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Public Trust Doctrine: Implications of New Public Access Law for Beachfront and Other Tidal Land Owners

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Summer is around the corner and beach access issues are once again in the news. Senate Bill 1074, an “Act Concerning Public Access to Certain Public Trust Land”, was signed into law by the Governor on May 3, 2019. The law is also being referred to as the public trust doctrine/public access law. Whether the law is truly a codification of the common law public trust doctrine principles that have developed through the courts over many years, or something less than that, is debatable. However, the law includes some concrete requirements that parties who own or are developing beachfront land or other land along tidal waters must consider.

The public trust doctrine is a common law doctrine tracing back to English law and Roman jurisprudence and long recognized by New Jersey. The recent public access law requires New Jersey Department of Environmental Protection (“DEP”) permitting decisions to be consistent with the public trust doctrine and it encourages municipalities to include public access plan elements in their master plans. DEP is required to protect the public right of access to tidally flowed waters and adjacent shorelines to the greatest extent practicable. To achieve this objective, the law provides that for any application submitted to DEP involving 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 make a determination as to whether additional public access to tidal waters and adjacent shorelines is necessary consistent with principals established under the public trust doctrine. In this context, 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 will be immediately applicable to any individual permit applications submitted to DEP on or after the 60th day after the law’s May 3, 2019 approval date. For applications involving other approvals, such as general permits, general permits by certification, or permits by rule, DEP has 18 months to adopt regulations identifying activities for which no public access is required, and also to identify activities for which public access is required but no individual review is necessary. With respect to the later, the absence of an individual review as expressly provided in the law directly conflicts with principles of the public trust doctrine as established by the courts. It will be interesting to monitor whether applicants for general permits for which DEP determines public access is required, without an individual review, seek to challenge the public access requirement on grounds that the absence of an individual review to determine whether the public access condition is reasonable, taking into account fact specific circumstances is inconsistent with the public trust doctrine. Interested parties should also carefully review DEP’s rule making activity to assess how DEP proposes to amend its Coastal Zone Management regulations, which currently include a lengthy (18 page) public access rule recently adopted September 2018, to address the requirements of the new law.

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