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In re Adoption of N.J.A.C. 7:26E-1.13, 871 A.2d 711 (N.J. Super. Ct. App. Div. 2005)

Heather Heinlein

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In re Adoption of N.J.A.C. 7:26E-1.13, 871 A.2d 711 (N.J. Super. Ct. App. Div. 2005)

public may access all the dry sand area, not just the three-foot wide area as prescribed by the trial court. To this point, Atlantis petitioned for certification to the Supreme Court of New Jersey.

The court reviewed the history of the public trust doctrine, from its origins in Roman jurisprudence to its application in *Matthews v. Bay Head Improvement Ass'n*. In *Matthews*, the court articulated the implied concept from case law that reasonable access to the sea is integral to the public trust doctrine. *Matthews* further held that the public trust doctrine extends to the right to enjoy the dry sand area immediately adjacent to the sea. *Matthews* established the framework for application of the public trust doctrine to privately owned upland sand beaches. The *Matthews* approach begins with the general principle that public use of the upland sands is subject to accommodation of the interests of the owner. Additionally, the case sets forth the criteria used when considering the appropriate level of accommodation including: (1) location of the dry sand area in relation to the foreshore, (2) extent and availability of publicly owned upland sand area, (3) nature and extent of the public demand, and (4) usage of the upland sand land by the owner.

After applying the *Matthews* factors to the case at hand, the court affirmed the Appellate Division ruling.

Roger J. Lucas

In re Adoption of N.J.A.C. 7:26E-1.13, 871 A.2d 711 (N.J. Super. Ct. App. Div. 2005) (deferring to the expertise of the New Jersey Department of Environmental Protection and upholding regulation N.J.A.C. 7:26E-1.13, making groundwater quality standards the remediation standards for cleanup of contaminated property).

Federal Pacific Electric Company ("FPEC") and the New Jersey State Chamber of Commerce ("NJCC") challenged the validity of regulation N.J.A.C. 7:26E-1.13 adopted by the New Jersey Department of Environmental Protection ("DEP") in February 2003. FPEC and NJCC appealed the adoption of the regulation to the Superior Court of New Jersey, Appellate Division. DEP adopted the regulation under the Brownfield and Contaminated Site Remediation Act ("Brownfield Act"). The regulation set minimum groundwater and surface water remediation standards for the cleanup of contaminated property under New Jersey environmental remediation laws. DEP used existing Ground Water Quality Standards ("GWQS") for the groundwater remediation standards. FPEC and NJCC challenged the DEP's use of GWQS, arguing the Brownfield Act required the DEP to promulgate new, less strict, site-specific standards.

To determine whether the DEP's regulation conformed to the Brownfield Act, the court looked to statutory language and legislative history. The Brownfield Act requires standards that minimized poten-

tial harm to public health, safety and the environment to “acceptable levels.” This was a change from an earlier version of the statute, the Environmental Cleanup Responsibility Act, which required minimizing the potential for harm to the “maximum extent practicable.” At the time of the change, there was a legislative declaration that protection of public health and safety and protection of the environment required strict remediation standards. The legislature also declared that previous strict standards would remain in place. The court found the change in statutory language was not enough to require the adoption of less strict remediation standards because the legislative history showed intent to keep the strict environmental standards in place.

In addition, the court noted that the legislature was fully aware the DEP was using GWQS as groundwater remediation standards when the legislature failed to adopt an amendment to the Brownfield Act in June 2003. This amendment would have made the use of GWQS inconsistent with legislative intent and statutory requirements under the Brownfield Act.

The Brownfield Act authorized the DEP to take into account the current, planned, or potential uses of the water when creating the remediation standards. This same legislative and administrative standard applied under the Water Pollution Control Act. DEP promulgated GWQS in 1997 under the Water Quality Planning Act and the Water Pollution Control Act. GWQS classified water according to current, planned, and potential uses of the water. The court found that since the legislature used the same standards under both statutes it intended that enforcement under the two statutes should be the same.

FPEC and NJCC challenged the regulation for failure to use appropriate scientific evidence and failure to avoid redundant conservative estimates as required by the Brownfield Act. The DEP’s regulation added narrative standards to the GWQS and provided for deviation when the specifically listed number was no longer appropriate according to current scientific information. The administrative regulation came before the court with a presumption of validity, and the burden was upon FPEC and NJCC to prove that the regulation frustrated legislative policy or was arbitrary. FPEC and NJCC did not meet this burden since the arguments they made before the court were not clearly convincing. The court gave deference to DEP’s expertise since the regulation involved a complex technical matter.

The court upheld N.J.A.C. 7:26E-1.13, adopted by the DEP under the Brownfield Act.

Heather Heinlein