New Public Access Law: A Codification Of The Public Trust Doctrine?

By Steven M. Dalton, Esq.

Summer is upon us and beach access issues are once again in the news. Senate Bill 1074, referred to as the public trust doctrine / public access law, was signed by the Governor on May 3, 2019. The law requires the New Jersey Department of Environmental Protection ("DEP") to address public access in connection with permitting decisions consistent with the public trust doctrine, but whether the law is a complete codification of the doctrine, or something less than that, is debatable.

The public trust doctrine is a common law doctrine tracing back to English common law and Roman civil law that has long been recognized by New Jersey. Arnold v. Mundy, 6 N.J.L. 1 (Sup. Ct. 1821). It recognizes that the State "holds ownership, dominion and sovereignty over tidally-flowed lands in trust for the people," Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296 (1972), and the "public has a right to use the land below the mean average high water mark where the tide ebbs and flows." Matthews v. Bay Head Imp. Ass'n, 95 N.J. 306 (1984).

Private property rights are often at odds with the public trust doctrine. The New Jersey Supreme Court has established that public access rights extend to privately owned dry sand beaches in limited circumstances, striking a careful balance between the public's right of access to tidal waters and the rights of private property owners. The Court's decisions of Matthews and Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 185 N.J. 40 (2005) address the public's limited rights with respect to use of privately-owned dry sand beach areas and perpendicular access to such lands. The Matthews Court noted that the question of the public's right to privately-owned dry sand beaches arises in two contexts: (1) perpendicular access across privately-owned dry sand beaches to gain access to the foreshore, and (2) access to dry sand beach for recreational use akin to use of public beaches. Public access in the context of private property is not an absolute right, but rather, at times it is appropriate for private property owners to exclude the public. The public's right of access "is satisfied so long as there is reasonable access to the sea."

The Court established factors for an individualized, case-by-case determination of whether reasonable access to water areas exists and whether private property owners may be required to accommodate public access for use of tidally-flowed waters. These factors include examination of: geographical proximity of the dry sand to the wet sand areas; availability of publicly owned upland sand area; the nature and extent of public demand; and usage of the upland by private owner. The Raleigh Court, applying the Matthews factors, held that public use of privately owned beach was reasonable. The facts demonstrated the beach had historically been open to the public for perpendicular access and unlimited use of the dry sand beach and water. Accordingly, it was unreasonable to deny access "after years" of public use.

Under these decisions, and progeny, the public trust doctrine does not create a per se right of public access across or use of privately owned lands. Rather, a fact-specific, individualized review is necessary to determine whether burdening private property with public access is reasonable. Where public access is not supported by such an individualized review, "the government may not create a right of public access without payment of just compensation." See Bubis v. Kassin, 404 N.J. Super. 105 (App. Div. 2008).

The law is being touted by DEP and others as a codification of the public trust doctrine. It does require DEP to make decisions consistent with the public trust doctrine. However, critical tenets of the doctrine are absent from the law, including a requirement in all cases involving privately owned lands to apply the Matthews reasonableness factors.

While questions exist regarding the extent of codification of the public trust doctrine, the law contains straightforward provisions that owners and developers of beachfront or other land along tidal waters should carefully consider. DEP permitting decisions must be consistent with the public trust doctrine and

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municipalities are encouraged to include public access plan elements in their master plans. DEP is required to protect the public's right of access to tidally-flowed lands and adjacent shorelines to the greatest extent practicable. For any application involving a change in the existing footprint of a structure, a change in use of property, or beach replenishment or dune maintenance activities, DEP shall review the availability of existing public access and determine whether additional public access is necessarily consistent with principles established under the public trust doctrine. DEP is required to consider the scale of any proposed change in footprint or use of the subject property, the demand for public access, and aspects of any DEP approved municipal public access plan.

The law becomes applicable to individual permit applications starting 60 days after the May 3, 2019 effective date. For other approvals, such as general permits, GPs by certification, or permits by rule, DEP has 18 months to adopt regulations identifying activities for which no public access is required, ***and identifying activities for which public access is required but no individual review is necessary***. With respect to the latter, the absence of an individual review directly conflicts public trust doctrine principles established under Matthews. Will a general permit applicant subject to public access without an individualized review challenge the public access requirement on grounds that the absence of an individualized review and determination of whether the public access condition is reasonable is inconsistent with the public trust doctrine?

Interested parties are encouraged to monitor DEP's forthcoming rule-making to assess how the agency proposes to implement the new law through amendments to its Coastal Zone Management regulations, which currently include a lengthy public access rule recently adopted September 2018, and carefully consider the implications of those amendments.

The Emerging Contaminant Challenge, How PFAS Can Impact Your Deals

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PFAS are tricky to sample and resistant to most treatment technologies. As PFAS are present in many consumer products and regulatory limits are very low, special handling is required to avoid contamination of samples. Many common materials, equipment and clothing cannot be used when sampling PFAS such as Teflon™, chemical ice packs, water-proof field books, Gore-Tex®, Tyvek® and certain personal care products. Not all laboratories are certified in the approved PFAS analysis methodologies and there almost certainly be a backlog of samples once the PFOA and PFOS standards in New Jersey are adopted. Currently, the only known but only somewhat effective method for groundwater remediation for PFAS is to pump-and-treat contaminated groundwater through granular activated carbon. Membrane and in situ chemical oxidation applications are under development.

Regulation of PFAS will create additional, and at present very uncertain, cost impacts for property transfers including incorporation of PFAS into the due diligence process and remediation when warranted. Other risks include uncertainties in future regulation and the potential for PFAS to cause previously approved remediation projects to be re-opened.

So what can purchasers do to protect themselves?

1. Make certain PFAS are included in your due diligence. PFAS has been used in a wide range of industries and may be present at the sites of accidents and first responder training where fire-fighting foams were utilized.

2. Know which PFAS chemicals are regulated and standards that are pending. Develop sampling plans as part of Phase 2 due diligence or other site investigation activities that target the appropriate PFAS chemicals.

3. Understand proper PFAS sampling protocols and make sure that the laboratory is certified in the approved analysis methodologies. Allow for additional time for due diligence as qualified laboratories may be backlogged.

4. Be prepared to estimate costs for investigation and cleanup and negotiate with the seller.

How Far We've Come With 10 Years Of The SRRA

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profession. The LSRPA provides information, education, and technical resources to LSRPs and other professionals involved in environmental remediation in the state. With more than 800 members, the LSRPA is recognized by the DEP as the primary representative of the profession and provides front-line feedback to the state on site remediation issues.

At this 10-year milestone, New Jersey officials are again considering updates to SRRA, but its foundation will likely remain unchanged: mandatory timeframes, requirements to remediate, and LSRPs. The program works and its dedication to clean water, land, air, and the protection of people are steadfast and constant.
