

ANNE MILGRAM, ATTORNEY
GENERAL OF NEW JERSEY, et al.

Plaintiffs,

v.

D. LOBI ENTERPRISES, et al,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY

DOCKET NO. C-296-06

Civil Action

CONSENT JUDGMENT BETWEEN
PLAINTIFFS AND DEFENDANT
DRIFTWOOD BEACH CLUB

WHEREAS, in 1993, the State of New Jersey and the Borough of Sea Bright entered into three-party agreements with Defendant Dixie Lime & Stone Company (hereinafter “Driftwood Beach Club”) and eight other beach clubs in the Borough of Sea Bright in connection with a joint federal, state and municipal shore protection project (the “1993 Agreements”); and

WHEREAS, in the 1993 Agreements, the State of New Jersey and Defendant Driftwood Beach Club and the other beach clubs agreed that the clubs would provide to the State of New Jersey the construction access easements necessary for the project and that public use of the beach in front of the Driftwood Beach Club and the other beach clubs would be limited to a 15-foot-wide limited use corridor; and

WHEREAS, on September 22, 2006, Plaintiffs filed suit against Defendants plead as Driftwood Beach Club, Driftwood Cabana Club t/a Driftwood Beach Club, Dixie Lime and Stone Co. t/a Driftwood Beach Club, Driftwood Beach Club L.P. t/a Driftwood Beach Club and Driftwood Beach Club, Inc. t/a Driftwood Beach Club (hereinafter collectively referred to as “Driftwood Beach Club”) and others in the Superior Court of New Jersey, Chancery Division, Monmouth County; and

WHEREAS, Counts I and II of the Plaintiffs' Complaint allege that the terms of the 1993 Agreements limiting public access to a 15-foot wide limited use corridor are contrary to law and public policy, i.e., the Public Trust Doctrine as clarified by the New Jersey Supreme Court's decision in Raleigh Ave. Beach Ass'n v. Atlantic Beach Club, Inc., 185 N.J. 40 (2005) and by other court decisions; and

WHEREAS, Counts I and II of the Plaintiffs' Complaint seek to reform the 1993 Agreements to obtain additional public access to the dry sand in front of Defendant Driftwood Beach Club and the other Defendant beach clubs; and

WHEREAS, Count III of the Plaintiffs' Complaint alleges that Defendant Driftwood Beach Club and certain other Defendant beach clubs are improperly occupying ungranted State-owned tidelands and limiting public access to these tidelands through their use for beach club operations; and

WHEREAS, Defendant Driftwood Beach Club has denied the material allegations of Plaintiffs' Complaint and has filed a counterclaim against Plaintiffs; and

WHEREAS, Plaintiffs and Defendant Driftwood Beach Club have engaged in an extensive mediation process conducted by Former Chief Justice James Zazzali (the Mediator); and

WHEREAS, in the interest of resolving all claims between them in this litigation, Plaintiffs and Defendant Driftwood Beach Club now agree to settle this matter in accordance with the following terms; and

WHEREAS, Plaintiffs have determined, based on an evaluation of all relevant facts and circumstances, including but not limited to the existence of the 1993 Agreements, that the settlement set forth herein is in the public interest and furthers the Public Trust Doctrine as set

forth in the New Jersey Supreme Court's decision in Raleigh Ave. Beach Ass'n v. Atlantic Beach Club, Inc., 185 N.J. 40 (2005) and other legal opinions post-dating 1993 that the State believes have clarified public rights of access to and use of the shores of tidal waterways; and

WHEREAS, the Mediator has advised the court that, in his opinion, this Consent Judgment is consistent with the Public Trust Doctrine and is in the public interest.

NOW THEREFORE, IT IS on this ____ day of _____, 2009, ORDERED AND ADJUDGED THAT:

1. PUBLIC USE AREA

a. The 15-foot limited use corridor provided for in Paragraphs 3(a)-(b) of the 1993 Agreement between the State of New Jersey, the Borough of Sea Bright, and Defendant Driftwood Beach Club will be replaced by a full public use area of 50% of the Beach (as hereinafter defined), up to a maximum of 150 feet, extending landward from the Annual Mean High Water Mark. As used herein, the Beach shall mean the area between the Base Line, as defined in red on Exhibit C attached hereto (aerial map dated July 2009), and the Annual Mean High Water Mark. The 2009 Mean High Water Mark is shown in magenta on Exhibit C. For the remainder of the term of this Consent Judgment, the Annual Mean High Water Mark will be identified on June 15 annually. Defendant Driftwood Beach Club shall retain exclusive use and control over the beach area landward of the public use area of the Beach provided for herein, including the beach area that is within both granted tidelands and those tidelands covered by the lease contemplated under Paragraph 5(e) of this Consent Judgment.

b. In the event of any future beach fill by the federal, state and/or municipal governments, the public use area will include (1) the area outshore of the 2009 Mean High Water

Mark, and (2) 50% of the area between the Base Line and the 2009 Mean High Water Mark, up to a maximum of 150 feet, extending landward from the 2009 Mean High Water Mark.

c. In the event erosion reduces the public use area described in Paragraph 1.a above to a width of less than 15 feet, the public will retain the right to a 15-foot limited use corridor (as provided in the 1993 Agreement) immediately adjacent to the then-current Mean High Water Line, unless the dry sand beach area between the Base Line and the then-current Mean High Water Line erodes to less than 15 feet, thus making a full 15-foot corridor physically impossible because less than 15 feet of dry sand beach remains seaward of the Base Line as defined on Exhibit C. In that event, the limited use corridor shall be the entire area, if any, seaward of the Base Line. Excepting only as provided in Paragraph 1.d below, in no event shall the public have access to any dry sand beach landward of the sea wall/Base Line as defined on Exhibit C.

d. Notwithstanding Paragraph 1.c above, Driftwood Beach Club shall allow fishermen traversing the beach from the south to access the jetty extending seaward from Driftwood Beach Club's property (which is located immediately to the north of transect K on Exhibit C), subject to the right of Driftwood Beach Club to restrict fishing in bathing areas during such hours as it shall deem appropriate for bathing.

e. Nothing in this Consent Judgment limits the right of the members of the Driftwood Beach Club and their guests to access the foreshore, the ocean, and the public use area and to otherwise enjoy in said areas any and all rights and privileges they currently have as beach club members.

f. The public use area may be marked by stakes or by modest signage, but it is not to be delineated by ropes, fences, or the like.

g. The public use area shall be deemed premises upon which public access has been required by agreement with the Department of Environmental Protection pursuant to N.J.S.A. 2A:42A-8. Any member of the public (other than a Beach Club member and their guests) entering upon or using the public use area shall be deemed a person entering or using the land for a use or purpose related to public access purposes within the meaning of N.J.S.A. 2A:42A-8.c. The purchase of a beach badge from the Borough of Sea Bright shall not be deemed a consideration paid to the Driftwood Beach Club, and hence any member of the public engaging in sport or recreational activity in the public use area shall not be deemed to have been granted permission for a consideration within in the meaning of N.J.S.A. 2A:42A-8.e.

2. THE 1993 AGREEMENT AND THE CONSTRUCTION EASEMENT

a. By the terms set forth above, Paragraphs 3(a)-(b) of the 1993 Agreement are superseded by this Consent Judgment and shall be of no further force and effect immediately upon the satisfaction of all contingencies to this Consent Judgment becoming final and binding. The remaining provisions of the 1993 Agreement, including the construction easements granted to the State therein, will remain in effect for the duration of this Consent Judgment. Upon the expiration of this Consent Judgment, all remaining provisions of the 1993 Agreement shall be of no further force and effect. To the extent that there are any conflicts between the terms of the 1993 Agreement and this Consent Judgment, the terms of this Consent Judgment shall govern.

3. DURATION OF CONSENT JUDGMENT

a. This Consent Judgment shall remain in full force and effect until October 15, 2039.

4. ADDITIONAL PUBLIC ACCESS AMENITIES

a. Defendant Driftwood Beach Club will contribute \$20,000 for the construction of public-access amenities. This contribution shall be paid within ten (10) business days of the date that this Consent Judgment is approved by, and Driftwood Beach Club obtains the conditional lease agreement from, the Tidelands Resource Council as required under paragraph 5 of this Consent Judgment. This money will be designated to a Sea Bright Public Access Fund. This Fund will be managed by the State and used to finance public-access improvements in the Borough. The improvements sought to be constructed will first be identified by the State, in coordination with the Borough and in consultation with Amici Curiae American Littoral Society and Citizens Right to Access Beaches, and representatives of the Sea Bright beach clubs, which will not exceed two in number. The Borough will have final input on acceptance of any amenity to be constructed on Borough property, and when construction is completed and accepted by the Borough Council by Resolution, the Borough will thereafter be responsible for the operation and maintenance of the improvements. Except for the payments required under this Paragraph 4, Driftwood Beach Club shall have no obligations of any type or kind with respect to such amenities.

b. In addition to the contribution specified in Paragraph 4.a above, Defendant Driftwood Beach Club will transfer to the State of New Jersey title to property identified as Lot 2.02, Block 16 on the tax map of the Borough of Monmouth Beach, Monmouth County within ten (10) business days of the date that this Consent Judgment is approved by, and Driftwood Beach Club obtains the conditional lease agreement from, the Tidelands Resource Council as required under paragraph 5 of this Consent Judgment.

5. TIDELANDS

a. Judgment is hereby entered quieting title in the State of New Jersey in all ungranted, avulsively-filled State-owned tidelands seaward of the Driftwood Beach Club property pursuant to the terms set forth in Appendix A. Nothing herein shall affect the validity of existing State tidelands grants held by Defendant Driftwood Beach Club. Exhibit D hereto depicts the areas of State-owned tidelands and the areas of existing State tidelands grants held by Defendant Driftwood Beach Club.

b. The foregoing notwithstanding, Driftwood Beach Club shall at all times be considered the riparian owner and retain all attendant rights and privileges at law and equity. While an upland owner, Driftwood Beach Club shall have a non-exclusive easement common with the public across the lands in which title is quieted in favor of the State for purposes of access to the ocean. Nothing herein shall be construed to limit future legislative action concerning riparian rights or public access, nor shall it limit Driftwood Beach Club's ability to challenge any such legislative action.

c. Plaintiffs will recommend to the Tidelands Resource Council that Defendant Driftwood Beach Club resolve all State tidelands claims for past usage and future usage for the duration of this agreement through a single payment of \$10,000.

d. The State retains its rights under N.J.S.A. 12:3-1 et. seq. to impose all reasonable and appropriate conditions for Defendant's use of the ungranted State tidelands at the expiration of this Consent Judgment.

e. This Consent Judgment is contingent upon final approval by the Tidelands Resource Council, subject to review and approval by the Commissioner of Environmental Protection and the Attorney General. Plaintiffs will recommend to the Council that it enter into a

conditional lease agreement for all ungranted tidelands with a term that runs until October 15, 2039 with Defendant Driftwood Beach Club in accordance with this Consent Judgment.

f. In the event this Consent Judgment has not been approved by the Tidelands Resource Council, and reviewed and approved by the Commissioner of Environmental Protection and the Attorney General, within 180 days of the entry hereof, this Consent Judgment shall be vacated, the complaint, and answer with defenses and counterclaim reinstated, and the matter shall be scheduled for trial.

f. All of the terms and conditions of this Consent Judgment including, without limitation, those that pertain to public access shall not take effect until this Consent Judgment is approved by, and Driftwood Beach Club obtains the conditional lease agreement from, the Tidelands Resource Council as required under this paragraph 5.

6. FUTURE REGULATORY APPROVALS

a. Plaintiff State of New Jersey, Department of Environmental Protection, will not impose any public access requirements as a term or condition of any permits or approvals it issues to Defendant Driftwood Beach Club for normal beach maintenance, pool maintenance, typical beach club operation activities, seasonal structures, and repair, reconstruction, or expansion of any beach club structure within the existing footprint, excepting only the requirement that Defendant Driftwood Beach Club comply with this Consent Judgment.

7. MISCELLANEOUS

a. Beach Badges and Fees: Except for members of Defendant Driftwood Beach Club and their guests, municipal beach badges will be required in public-use areas in front of Defendant Driftwood Beach Club if the club elects to provide lifeguards and beach cleaning services. Driftwood Beach Club shall have no obligation to provide any services in connection

with the public's access, occupancy and use of the Beach and/or the ocean including, without limitation, provision of lifeguards or other safety personnel, and cleaning and maintenance. To the extent that Driftwood Beach Club provides any such services in the public-use area and/or the ocean, Driftwood Beach Club will provide them equally to members and non-members alike. The Borough shall take reasonable steps to ensure the availability of municipal beach badges on its website and at the municipal beach. This reflects the limit of the Borough's responsibility in this regard. Should the Borough and the Beach Clubs strike some additional arrangement for the sale of Municipal Beach Badges in the future, such arrangement is wholly voluntary.

b. Regulation of the Public-Use Area: The public-use areas in front of the Driftwood Beach Club will be considered unsupervised municipal beaches and will be governed by the rules that apply to supervised and unsupervised municipal beaches in the Borough of Sea Bright and reasonable non-discriminatory rules that Driftwood Beach Club applies equally to all users of the beach in front of Driftwood Beach Club, both members and non-members alike, concerning the prohibition or other restrictions on the following: smoking; possession and consumption of alcoholic beverages; use of electronic devices (e.g., radios, CD players, iPods, MP3 players) without earphones; ball playing; use of the beach during beach cleaning operations; swimming or wading outside of designated guarded areas; swimming or wading when lifeguards are not on duty; use of surf boards; littering; use of china, glassware or other breakable or metallic utensils; use of glass bottles; unattended children under 12 years of age; disrespectful or dangerous behavior, horseplay or foul language; lewd or indecent conduct or attire; gambling; and fishing in bathing areas during such hours that the club designates for bathing. The beach club may install modest signage to identify the rules applicable to the public-use areas in front of the club.

c. In the event Driftwood Beach Club wishes to adopt rules or regulations other than those specified above, it shall give written notice to the Plaintiffs, and unless Plaintiffs provide Driftwood Beach Club with written objection to such rules within 30 days, those rules shall be deemed acceptable and enforceable. In the event Plaintiffs provide written notice of objection within 30 days, the Plaintiffs shall present the matter to this Court by way of motion pursuant to R. 1:10 to decide whether said rule is reasonable and consistent with the public trust doctrine, which decision may be made in a summary manner. In the event of an appeal, the decision of this Court shall be upheld so long as it is not arbitrary, capricious or unreasonable.

d. Modification of Agreement: No modification of this agreement will be effective without the written approval of the Plaintiffs and Defendant Driftwood Beach Club.

e. This agreement may be executed in counterparts.

8. REVIEW AND APPROVAL BY THE COURT

a. The Court has reviewed this Consent Judgment and finds and declares that this Consent Judgment furthers the Public Trust Doctrine and is in the public interest.

Hon. Thomas W. Cavanagh, Jr., P.J. Ch.

The undersigned hereby consent to the form and entry of this Consent Judgment.

ANNE MILGRAM, ATTORNEY GENERAL,
STATE OF NEW JERSEY

Date: _____

By: _____

STATE OF NEW JERSEY, DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Date: _____

By: _____

DRIFTWOOD BEACH CLUB,
DRIFTWOOD CABANA CLUB T/A
DRIFTWOOD BEACH CLUB, DIXIE LIME
AND STONE CO. T/A DRIFTWOOD
BEACH CLUB, DRIFTWOOD BEACH
CLUB L.P. T/A DRIFTWOOD BEACH
CLUB AND DRIFTWOOD BEACH CLUB,
INC. T/A DRIFTWOOD BEACH CLUB

Date: _____

By: _____

BOROUGH OF SEA BRIGHT

Date: _____

By: _____

APPENDIX A

Pursuant to Paragraph 5(a) of this Consent Judgment, judgment is hereby quieted in the State of New Jersey in all lands within the subject property outshore of the line entitled "1993/1995 Mean High Water Line" in Exhibit D to this Consent Judgment. These lands are hereby quieted in the State of New Jersey free of any claim of the Driftwood Beach Club, except as stated herein.

The lands quieted in the State of New Jersey shall not include any areas subject to State tidelands grants, such grants being identified in Exhibit D. Title is hereby quieted in the Driftwood Beach Club in all lands within the subject property inshore of the 1993/1995 Mean High Water Line, and to all lands between the 1993/1995 Mean High Water Line and the eastern boundary of the applicable State tidelands grants, free of any claim of title of the State of New Jersey, except as stated herein.

The title of the State of New Jersey and the title of the Driftwood Beach Club are subject to natural erosion and accretion in those portions of the subject property that are ungranted. Once the current mean high water line erodes to the location of the 1993/1995 Mean High Water Line, in an ungranted area, then the common law rules concerning title by natural accretion, natural erosion and natural avulsion shall apply, to that extent.

Either party may move to amend this Judgment to identify the area quieted in the State and in the Driftwood Beach Club by metes and bounds upon 60 days notice to the other party.

A copy of Exhibit D shall be maintained in the office of the Bureau of Tidelands Management in the Division of Land Use Regulation, New Jersey Department of Environmental Protection, P.O. Box 439, Trenton, New Jersey 08625 in File Number _____. This Judgment shall be recorded in the Bureau's records in Liber _____ starting at page _____ and in the real property records of the Monmouth County Clerk's Office.