

NJ Requires Private Beach to Provide Access to Public

By Donna T. Urban, Esq.

In a landmark beach-access case, *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc. et al.*, the New Jersey Supreme Court upheld the appellate court ruling that the private Atlantis Beach Club could not prevent the public's right to access and use the club's beach property. Although the decision was based on the particular circumstances of the case, the ruling clearly expands the public's right to use private beaches, which could likely have far-reaching consequences on all private beach owners and developers along the Jersey Shore. The decision certainly paves the way for citizens groups and environmentalists to challenge private beach owners who attempt to restrict the public from accessing their beaches.

The Atlantis Beach Club owns beachfront property in Lower Township, New Jersey commonly known as Diamond Beach. Significantly, the area contains the only beach in Lower Township facing the Atlantic Ocean. Beginning in 1996, Atlantis established a private beach club and began to limit public access to its beach by, among other things, charging substantial seasonal membership fees and erecting barricades along the property. A legal battle ensued between the neighboring property owners and the beach club, leading all the way to the State Supreme Court.

In reaching its decision, the Supreme Court was called upon to interpret the longstanding public trust doctrine, which provides that all the land covered by tidal waters is held in trust by the state for the public use and benefit. The issue in *Atlantis* concerned whether use of the dry sand areas ancillary to use of the ocean for recreational purposes is also implicit in the rights afforded to the public under the public trust doctrine. Applying previously established criteria for the application of the public trust doctrine to privately-owned beaches, and based on the circumstances in the case, the Court held that upland dry sand areas must also be available for use by the public under the public trust doctrine. The Court also affirmed the appellate court's decision concerning the appropriateness of the fee structure for use of the private beach by the public, and found that the New Jersey Department of Environmental Protection (DEP) could weigh in on the validity of the fees where the DEP has jurisdiction, *i.e.*, where, as in *Atlantis*, the DEP regulates activities relating to beach development.

Factors considered by the Court in determining the public's right to access included: (1) the location of the dry sand area in relation to the foreshore, (2) the extent and availability of publicly-owned upland sand area, (3) the nature and extent of the public demand, and (4) usage of the upland sand land by the owner. In balancing these factors, the Court found in favor of public access to the upland sand beach area. Of significance to the Court was the longstanding public access to and use of the beach, the documented public demand, the lack of any publicly-owned beaches in Lower Township, and the use of the property by the beach club as a business enterprise.

This is the first case in which New Jersey's public trust doctrine has been applied to privately owned beaches. Previously the doctrine had been limited to cases involving municipally owned properties or property owners who provide services ordinarily provided by a municipality. The ruling therefore establishes a precedent that will likely be used by beach-access advocates to gain access to other privately owned beaches in New Jersey. The decision will consequently impact private beach owners and developers of beachfront properties up and down the coast.

We intend to monitor the effect of this decision closely and will report on whether Atlantis decides to take this case to the U.S. Supreme Court. ♦

Attorneys in the Environmental Law Practice Group at Flaster/Greenberg P.C. are available to counsel corporate clients and individuals with concerns about this New Jersey case.

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