

Pursuit of the Public Trust: Beach Access in New Jersey from *Neptune v.* *Avon* to *Matthews v. BHIA*

Thomas J. Fellig*

INTRODUCTION

This article examines some of the legal problems arising from local restriction of beach access in communities along the New Jersey shore. The article surveys the development of New Jersey case law on beach access and considers the legal success of the "public trust" doctrine in securing public access rights. This article also examines the crucial role which New Jersey's Public Advocate has played in presenting cases on beach access to the courts of New Jersey.

The decisions of the New Jersey courts address two related issues in the area of beach access: (1) the scope of discretion permitted to coastal municipalities in the management and operation of their beaches, particularly in the setting of fees and admission of nonresidents; and (2) the extent to which the public has a right to cross over and make recreational use of privately-owned beach property.

* A.B. Harvard University, 1978; B.A. Cambridge University, 1980; J.D. Villanova University, 1984. Admitted New Jersey, 1984. Associate, Shanley & Fisher, Morristown, New Jersey.

The author gratefully acknowledges the advice and encouragement of Professor Joseph Dellapenna of the Villanova University School of Law. An earlier version of this paper was presented to his seminar on Ocean and Coastal Management Law. That paper received Second Prize in the 1983 New Jersey Sea Grant Law Award competition sponsored by the New Jersey Marine Sciences Consortium of Rutgers University.

Court challenges to the municipal administration of public beaches and to the conduct of individual owners and developers of shorefront property have been common in New Jersey as in other coastal states.¹ Historically these lawsuits have resulted from postwar development and the completion of an interstate highway system which made it possible for unprecedented numbers of people from both the Philadelphia and New York metropolitan areas to reach the New Jersey shore in less than three hours. Confronted by steadily increasing demands for access to beach facilities along with rising maintenance costs, municipalities attempted to reduce overcrowding and pass some of the increasing maintenance costs on to nonresidents through user fees. Municipal ordinances imposing or raising beach user fees sparked many of these disputes. As reflected in the media, public opinion took the side of those who challenged beach use restrictions.² With a growing perception that beach resources were finite and that ever-increasing numbers of people were seeking access to them, the challengers to municipal beach restrictions came to be perceived as representing a right of the population as a whole to share in the recreational use of beaches hitherto reserved for a small group of shorefront residents.³

The decision of the Supreme Court of New Jersey in *Borough of Neptune City v. Borough of Avon-by-the-Sea*⁴ was the first significant decision to reflect this attitude favoring greater public access to beaches. Subsequent challenges to local access restrictions received the support of Governor Byrne's administration as part of a broader effort to increase the power of the state executive rela-

1. *E.g.*, *Brindley v. Borough of Lavallette*, 33 N.J. Super. 344, 110 A.2d 157 (Law Div. 1954) (city ordinance requiring payment of fees by residents and property owners over age twelve for use of facilities of bathing beach and prohibiting use of beach by nonresidents or nonproperty owners declared invalid as discriminatory against nonresidents); *Dep't of Natural Resources v. Mayor of Ocean City*, 274 Md. 1, 332 A.2d 630 (1975) (neither custom nor grant under Maryland Charter give public any right to use coastal shore lying within the property line of private owner where such use unreasonably interferes with owner's possessory rights); *State v. Beach Co.*, 248 S.E.2d 115 (S.C. 1978) (public did not acquire prescriptive right to ocean beachfront where no dedication could be proven by written instrument or from sporadic, permissive use of property). *See generally* Annot., 57 A.L.R. 3d 998 (1974); Annot., 18 A.L.R. 4th 568 (1982).

2. *See e.g.*, *Suburbia's Exclusive Beaches, The "Keep-Out" Syndrome is Under Legal Assault*, N.Y. Times, June 2, 1974, § 4, at 6, col. 3; *Opening Up New Jersey's Sea and Sand*, N.Y. Times, July 5, 1981, § 4, at 6, col. 3.

3. *The Gritty Battle for Beach Access*, TIME, Aug. 27, 1984, at 48.

4. 61 N.J. 296, 294 A.2d 47 (1972).

tive to the municipalities.⁵ Through the vehicles of the Attorney General's office and the newly created Department of the Public Advocate,⁶ the state joined, and in some cases initiated, actions to overturn ordinances restricting nonresident beach access.

Recognizing the policy concerns inherent in the increasing demand for access to limited beach resources,⁷ the Supreme Court of New Jersey in *Neptune* applied the "public trust" doctrine as a means of protecting the recreational access rights of nonresidents.⁸ The doctrine requires a state to hold land between the mean high tide and mean low tide lines in trust for the use of the public.⁹ As developed in cases beginning with *Neptune v. Avon*, the doctrine has been successfully applied to limit the otherwise nearly unrestrained exercise of municipal authority over nonresident users of municipal beaches.¹⁰ In this context, the public trust doctrine has come to stand for the principle that municipal beaches "must be open to all on equal terms."¹¹

Other decisions of the New Jersey courts have considered the scope of the public trust doctrine in protecting residents' recreational access and use rights against actions by local governments.¹² Most significantly, the recent decision of the Supreme Court of New Jersey in *Matthews v. Bay Head Improvement Ass'n*¹³ marked the first attempt of New Jersey courts to define a public right of "reasonable access" over privately-owned dry sand beach to reach wet sand beach.¹⁴

5. Philadelphia Inquirer, Jan. 17, 1982, § 9, at 25.

6. See *infra*, text accompanying notes 113-31.

7. *Id.* at 303, 294 A.2d at 49-50.

8. *Id.* at 303, 294 A.2d at 51.

9. *Neptune v. Avon*, 61 N.J. at 303, 294 A.2d at 51.

10. See *infra* text accompanying notes 15-78.

11. *Id.* at 309, 294 A.2d at 54.

12. See *Lusardi v. Curtis Point Prop. Owners Ass'n*, 86 N.J. 217, 430 A.2d 881 (1981); *Capano v. Borough of Stone Harbor*, 530 F. Supp. 1254 (D.N.J. 1982); *Sea Watch, Inc. v. Borough of Manasquan*, 186 N.J. Super. 25, 451 A.2d 192 (App. Div. 1982), see *infra* text accompanying notes 79-105.

13. 95 N.J. 306, 322-24, 471 A.2d 355, 363-66 (1984), *cert. denied*, 53 U.S.L.W. 3236 (U.S. Oct. 2, 1984).

14. See *infra* text accompanying notes 106-29. The term dry sand beach refers to beach property directly inland of the mean high tide line. Wet sand beach refers to beach property between the mean high and low tide lines. It is the area of the beach normally covered by the flow of the tide. 95 N.J. at 312, 471 A.2d at 358. See R. HILDRETH & R. JOHNSON, OCEAN AND COASTAL LAW 132 (Rev. ed. 1982).

I. PUBLIC RIGHTS IN MUNICIPAL BEACHES: THE PUBLIC TRUST
DOCTRINE IN NEW JERSEY AS A RESTRICTION ON
MUNICIPAL DISCRETION

A. *Coastal Municipalities versus Nonresidents*

The first case challenging the legality of a municipality's decision to increase the beach fees paid by longtime nonresident beach users involved the adjoining boroughs of Neptune City and Avon-by-the-Sea.¹⁵ Avon, a coastal community on the Atlantic Ocean, owned the dry sand beach running north/south directly east of the town.¹⁶ Avon operated this beach area as a municipal park. Neptune, which bordered Avon on the west, had no oceanfront access and no dry sand beach.¹⁷ Pursuant to state statutory authorization,¹⁸ Avon had enacted an ordinance providing for the sale of badges to all who wished to use the beach. Since the mid-1950's, the fee for a badge had been ten dollars per season or seven dollars per month. The controversy arose in 1970, when the Borough Council amended the ordinance to raise fees for monthly badges to equal the rate for season passes, while restricting the sale of season passes to residents and taxpayers of Avon. In opposition to this increase, suit was brought by the Borough of Neptune City and by several of its residents.¹⁹

Plaintiffs challenged the fee increase on two grounds. First, they argued that access restrictions to municipal facilities based on residence violated the equal protection clause of the fourteenth amendment. Second, they argued that Avon had denied the plaintiffs their right of access to navigable waters which was protected by the common law.²⁰

The Law Division found for the defendants.²¹ The trial judge dismissed the plaintiffs' contention that their common law right of access to navigable waters precluded Avon from charging user fees by noting that the power to regulate public rights in tidal waters lay with the legislature. Here the legislature had acted to

15. *Neptune*, 114 N.J. Super. 115, 274 A.2d 860 (Law Div. 1971).

16. *Id.* at 117, 274 A.2d at 861.

17. *Id.*

18. N.J. STAT. ANN. 40:61-22.20 (West 1984).

19. 114 N.J. Super. at 118-19, 274 A.2d at 862-63.

20. *Id.* at 119, 274 A.2d at 863.

21. *Id.* at 123, 274 A.2d at 865.

permit municipalities to charge user fees, thus restricting the public's right of access.²²

In reviewing the plaintiffs' claim that discrimination in beach fees based upon residence violated the equal protection clause, the trial court applied a deferential standard of review. The court stated that "[i]t is settled law in New Jersey that if there is a reasonable basis for the recognition of separate classes, and the disparate treatment of these classes has a rational relation to the object sought to be achieved by the lawmakers the Constitution is not offended."²³

The trial court found that the economic burden born by the Borough of Avon in providing municipal services for users of the beach justified charging nonresidents—who do not pay for such services in the same way as resident taxpayers—higher fees. "Avon, because of its fortuitous location, is charged with the responsibility of administering this natural resource for all our citizens. . . . Avon should not alone bear the disproportionate cost of the administration."²⁴

The Supreme Court of New Jersey granted certification to hear the *Neptune v. Avon* appeal directly, thereby bypassing the Appellate Division, because "the question posed is of ever-increasing importance in our metropolitan area."²⁵ By a four-to-two vote, the Supreme Court of New Jersey reversed the judgment of the Law Division and held that fees charged to nonresidents must be no greater than fees charged to residents.²⁶

The Supreme Court of New Jersey might have supported its decision by construing the statutory language authorizing municipalities to provide "for the charging . . . of reasonable fees"²⁷ as denying municipalities the power to charge higher fees to nonresidents. Alternatively, the Supreme Court of New Jersey might have held that Avon's beach fee ordinance was invalid because the borough lacked a reasonable basis for discrimination between residents and nonresidents, and thus violated the equal protection clause of the fourteenth amendment. The decision in *Brin-*

22. *Id.* at 120, 274 A.2d at 863.

23. *Id.*

24. *Id.* at 123, 274 A.2d at 865.

25. 61 N.J. at 299, 294 A.2d at 49. The supreme court may certify appeals pending unheard in the Appellate Division. N.J. CT. RULES 2:12-2.

26. 61 N.J. at 311, 294 A.2d at 56.

27. N.J. STAT. ANN. 40:61-22.20 (West 1984).

dley v. Borough of Lavallette,²⁸ which invalidated an ordinance barring nonresidents from the use of its dedicated beach on equal protection grounds, could have been extended to this situation.²⁹

The Supreme Court of New Jersey rejected both of these approaches. Instead, the court chose to rest its decision on the public trust doctrine, a theory of relief not expressly advanced by the plaintiff. The court interpreted the plaintiffs' claim of a common law right of access to the ocean as "in essence . . . reliance upon the public trust doctrine. . . ."³⁰ The doctrine, the supreme court explained, "derives from the ancient principle of English law that land covered by tidal waters belonged to the sovereign, but [is] for the common use of all the people. Such lands passed to the respective states as a result of the American Revolution."³¹ As explained by the United States Supreme Court in the leading case of *Illinois Central R.R. v. Illinois*,³² the public trust doctrine provides that land between the mean low and mean high tide lines is owned by the state, as successor to the rights of the Crown, and is held in trust for use by the people of the state for purposes of navigation, fishing, and commerce.³³ The power to improve the trust property, or to alienate small portions of it consistent with public trust purposes, rests with the state legislature, subject to judicial review.³⁴ The state's obligation to administer

28. 33 N.J. Super. 344, 110 A.2d 157 (Law Div. 1954).

29. The Supreme Court of New Jersey approved the holding of *Brindley in Neptune v. Avon*, 61 N.J. at 303, 294 A.2d at 51.

30. *Id.* at 302, 294 A.2d at 51.

31. *Id.* at 303, 294 A.2d at 51. By treating the plaintiff's claim of a common law right of access as a claim under the public trust doctrine, the court implicitly rejected any finding of a prescriptive easement, an implied dedication or customary use. These theories had served as the basis for judicial decisions opening private beaches to public use in California and Oregon. In *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970), the Supreme Court of California concluded that an implied dedication of beachfront property had deprived its owners of the right to exclude members of the public from its use. The court relied upon evidence that members of the public had used the land as they would have used public land, and refused to presume that they did so with the owners' permission. In *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969), the Oregon Supreme Court relied upon evidence of common use of the dry sand beach antedating the settlement of Oregon to find that the customary rights protected public recreational access against the claims of private landowners. The Supreme Court of New Jersey expressly rejected these theories in *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. at 325, 471 A.2d at 265.

32. 146 U.S. 387 (1892).

33. *Id.* at 435, 452.

34. The Supreme Court of New Jersey stated that the legislature did not have unlimited power to alienate tide-flowed property in derogation of public trust rights. In *Neptune* the

this resource under the public trust doctrine is inherent in its sovereignty. According to the United States Supreme Court, “[t]he state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers.”³⁵

In proceeding by means of the public trust doctrine, the Supreme Court of New Jersey was adopting the approach suggested by Professor Joseph Sax.³⁶ Professor Sax has urged that courts should apply the public trust doctrine to those environmental management situations “in which diffuse public interests need protection against tightly organized groups with clear and immediate goals.”³⁷ In such cases, the value of the public trust doctrine lies in its breadth and its source, as a public right derived from the power of the sovereign. Any right founded on the public trust inures to the public at large, and takes precedence over any legislative grant.³⁸

One novelty of the New Jersey Supreme Court’s decision was the inclusion of recreational use as one of the activities protected by the public trust doctrine. The court had “no difficulty in finding that, in this latter half of the twentieth century, 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.”³⁹ From the recognition of a public right of recreational access, it follows that the wet sand beach lying between the mean low and mean high tide would be open to all for recreational use, and would be protected against any unreasonable alienation by the state.

court declined to speculate on the extent of legislative authority. In recognizing the judiciary’s responsibility to protect tide-flowed lands against improper alienation, the court said only that a municipality could not rest its claim to charge higher fees to nonresidents on legislative delegation of the power to collect reasonable beach fees. 61 N.J. at 308, 294 A.2d at 53. The issue of improper legislative alienation of tidelands is central to the controversy over riparian grants. See *Matthews v. Bay Head Improvement Ass’n*, 95 N.J. at 319-20, 471 A.2d at 362; *Dickinson v. Fund for Support of Free Public Schools*, 95 N.J. 65, 469 A.2d 1 (1983).

35. 146 U.S. at 453.

36. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

37. *Id.* at 556.

38. *Neptune*, 61 N.J. at 306, 294 A.2d at 53.

39. 61 N.J. at 309, 294 A.2d at 54. In *Matthews v. Bay Head Improvement Ass’n*, 95 N.J. at 321, 471 A.2d at 361, the Supreme Court of New Jersey demonstrated that earlier evidence existed for the inclusion of recreation and bathing among the uses protected by the public trust doctrine.

The value of such a right would be significant only if it carried with it some right of access to the dry sand beach adjoining the wet sand beach. The Supreme Court of New Jersey imposed a duty upon coastal municipalities to administer their beaches in a manner which furthered the general availability of the tidal zone for the public's recreational use.

[W]here 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 the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.⁴⁰

The *Neptune* decision was novel in deriving from the broad public trust doctrine the specific rule barring municipalities from discriminating “in any respect” between residents and nonresidents in fixing reasonable fees for access to dry sand beaches bordering state tidelands protected by the public trust.⁴¹

By resting this decision on the public trust doctrine, thereby asserting the right of the Supreme Court of New Jersey to protect that trust against legislative alienation, the court eliminated the possibility that the legislature might reverse the outcome of *Neptune* by expressly granting coastal municipalities further power to restrict access to the public trust. Finally, use of the public trust doctrine removed the courtroom debate over beach fees from the equal protection rubric under which the lower court had concluded that a discriminatory fee structure favoring residents was reasonable because of the costs of beach administration born by resident taxpayers.⁴²

Following *Neptune v. Avon*, two major cases made their way through the New Jersey courts during the late 1970's. These decisions placed limits on the scope of the public trust doctrine as a restraint on municipal discretion in setting beach fees. The first of these cases, *Van Ness v. Borough of Deal*, involved litigation against the Borough of Deal between 1975 and 1979.⁴³ This litigation raised the issues of public access rights to man-made municipal dry sand beaches and to municipal recreational facilities

40. 61 N.J. at 309, 294 A.2d at 54.

41. *Id.* at 310, 274 A.2d at 55.

42. *Id.*

43. 139 N.J. Super. 83, 352 A.2d 599 (1975).

constructed on land adjoining a municipal beach. *Deal* also marked the first involvement of the Public Advocate in a beach access dispute.

The Borough of Deal owned approximately 1300 feet of dry sand beach adjoining the tideland of the Atlantic Ocean. The 1300 feet of beach were divided into three parts: the Deal Casino beach, the Phillips Avenue Pavilion beach and a surfing and boating beach. The Casino beach was man-made, having been constructed entirely at the borough's expense. Immediately west of the Casino beach the borough had erected the Deal Casino, an enclosed recreational facility including cabanas, bathhouses and a restaurant. Membership in the Casino and access to the Casino beach were limited to permanent residents, their immediate families, and nonresident property owners. Daily guest passes were strictly limited to guests of members.⁴⁴ In contrast to the use restrictions imposed upon the Casino beach, the Phillips Avenue Pavilion beach and boathouses were open to the public at large on a daily or seasonal basis. Nonresidents were required to pay a higher fee than residents for the use of locker facilities in the Pavilion. The surfing and boating beach was open to the public.⁴⁵

The Public Advocate, joined by the Attorney General of New Jersey, brought an action to remove municipal restrictions on access to the beaches and adjoining facilities. The plaintiffs sought declaratory judgment and injunctive relief on the following grounds: (1) the requirement that nonresident users of the Pavilion Beach pay a higher fee for locker rentals was discriminatory and thus repugnant to the decision in *Neptune v. Avon*; and (2) the public could not be denied access to the Deal Casino beach and to the Deal Casino complex, even though nonresidents had unlimited access to the adjoining wet sand beach area through the Pavilion beach.⁴⁶

The Chancery Division granted judgment for the plaintiff and enjoined the defendant's illegal conduct.⁴⁷ First, the court found that the higher fees charged nonresidents for use of locker facilities at the Pavilion beach were illegal under *Neptune v. Avon*, since the borough had dedicated the Pavilion beach to the use of the general public. The court "extend[ed] the Avon holding here to

44. *Id.* at 88-91, 352 A.2d at 602-03.

45. *Id.* at 91, 352 A.2d at 604.

46. *Id.* at 91, 92, 352 A.2d at 603, 604.

47. *Id.* at 99, 100, 352 A.2d at 608, 609.

include the view that where there is a municipal beach and facilities provided . . . which have both been dedicated to the general public's use, then such beach, ocean and facilities must be open to all on equal terms."⁴⁸

The Chancery Division also found that Deal could not limit membership in the Deal Casino to residents and nonresident taxpayers. The court concluded that the municipality's ordinance imposing such a limitation was *ultra vires*, since no statute gave municipalities the authority to enact ordinances excluding other state residents from municipal facilities. In addition, the court found that the ordinance's distinction between residents and nonresidents failed to bear "a rational relationship to a legitimate state end," and therefore constituted a denial of equal protection under the New Jersey Constitution.⁴⁹ The Chancery Division ordered the Casino and the Casino beach open to the nonresident public.

Shortly after the Chancery Division ruling, Deal equalized the fees charged resident and nonresident users of the Pavilion Beach lockers. Deal appealed the Chancery Division's ruling on the Deal Casino and the Casino beach. The Appellate Division reversed the judgment of the Chancery Division.⁵⁰ Recognizing that the municipality had the authority to install and operate a beach club, the court concluded that reasonable membership qualifications should be upheld as within the power granted to municipalities under the New Jersey Constitution and the Home Rule Act.⁵¹ The Appellate Division found that a classification for membership in the Deal Casino based upon residence was reasonable and offended neither the New Jersey nor the United States Constitutions. The decision relied on court opinions which had approved residence classifications limiting outsider access to facilities financed through local taxes or bond issues.⁵²

In 1978, the Public Advocate and the Attorney General appealed the Appellate Division's ruling that the dry sand Casino beach could remain closed to nonresidents.⁵³ The Supreme Court of New Jersey reversed on this issue, relying on its decision

48. *Id.* at 99, 352 A.2d at 608.

49. *Id.* at 100, 352 A.2d at 608.

50. 145 N.J. Super. 368, 367 A.2d 1191 (App. Div. 1976).

51. *Id.* at 374, 367 A.2d at 1194, 1195.

52. *Id.* at 376, 367 A.2d at 1195, 1196.

53. 78 N.J. 174, 393 A.2d 571 (1978).

in *Neptune v. Avon*. The opinion reaffirmed the propriety of applying the public trust doctrine to recreational access disputes.⁵⁴ Although the beach had never been dedicated to public use, the supreme court found it sufficient that Deal had dedicated the Casino beach to recreational use. As such, the court concluded that all members of the public had an equal right to use it, because the right of use was inherent in the public under the public trust doctrine. The supreme court added that local investment in constructing the beach was irrelevant, because “[w]hether natural, or man-made, the beach is an adjunct to ocean swimming and bathing and is subject to the public trust doctrine.”⁵⁵

The second major municipal beach access case after *Neptune* was an action brought against the Borough of Allenhurst by the Attorney General of New Jersey. Allenhurst, a small residential community directly south of Deal, owned approximately 300 feet of dry sand beach adjoining its eastern border with the Atlantic Ocean. The majority of Allenhurst’s residents lived in the borough on a year-round basis. There were no hotels or rooming houses. Allenhurst provided for the sale of beach badges to non-residents for the same fee charged to residents. The borough had erected a beach club on upland soil adjacent to the dry sand beach. The club provided lockers, cabanas, restaurant facilities and sundecks for members. Club memberships were available to residents and nonresidents on a seasonal and half-seasonal basis. Nonresidents, however, were charged a higher fee for beach club memberships than were residents.⁵⁶

The Attorney General challenged the fee structure of the beach club as discriminatory under the holding of *Neptune v. Avon* because the restrictions on nonresident access to the beach club had the effect of restricting nonresident use of the wet sand beach. He sought an order (1) invalidating the differential fee charged nonresidents for use of the beach club and (2) providing daily club passes for both residents and nonresidents.⁵⁷ The Attorney General sought a separate order invalidating the borough ordi-

54. *Id.* at 179, 393 A.2d at 573.

55. *Id.* at 180, 393 A.2d at 574.

56. *Hyland v. Borough of Allenhurst*, 148 N.J. Super. 437, 439-41, 372 A.2d 1133, 1134-35 (App. Div. 1977).

57. *Id.* at 442, 444, 372 A.2d at 1136, 1137.

nance prohibiting the wearing of beach apparel on the streets of Allenhurst.⁵⁸

The trial judge invalidated the borough's beach apparel ordinance on the ground that it restricted access to the public trust by eliminating the public's opportunity to change into clothing necessary for use of the beach.⁵⁹ The court also invalidated the beach club ordinance on the basis of *Neptune's* rule that municipalities cannot provide access to the public trust on a discriminatory basis.⁶⁰ Allenhurst agreed to permit members of the public to wear beach apparel on borough streets. The borough appealed the trial court's other rulings.

The Appellate Division reversed the trial court.⁶¹ It noted that by removing the ordinance that banned the wearing of beach apparel on borough streets, Allenhurst had removed a major obstacle to full recreational use of the wet sand by the public. As a result, "the practical requirement for Club membership as a condition to enjoyment of public trust lands . . . is no longer the case."⁶² The Appellate Division concluded that the public trust did not extend to man-made facilities constructed on dry land. Accordingly, the court found that Allenhurst had no duty to make beach club memberships available to nonresidents for the same fees charged residents.⁶³

Having concluded that the public trust obligation did not apply to the beach club, the Appellate Division rejected the trial court's conclusion that Allenhurst must charge nondiscriminatory fees. According to the court, the differential fee structure was a rational attempt to equalize the financial burdens for the club's maintenance between resident taxpayers and nonresidents.⁶⁴ Additionally, the requirement for seasonal memberships was considered a reasonable attempt by the municipality to "insure the orderly use and maximum enjoyment of a limited municipal facility."⁶⁵

In dissent, one member of the Appellate Division urged that Allenhurst be required to open the club's changing and toilet fa-

58. *Id.* at 442, 372 A.2d at 1135.

59. *Id.* at 441, 372 A.2d at 1135.

60. *Id.* at 442, 372 A.2d at 1136.

61. *Id.* at 444, 372 A.2d at 1137.

62. *Id.* at 441, 372 A.2d at 1135-36.

63. *Id.* at 442-43, 372 A.2d at 1136.

64. *Id.* at 444, 372 A.2d at 1137.

65. *Id.*

cilities to the public at large, because access to these club facilities was reasonably necessary to ensure the maximum enjoyment of public trust lands by all nonmembers.⁶⁶ This was the sole issue raised on appeal.

The Supreme Court of New Jersey reversed the Appellate Division's holding on this issue and required the Borough of Allenhurst to make its existing toilet facilities, or suitable alternatives, available to all beach users.⁶⁷ The supreme court declined to decide the case on the basis of the public trust doctrine, however, leaving open the issue of its application to man-made improvements adjacent to a municipal beach area. Recognizing a municipality's responsibility for public health and welfare, the court held that "where municipal toilet facilities exist adjacent to a public beach area, it would be an abuse of municipal power and authority to bar the users of the public beach from access to this basic accommodation."⁶⁸ The court failed to find the same necessity for the borough to provide changing facilities.

Together, the *Deal* and *Allenhurst* cases set certain bounds on the application of the public trust doctrine to municipal beach facilities. First, *Deal* held that man-made municipal dry sand beaches were subject to the public access obligations of *Neptune v. Avon*. Construction costs borne by the municipality were irrelevant, as was the existence of other dry sand beach providing alternative access to the wet sand for nonresidents. Second, *Deal* and *Allenhurst* suggest that municipalities must expect that certain facilities "reasonably necessary" for public recreational use of beach property may be subject to the obligations of *Neptune v. Avon*. The municipality which chooses to provide lockers (*Deal* Pavilion) or toilet facilities (*Allenhurst*) must expect to make these available to all beach users. Finally, the Appellate Division rulings in both *Deal* and *Allenhurst* upholding the right of a municipality to restrict nonresident membership in recreational facilities adjoining dry sand beaches were not raised before the Supreme Court of New Jersey. Under these rulings, judicial review of the ordinances authorizing and governing such facilities will continue to be based upon the deferential, reasonableness standard applied to residence-based classifications under the equal protection clause.

66. *Id.* at 447, 372 A.2d at 1138.

67. 78 N.J. 190, 393 A.2d 579 (1978).

68. *Id.* at 196, 393 A.2d at 582.

The scope of municipal discretion in setting fees for access to public trust lands after *Neptune v. Avon* can be seen in two Appellate Division opinions upholding the challenged beach fee ordinances. In *Hyland v. Township of Long Beach*,⁶⁹ the Attorney General sought to void the township's beach badge fee schedule on the ground that the lower rates available only to preseason purchasers of badges failed to provide all members of the public with equal access to public trust lands.⁷⁰ The Appellate Division affirmed an entry of summary judgment for the defendants. The court rejected the Attorney General's contention that the fee schedule violated the ruling of *Neptune v. Avon*.⁷¹ The Appellate Division was satisfied that the ordinance treated residents and nonresidents alike since badge applications could be made by mail, thus overcoming any advantage of geographic proximity available to residents.⁷² The court found that the distinction between early and late badge purchases embodied in the fee structure of the ordinance was also valid under an equal protection analysis because the criteria were reasonably related to a proper governmental objective. The Appellate Division recognized that preseason badge sales benefitted the township by providing funds for early season expenses, by facilitating the orderly processing of applications, and by providing an estimate of the number of expected beach users to aid in planning for the provision of necessary services.⁷³

In the case of *State v. Mizrahi*,⁷⁴ the Appellate Division declined to decide whether the general public had a right to pass along the wet sand beach adjacent to municipal beach facilities without paying a valid beach fee.⁷⁵ The defendant had been convicted and fined \$110 by the municipal court of Margate City for using the

69. *Hyland v. Township of Long Beach*, 160 N.J. Super. 201, 389 A.2d 494 (App. Div. 1978), cert. denied, 78 N.J. 395 (1979).

70. *Id.* at 204, 389 A.2d at 495.

71. *Id.* at 207, 389 A.2d at 497.

72. *Id.*

73. *Id.*; see *Sea Isle City v. Caterina*, 123 N.J. Super. 422, 303 A.2d 351 (Cty. Ct. 1973), affirming a conviction for refusal to wear a beach badge under a valid municipal ordinance providing for lower seasonal rates for badges purchased before May 31 of the season. The Cape May County Court held invalid that part of the ordinance which provided that weekly badges would be valid "from noon Saturday until noon the following Saturday," because the Court found it unreasonable for a beach user to have to buy two badges for one weekend.

74. 149 N.J. Super. 143, 373 A.2d 433 (App. Div.), cert. denied, 75 N.J. 590 (1977).

75. *Id.* at 145-46, 373 A.2d at 434.

beach without purchasing a beach badge as required by local ordinance. The record showed that the defendant had been lying on a towel on the seaward side of mean high tide, and had refused to purchase a badge.⁷⁶ In a trial *de novo* in the Atlantic County Court the conviction was affirmed. Before the Appellate Division, the defendant asserted that: (1) the public trust doctrine protected his right as a member of the public to use the Atlantic Ocean wet sand beach free of Margate's beach fee; (2) the beach fee ordinance violated the due process clause of the fourteenth amendment because the ordinance was too vague as to the seaward boundaries of the municipal beach; and (3) the ordinance's imposition of fees for users of the public trust was a violation of the equal protection clause of the fourteenth amendment.⁷⁷ The Appellate Division affirmed the conviction, noting that the ordinance in question did not discriminate against nonresidents. The court presumed that the defendant received the benefit of municipal maintenance services in his use of the Atlantic Ocean wet sand.⁷⁸

While *Hyland v. Long Beach* stated only that municipalities could set lower fees for badges it sold before the summer season began, *State v. Mizrahi* appears to have set an outer limit on a municipality's obligation to provide access under the public trust doctrine: free access to beach facilities is not required. The defendant's right of access to the wet and dry sand beach consists of the right to purchase a beach badge under a fee schedule which complies with *Neptune v. Avon* and subsequent decisions. It is unlikely that either a municipality or a private owner of dry sand beach could prevent a member of the public from crossing in front of the dry sand while remaining in the wet sand at all times. Yet, the *Mizrahi* court's presumption that users of the wet sand beach receive benefits from adjacent municipal facilities on dry sand appears to be a reasonable basis for the imposition of fees on such users.

76. *Id.* at 144, 373 A.2d at 434.

77. *Id.* at 145, 373 A.2d at 434.

78. *Id.* at 145, 373 A.2d at 434. See *Capano v. Borough of Stone Harbor*, 530 F. Supp. 1254, 1270, (D.N.J. 1982), *infra* text accompanying notes 90-95, for a federal court's conclusion that the public trust doctrine prohibits dry sand owners from excluding the public from wet sand below their property.

B. *Coastal Municipalities versus Residents*

The foregoing cases involved disputes between coastal municipalities and nonresident beach users. In three cases, New Jersey courts have considered the appropriate scope of the public trust doctrine in protecting residents against actions taken by their municipal government in derogation of their access rights to dry sand beach property.

Municipal administration of beaches is not the only aspect of municipal authority which the Supreme Court of New Jersey has subjected to the burden of serving a broad public interest in widespread recreational access. In *Lusardi v. Curtis Point Property Owners Ass'n*,⁷⁹ the court indicated that the municipal zoning power could not be used in a manner which ignored the burden placed upon dry sand property to serve the recreational needs of the public.

Brick Township, a municipality bordering the Atlantic Ocean, had enacted a zoning ordinance which provided for single family residential use of all lots adjoining the ocean. The defendant, the Curtis Point Property Owners Association, was an organization of homeowners in a residential development. Members of the Association had a right to use one unimproved beachfront lot, left to the Association by the developer, for recreational purposes.⁸⁰ The dispute arose in 1964 when Peter Lusardi, an adjacent homeowner angered by parties held by Association members on the undeveloped lot, sought to enjoin the recreational use of the lot as a violation of the zoning ordinance and as a nuisance. The trial court granted the injunction, prohibiting the use of the Association's lot "as a bathing beach or recreation area, while the zoning laws of the State of New Jersey and Brick Township, affecting the subject matter of this case, remain as they are at the time of entry of this judgment. . . ."⁸¹ In 1974, Lusardi's successor in title moved to hold the Association in contempt for violating the original judgment, after neighbors complained of late-night parties, loud music, and litter resulting from recreational use of the lot. The Association sought to dismiss the injunction on the grounds that the *Neptune v. Avon* decision altered New Jersey law and invalidated the zoning ordinance. The case was remanded to the Chancery Division, where Brick Township was ordered joined.

79. 86 N.J. 217, 430 A.2d 881 (1981).

80. *Id.* at 222-23, 430 A.2d at 883-84.

81. *Id.* at 223, 430 A.2d at 884.

The Chancery Division invalidated the ordinance as contrary to the state policy of protecting public access to dry sand beaches for recreational use.⁸² On appeal, the Attorney General and the Public Advocate filed briefs as *amici curiae* urging affirmation of the Chancery Division's judgment.

On direct certification, the Supreme Court of New Jersey affirmed the Chancery Division. The court stated that the wide discretion of municipal officials to determine proper land use had to be qualified "where land has a unique character and a state-wide policy designates what uses are appropriate for such land."⁸³ The Supreme Court of New Jersey cited three sources indicating a state policy favoring recreational beach access: (1) its decisions concerning equality of access between residents and nonresidents under the public trust doctrine; (2) the Beaches and Harbors Act of 1977;⁸⁴ and (3) the state Department of Environmental Protection's Coastal Resource and Development Policies.⁸⁵ The court concluded that the township had made no effort to accommodate the state policy of affording recreational opportunities along the Atlantic Ocean to as many citizens as possible.⁸⁶

The court held the ordinance invalid to the extent that it prevented owners of undeveloped oceanfront lots from using the dry sand beach areas primarily for recreational purposes. The injunction barring the Curtis Point Property Owners Association from using its vacant lot for recreational purposes was vacated.⁸⁷ While the court assured that municipalities could still pass "reasonable ordinances directed at specific abuses" which would affect the public's recreational access rights⁸⁸ *Lusardi* suggests that many activities of a local governmental unit might be invalidated if they interfered with public recreational access to dry sand beach.

*Capano v. Borough of Stone Harbor*⁸⁹ presented a federal district court with the most intricate fact situation of any of the beach access cases yet decided. The plaintiffs had purchased a beach-

82. *Id.* at 225, 430 A.2d at 884.

83. *Id.* at 227, 430 A.2d at 886.

84. 1977 N.J. LAWS 208.

85. N.J. ADMIN. CODE tit. 7, § 7:7E-4.1 to 4.11 (1982). *Lusardi*, 86 N.J. at 228, 430 A.2d at 886.

86. 86 N.J. at 230, 430 A.2d at 887.

87. *Id.* at 231, 430 A.2d at 888.

88. *Id.*

89. 530 F. Supp. 1254, 1258-63.

front building lot at a municipal auction, believing that the dry sand owned by the borough seaward of their lot would be open for recreational uses including swimming in the water directly below it. Only after purchasing the lot did the plaintiffs learn that public swimming was not permitted on the beach in front of their property. While the municipality made a number of other beaches available for public swimming and provided lifeguards at these sites, borough officials believed that the beach of interest to the plaintiffs was unsafe because of its proximity to municipal fishing jetties. However, the borough did permit nuns who resided in a convent one block south of the beach to use part of the public dry sand beach, and that portion of the beach owned by the convent, for swimming.⁹⁰

When the plaintiffs attempted to void the sale of their lot they were told by the Mayor that "something would be worked out." Construction of the plaintiffs' house was completed during the following summer. At that time, upon a formal request, the Mayor and Council considered whether a bathing beach should be established at the site. The proposal was rejected for reasons of safety.⁹¹

Plaintiffs commenced an action in the federal district court alleging misrepresentation and seeking rescission, damages, and an injunction to prevent the borough from enforcing its ban on swimming at the beach in dispute. In a lengthy opinion, the district court rejected the plaintiffs' contentions based upon fraud and contract and denied their request for injunctive relief.⁹² The district court accepted plaintiffs' argument that the municipality's conduct violated the public trust doctrine and federal constitutional principles and entered a declaratory judgment order in their favor.⁹³

The court recognized that the borough's conduct in permitting one class of residents (the nuns) access to the disputed wet sand beach for swimming while other residents were excluded was prohibited by the public trust doctrine. The court conceded that municipalities had the right to impose "reasonable" regulations on the use of beaches, but concluded that the justification of safety which the defendant offered as support for its access restriction

90. *Id.* at 1258-63.

91. *Id.* at 1259-61.

92. *Id.* at 1268.

93. *Id.* at 1271.

was not reasonable in this case. The court stated that the defendant would have to choose between establishing an open swimming beach at a particular site and prohibiting all swimming at the site.⁹⁴ In so ruling, the district court concluded that New Jersey courts would interpret the public trust doctrine to protect individual residents from discrimination by municipalities with respect to recreational access.

*Sea Watch, Inc. v. Borough of Manasquan*⁹⁵ addressed the validity of a municipal ordinance requiring all persons in bathing attire to display a beach badge before entering a macadam walkway located on the inland boundary of a municipal dry sand beach. Plaintiff, the owner of a commercial beach adjoining the municipal beach, brought this action on the theory that the municipal ordinance was "an overly broad exercise of the police power," in restricting his paying customers' right to use the municipal walkway.⁹⁶

The Law Division voided the ordinance. It found that the walkway had been constructed "for general public and recreational purposes" and concluded:

[T]here is sufficient reason, considering the geographical location and desirability of the area and walkway in question for recreational and access purposes, to judicially mandate that any restriction of the public use of the walkway be subject only to the most reasonable and unarbitrary exercise of municipal power and authority.⁹⁷

The Law Division added that the borough had several alternative means to enforce compliance with the badge requirement for persons using the public beach.⁹⁸

The Appellate Division reversed the judgment of the Law Division and reinstated the ordinance.⁹⁹ The Appellate Division noted that the dispute had arisen after the plaintiff had ceased leasing its beach to the borough, and had attempted to operate it as an independent commercial venture, although there had been no dedication of the walkway as a public road. The court rejected the Law Division's application of the public trust doctrine to

94. *Id.* at 1270.

95. 177 N.J. Super. 199, 425 A.2d 1098 (Law Div. 1980), *rev'd*, 186 N.J. 25, 451 A.2d 192 (App. Div. 1982).

96. 186 N.J. Super. 25, 28, 451 A.2d 192, 195 (App. Div. 1982).

97. 177 N.J. Super. at 202, 425 A.2d at 1099.

98. *Id.*

99. 186 N.J. Super. 25, 451 A.2d 192 (App. Div. 1982).

these facts, because “[t]here is no suggestion in this case that this walkway is not available to all on equal terms.” That is, “[n]o one with a Manasquan beach badge has been or will be denied use of the walkway in question.”¹⁰⁰ The Appellate Division suggested that opening the walkway to plaintiff’s patrons would be unfair to those who purchased badges to use the walkway for access to the public beach.¹⁰¹ The court concluded that since the Manasquan ordinance constituted a reasonable exercise of municipal power, the existence of a “more reasonable” alternative was irrelevant.¹⁰²

Given the interest of elected municipal officials in satisfying the preferences of municipal residents, suits by individual residents challenging municipal actions in the administration of beaches or other recreational areas may be infrequent, *Capano* and *Sea Watch* notwithstanding.¹⁰³ In both of these cases the trial courts applied the public trust doctrine to protect the recreational access rights of residents against municipal authority. Both decisions reveal concern for the policy goals of furthering recreational access as stated in *Lusardi*.¹⁰⁴ *Capano* turns on the federal court’s concern that the borough provided municipal beach facilities to one group of residents and not to others. The court held that, as members of the public, all residents have a right of equal access to those facilities. It is irrelevant, after *Deal*, that other municipal beach sites are available for use by those excluded from the restricted beach.¹⁰⁵

Because of its unusual facts, the implications of *Sea Watch* are ambiguous and somewhat unsatisfactory. As a case concerning the right to use a macadam walkway, the Appellate Division is probably correct in its refusal to apply the public trust doctrine. The walkway was erected as a means to facilitate recreational access to municipal beach property. It was not a dedicated street, but was available to all members of the public who purchased a municipal beach badge. The Appellate Division appears correct in asserting that it would be unfair to purchasers of Manasquan

100. *Id.* at 32, 451 A.2d at 195.

101. *Id.*

102. *Id.* at 32-33, 451 A.2d at 196.

103. More typical are disputes between rival groups of residents which result in court review of the decisionmaking process of municipalities. See, e.g., *Concerned Citizens of Wildwood Crest v. Pantalone*, 185 N.J. Super. 37, 447 A.2d 200 (App. Div. 1982).

104. See *supra* text accompanying notes 85-86.

105. *Van Ness v. Deal*, 139 N.J. Super. 83, 99, 352 A.2d 599, 608 (1975).

beach badges if users of the Sea Watch beach were allowed access to the walkway at no charge, and no additional system of keeping them out of the municipal beach was established.

This result is consistent with the holdings of the Appellate Division in *State v. Mizrahi*, and in *Hyland v. Allenhurst*. Like the ordinances upheld in those decisions, the ordinance upheld in *Sea Watch* was a reasonable exercise of municipal authority and did not discriminate between residents and nonresidents as to beach fees. The ordinance, therefore, satisfied the court's criteria for judicial review under the public trust doctrine.

However, if the courts' goal is to advance the public policy—as affirmed in *Lusardi*—of furthering recreational access to municipal dry sand beach, a different analysis might be applied. It can be argued that access to the walkway in *Sea Watch*, the pavilion lockers in *Deal*, and the sanitary facilities in *Allenhurst* is so linked to furthering the public recreational use of dry sand beach that each of the facilities must be available to all users without charge. Adoption of this argument would show a determination by the courts to minimize municipal restrictions and thereby further the right of the public to make the fullest recreational use of the public trust. Such an argument might have had more appeal if suit had been brought by a member of the public who wished to enter the *Sea Watch* beach without paying the municipal beach fee, rather than by a landowner feuding with the local government over access to his commercial property.

II. *MATTHEWS V. BAY HEAD IMPROVEMENT ASS'N*: THE PUBLIC TRUST DOCTRINE AS A TOOL FOR ORDERING PUBLIC ACCESS RIGHTS IN PRIVATE BEACH PROPERTY

The Borough of Bay Head is a residential community of approximately 1,300 inhabitants. It was first developed in the 1890's. It borders on the Atlantic Ocean and has a dry sand beach one and one-quarter miles long and fifty feet wide. Twelve public streets run through the borough perpendicular to the ocean and end near the beach. The entire beach is privately owned. There are no off-street parking facilities for beach users, no public dressing facilities, sanitary facilities or eating establish-

ments. Private residences have been built on the oceanfront lots. Title to these lots usually extends to the mean high tide line.¹⁰⁶

In 1910, some of the property owners formed the Bay Head Improvement Association ("BHIA"), a private organization converted into a nonprofit corporation in 1932. The BHIA was set up to exercise control over the beach area. Article II of the BHIA charter specifies that the BHIA's object is "to own property, operate bathing beaches, hire lifeguards, beach cleaners and policemen and do any and all things which, in the judgment of their executive committee may be in the best interest of the Borough of Bay Head. . . ."¹⁰⁷

Over the years, the BHIA acquired several tracts of dry sand beach. In addition, it secured leases of dry sand beach from a number of oceanfront property owners in consideration for the lifeguard, police, and maintenance services the BHIA provided annually between Memorial Day and Labor Day. The BHIA limited access to the dry sand beach from the streets of Bay Head by posting guards to check for badges. Only members and their guests were entitled to badges. Under the BHIA charter, property owners in Bay Head were eligible for voting memberships in the Association. Nonowners, guests of hotels, visitors and lessors of cottages were eligible for nonvoting memberships.¹⁰⁸ Over the past thirty years, as the neighboring boroughs of Bay Head, Point Pleasant and South Point Pleasant grew together, it was common for residents of the latter two boroughs to obtain badges from the BHIA.¹⁰⁹

The dispute arose when the BHIA decided to stop making badges available to residents of neighboring boroughs. The Borough of Point Pleasant instituted an action against Bay Head and the BHIA and was ultimately joined by a resident of Point Pleasant and by the Public Advocate as intervenors.

Procedural delays and a stay pending the outcome of the *Deal* litigation delayed a ruling by the Law Division on cross motions for summary judgment.¹¹⁰ The motions raised the following is-

106. *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 313-16, 471 A.2d 355, 359-60, *cert. denied*, 53 U.S.L.W. 3236 (U.S. Oct. 2, 1984).

107. *Id.* at 314, 471 A.2d at 367. The facts are detailed in *Matthews v. Bay Head Improvement Ass'n*, No. L-23410-73, Letter Opinion (Law Div. June 1, 1981).

108. 95 N.J. at 315, 471 A.2d at 359.

109. *Id.* at 312, 471 A.2d at 358.

110. *Id.* at 316, 471 A.2d at 360.

sues: (1) Does the public trust doctrine or a public use theory give the public a right of access to dry sand beach above the mean high tide line, when record ownership of such dry sand beach is in the name of private individuals or the BHIA? (2) Did the formation of the BHIA and the imposition of access restrictions on the beach during the summer months interrupt the period necessary for the public to acquire a prescriptive easement in the beach at Bay Head? (3) Did the incorporation of the BHIA in 1932, and the organization's subsequent acquisition and maintenance of beach property, issuance of badges to residents, guests, and—prior to 1974—a limited number of nonresidents, constitute a dedication to public use of the beaches in Bay Head? (4) Should the BHIA be treated as the equivalent of the Borough of Bay Head, and if so, to what extent would *Neptune v. Avon* be applicable to beaches in Bay Head leased by beachfront owners to the BHIA?¹¹¹

In a letter opinion dated June 1, 1981, the Law Division rejected plaintiff's contentions on each of the issues. The court found that there was no evidence to support a claim of a dedication, express or implied, of the Bay Head beach to public use since the formation of the BHIA. Nor could a prescriptive easement be found given the conduct of the BHIA since 1932.¹¹²

The trial judge also rejected the Public Advocate's assertion that the BHIA was an extension of the borough, stating that "[t]he Borough of Bay Head has no ownership or right of control to [the] exclusion of the rights of the property owners over any portion of the beach area."¹¹³

Finally, the trial court rejected the Public Advocate's argument that *Neptune v. Avon* and *Van Ness v. Deal* mandated application of the public trust doctrine to the privately-owned beach property in Bay Head. The judge relied on the principle that the right to exclude others from one's property is an essential attribute of private ownership, and that the taking of private property by the

111. No. L-23410-73, Letter Opinion (Law Div. June 1, 1981).

112. *Id.* at 8. The judge ordered a plenary hearing on the questions of whether a prescriptive easement or an implied dedication took place through public use prior to 1932, but entered a judgment for the defendants when plaintiffs dropped these claims. 95 N.J. at 313, 471 A.2d at 358.

113. *Id.* at 9.

state without just compensation is prohibited by the United States and New Jersey Constitutions.¹¹⁴

The Public Advocate appealed the trial court's ruling. In a *per curiam* opinion delivered in June 1982, the Appellate Division affirmed the judgment of the Law Division, noting that "[t]he Association is an entirely private entity representing simply and solely the interests of some of the private owners of beachfront properties. . . . [It] is neither a public agency nor a public entity; neither has it been delegated any authority with regard to any of the beaches by the municipality."¹¹⁵

In a partial dissent, one judge expressed his opposition to what he perceived as the *de facto* public status of the Bay Head beaches.

[I]t is clear that the beaches in Bay Head in so far as the same are controlled by the Bay Head Improvement Association are open to all residents of Bay Head as well as visitors to the municipality who stay at hotels within the Borough. . . . The effect of this arrangement is obvious. . . . [The beaches] are public to the residents and visitors who stay in hotels. They are private to everyone else. . . . I would hold that so long as the beaches are controlled by the Association the beaches so operated must be open to the public on equal terms, regardless of residency. . . .¹¹⁶

The dissenting judge admitted, however, that his decision could not be applied in any manner which would suddenly deprive private property owners of their rights.¹¹⁷ As a result of this dissent, the plaintiff became entitled to an appeal to the Supreme Court of New Jersey, limited in scope to the issue raised in the dissent.¹¹⁸ Because of a separate appeal by the Public Advocate, the Supreme Court granted certification to hear all issues raised in the *Bay Head* case.

In a lengthy opinion dated February 2, 1984, the Supreme Court of New Jersey reversed the lower courts' decisions and ordered the defendant BHIA to admit nonresidents on a seasonal and daily basis.¹¹⁹ The court reviewed the history of the public trust doctrine in New Jersey, beginning with cases predating *Nep-*

114. *Id.* at 12. The Supreme Court of New Jersey made no reference to the taking question in its opinion. 95 N.J. 306, 471 A.2d 355. *See infra* note 125.

115. *Matthews v. Bay Head Improvement Ass'n*, A-5516-890T3 (N.J. Super. Ct. App. Div. June 8, 1982) at 2.

116. *Id.* at 4.

117. *Id.* at 6.

118. N.J. CT. RULES 2:2-1(a).

119. 95 N.J. 306, 471 A.2d 355.

tune and *Deal*, which recognized that full recreational access rights to wet sand beach required open and nondiscriminatory access to municipal dry sand beaches adjoining the wet sand.¹²⁰ The novelty of the *Bay Head* decision lay in its application of the public trust access requirement to privately-owned dry sand beach property. The court stated:

This interest [of the public] may take one of two forms. First, the public may have a right to cross privately-owned dry sand beaches in order to gain access to the foreshore. Second, this interest may be of the sort enjoyed by the public in municipal beaches under *Avon* and *Deal*, namely, the right to sunbathe and generally enjoy recreational activities.¹²¹

The Supreme Court of New Jersey recognized that public access and use rights in privately-owned beach property were not unlimited. Rather, “the public interest is satisfied so long as there is reasonable access to the sea.”¹²² Nor did the court expect that reasonable access would result in the forced conversion of a private beach into a public beach, because “the public’s rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches. . . .”¹²³ In each case in which restrictions on beach use are challenged, judicial inquiry into the scope of the public’s right of access and use will focus on the particular facts. According to the court, the “[l]ocation of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand.”¹²⁴ The court concluded that, in this case, the BHIA’s purposes, close relationship with the municipality, operation of the beach in a manner resembling that of a municipality, and “virtual monopoly” over the waterfront in Bay Head, rendered the BHIA “quasi-public.”¹²⁵ As such, the court imposed obligations on the BHIA similar to those imposed on a municipality charged with maintenance of the public trust.

While the language used by the Supreme Court of New Jersey to define the public right of access over privately-owned beach

120. *Id.* at 316-22, 471 A.2d at 360-63.

121. *Id.* at 322, 471 A.2d at 363.

122. *Id.* at 324, 471 A.2d at 364.

123. *Id.* at 326, 471 A.2d at 365.

124. *Id.*

125. *Id.* at 330, 471 A.2d at 368.

property appears very broad, the remedy ordered by the court was narrow.¹²⁶ The court relied on prior decisions requiring private associations to accept certain restrictions on their autonomy (usually with respect to membership criteria),¹²⁷ and ordered the BHIA to make seasonal memberships available to the general public, to sell monthly and daily badges, and to set reasonable, nondiscriminatory fees for all badges.¹²⁸ The court encouraged beach owners who were not members of the BHIA to participate in the plan to "open up" Bay Head, but declined to speculate as to whether an individual member of the BHIA could be compelled to permit public access to or use of his individual lot if he withdrew from the BHIA. "If any of these leases [to the BHIA] have been or are to be terminated, or if the Association were to sell all or part of its property, it may necessitate further adjudication of the public's claims in favor of the public trust. . . ."¹²⁹

The remedy ordered by the Supreme Court of New Jersey is similar to remedies granted in cases challenging municipal beach restrictions. Having found that the BHIA acted as a quasi-public authority, the court concluded that the private association must

126. *Id.* at 331-32, 471 A.2d at 368.

127. The court cited *Guerrero v. Burlington Cty. Memorial Hosp.*, 70 N.J. 344, 360 A.2d 334 (1976), *Greisman v. Newcomb Hosp.*, 40 N.J. 359, 192 A.2d 817 (1963), and *Falcone v. Middlesex Cty. Medical Society*, 34 N.J. 582, 170 A.2d 791 (1961). 95 N.J. at 327, 328, 471 A.2d at 366. In all other public trust doctrine cases, the court was restricting a municipality, a creature of state statute. Thus, the finding that the BHIA is a "quasi-public" body avoids the issue of whether the imposition of a public trust obligation on land owned by a private group constitutes a "taking" of private property in violation of the fifth amendment. See *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring); *Van Ness v. Deal*, 78 N.J. at 188-89 (Mountain, J., dissenting) (municipal property can be "taken" for fifth amendment purposes).

128. 95 N.J. at 332, 471 A.2d at 368-69.

129. *Id.* at 333, 471 A.2d at 369. In considering the scope of the access obligations which might be imposed on dry sand beach by the public trust doctrine, the decision in *Lusardi*, *supra* text accompanying notes 79-88, presently stands as an outer bound on the extent of the public's "reasonable" access to privately-owned dry sand beach which the courts might require under the public trust doctrine. In *Lusardi*, the court invalidated a zoning provision which had barred the members of the Curtis Point Property Owners Association from making recreational use of an undeveloped beachfront lot belonging to the Association. No requirement was imposed on members of the Association to make their lot available to any part of the public. The Curtis Point Property Owners Association is similar to the Bay Head Improvement Association in all respects except size. Although public access rights were not at issue in *Lusardi*, the court's approval of a private property owners' arrangement without the imposition of public access requirements suggests that a private recreational organization smaller than the BHIA, and controlling less dry sand beach than the BHIA, might not be subject to any public access obligation.

be operated in a manner consistent with the public rights of reasonable access and use of the dry sand beach.

What emerges from *Bay Head* is a framework for ordering the competing claims of individual members of the public and private property owners to dry sand beaches. In reviewing claims by members of the public to use of private dry sand beach, one must determine whether the access claim is reasonable in light of all relevant facts. Reasonableness will rest on the following factors: (1) location and extent of the dry sand area in relation to the wet sand; (2) extent and availability of public dry sand beach; (3) extent of public demand; and (4) the use made of the dry sand beach by its owner. In most instances, the presence of a municipal beach operated in compliance with the requirements of *Neptune v. Avon* should be sufficient to relieve an individual dry sand owner in the same municipality of any obligation to provide access or use of his property for the public at large. For those few coastal municipalities which presently own no dry sand beach and thus provide no nonresident access to the wet sand beach, the purchase of a municipal beach of reasonable size might serve to relieve individual dry sand owners of any burden of public access.

What appears much less settled is whether private beach clubs located in municipalities which have some public beach facilities might be called upon to make their dry sand beaches available for public use. Nor is it clear whether, and under what circumstances, the obligation of reasonable access would require individuals to permit members of the public to enter and cross private dry sand lots containing single family homes. In the aftermath of *Bay Head*, all that can be said with confidence is that in some circumstances the courts may require individual owners of dry sand beaches to make their property available for public recreational access and use.

III. THE ROLE OF THE PUBLIC ADVOCATE IN BEACH ACCESS LITIGATION

The Department of the Public Advocate has been a significant force in the development of case law on beach access in New Jersey. This office has brought or intervened in several of the major beach access decisions extending the holding of *Neptune v. Avon*, and thereby increasing the number of beach facilities open to members of the general public. Because beach access case law has been shaped, in large part, by the efforts of the Public Advo-

cate, beach access cases provide insight into the operation of that office.

The Department was created by the Department of the Public Advocate Act of 1974 (the "Public Advocate Act").¹³⁰ The Act's purpose is to provide legal representation for the "public interest" in New Jersey. The Act establishes the Division of Public Interest Advocacy within the Department. This division includes a professional legal staff, independent of the Attorney General,¹³¹ and is assigned responsibility for representing "the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest."¹³² "Public interest" is defined as "an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens."¹³³ Thus, the Public Advocate has been given broad discretion by the legislature to determine when to litigate in the "public interest" as so defined.¹³⁴ The exercise of this authority is subject to deferential judicial review under an "arbitrary and unreasonable" standard.¹³⁵

The Public Advocate's authority has been subject to constitutional challenge in several cases. In *Van Ness v. Deal*, the Chancery Division rejected the contention that the delegation of power to the Public Advocate was unconstitutionally broad because the legislature had failed to set specific standards to guide the Public Advocate.¹³⁶ The Chancery Division recognized that the power of the Public Advocate had been broadly defined by the legislature, which had concluded that under certain circumstances the interest of the state, represented by the Attorney General, and the interest of the public might not be identical. Thus, the legislature created the Public Advocate to represent the public's interest. As

130. N.J. STAT. ANN. 52:27E (West 1984).

131. *Id.*

132. *Id.* 52:27E-29.

133. *Id.* 52:27E-30.

134. *Id.* For a general discussion of the accomplishments of the Public Advocate, see Bierbaum, *New Jersey's Pioneering Effort in Public Interest Law*, 109 N.J.L.J. 177 (1982); Note, *Private Attorney General and The Public Advocate — Public Interest Litigation*, 34 RUTGERS L.J. 350 (1982).

135. *Township of Mount Laurel v. Dep't of the Public Advocate*, 83 N.J. 522, 533, 416 A.2d 886, 891 (1980).

136. 139 N.J. Super. 83, 94, 352 A.2d 599, 605 (Ch. Div. 1975).

noted by the court, such a function “does not duplicate that of the Attorney General, although their positions may coincide in certain instances, as here, to a degree.”¹³⁷ The constitutionality of the Public Advocate was challenged again in *Township of Mount Laurel v. Dep’t of the Public Advocate*.¹³⁸ In that decision, Mount Laurel, which had opposed the Public Advocate’s challenge to Mount Laurel’s zoning ordinance, contended that the discretionary authority delegated to the Public Advocate was so broad as to violate the separation of powers clause of the New Jersey Constitution, and that the Public Advocate spent public funds for private purposes in violation of a provision of the New Jersey Constitution, article 8, section 3, paragraph 3, which prohibits the spending of public funds for private purposes.

The Supreme Court of New Jersey rejected both constitutional challenges. The court found that the Public Advocate neither makes nor interprets the law and thus does not interfere with the functions of the legislature and the judiciary. Rather, the Public Advocate acts to enforce the law in furtherance of the perceived public interest.¹³⁹ Additionally, the court found that, in the instant case, the Public Advocate did not violate the constitutional bar against the expenditure of public funds for private purposes, because the decision of the Public Advocate to represent the challengers to the Mount Laurel zoning ordinance was within his discretion, as it “is manifestly for the benefit of many persons in this State and for a public purpose.”¹⁴⁰

The problem underlying challenges to the Public Advocate’s authority is not in the statutory grant of power to the Public Advocate, but in the widely differing concepts of “public interest” which the office has been created to advance. The Supreme Court of New Jersey recognized this problem in the *Mount Laurel* decision¹⁴¹ when it stated that “[p]laintiffs’ real complaint here is that the Public Advocate is free to litigate cases which do not fit into the plaintiffs’ ideological mold.”¹⁴² The court conceded that

137. *Id.*

138. 83 N.J. 522, 416 A.2d 886 (1980).

139. *Id.* at 531, 416 A.2d at 890-91.

140. *Id.* at 535, 416 A.2d at 893.

141. *See id.*

142. 83 N.J. at 536, 416 A.2d at 893.

the concept of the public interest "may elude a universally satisfactory definition."¹⁴³

The purpose of public interest representation is to present before the court perspectives and opinions which ordinarily receive little attention within the judicial process. There are two views of the necessity for public interest advocacy. The first is that public advocacy is needed to further an interest held by a wide segment of the population, where such population may not be sufficiently aroused or well organized to advance its interest through litigation. Public interest litigation of this sort typically involves challenges to established groups or groups ably represented in the legal system. Environmental and workplace safety litigation are two examples. During the debate over the Public Advocate Act in the New Jersey State Senate, one of its supporters, Senator Merlino, described the function of the office in these terms:

What [the Act] does seek to do is to introduce into government a new force on behalf of the people, and of the public . . . to see what benefits and safeguards can be won for plain folks, for people who don't have hordes of lawyers in their pay. Should the public not have its advocate ready . . . while the big private interests have theirs quietly in the field?¹⁴⁴

The second view is that public interest representation is necessary for those groups which lack the resources to participate independently in judicial proceedings.¹⁴⁵ Inmate advocacy and mental health advocacy are two examples of such representation. Stanley Van Ness, the Public Advocate who decided to involve the office in court challenges to the Mt. Laurel Township zoning ordinances, saw his decision as an expression of this view of public interest advocacy.¹⁴⁶

While the Public Advocate was not involved in the *Neptune v. Avon* decision, its goal of expanding public beach access rights and limiting municipal discretion falls squarely within the first view of public interest advocacy. *Van Ness v. Deal*, which the Public Advocate brought in conjunction with the Attorney General of New Jersey, and *Matthews v. Bay Head Improvement Ass'n*, in which

143. *Id.*

144. Public Hearing before the New Jersey Senate, Apr. 15, 1974, quoted in *Mount Laurel*, 83 N.J. at 529, 416 A.2d at 889.

145. 83 N.J. at 535, 416 A.2d at 893.

146. Van Ness, *On the Public Advocate's Involvement in Mount Laurel*, 14 SETON HALL L. REV. 832 (1984).

the Public Advocate intervened and subsequently directed the litigation on behalf of the plaintiffs, are the results of this goal.

Lusardi exemplifies the ability of the Public Advocate to assess the interests involved in a specific dispute and, through its intervention, to influence the outcome of the case in the direction most beneficial to the stated public policy. The case began as a contempt hearing involving a dispute between two adjoining landowners over the use made of an undeveloped lot. The Public Advocate intervened to attack the zoning ordinance which supported the original injunction on the ground that the ordinance was hostile to the public interest in recreational access to beach-front property. The Supreme Court of New Jersey recognized this public interest and invalidated that portion of the ordinance which had supported the injunction.¹⁴⁷ Without the intervention of the Public Advocate, the public interest in recreational access would not have been recognized by the court.

In *Lusardi* and other beach access cases, the Public Advocate has acted to further "an interest or right . . . inhering in the citizens of this State or in a broad class of such citizens."¹⁴⁸ The Public Advocate's role was necessary to articulate a viewpoint held by too large and too amorphous a group to otherwise have been raised in judicial proceedings. The Public Advocate has succeeded in furthering the availability of public recreational beaches in New Jersey precisely because it was able to amplify, in judicial proceedings, a concern felt strongly by most citizens of the state. It is fair to say that the beach access law in New Jersey would not have developed as it did without the Public Advocate's involvement.

CONCLUSION

The Supreme Court of New Jersey's innovative use of the public trust doctrine in *Neptune v. Avon* to promote recreational access has been applied in a variety of situations. The case has come to stand for two broad principles. First, coastal municipalities must make their dry sand beaches available "to all on equal terms." A coastal municipality is not permitted to discriminate between residents and nonresidents in the setting of beach access regulations. Second, the public trust doctrine has been inter-

147. 86 N.J. at 231, 430 A.2d at 887-88.

148. N.J. STAT. ANN. 52:27E-30 (West 1984).

puted to place restrictions on the rights of private owners of dry sand beach to exclude the public at large from recreational access and use. Since the majority of cases have dealt with municipal beaches, it remains to be seen to what extent the duty of "reasonable access" will be imposed on private beach owners such as those in *Bay Head*.

The Public Advocate has succeeded in advancing the right to beach access on behalf of the majority of the citizens not owning property in shorefront communities. Absent such an office, it is likely that the concern for beach access, which is held by the general public but not articulated by a specific interest group, would not have been introduced into these cases.

Some mention must be made of the problems inherent in the public trust approach to recreational beach access. The net effect of the public trust litigation has been to place legal restrictions on the power of municipal and private beach owners to control access to beach facilities. Neither the improvement of existing facilities, nor the construction of new facilities has been stimulated by this litigation. In addition, courts have paid no attention to another potential problem of beach access: namely, that transportation to the shore and reasonable accommodations are major bottlenecks limiting the public's use of coastal recreational facilities in New Jersey. Those oceanfront municipalities which have provided no recreational facilities in the past have received no encouragement to do so in the future. In fact, beach access litigation has given opponents of coastal recreational development a strong argument that the state would be in a position to regulate the use of any new facility a municipality might build. To the extent that this argument is valid, and accepted as such, public concern for increasing the availability of recreational facilities may have gained little from beach access litigation. Only if the legislature encourages the development of new recreational facilities will the full benefit of efforts to achieve greater public recreational access be felt.