

Public Rights of Access to and Use of the Shores of Tidal Waterways in New Jersey

by Brian Weeks 

The public trust doctrine safeguards natural resources for the benefit of the public.¹ The public benefits ensured by the doctrine include public access to and use of tidal waters and their shores, whether publicly or privately owned.² As the Roman Emperor Justinian explained in his 6th century legal compendium, “By the law of nature...the air, running water, the sea, and consequently the shores of the sea” are “common to mankind.”³

Since before statehood, New Jersey’s citizens have enjoyed the traditional public trust rights of access to and use of the tidally flowed portion of our shores. “Such waters, and the lands...are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the king’s subjects.”⁴ Although the states have the authority to convey riparian grants to private persons, the sovereign never waives its right to regulate the use of lands subject to the public trust doctrine.⁵

The New Jersey Supreme Court decided its seminal public trust doctrine case, *Arnold v. Mundy*, within living memory of the American Revolution.⁶ Since then, New Jersey’s courts have repeatedly acknowledged the deep roots of the public trust doctrine as one of the rights of a free citizenry that the American people inherited after the overthrow of English rule. While the scope of the public trust doctrine and its effect on property rights is a matter of state law,⁷ the New Jersey

doctrine has been influential nationally. In fact, each of the United States Supreme Court landmark public trust decisions in the 19th century discussed the adoption of the doctrine after the Revolution and referred to *Arnold v. Mundy*.⁸

In *Martin v. Waddell’s Lessee*, the United States Supreme Court explained the evolution of the doctrine from a royal prerogative and obligation to an asset held by the state in trust for the people. Originally the lands within what is now New Jersey were “held by the king [Charles II] in his public and regal character, as the representative of the nation, and in trust for them.”⁹ In 1664, the king conferred on his brother James, Duke of York, his rights and title to the land, its natural resources and the royal rights and prerogatives. The latter included title to and dominion over all navigable waters and submerged lands; however, the duke governed New Jersey under the laws of England. English law, in pre-Norman times and again after the Magna Carta, included public rights to free navigation and fishery, which the Declaration of Independence confirmed.¹⁰ Accordingly, the king and then the duke held the navigable waters and submerged lands of New Jersey in a public trust for the common benefit and use of the whole community, to be freely used by all for navigation and fishery and not as private property.¹¹

These prerogatives passed with the navigable waters and the submerged lands to the people of New Jersey.

For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.¹²

Since the American Revolution, tidal waterways and their shores have been owned by the state and impressed with a public trust for the benefit of all.¹³ Thus, “[t]he public trust doctrine has always been recognized in New Jersey and is

deeply ingrained in our common law.”¹⁴ “The doctrine is premised on the common rights of all citizens to use and enjoy tidal land seaward of the mean high water mark.”¹⁵

The public trust doctrine imposes a servitude of public access and use on lands flowed by the tide and on a portion of municipally or privately owned dry sand beach areas¹⁶ landward of the tidally flowed lands. The increasing pressure on the coastline from development and population growth has prompted a judicial recognition that the public trust doctrine protects public uses of the shores of tidal waterways that have changed over time. The New Jersey courts have recognized that:

the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.¹⁷

In addition, the courts have clarified that the doctrine reaches a portion of the privately owned dry sand beach areas adjacent to the high water mark.¹⁸ This common law evolution recognizes the reality that the exercise of public trust rights imposes a limited servitude on and across private property adjoining tidal lands to reach the ocean shore, and is of ancient origin.

Legal scholars long have recognized that the use of the tidal flats for fishery and navigation required some limited access to private upland in order to reach and make use of the shore.¹⁹ Imposing some limits on the property rights of private littoral owners, as a consequence of the exercise of public trust rights, is not new to the New Jersey

courts. Earlier cases have considered whether, waterfront “land might not be crossed in going to and returning from the water; whether the right to tow boats along the bank or to land, or to dry nets upon it, was not a public right incident to the use of the water.”²⁰ After over 100 years of explosive population growth and coastal development, the increased pressure to use tidal shores required a gradual evolution in the case law to ensure the continued exercise of public trust rights.

While recreational uses of the shoreline have come to predominate (and the modern equivalent of the fishing net may be the beach blanket), fishing, crabbing, walking and launching and landing boats, remain popular. These traditional coastal uses are now subject to modern public health and safety regulations, but remain protected by the public trust doctrine, as inherited from ancestors over the last several hundred years.

In *Matthews v. Bay Head Improvement Association*,²¹ our Supreme Court recognized a public right of access across and use of privately owned property if reasonably necessary for the exercise of public trust rights. The Court recognized this limited public easement, to cross private land to reach and use the ocean shore, as indispensable, since it was clear that the “[r]easonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed.”²²

The Court stated:

we 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...the doctrine warrants the public's use of the upland... subject to an accommodation of the interests of the owner.²³

The Court then held that “[t]he public must be given both access to and use of privately-owned dry sand area as rea-

sonably necessary.”²⁴ The Court found that this expanded view of public trust doctrine was supported by the historic right of fishermen to lay out their nets on the private dry sand as an ancillary to the public right of fishing.²⁵

The Court decided that the extent of required public access across and use of private beach property depends upon four factors: 1) the location of the dry sand in relation to the foreshore; 2) the extent and availability of publicly owned upland dry sand area; 3) the nature and extent of the public demand; and 4) the usage of the upland dry sand area by the private owner.²⁶

In practical terms, the last three factors are the most relevant to a typical ocean beach. The location of the dry sand becomes relevant when its location or size is unusual for reasons of title or geography. The second factor considers the area of publicly owned dry sand beach, usually within the same municipality. The public demand factor looks at the extent to which the number of people who want to use the tidal shore exceeds the available publicly owned lands. The final factor considers the legally existing structures and uses of the dry sand beach by its owner. This may include homes, beach club pools, cabanas, or dining areas.

Matthews involved a quasi-public association that regulated all beaches in a municipality. However, the *Matthews* Court noted, “private land is not immune from the possibility that some of the dry sand may be used by the public incidental to its right of bathing and swimming.”²⁷ That possibility was presented to the Supreme Court of New Jersey in *Raleigh Avenue Beach Association v. Atlantis Beach Club*, a recent case involving privately owned property that did not serve a quasi-public function.²⁸

In *Raleigh Avenue*, a neighborhood association and a private beach club sued each other, the local government and police department and the state,

seeking a determination whether the public has a right of access to and use of an unimproved strip of dry sand, and what if any limits the public trust doctrine places on beach fees. The Appellate Division in *Raleigh Avenue* reversed the provisions of the trial court judgment that would have restricted the public right to merely walking along the edge of the ocean through a strip of dry sand three feet wide, and that would have mandated a lengthy route through sand dunes, that would have led only to another adjacent privately owned property. Applying the *Matthews*' balancing analysis, the Supreme Court affirmed, allowing public access across and use of the dry sand beach.²⁹

The principles enunciated in *Raleigh Avenue*, like much of the public trust case law in New Jersey, arose from a vibrant set of facts and personalities that included law enforcement intervention in claims of alleged physical confrontations and trespass.³⁰ Such incidents have frequently factored in initiating several public trust doctrine cases.

The *Raleigh Avenue* decision should mean that people can exercise their public trust rights without risking a confrontation with law enforcement personnel or private security guards, or prosecution for an alleged trespass. A person should be able to walk the entire length of the Jersey shore without paying a fee, joining a club, obtaining a pass or even showing identification. The only exceptions to this rule would be those areas involving a clear danger or security risk, such as a military base, oil port or other dangerous industrial use, or areas subject to regulatory prohibition such as for the presence of a seasonal nesting bird. But the combination of our attractive and valuable shore with human nature likely will produce other public trust disputes in the future.

These pressures will continue to increase. Along much of the Jersey shore, the demand far exceeds the area

of publicly accessible beach. The symbiotic relationship between the public assets of ocean and tidelands, and shore-front property, supports the public use of waterfront areas above the mean high water line. The value, use and popularity of shore properties in this crowded state are due largely to the owners' access to and use of tidal waters. Nevertheless, waterfront property owners may not appropriate public assets or rights for their own exclusive use. As the real estate market drives land values higher, towns sell off valuable assets like street-end lots and beaches, and redevelopment activities convert older homes and businesses into more upscale and exclusive properties, the meaningful survival of the public trust doctrine requires the continued recognition and support of the courts and citizenry.

Under *Raleigh Avenue*, privately owned dry sand beach areas are open to public access and use to the extent necessary to effect the public trust doctrine. The precise extent of public access in a specific area remains subject to a fact-sensitive analysis, based on the *Matthews* factors. This analysis impacts the area landward of the mean high water line that is available to the public. Because of regulations that limit allowable development on beaches and dunes, there should be few structures in those areas that would preclude public access. Since most sand areas are used for sitting and recreation, there should be few practical reasons to exclude the public. "Exclusivity is not a valid reason for limiting use or access."³¹

Further, *Raleigh Avenue* recognizes the broad scope of the state of New Jersey, Department of Environmental Protection (DEP) administrative authority to regulate public access to and development on beaches, dunes and waterfront areas.³² Because such areas are held in trust for the public, local land use oversight is not exclusive.

Lands Now or Formerly Flowed by the Tide Remain Subject to the Doctrine

All tidally flowed lands belong to the public, and any conveyance of such lands by the state is subject to permanent public rights under the public trust doctrine.³³ A state tidelands grant does not exempt such lands from "the operation of State regulation on behalf of the public."³⁴

Six years ago, in *National Association of Home Builders v. DEP*,³⁵ the United States District Court for the District of New Jersey articulated an expansive interpretation of the New Jersey public trust doctrine, rejecting arguments that the doctrine was unreasonably broad or effected an unconstitutional regulatory taking. The court upheld extensive and detailed DEP regulations³⁶ to ensure permanent public access to and along the Hudson River and its shore. Those regulations require developers of property along the Hudson River to dedicate for public access and use a strip of river shore property up to 30 feet wide, along with perpendicular access routes, and to construct and maintain a segment of the Hudson Waterfront Walkway on their property.

The court ruled that since the owners had acquired and held title subject at all times to the public trust doctrine, the regulations were not an unconstitutional taking of property. While most (over 88 percent) of the current upland property subject to the walkway rule had been conveyed through tidelands grants (some over 100 years previously), the court nevertheless found these conditions established by the regulations to be well within the state's land use police power and a reasonable intrusion into the privately held upland areas, necessary to effect the public trust doctrine.³⁷

Doctrine Allows Beach Operators to Charge Only Reasonable Fees for Public Use of the Beaches

Regulation of municipal beach fees is expressly subject to statute, and charges on both privately and publicly owned beaches are subject to regulation by the DEP. However, all beach fees also remain subject to the police power of the state and the public trust doctrine.

Until 1955, beaches in New Jersey were free and open to the public.³⁸ The Legislature authorized municipalities to charge beach fees in 1955, but required that the fees must be spent to protect, clean and maintain the beach, and prohibited charging children under 12 years of age.³⁹

Nevertheless, those fees must reflect actual costs for basic services, and must not be prohibitive or discriminatory. A municipality may not supplement its local taxes or earn a profit from the use of its beaches. The public trust doctrine has never supported carving exclusive reservations out of the shore of our tidal waterways. Unreasonable or discriminatory beach admission fees may violate the statute, and the public trust doctrine, since they prevent public access to the land along the ocean shore.⁴⁰

The courts struck down a series of discriminatory beach fee ordinances in the 1970s and 1980s. In *Neptune v. Avon*, the Court cited the public trust doctrine to overturn an ordinance that restricted the sale of beach badges to residents, resulting in a higher fee for non-residents.⁴¹ In *Van Ness v. Deal*, the Court held that, under the public trust doctrine, a municipality could not set aside part of a public beach for use by residents only.⁴² In *Slocum v. Borough of Belmar*, the court adopted the reasoning of *Neptune* and *Van Ness*, and invalidated beach fees that discriminated against nonresidents.⁴³

Two years ago, in *Secure Heritage*, the Appellate Division struck down, as unconstitutional, provisions of a city of Cape May ordinance that banned the sale of seasonal beach tags to hotels, motels and other rental unit guests, but

permitted individuals to purchase transferable seasonal beach tags.⁴⁴

The Appellate Division explained the basis of its decision:

The public trust doctrine, which is premised on the common rights of all citizens to use and enjoy tidal land seaward of the mean high water mark, dictates "that the beach and the ocean must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible."⁴⁵

Raleigh Avenue clarified that there is no legal basis to allow a private entity to deny public trust rights through practices similar to those the courts⁴⁶ already disapproved for governmental entities.⁴⁷ Restrictions on the transferability of beach badges, and beach fees that are not related to the costs of operating and administering the beach, but only to ensure its profitability, are invalid.⁴⁸

The *Matthews* Court expressed concern for the damage to public trust rights if the courts were to allow widespread obstruction of public access by private owners or associations:

There is no public beach in the Borough of Bay Head. If the residents of every municipality bordering the Jersey shore were to adopt the Bay Head policy, the public would be prevented from exercising its right to enjoy the foreshore. The Bay Head residents may not frustrate the public's right in this manner.⁴⁹

Increased real estate values for waterfront properties and redevelopment activities in shore communities will only increase the temptation to increase beach fees and adopt other measures that obstruct the general public from exercising their public trust rights along the ocean shore in those increasingly affluent communities.

Beach access and use fees that dis-

criminate against non-residents, or are intrinsically unreasonable, violate the public trust doctrine. Practices that discriminate against non-residents include fee structures that offer only a full season membership, without any daily, weekly or monthly option. The concern is that such fee structures discourage short-term non-residents from using that section of tidal shore.⁵⁰

Raleigh Avenue extends these same principles to fees on privately owned tidal shores. The Court began with the principle that all citizens have a right to use the ocean and a reasonable area of dry sand. The beach owner may recoup its actual costs of providing basic services, including lifeguards, toilets, showers and trash removal, plus its reasonable administrative costs. A business may not, however, profit from charging the public for access to or use of a resource to which the public already is entitled, and may not exclude members of the public who are not profitable to that business.

New Jersey's public trust law has never required that the public may exercise its public trust rights only if the riparian property owner can profit from that use. A beach owner may not conduct any practice, including physical obstructions, exorbitant fees or discriminatory practices, that prevent members of the public from exercising the rights protected by the public trust doctrine.

Neither the state nor a private property owner may deprive the people of their rights under the public trust doctrine. As our Supreme Court stated almost 200 years ago, "It would be a grievance which never could be long borne by a free people."⁵¹ ❧

Endnotes

1. See *Capano v. Stone Harbor*, 530 F. Supp. 1254, 1269 (D.N.J. 1982); Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial

- Intervention," 68 *Mich. L. Rev.* 471 (1970).
2. Although the public trust doctrine applies to public rights to use a wide variety of natural resources, this article discusses only its application to the shores of tidal waterways. This article and the public trust doctrine cases often use several terms, including the following: Tidal waterways are those bodies that have a tidal flow, to the head of tide. Tidal lands are lands that are flowed by the tide, up to the highest spring high tide. The foreshore is the shore of any tidal waterway, between the high tide and low tide line. The upland is that area of tidal shore above, or landward, of the mean tide line. A littoral owner is the owner of land that now is or formerly was flowed by the tide.
 3. Justinian, Institutes 2.1.1.
 4. *Shively v. Bowlby*, 152 U.S. 1, 12, 14 S. Ct. 548, 38 L. Ed. 331 (1894); *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 435, 13 S. Ct. 110, 111, 36 L. Ed. 1018, 1036 (1892).
 5. *Illinois Central*, *supra*, 146 U.S. at 435, 13 S. Ct. at 111; *see Karam v. State, Dep't of Env. Protect.*, 308 N.J. Super. 225, 240 (App. Div. 1998), *aff'd* 157 N.J. 187 (1999), *cert. denied*, 528 U.S. 814, 120 S. Ct. 51, 145 L. Ed. 2d 45 (1999).
 6. *Arnold v. Mundy*, 6 N.J.L. 1, 3 (Sup. Ct. 1821).
 7. *Philips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475, 108 S. Ct. 791, 794-795, 98 L. Ed. 2d 877 (1988).
 8. *Shively*, *supra*; *Martin v. Waddell's Lessee*, 41 U.S. 367, 10 L. Ed. 997 (1842); *see also Illinois Central*, *supra*.
 9. *Martin*, *supra*, 41 U.S. at 409-413.
 10. *Arnold*, *supra*, 6 N.J.L. at 3-6, 65-78.
 11. "The sovereign power itself, therefore, cannot, consistently with the principles of the 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." *Id.*, 6 N.J.L. at 162.
 12. *Martin*, *supra*, 41 U.S. at 410.
 13. *Bell v. Gough*, 23 N.J.L. 624 (E. & A. 1852).
 14. *Slocum v. Borough of Belmar*, 238 N.J. Super. 179, 185 (Law Div. 1989)(*citing Van Ness v. Borough of Deal*, 78 N.J. 174, 179 (1978)).
 15. *Slocum*, *supra*, 238 N.J. Super. at 185 (*citing Lusardi v. Curtis Point Prop. Owners Ass'n*, 86 N.J. 217, 228 (1981)).
 16. The dry sand area is generally defined as the land located landward of the high water mark to the vegetation line or where there is no vegetation to a seawall, road, parking lot or boardwalk. *Matthews v. Bay Head*, 95 N.J. 306, 312 n. 1 (1984), (*citing* New Jersey Beach Access Study Commission, Public Access to the Oceanfront Beaches: A Report to the Governor and Legislature of New Jersey 2 (1977)), *cert. denied*, 469 U.S. 821 (1984).
 17. *Neptune City v. Avon-by-the-Sea*, 61 N.J. 296, 309 (1972); *accord Lusardi*, *supra*, 86 N.J. at 228; *Slocum*, *supra*, 238 N.J. Super. at 186.
 18. *Id.*
 19. Hall, An Essay on the Rights of the Crown in the Sea-Shore of the Realm, etc. Of the King's Title to the British Seas (1830), in *History of the Foreshore*, at 847-48, 850-51 (Wm. W. Gaunt & Sons, Inc., reprint 1993)(emphasis added); *Matthews*, *supra*, 95 N.J. at 316-17 (*quoting* Justinian, Institutes 2.1.1).
 20. *Stevens v. Paterson and Newark R.R. Co.*, 34 N.J.L. 532, 540 (E. & A. 1870).
 21. *Matthews*, *supra*, 95 N.J. 306 (1984).
 22. *Id.* at 325.
 23. *Id.*
 24. *Id.* at 326, 325 n. 7.
 25. *Id.*; *see also, National Ass'n of Home Builders v. State, Dep't of Env. Protect.*, 64 F. Supp. 2d 354, 358-359 (D.N.J. 1999).
 26. *Matthews*, *supra*, 95 N.J. at 326.
 27. *Matthews*, *supra*, 95 N.J. at 333.
 28. *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005).
 29. *Id.*
 30. For an entertaining review of the history of New Jersey's tumultuous public trust doctrine case law, *see* Bonnie J. McCay, *Oyster Wars and the Public Trust*, (U. of Arizona Press 1998).
 31. *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club*, 370 N.J. Super. 171, 188 (App. Div. 2004), *aff'd*, 185 N.J. 40 (2005); *see Matthews*, *supra*, 95 N.J. at 326.
 32. Under the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 *et seq.*; the Waterfront Development Law, N.J.S.A. 12:5-3; and the Coastal Rules, N.J.A.C. 7:7 and 7:7E.
 33. *Lusardi*, *supra*, 86 N.J. at 227-228; *Van Ness*, *supra*, 78 N.J. at 179-180; *Neptune City*, *supra*, 61 N.J. at 307-308; *National Ass'n*, *supra*, 64 F. Supp. 2d at 358-359; *East Cape May Assoc. v. State, Dep't of Env. Protect.*, 343 N.J. Super. 110, 140-143 (App. Div. 2001).
 34. *East Cape May*, *supra*, 343 N.J. Super. at 140-143.
 35. 64 F. Supp. 2d 354 (D.N.J. 1999).
 36. The Public Access to the Waterfront Rule, N.J.A.C. 7:7E-8.11, applicable to all lands that face tidal waters, and the Hudson Waterfront Walkway Rule, N.J.A.C. 7:7E-3.48.
 37. 64 F. Supp. 2d at 358-359, 359 n.2.
 38. *Neptune City*, *supra*, 61 N.J. at 300.
 39. N.J.S.A. 40:61-22.20; *Secure Heritage, Inc. v. City of Cape May*, 361 N.J. Super. 281, 289-290 (App. Div.), *certif. denied*, 178 N.J. 32 (2003).
 40. *See generally, Secure Heritage*, *supra*; *Slocum*, *supra*, 238 N.J. Super. at 186-

189.

41. *Lusardi, supra*, 61 N.J. at 310.
42. *Van Ness, supra*, 78 N.J. at 180.
43. *Slocum, supra*, 238 N.J. Super. at 186-189; *see Hyland v. Allenhurst*, 78 N.J. 190, 196 (1978) (municipal beach toilet facilities may not discriminate against non-residents); *State v. Vogt*, 341 N.J. Super. 407, 422-423 (App. Div. 2001).
44. *Secure Heritage, supra*, 361 N.J. Super. at 304-305.
45. *Id.* at 301-302 (*quoting Neptune, supra*, 61 N.J. at 309).
46. *See generally, Slocum and Secure Heritage, supra.*
47. *See also Matthews, supra*, 95 N.J. at 329, 328-30 (a court may be forced to intervene in affairs of a voluntary association where the association “enjoys monopoly power in an area of vital public concern”); *Capano, supra*, 530 F. Supp. at 1269 (summarizing New Jersey law).
48. *Raleigh Avenue*, 185 N.J. at 61-62.
49. *Matthews, supra*, 95 N.J. at 331.
50. *See Slocum, supra*, 238 N.J. Super. at 189.
51. *Arnold, supra*, 6 N.J.L. at 162.

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