTES OF JUSTINIAN, BOOK II, TIT. I 65 (J.A.C. Thomas trans., 1975).

31. HUGO GROTIUS, FREEDOM OF THE SEAS 15 (Ralph Magollin trans., Botoche Books 2000) (1633).

32. Martin v. Waddell, 41 U.S. 367 (1842); KALO ET AL., *supra* note 14, at 4.

33. KALO ET AL., *supra* note 14, at 4; Martin, 41 U.S. at 412.

34. *Martin*, 41 U.S. at 411.

35. *Arnold*, 6 N.J.L. at 1.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

interest in the seashore, submerged lands, and waters overlying them.[40]

The court identified and discussed two types of public property.[41] There is property that has to be held for the state to function and, although public, is treated very much like privately-held property.[42] The other type is property that is so important to the well-being of the public that it has to be owned differently:

> The title of both of these, for the greatest order, and perhaps, of necessity, is placed in the hands of the sovereign power but it is placed there for different purposes. The citizen cannot enter upon the domain of the crown and apply it, or any part of it, to his immediate use. He cannot go into the King's forests and fall and carry away the trees, though it is the public property; it is placed in the hand of the King for a different purpose; it is the domain of the crown, a source of revenue; so neither can the King intrude upon the common property, thus understood, and appropriate it to himself, or to the fiscal purposes of the nation, the enjoyment of it is a natural right which cannot be infringed or taken away, unless by arbitrary power; and that, in theory, at least, could not exist in a free government, such as England has always claimed to be.[43]

According to the court, property that is unavailable for general public use is part of the public domain.[44] This property can be used for any public purpose, including its sale to defray the state's debt.[45] It can be used not only for public buildings and for the public good in general, but also exclusively for some segment of the public.[46]

This is not true of common property.[47] The government maintains this class of property for the common use of the public.[48] Fishing and navigating are among the common uses for which this property is available.[49] The *Arnold* court held that common property is vested in the hands of the government but for the public.[50] The court recognized that the legislature could improve navigation, fishing, and commerce through the use of submerged lands to make the public's use of them more valuable.[51]

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40. *Id.*
41. *Arnold*, 6 N.J.L. at 1.
42. *Id.*
43. *Id.* at 50.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Arnold*, 6 N.J.L. at 50.
50. *Id.*
51. *Id.*

However, the court also set down what has become one of the cornerstones of the doctrine:

> [T]he sovereign power itself, therefore, cannot, consistently with the principles of law of nature and the constitution of a well[-]ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.
>
> From this statement, it is seen that, in my opinion, the proprietors, as such, never had since the surrender of the government, any such right to, interest or power over, these waters or the land covered by them, as that they could convey the same and convert them into private property; and that, therefore, the grant in question is void, and ought not to prevail for the benefit of the plaintiff, and of course, that the rule to show cause must be discharged. [52]

The court's analysis did not apply above the mean high water mark.[53] Nothing was said about expanding the number of uses of the public trust lands. In fact, the *Arnold* case represented a classic statement of the trust so much so that it arguably formed the jurisprudential reasoning for the United States Supreme Court's landmark public trust opinion *Illinois Central v. Illinois*.[54]

The court in *Arnold* did not specifically address the accessibility of public trust lands to the public. This issue was addressed by the court in *Neptune City v. Avon*.[55] The city of Avon charged non-residents higher fees than residents to use the beach area. Avon owned and maintained the dry sand area that was landward of the mean high tide line.[56] There was no dispute that the land was owned by Avon and that it was dedicated for public beach recreational purposes.[57] The area provided its users a path to the beach.[58] The area served as a place for people to sunbathe, play, and lounge.[59]

At one time, Avon did not charge fees to the residents of Neptune differently than it did to its own citizens.[60] Eventually, Avon passed an ordinance adopting the differential in charges. The court found the ordinance to be in violation of the Public Trust Doctrine.[61] The basis of

52. *Id.* at 53-54.
53. *Id.*
54. 146 U.S. 387 (1892).
55. 294 A.2d 47 (N.J. 1972).
56. *Id.* at 49.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 55-56.

its decision was the town's ownership and use of the beach for recreation:

> At least where the upland sand area is owned by a municipality—a political subdivision and creature of the state—and dedicated to public beach purposes, a modern court must take the view that the public trust doctrine dictates that the beach and ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.[62]

The court went on to suggest elasticity in the public trust that was both novel and potentially destructive of private property rights, a principle which is further developed below.[63] The court found the trust's uses to include bathing, swimming, and recreation, thereby extending the trust beyond its traditional purposes of promoting fishing, navigation, and commerce.[64]

The court also extended the corpus of the trust to the dry sand area, at least for municipally-owned beaches.[65] The court supported its expansion of the purposes and the corpus of the trust by citing to other state decisions.[66] Such reliance was out of place for expansion of the corpus because the other cases dealt with the expansion of uses over traditional trust land, not the corpus. Even the expansion of uses has engendered caution by some courts.[67]

None of the courts in these cases held that the corpus could be extended above the mean high water mark onto the dry sand area. They do represent cases that expanded the uses of the state's submerged land by the public. The dry sand area is the most valuable area on the beach for recreational purposes. It serves as the most convenient entrance point to the water and serves as the focal point for sun bathing, walking, and playing. The sight of a volleyball game in the dry sand is a familiar one. The area is what makes beachfront property so attractive to buyers. It is also the area that is most vulnerable to attack by the New Jersey courts.

The expansion of trust uses to the dry sand area in *Neptune City*

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62. *Id.* at 54.
63. *Id.* at 54-55.
64. *Id.* at 54-56.
65. *Id.* at 55.
66. *Id.*
67. *See, e.g.*, Bell v. Town of Wells, 557 A.2d 168 (Me. 1989). The Supreme Judicial Court of Maine struck down a statute that expanded recreational activities intertidal lands shared under the public trust with private landowners. The Court determined that such an expansion would constitute a taking. It is worth noting that the Maine case is really an amplification case, not an expansion of the corpus. One should also keep in mind that private property rights go to low tides in Maine. Thus, even the statute failed to venture above the high water mark, but concentrated on the intertidal zone.

could be explained by noting that the beach involved was public and that there were issues of equal protection. If the court had stopped there, *Neptune City* would be of very little interest beyond its facts and to the residents of Neptune. However, the court did not resolve the case on equal protection grounds, but rather continued its attack on privately-owned beaches. As noted above, in its zeal, the court had misused precedent from other states.

An example of misuse is the court's mishandling of the Massachusetts case, *The Home for Aged Women v. Commonwealth.*[68] The Massachusetts Supreme Court was not faced with an issue of public or private use of the dry sand area. A group of landowners alleged that its riparian rights had been destroyed by governmental activities that took place below the mean low tide mark.[69] The court made it clear that the trust's corpus lay below the high water mark.[70] It recognized more uses for trust land than just navigation, but did nothing to expand the corpus landward of the mean high water mark.[71] The New Jersey court's reliance on *The Home for Aged Women* was misplaced.

At least one member of the *Neptune City*[72] court recognized the danger of the majority's opinion. Justice Francis noted with trepidation the court's dicta, which in later cases would form the basis for New Jersey's unprecedented expansion of the trust to privately-held dry sand:

> However, the majority opinion here states views upon a subject of serious consequence to ocean front communities and to the owners, private or public, of beach front land above the mean high water mark. The basic question may be couched in these terms: Since the people generally have the common right to use and enjoy the ocean and the portion of the beach below the mean high water mark, of what utility is that right if access from the upland does not exist or is refused by the upland owner?

Although the majority opinion disclaims any positive ruling on the subject, it seems to imply that exercise of the common right carries with it, by way of implementation, the right to use and enjoy any beach upland for purposes of recreation and access to the ocean.[73]

Justice Francis was clearly worried that the elasticity concept adopted by the majority would extend beyond municipal property and onto privately-owned dry sand beaches.[74] Justice Francis' fear has come

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68. 89 N.E. 124 (Mass. 1909).
69. *Id.* at 125.
70. *Id.*
71. *Id.* at 129.
72. Neptune City, 294 A.2d at 56-57.
73. *Id.*
74. *Id.*

true in the Atlantis Beach Club case, as the New Jersey Attorney General has blurred the distinction between publicly-owned and privately-owned beaches. After the *Neptune City* case, New Jersey courts began to wrestle with their rationales for the expansion of the trust corpus, at times even seeming to reject the *Neptune City* dicta of universal public access to the dry sand.

One such instance is the decision by the Chancery Division in *Van Ness v. Borough of Deal.*[75] The Chancery Division's initial decision set out the facts of the case and renounced the public trust as the basis for its decision.[76] The Borough of Deal (Borough) is an oceanside community.[77] The municipality owned a 1300-foot-long municipal beach used for swimming and other recreational activities.[78] The beach was divided into three sections.[79] The first section included the Deal Casino Beach.[80] The second segment included the Phillips Avenue Pavilion Beach, and the third segment was a surfing and boating beach.[81] A rope barrier had been placed fifty feet upland and ran the entire length of the Casino Beach, totaling about 350 feet.[82] The area east of the rope was dedicated to the public for use as a recreational beach.[83] However, the dry sand area west of the barrier was for the exclusive use of members of the Deal Beach Club.[84] This area was comprised of the dry sand.

The Borough had constructed the beach upon which the casino was located.[85] The Borough built a pool with a pump house, bathroom facilities, and a restaurant; it also supplied beach cleaning equipment at its own expense.[86] Other facilities included basketball, shuffleboard, and tetherball courts.[87] Only residents and their immediate families were members of the club.[88] The only non-residents who were members were the immediate members of residents' families and non-resident property owners.[89] The Borough adopted rules and regulations for the Casino

75. 352 A.2d 599 (N.J. Super. Ct. Ch. Div. 1975).
76. *Id.* at 601-606.
77. *Id.* at 601-602.
78. *Id.* at 602.
79. *Id.* at 601.
80. *Id.*
81. *Id.*
82. *Id.*
83. Van Ness, 352 A.2d at 603.
84. *Id.*
85. *Id.* at 602.
86. *Id.*
87. *Id.* at 603.
88. *Id.*
89. *Id.*

Beach Club.[90]

The Borough also owned and operated the beach facilities known as the Pavilion Beach.[91] The Pavilion Beach had bathhouses, locker rooms, toilets, changing rooms, free parking, and a number of sports activities.[92] The Pavilion Beach was open to the entire public, residents as well as non-residents.[93] The Borough charged the same fee for resident and non-resident alike.[94] In a challenge to the exclusivity of Casino Beach, the Chancery Division held that Casino Beach had to be opened to the public.[95]

The most important aspect of the case was the reasoning employed by the court. Unlike the *Neptune City* majority, the majority in *Van Ness* based its holding on the theory of dedication and not on the public trust.[96] In point of fact, the court flatly rejected the Public Advocate's argument that the Public Trust Doctrine should be interpreted to include Casino Beach under its purview.[97] Instead, the court relied on dedication, equal protection, and municipal law.[98] By rejecting the public trust doctrine as the basis for its decision, the Chancery Division made a more conservative decision and considered factors that most of the other coastal states' courts use.[99] The majority of states use dedication, prescription, and custom to achieve a public presence on dry sand beaches. The Chancery Division and later the Appellate Division both used the more traditional beach access analysis, eschewing the more radical use of the Public Trust Doctrine.

The Appellate division reversed the trial court but not on the basis of its refusal to extend the public trust's corpus to the municipality's dry sand area.[100] Instead, the Appellate Division emphasized the difference between public trust land and dry sand areas dedicated to the use of the public.[101] The court stressed the fact that public trust property extended no further landward than the mean high water mark even though Borough allowed fifty feet of the dry sand to be used by the public in

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90. *Id.*
91. *Id.*
92. *Id.* at 603-604.
93. *Id.*
94. *Id.* at 604.
95. *Id.* at 609.
96. *Id.* at 606.
97. *Id.*
98. *Id.* at 607-608.
99. National Association of Attorneys General, Committee on the Office of Attorney General, Legal Issues in Beach Access (1977). Other than *Matthews*, 471 A.2d at 355, there really doesn't seem to be a significant use of the public trust doctrine for access to the dry sand area.
100. Van Ness v. Deal, 367 A.2d 1191, 1197 (N.J. Super. Ct. App. Div. 1976).
101. *Id.* at 1192.

front of the casino.[102]

When the case reached the New Jersey Supreme Court, the court rejected the lower court's reliance on dedication and municipal law.[103] Instead, the court reiterated the *Neptune City* analysis, determining that the public trust was the doctrine that demanded access for the entire public to the dry sand area of the municipality.[104] The fact that the beach was used for recreation made the dry sand area available to the public under the Public Trust Doctrine.[105] The court found it immaterial that Borough had not dedicated the area to the general public; it was enough that the beach had been dedicated for recreation.[106] The justices concluded that if a beach is subject to municipal ownership and dedication, then the trust allows for the right to use and enjoy it by everyone.[107] The court held this even though it was clear that the public was in no way being prevented from reaching the intertidal zone or the ocean over the other two segments of the beach.[108]

The *Van Ness* decision was by far the most radical of the public trust decisions until that time. The court rejected the traditional beach access rationales for breaking down municipal resistance towards allowing the general public to use the beaches alongside town residents. The use of the doctrine in this manner was also an extension of the corpus of the trust to the dry sand area. Arguably, this extension could be considered unimportant if not for the continued implication that Justice Francis had feared: that the court was not content with its expansion to publicly-owned dry sand areas only.[109] While the expansion to municipally-owned beaches was disruptive of municipal prerogatives, cities and towns are creations of the state and in most aspects inferior to the power of the state.[110] Consequently, for a court to allow the public onto governmentally-owned beaches using any doctrine is at least understandable. While the taxpayers of the municipalities will undoubtedly be burdened, it is part of the social and jurisprudential structure of state municipal law.

To extend the trust to privately-owned lands as feared by Justice Francis is another matter entirely. In fact, such an extension could very easily involve constitutional issues of both state and federal scope. Some of these implications will be discussed below because the state of New

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102. *Id.* at 1193.
103. Van Ness v. Deal, 393 A.2d 571 (N.J. 1978).
104. *Id.* at 573-575.
105. *Id.* at 573-574.
106. *Id.*
107. *Id.*
108. *Id.* at 574.
109. Neptune City, 294 A.2d at 56-57.
110. *Id.* at 50.

Jersey has and continues to claim such a right. The use of the trust for expansion of public rights onto privately-owned lands is an extremely easy method of expanding public rights. There are no proof problems such as those commonly encountered in states that apply the normal theories that gain public rights in the dry sand areas. To prove custom, for example, the state must establish eight separate elements and their existence since time immemorial. The use of dedication and prescription are also evidentiary nightmares.[111] Any Assistant Attorney General given the task of trying one of these cases is well advised to look at the opinion in *Seaway v. Attorney General*[112] for a discussion of the proof required.

The case of *Matthews v. Bay Head Improvement Association* represents the first baby steps by the Public Trust Doctrine onto a privately-held dry sand beach.[113] The case only represents baby steps because the beach, although private, was held by a private association for the purposes of owning property, operating beach houses, and hiring life guards and beach cleaners.[114] The Bay Head Improvement Association (Association) had beach police patrol the beaches.[115] The Association was a non-profit group incorporated in 1932.[116] The Association owned beachfront property that extended from the end of seven streets through the dry sand to the mean high water mark.[117] In addition to the property it owned, the Association leased dry sand areas from a number of landowners for recreation.[118] During the summer, the Association employed forty people in the capacities listed above.[119] Non-residents could use the facilities by acquiring a beach tag from a local motel or inn.[120] A number of other exceptions existed, but the bottom line was that only Association members could use the dry sand area.

The New Jersey Supreme Court's analysis in *Matthews* turned on the question of whether the Association was a de facto governmental body.[121] Generally a private association may establish membership qualifications.[122] However, if an association is quasi-public, its power to exclude must be reasonably and lawfully exercised in furtherance of the

111. Thornton v. Hay, 462 P.2d 671, 677 (Ore. 1969).
112. 375 S.W.2d 923 (Tex. Civ. App. 1964).
113. Matthews, 471 A.2d at 355.
114. *Id.* at 359-360.
115. *Id.* at 159.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 366-367.
122. *Id.* at 366.

public welfare.[123] The court explained that such associations, while private, are dedicated to the public service.[124] The court determined that the "[a]ssociation's activities paralleled those of a municipality in its operation of the Beachfront."[125] From this conclusion, the court reasoned:

> When viewed in its totality—its purposes, relationship with the municipality, communal characteristics and virtual monopoly over the Bay Head beachfront—the quasi-public nature of the Association is apparent. The Association makes available to the Bay Head public access to the common tidal property for swimming and bathing and to the upland dry sand areas for the use incidental thereto, preserving the resident's interests in a fashion similar to Avon.[126]

The court was bothered by the Association's limiting its membership to residents only.[127] The limitation was found to be "in conflict with the public good and contrary to the strong public policy in favor of encouraging and expanding public access to public trust lands."[128] The court ordered the Association to open its membership to the public and provide access to the trust corpus.[129]

In its dicta, however, the court went way beyond its limited holding. One section of the opinion was titled "Public Rights in Privately-Owned Dry Sand Beaches."[130] The justices recognized that prior decisions were limited to municipally- owned beaches.[131] However, the court applied an analysis reminiscent of an easement of necessity to suggest the end of privately-held dry sand areas and sanctity of the accompanying uplands.[132] Justification of public access and use of privately-owned dry sand were grounded in the court's municipal jurisprudence and reasoning, thereby allowing for the expansion of the corpus of the trust:

> Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass along the upland beach. Without some means of access, the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would

123. *Id.*
124. Matthews, 471 A.2d at 367.
125. *Id.* at 367-368.
126. *Id.* at 368.
127. *Id.* at 368-369.
128. *Id.* at 368.
129. *Id.* at 369.
130. *Id.* at 363.
131. *Id.* at 363-364.
132. *Id.* at 363.

> seriously impinge on, if not eliminate, the rights of the public trust. 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.[133]

The court reasoned that if access is available elsewhere in the vicinity, a private landowner might avoid the public demand for use of her upland and dry sand area.[134] Where the obligation exists, however, the court defined it much more broadly than just passage:

> The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge. The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the recreational use of the ocean . . . *[w]e see no reason why rights under the public trust doctrine to use of the upland dry sand area should be limited to municipally-owned property.* It is true that the private owners' interest in the upland dry sand area is not identical to that of a municipality. Nonetheless, where use of the dry sand is essential or reasonably necessary for the employment 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.[135]

Every first-year property student should be impressed by the court's insight. Yes, a private landowner's interests in both the dry sand area and upland access are fundamentally different from each other. The private landowner wants to exclude the public. The very essence of ownership is the right to exclude whom she wants and to include those she wants to be on her property. For the court to find that the trust, nearly 200 years after *Arnold*[136] includes within the corpus privately-owned dry sand beaches is a perversion of the trust, private property, and common sense. The state and many of its subdivisions have the power of eminent domain. A municipality could and should without doubt condemn a beach for the purpose of providing more beach access.

An important facet of the court's determination in *Matthews* was the court's implied recognition that the expansion was new.[137] Any challenge to a determination that a completely private beach must be

133. *Id.* at 364.
134. *Id.*
135. *Id.* at 365 (emphasis added).
136. *Arnold*, 6 N.J.L. at 1.
137. *Matthews*, 471 A.2d at 365-366.

opened to the public has to be grounded in a regulatory taking claim. An analysis of regulatory takings includes a determination as to what expectations a landowner has with regard to his property rights. New Jersey beachfront owners have every right to assume that they have the right to exclude the public from their private dry sand areas in the same manner as they are able to exclude the public from their upland property. These historic expectations will be examined more below.

The *Matthews* court reiterated its refusal to use the more traditional causes of action to create a public presence on the dry sand beach.[138] In going even farther with its rejection, the court stated:

> We perceive no need to attempt to apply notions of prescription, dedication or custom, as an alternative to application of the public trust doctrines. *Archaic judicial responses are not an answer to a modern social problem.* Rather, we perceive the public trust doctrine not to be "fixed or static," but one to "be molded and extended to meet changing conditions and needs of the public it was created to benefit."[139]

Of course *Neptune City*[140] was a municipal beach case, and the trust in most states applies below the mean high water mark. In any event, the *Matthews* case was appealed to the United States Supreme Court, which ultimately denied certiorari.[141]

A decision supporting the public's right to use the dry sand based on *Matthews* in the Atlantis Beach Club situation will undoubtedly reprise interest in a regulatory takings challenge. Such a challenge will demand an analysis of two things. First, a court will need to understand the elements inherent in a beachfront owner's title and what her realistic expectations are with regard to the property. Second, an examination of the Public Trust Doctrine, its limits, and its relationship to the unconstitutional taking of property must be made.

III. Regulatory Takings and Physical Invasions: Maybe the Beach Can Be Saved for Private Landowners

Regulatory takings occur when the government overreaches its regulation of property.[142] The United States Supreme Court has established three categorical instances when such a taking occurs. The first and oldest category is a physical invasion.[143] Such invasions can be

138. *Id.* at 365.
139. *Neptune City*, 294 A.2d at 47 [sic] (emphasis added).
140. *See id.* at 47.
141. Matthews v. Bay Head Improvement Ass'n, 469 U.S. 821 (1984).
142. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 145-46 (1979).
143. *Id.* at 124.

minimal or major. Flooding of a landowner's property is a classic type of physical taking that has been recognized almost as long as the federal court system has existed.[144] Less dramatic invasions have resulted in compensation. For example, the Court in *Loretto v. Teleprompter Manhattan CATV Corp.* held that even a television cable laid on private property pursuant to governmental fiat results in a physical invasion for which compensation must be paid.[145]

The second category of categorical regulatory takings occurs when the regulation "does not substantially advance legitimate state interests."[146] The most important case illustrating this category is *Nollan v. California Coastal Commission.*[147] In *Nollan*, the California Coastal Commission (Coastal Commission) denied beachfront landowners permission to enlarge a bungalow, compelling the owners to claim that the denial amounted to a taking.[148] The Coastal Commission had demanded a dedication of a strip of land on the dry sand running parallel with the Pacific Ocean.[149] The purpose of the dedication was to allow passage above the mean high water mark but below the Nollan's seawall (dry sand area) parallel with the ocean.[150] However, the public interest, or justification for the dedication, was the impact that the enlargement would have on visual access from the road running parallel with the Pacific but landward of the Nollan's property.[151]

Justice Scalia was at a loss to understand the connection.[152] He found that there was no connection between the Coastal Commission's demand for the dedication and visual access from a road.[153] He suggested that if the Commission required some sort of viewing platform or access perpendicular from the road to the Pacific, the Court might have decided differently.[154] However, for the purposes of the New Jersey effort to reach the dry sand, Justice Scalia's hypothetical dedication is of most interest:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning

144. *See* Pumpelly v. Green Bay Co., 80 U.S. 166 (1872).
145. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 419-20 (1982)
146. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) (internal citation omitted).
147. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).
148. *Id.* at 827-829.
149. *Id.* at 828.
150. *Id.*
151. *Id.* at 828-829.
152. *Id.* at 838-839.
153. *Id.*
154. *Id.* at 836.

> their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather (as Justice Brennan contends) "a mere restriction on its use," is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them. Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental action leads to the same conclusion. We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [is one] of the most essential sticks in the bundle of rights that, are commonly characterized as property. . . ." We think a "permanent physical occupation" has occurred for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently on the premises.[155]

There is no doubt that Justice Scalia's observations are perfectly suited to the New Jersey battle for Diamond Beach. However, before *Nollan* can be assuredly applied as an extension of *Matthews* to privately-owned dry sand resulting in a declaration of unconstitutionality, the third category of categorical takings must be discussed.

This third group includes governmental actions that deprive a landowner of all economically valuable uses of her property. The classic case illustrating this category is *Lucas v. South Carolina Coastal Council.*[156] In 1988, the South Carolina legislature adopted a new Beachfront Management Act (Management Act).[157] In essence, the Management Act was a building line regulation.[158] The statute's effect on the plaintiff, David Lucas, was to prohibit his building on two lots that he had purchased for $975,000.[159] Mr. Lucas acknowledged that South Carolina met the *Nollan* prong of the categorical takings trilogy.[160] He accepted the fact that the state had an interest in protecting its beaches and landowners from the erosion and danger caused by storms.[161] However, he posited that the set back requirement constituted

155. *Id.* at 831.
156. 505 U.S. at 1003.
157. *Id.* at 1006.
158. *Id.* at 1008-1009.
159. *Id.* at 1006-1007.
160. *Id.* at 1009.
161. *Id.*

the deprivation of all of his economically viable uses.[162] As a result, he sought compensation of approximately one million dollars.[163] The majority of the court agreed with Mr. Lucas except for one reservation of import to the Diamond Beach dispute.

The Court held that before a court could hold that total takings had occurred, it must first determine whether "the proscribed use interests were not a part of his title to begin with."[164] The Court reasoned that such a requirement was inherent in its takings jurisprudence.[165] Of great significance to the analysis is the "understanding of our citizens regarding the content of, and the state's power over the 'bundle of rights' they acquire when they obtain title to property."[166] This doesn't mean that a state may not regulate in a manner that causes a loss of value.[167] Many exercises of the police power cause such losses. What the Court meant is that a taking results when the a court denies a landowner the opportunity to engage in an activity that is inherent in his title, thereby causing a loss of all of the economically viable uses of the land. A private beachfront owner of property in New Jersey has every right to believe that upon purchase of beachfront property, she still has the oldest stick of all in her bundle: the right to exclude. There is no doubt that exclusion from the dry sand and upland of her property is inherent in her title. If not, the result is a physical appropriation of the property unlike anything else throughout American Jurisprudence. Such a state of affairs is not part of the bundle purchased by beachfront owners in New Jersey.

In another case, the Supreme Court rejected the idea that a state could change the characterization of property from private to public, stating:

> The usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal. . . .
>
> . . .
>
> . . . Neither the Florida legislature by statute nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is

162. *Id.*
163. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 896 (S.C. 1991).
164. Lucas, 505 U.S. at 1027.
165. *Id.*
166. *Id.*
167. *Id.*

> property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.
>
> *To put it another way: a State, by "ipse dixit," may not transform private property into public property without compensation, even for the limited duration of the deposit in court.* That is the very kind of thing that the takings clause of the Fifth Amendment was meant to prevent. That clause stands as a shield against the arbitrary use of governmental power.[168]

The New Jersey Supreme Court violated just such a prohibition in *Matthews,* and the Superior Court has done so again in Diamond Beach.

IV. New Jersey's Public Trust: Grounded at the High Water Mark

Any extension of New Jersey's Public Trust corpus to include the dry sand area would constitute a violation of the Fourteenth Amendment's prohibition of takings without compensation. Such an extension would be in derogation of the existing bundle of property rights as they have existed for centuries in New Jersey. The most basic right a landowner has is the right to exclude. If the public is "found" to have a right to use the dry sand area, the taking that will occur is a physical invasion.

At one time, there was a belief that the only type of regulatory taking that could occur was a physical one. There is no degree of taking in the sense of size. There can, of course, be temporal differences between temporary and permanent physical invasions. The Attorney General of New Jersey wants to impose an easement on all dry sand privately held in New Jersey. To do so would violate basic property rights, redefine common law expectations in titles, and defy Supreme Court precedent.

Prior to *Matthews*[169] no New Jersey case ever expanded the trust's corpus to privately-held dry sand beaches; no New Jersey court even intimated that the Public Trust Doctrine in New Jersey could burden private property. New Jersey is a mean high water state.[170] This means that the line dividing public from private ownership is the mean high water. A number of states, including Delaware, Maine, Pennsylvania, and Virginia, allow private rights to extend down to the mean low water mark.[171] None of them, not even New Jersey, allowed public rights

168. Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 164 (1980).
169. *Matthews*, 471 A.2d at 355 (emphasis added).
170. KALO ET AL., *supra* note 14, at 1.
171. *Id.*

based on the Public Trust Doctrine to extend above the mean high water mark into privately-owned dry sand area—at least not until *Matthews* and *Raleigh Avenue Beach Association v. Atlantis Beach Club.*[172]

New Jersey law as it stood prior to these two cases was in line with the vast majority of states. A littoral or riparian landowner holds exclusive rights in the dry sand area. The New Jersey courts have historically protected these owners from public and private trespassers. In *Beach Realty Company v. City of Wildwood*,[173] the court held that absent dedication, mere title to the land is enough to eject a municipality at common law.[174] Such a dedication is not to be presumed.[175] In *Beach Realty Company*, the City of Wildwood leased a number of parcels from private landowners for a beach.[176] After the lease expired, the city remained in possession and failed to pay rent.[177] After two months, Beach Reality brought a suit of ejectment.[178] The New Jersey court found for Beach Realty Company, holding that there was still a landlord-tenant relationship and that the city could not resist the ejectment suit.[179]

Murphy v. Borough of Point Pleasant Beach is another case in which the municipality claimed a dedication of privately-held dry sand.[180] The Murphy's had acquired property landward of the mean high water mark and rented bathhouses to the public.[181] In this case, the municipality treated the property as the private property of the Murphy's; unless the community could show a specific dedication, there is none.[182]

These two dedication cases indicate that the New Jersey courts upheld the exclusive control, possession, and enjoyment of the dry sand areas. Both municipalities attempted to defeat the owner's title but were rebuffed. The courts' decisions were based on the common law right of ownership, which shows its essence in the right to exclude. The cases also illustrate the recognized methods of public acquisition of Public Trust property and that a municipality should be able to acquire these rights only through purchase, express dedication, and prescriptive easement.

A more modern decision analyzing the common law of New Jersey

172. *Matthews*, 471 A.2d at 355; Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 851 A.2d 19 (N.J. Super. Ct. App. Div. 2004).
173. 144 A. 720 (N.J. 1929).
174. *Id.* at 722.
175. *Id.*
176. *Id.* at 721.
177. *Id.*
178. *Id.*
179. *Id.* at 722.
180. 8 A.2d 116 (N.J. Sup. Ct. 1939).
181. *Id.* at 117-118.
182. *Id.* at 118.

is *Capano v. Borough of Stone Harbor.*[183] This federal district court decision is interesting and useful. In Stone Harbor, all public swimming and bathing were prohibited.[184] However, a convent of nuns living at 112th Street was allowed to swim in the vicinity of the 112th Street beach, and a public lifeguard was made available to protect the nuns.[185] The convent privately-owned the dry sand at the beach that its nuns used.[186] Although the public was not allowed to use the public trust property between 112th Street and 114th Street, the nuns were.[187] The court struck down the ban as being unduly restrictive and contrary to the Equal Protection Clause.[188] The importance of the *Capano* case lies in the court's discussion of the private and public rights implicated. The court recognized that the municipality could protect everybody but not allow the nuns to use the public beaches.[189] At the same time, the court recognized the rights of the nuns to be free from public and private trespassers above the mean high water mark.[190]

Protection of privately-owned dry sand has not just been limited to the first half of the Twentieth Century. The New Jersey Appellate Division has recently reaffirmed that privately-owned dry sand should not be construed to be impressed with an implied easement without clear evidence. In *Bubis v. Kassin,*[191] the court had to decide an easement case. In 1995, Jack and Joyce Kassin purchased eight ocean lots that were previously owned by a beach club.[192] The development in which the Kassins purchased their lots was plotted at one time to show that inland lots and the public had access over streets that ran from west to east to the beach.[193] The public was granted an easement over "a part of beach and Bluff."[194]

After they purchased the lots, the Kassins built a twelve-foot high berm along the western edge of their property.[195] Inland lot owners complained that the berm blocked their access.[196] The case was heard twice by the court. Initially, the court determined that there was an

183. 530 F. Supp. 1254 (D.C.N.J 1982).
184. *Id.* at 1257.
185. *Id.* at 1262, although the township ended the lifeguard service in summer 1981.
186. *Id.* at 1262.
187. *Id.*
188. *Id.* at 1271.
189. *Id.* at 1270.
190. *Id.*
191. 803 A.2d 146 (N.J. Super. Ct. App. Div. 2002).
192. *Id.* at 148-149.
193. Bubis v. Kassin, 733 A.2d 1232, 1234 (N.J. Super. Ct. App. Div. 1999).
194. *Id.* at 1235.
195. *Id.* at 1234-1235.
196. *Id.* at 1235.

implied easement over one of the streets.[197] However, the access over the "beach and bluff" had eroded below the mean high water mark.[198] The second time the case was considered, the court refused to impress an easement over the Kassin's property that would have effected a division of their property.[199] Although the court's decision is limited to the facts of that case, it is important that the court did not use the public trust as the analytical basis for its opinion.

The dedication cases and the *Bubis* case strongly suggest that the New Jersey courts saw no public interest(s) in the dry sand areas of the beach. These cases are undoubtedly correct. To expand into the dry sand would be to unbundle the set of rights a landowner receives, and more importantly, expects to be part of the bundle of rights inherent in the title acquired upon purchase. This is the essence of the *Lucas* decision.[200] The New Jersey courts would be doing the same thing judicially that the South Carolina legislature was prohibited from doing in *Lucas*.[201] Court fiat cannot accomplish an unconstitutional objective any better than a legislature can.

The value and rights making up that value were recognized in a condemnation case *Maffucci v. City of Ocean City*.[202] Ocean City attempted to acquire an easement on the dry sand area by building a dune line parallel with the beach.[203] The Maffucci's resisted the project and Ocean City correctly sought to exercise its power of eminent domain.[204] The court agreed that the Maffuccis were entitled to receive payment for their loss of access over the dry sand.[205] The court failed to mention or discount the value of the recovery, asserting that the Maffuccis owned the dry sand period.

In *Matthews*, the New Jersey Supreme Court recognized the fact that a sea change was being made. The court determined that the public trust doctrine is not static or fixed.[206] With this declaration, the court washed away the property rights of beach-front owners. The logic of the doctrine as enunciated by the court could extend landward indefinitely. The court recognizes indirectly that private land owners had every right to exclude the public from the dry sand adjacent to the wet sand. This expectation is part of the bundle of rights that Justice Marshall discussed

197. *Id.* at 1236.
198. *Id.*
199. *Bubis*, 803 A.2d at 149.
200. *Lucas*, 505 U.S. at 1003.
201. *Id.*
202. 740 A.2d 630 (N.J. Super. Ct. App. Div. 1999).
203. *Id.* at 631-632.
204. *Id.*
205. *Id.*
206. *Matthews*, 471 A.2d at 365.

in Loretto.[207] In fact, the power to exclude is the trunk in the bundle of sticks.[208]

The decision in *Raleigh Avenue Beach Association* makes it clear that the lower courts have interpreted *Matthews* to include all dry sand private property within the public trust.[209] In a remarkably candid statement, the court reasoned, "[e]xclusivity is not a valid reason for limiting use or access."[210] While the court couched its decision by stressing the unusual circumstances of the case, the case has to be considered a quantum leap from *Matthews*. The decision is based upon *Matthews* and the Public Trust Doctrine, not on dedication, custom, or prescriptive easement.[211] Atlantis Beach is a private beach club which charged a fee.[212]

Also, the Appellate Division has failed to consider the broader implications of its pronouncement of the modern implementation of the Public Trust Doctrine. The doctrine governs all lands submerged by tidally controlled waters. However, the beaches of the Atlantic Ocean are not the only lands submerged by tidal waters. The Delaware Bay, Tuckahoe River, Egg Harbor River, and the back bay areas of all the barrier islands on the New Jersey Coast are all tidal waters. These lands are also governed by the Public Trust Doctrine. However, a vast majority of these lands, especially along the back bay areas, are abutted by private property. If the public is supposed to have unfettered access to public trust lands, what is to stop an individual from traversing the private property of a bay-front or river-front homeowner to go fishing or kayaking?

Although the *Raleigh Avenue Beach Association* case had unique circumstances, it would appear to be logically inconsistent for the New Jersey courts to rule that the public has unfettered access to one type of public trust lands (the beaches) but yet can be barred from easily accessing another type of public trust lands (tidal rivers and bays). If anything, the courts of New Jersey have not rationally thought out the logical conclusions of their judicial pronouncements. Instead, the judges have made rulings based on what results they think would be best rather than stating the proper application of the public trust doctrine. Clearly, New Jersey's modern interpretation of the Public Trust Doctrine is judicial activism at its worst.

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207. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982).

208. *See id.* at 433-447.

209. Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 851 A.2d 19, 27-28 (N.J. Super. Ct. App. Div. 2004).

210. *Id.* at 30.

211. *Id.*

212. *Id.* at 24.

V. If the Beach Is to Be Taken, Do It the Old Fashioned Way

A person owning beachfront property in New Jersey has a dark cloud on his title. The State of New Jersey owes these owners the courtesy of not objecting to the appeal of this case to the New Jersey Supreme Court. Ultimately, the land owners will have to take the case to the federal system. The protesters are happy this summer, no longer complaining that they should have a right to wallow on somebody else's property. Most people know that they will never own beachfront property. The best they can look forward to is the occasional week at the shore we all love. To want more is human, to demand more is greed.

To have a court decree more is anarchy. *Lucas*, *Loretto*, *Nollan*, and other cases make clear that the New Jersey courts will ultimately lose on appeal to the federal system. New Jersey has done an admirable job of reclaiming public trust land illegally filled by artificial means. Its acts of intimidation following *Matthews* is beneath the dignity of a great state. An admission that it just found a penumbra of public rights radiating from the summer heated dry sand beaches in New Jersey is sophistry at its best. The state must remove the cloud from littoral and riparian properties and concentrate on buying property that it wants it citizens to enjoy.