

LITTORAL TRUTHS

Issues, concerns and practices that impact the coastal zone

NJ Supreme Court Orders Private Beach to Provide Public Access

Raleigh Avenue Beach Association vs. Atlantis Beach Club

THE DECISION

On July 26, 2005, the New Jersey Supreme Court issued a landmark decision requiring the Atlantis Beach Club, a self-styled “private beach” along Diamond Beach in Lower Township, Cape May County, to provide full public access to the beach and ocean. In *Raleigh Beach Association v. Atlantis Beach Club*, the Supreme Court held that under the Public Trust Doctrine, the Atlantis Beach Club could not deny public access to and use of the ocean and the beach adjacent to its property. The American Littoral Society (ALS), the NY/NJ Baykeeper (Baykeeper) and Citizens Right to Access Beaches (CRAB) participated at oral argument as *amici curie* (“friends of the court”) and argued in favor of public access and use of the beach in question.

The Public Trust Doctrine recognizes that certain resources—such as the ocean, navigable rivers, and their shores—are held in trust by the government for the public’s use and enjoyment. Under this ancient legal doctrine, the government cannot defeat or alienate the public’s rights, even through the sale or grant of submerged or tidal lands. Previously, New Jersey courts have applied the Public Trust Doctrine to require public access in cases involving



municipal beaches and to beaches operated by nonprofit or “quasi-public” corporations. The *Atlantis* decision is the first New Jersey

case upholding public access and use of a privately-owned beach under the Public Trust Doctrine.

BACKGROUND

Until 1996, the beach on the Atlantis property was open to the public free of charge. In the summer of 1996, Atlantis established a private beach club and began to limit public access to its beach by charging substantial fees. These fees grew over time to \$700 for annual beach badges and \$10,000 for a so-called “lifetime easement” to use the beach. Atlantis also hired guards to patrol the beach and to remove those without badges. Atlantis took all of these steps in order to secure this private beach for the exclusive use of its paying members.

In 2002, Atlantis then sought an injunction to restrain citizens from accessing its property. At the same time, the Raleigh Avenue Beach Association filed a suit of its own seeking a declaration requiring public access to a reasonable portion of the beach. These cases were consolidated.

In 2003, the trial court held that the public was entitled to access a three-foot-wide strip of dry sand, but only for the



purposes of traversing the property. On appeal, ALS, Baykeeper and CRAB joined the State and the Association in successfully arguing for a reversal of the trial court decision. In 2004, the Appellate Division held that Atlantis could not limit vertical or horizontal access to its dry sand area and could not interfere with the public’s right to use of the dry sand for intermittent recreational purposes. Atlantis Beach Club then received permission from the New Jersey Supreme Court to appeal the Appellate Division’s decision, which the Supreme Court subsequently affirmed.

SIGNIFICANCE OF THE ATLANTIS DECISION

1. Contrary to popular belief, the public cannot be excluded from a privately-owned beach in the same way it can be excluded from other types of private property.
2. A private landowner does not have the right to exclude the public from using the ocean or the wet sand on or adjacent to its property.
3. Depending upon the circumstances, a court may decide that the public may have a right
4. to access, use and remain upon some or all of the dry sand on a particular private beach.
5. To determine what amount of privately-owned dry sand may be available to the public, a court must examine the following four factors:
 - The location of the dry sand in relation to the wet sand;

- The extent and availability of publicly-owned beaches;
- The nature and extent of the public demand;
- Usage of the beach by the owner.

Where public access and use is granted to a private beach, and subject to the approval of the New Jersey Department of Environmental Protection (DEP), the landowner may charge a reasonable fee to cover beach-related costs (e.g. lifeguards, litter control, etc.).

DEP has the authority to set and approve of reasonable fees for such private beaches.

Under no circumstance may fees be set so high as to discourage public use of a private beach.

IMPACT OF THE ATLANTIS DECISION

At first blush, the impact of the *Atlantis* case may appear limited to a single beach located in a seemingly remote area. However, the *Atlantis* case may have far-reaching impacts and implications for a variety of persons and entities.

1. The Public: The *Atlantis* case will serve as strong precedent in helping the public gain access to private beaches where the issue of public access to a particular private beach or beaches is litigated.

2. Private Property Owners: The *Atlantis* case serves to advise owners of private beaches that their ownership is subject to public access and use, rights that have been recognized around the world for centuries. Privately-owned beaches (e.g. Jenkinson's in Point Pleasant Beach, NJ) that are open to the public on a fee-basis may continue to charge reasonable beach fees, which are now subject to the approval of DEP.

3. Local Governments: Municipalities should review their protocol in responding to trespass claims made by private landowners against orderly persons simply enjoying the ocean in accordance with their rights under the Public Trust Doctrine. In addition, municipalities should avoid the practices of selling street ends and restricting parking in areas near to the beach. These practices defeat the rights of the public recognized by the *Atlantis* case. Municipalities should also prepare an inventory of public access points and support facilities to ensure that there is ample public access to the beaches in their communities. Finally, municipalities may want to consider developing a beach access plan that could be integrated into the local master plan so that all the elements of local public access can be identified for members of the public and private property owners alike. The beach access or public access plan makes clear not only whether and how a town has chosen to

satisfy its Public Trust Doctrine obligations but also makes it easy for the public to review its options for accessing the beach.

4. State Government: DEP is a clear winner of the *Atlantis* case. The decision recognizes its jurisdiction under CAFRA to regulate privately-owned beaches. In addition to approving of reasonable beach fees, DEP can now require developers of beachfront properties to provide enhanced public access and use.

5. Real Estate Industry: The *Atlantis* decision should serve as notice to the real estate industry that "exclusive" beachfront communities are subject to the Public Trust Doctrine, and should not be promoted or sold as strictly exclusive beach enclaves. Ownership of beach front property is subject to public access and use, and no one owns the ocean. Developers would do well to design beachfront developments that contain appropriate public access and use elements to promote harmony between property owners and public users of the shore. Beachfront development and public access need not, and after *Atlantis* clearly may not, be in conflict with each other.

6. American Littoral Society and other Access Advocates: The *Atlantis* decision affirms the position ALS and other public access advocates have advocated for a long time, and creates the necessary legal precedent to vigilantly keep the Jersey shore open to all people who enjoy its many uses. Because this decision clearly establishes the State's right to enforce the Public Trust Doctrine and to regulate fees, ALS will actively encourage the State to step up to the plate and exercise these rights to secure those of the public. It will also continue to assure public access rights through appropriate litigation as may be required.

THE AMERICAN LITTORAL SOCIETY

The American Littoral Society is a non-profit, coastal conservation group headquartered on Sandy Hook in Highlands, NJ. Since 1961, we have empowered people to care for the coast through programs focused on learning, advocating, and conserving. We also strive to ensure that all people have access to the coast and will be able to enjoy its beauty and bounty for generations to come. To learn more about our work and how you can help, visit

www.littoralsociety.org.



**Empowering people to
Care for the coast**