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February 23, 2023

Via JEDS

Hon. Michael J. Blee, A.J.S.C.
 Superior Court of New Jersey
 Cape May County Courthouse
 9 North Main Street
 Cape May, New Jersey 08210

Re: New Jersey Department of Environmental Protection v. City of North Wildwood, et al
Docket No. C-000055-22

Dear Judge Blee:

Our office represents the City of North Wildwood (the “City”) in the above referenced matter. We write in response to the Department of Environmental Protection’s (“DEP”) letter dated February 21, 2023. We understand a case management conference has since been scheduled by the court on February 24, 2023 at 2:30 p.m. via Zoom. We write in anticipation of the case management conference to (1) address the DEP’s objection to the Amended Answer and Counterclaim filed by the City on February 17, 2023; and (2) provide the court with a status update with respect to the pending Emergency Authorization submitted by the City on February 21, 2023, in conformance with the court’s Order dated February 1, 2023.

The DEP’s letter sets forth that on February 17, 2023, the City of North Wildwood filed an Amended Answer and Counterclaim “without leave of this Court, adding three additional Counts which were not included in the proposed Answer and Counterclaims considered by the Court on February 1, 2023.” The DEP seems to suggest that leave of court was required by the court to file the Amended Answer and Counterclaim. However, Rule 4:9-1 (Amendments) makes clear that “a party may amend any pleading as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 90 days after it is served.” Here, the City has strictly conformed to Rule 4:9-1 in filing the Amended Answer and Counterclaim “as a matter of course” as allowed by Rule 4:9-1 prior to any responsive pleading being filed by the DEP. As such, there is no basis for DEP’s objection that the City has failed to seek leave of court, because Rule 4:9-1 makes unequivocally clear that no such leave is required.

The DEP further argues relative to the Amended Answer and Counterclaim that “the additional counts are [not] related to DEP’s original summary proceeding....” In addition to adding claims for nuisance, violation of the Administrative Procedures Act, and Declaratory Judgment, the Amended Answer and



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Counterclaim specifically adds factual allegations concerning conditions that have significantly deteriorated not only at 15th Avenue but also extending down to 13th Avenue. The fact that the conditions have worsened and expanded to other sites (as reflected in the Amended Counterclaim) was specifically referenced at oral argument on February 1, 2023 (See Exhibit A, Transcript of Decision of Court dated February 1, 2023, at 41:7-11 and 50:7-8). In addition, these deteriorating conditions are specifically referenced in the Emergency Authorization that was filed with the DEP –per the court’s Order – on February 10, 2023.

Against this backdrop, the court specifically ruled that “[t]he counterclaims conceivably rise out of the same transactions and occurrence. There is -- appears to be, on its face, a common nucleus of operative fact.” (Tr. at 57:13-22). All of the factual allegations and the additional claims in the Amended Answer and Counterclaim arise of the same common nucleus of operative facts. Perhaps more importantly, though, is that all of these matters can be addressed in this litigation per the court’s existing case management order. This is the law of the case, and the DEP should not be permitted to relitigate this issue, and certainly not by letter. “Under the doctrine of the law of the case, a party cannot relitigate a previously resolved issue.” Washington Commons v. City of Jersey City, 416 N.J. Super. 555, 563 (App. Div. 2010).

In sum, the Amended Answer and Counterclaim was filed in conformity with both Rule 4:9-1, which permits amendments as of right, and the court’s ruling on February 1, 2023. As such, there is no basis for any objection by the DEP to the filed Amended Answer and Counterclaim. We respectfully submit that the court has already recognized that these matters should and will be handled by this court despite DEP’s continual insistence that this is a “summary proceeding.” As indicated at oral argument, we do not have the benefit of handling this matter solely looking at what existed in October. The court recognized that in its ruling by permitting the filing of the counterclaim.

Lastly, as indicated above, on February 10, 2023, the City submitted the Emergency Authorization to the DEP. While there have been email communications between the DEP and the City’s professionals, including multiple requests for additional information by the DEP, all of which have been responded to by the City, as of this writing the DEP has yet to make any determination on the City’s Emergency Authorization. We learned this morning that a decision is may be coming tomorrow.

As always, we thank Your Honor for the court’s consideration of the City’s position in this matter. We look forward to the case management conference tomorrow to discuss these matters with Your Honor.

Respectfully submitted,

CULLEN AND DYKMAN LLP


ANTHONY S. BOCCHI

ASB/rc



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Encl.
cc: Kevin H. Terhune, D.A.G. (via JEDS and Email)
Dianna Shinn, D.A.G. (via JEDS and Email)

EXHIBIT A

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CIVIL PART
CAPE MAY COUNTY, NEW JERSEY
DOCKET #CPM-C-55-22
A.D.#

NEW JERSEY DEPARTMENT OF)	
ENVIRONMENTAL PROTECTION)	
)	TRANSCRIPT OF
PLAINTIFF)	ORDER TO SHOW CAUSE
)	AND
V)	MOTION FOR LEAVE
)	TO FILE COUNTERCLAIM
CITY OF NORTH WILDWOOD)	
)	
DEFENDANT)	

PLACE: CAPE MAY COUNTY SUPERIOR COURT
9 NORTH MAIN STREET
CAPE MAY, NJ 08210

DATE: FEBRUARY 1, 2023

BEFORE:

HONORABLE MICHAEL A. BLEE, J.S.C.

TRANSCRIPT ORDERED BY:

RYAN P. DUFFY, ESQUIRE
(CULLEN AND DYKMAN, LLP)

APPEARANCES:

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1 allow the parties to deal with these issues and, you
2 know, ultimately there will be a disposition or there
3 may be a settlement of those disputes. Who knows. But
4 the point of it is is that we do think there's
5 authority to allow North Wildwood the ability to make
6 these claims because the time is now to make those
7 claims. It's ripe for adjudication based on what's
8 happening and based on, you know -- you know,
9 conditions are worsening not just with respect to the
10 site that we're talking about today, but in other
11 sites. So when you take that all into account, the
12 Court ought to invoke its jurisdiction and step in and
13 be a vehicle to hopefully try to, you know, dispose of
14 these matters in a way that is fair and equitable to
15 everyone. And that's why we think Your Honor should
16 invoke your jurisdiction and allow us to assert that
17 counterclaim.

18 THE COURT: Thank you, counsel. Mr. Terhune,
19 opposition?

20 DAG TERHUNE: Thank you, Your Honor. Again,
21 I'm going to try to avoid going into the -- the merits
22 themselves of the -- of the requested counterclaim and
23 just point out a couple of things in -- in particular.
24 The appearance, the driving factor of the request for
25 North Wildwood, not only is the current conditions

1 North Wildwood. Defendants contend this is a response
2 to an imminent threat to life and property. Because it
3 is currently storm season, there's little beach or
4 protection left. They argue that even a moderate storm
5 may cause catastrophic loss to life and property. They
6 argue that the Crowe factors lean more in favor of the
7 defendants. That there would be irreparable harm and
8 further argue the conditions have worsened since
9 October and the threat remains severe, and they argue
10 their environmental concep -- consultant believes that
11 North Wildwood could not withstand a single coastal
12 storm event up into the future; that if the dunes are
13 breached, there's a storm drainage system which would
14 likely be destroyed, rendering it non-functional,
15 leading to catastrophic widespread flooding. They
16 argue that the beach nourishment method has been eff --
17 ineffective through the years, and the only successful
18 method of coastal protection is the installation of
19 bulkheads. They believe, the defendants, that equities
20 balance in their favor. In reply, plaintiff indicates
21 that it satisfies the legal standard for a preliminary
22 injunction. That there's been ongoing environmental
23 leys (sic) -- environmental violations, which is ground
24 for injunctive relief. They further argue that it
25 would be improper for this Court to review the NJDEP's

1 considerations and unique facts of each case. Highland
2 Lakes Country Club vs. Nicastro, 201 NJ 123-125, 2009.
3 Chief of these equitable considerations that are
4 principles laid out in the Entire Controversy Doctrine,
5 which requires litigants to consolidate claims arising
6 from a single controversy or else run the risk of
7 forfeiting such claim. Dimitrakopoulos vs. Borrus
8 Golden, et al., 237 NJ 91 at 98, 2019. The polestar
9 for the application of this doctrine is judicial
10 fairness, K-Land Corp #28 vs. Landis Sewerage
11 Authority, 173 NJ 59 at 74, 2002. Here the equities
12 are in favor of allowing the defendants leave of court
13 to file a counterclaim. The counterclaims conceivably
14 arise out of the same transactions and occurrence.
15 There is -- appears to be, on its face, a common
16 nucleus of operative fact. The -- The counterclaim
17 does not petition the Court to grant relief outside its
18 equitable authority. So the Court grants that
19 application. I say that with the following comments.
20 First, the Court is also going to order something,
21 whether that be in -- in the counterclaim or in the
22 case in chief. I find the defendants are not without
23 remedy. Defendants have presented the Court with a
24 myriad of exhibits and certifications detailing the
25 significant degradation of their coastal protective