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February 28, 2023

Via JEDS and Regular Mail

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:

This office serves as counsel to the City of North Wildwood (hereafter, the “City”) in the above-referenced matter. We write to apprise the court of the New Jersey Department of Environmental Protection’s (hereafter, the “DEP”) denial of the City’s Emergency Authorization application dated February 10, 2023 (hereafter, the “EA”). For the reasons set forth herein, the City respectfully requests a case management conference with Your Honor at the court’s earliest convenience to discuss the ramifications of the DEP’s denial of the City’s Emergency Authorization, including, among other things, the City’s request that it be granted leave to file a motion tolling any applicable administrative appeal deadlines pending the court’s disposition of this matter.

As the court is aware, the EA was submitted pursuant to the court’s February 1, 2023 Order (the “Order”). (Annexed hereto at **Exhibit A** is the Order). The Order provided, in pertinent part, at paragraph 3, as follows:

3. Defendants must file an Emergency Authorization application with the NJDEP WITHIN TEN (10) DAYS of this Order, seeking to:
 - a. Allow Defendants to install a bulkhead between 15th and 16th Avenue
 - b. Allow Defendants to engage in further excavation, placement, or regrading of sand between 14th and 16th Avenues
 - c. Allow Defendants to engage in any other oceanfront construction, reshaping of dunes and/or reconstruction of the access point at 16th and 25th Avenues.



Honorable Michael J. Blee, A.J.S.C.
February 28, 2023
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In conformance with the Order, on February 10, 2023, the City submitted the EA. On Friday, February 24, 2023, shortly after the case management conference with the court, the DEP's Division of Land Resource Protection sent the City its denial of the EA (Annexed hereto at **Exhibit B** is the DEP's EA denial dated February 24, 2023).

Clearly, the City strongly disagrees with the DEP's denial of the EA. As it presently stands, the good citizens of North Wildwood remain endangered by the DEP's blatant refusal to allow the City to expeditiously address an issue of grave public concern. We will not burden the court in this correspondence with a response to what we respectfully submit are, by every objective measure, baseless contentions set forth in the EA denial letter.

Nonetheless, there are certain administrative appeal deadlines that arise from the denial of the EA. N.J.A.C. 7:7-28.1 (Procedure to request an adjudicatory hearing; decision on the request), provides at subsection b the following:

(b) To contest a Department decision on a coastal permit, a person shall submit an adjudicatory hearing request within 30 calendar days after public notice of the decision is published in the DEP Bulletin. If a person submits the adjudicatory hearing request after this time, the Department shall deny the request.

Since the court retained jurisdiction in this matter, and given that it would be an exercise in futility for the City to appeal this matter to the DEP, we believe it is necessary and appropriate that the court grant the City leave to file a formal application tolling the administrative appeal deadlines set forth in N.J.A.C. 7:7-28.1. Given the court's previous rulings, which granted the City leave to assert claims against the DEP as it relates to this matter, we believe that there exists good cause to toll said deadline pending the court's disposition of this matter. Any other decision would render the court's previous rulings in this matter futile, which we respectfully submit could not have been the intention of the court.

At the conclusion of the court's case management conference on February 24, Your Honor graciously offered the parties another case management conference if we so desired. The City wishes to take Your Honor up on that offer and respectfully requests a case management conference to discuss this matter further.

As always, we thank Your Honor for the court's consideration of this request.

Respectfully submitted,

CULLEN AND DYKMAN LLP

A handwritten signature in blue ink, appearing to read 'A. Bocchi', written over the printed name.

ANTHONY S. BOCCHI

ASB/rc
Encls.
cc: Dianna Shinn, D.A.G. (via JEDS and Email)

EXHIBIT A

Prepared by the Court

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Plaintiff,

v.

CITY OF NORTH WILDWOOD, "XYZ CORPORATIONS" 1-10; and "JOHN AND / OR JANE DOES" 1-10,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CAPE MAY COUNTY
CHANCERY DIVISION

DOCKET NO: CPM-C-5522

Civil Action

ORDER

FILED

FEB - 1 2023

CIVIL DIVISION
SUPERIOR COURT - CAPE MAY CO.

THIS MATTER, having been brought before the Court by way of an Order to Show Cause, Plaintiff's Motion for Temporary Restraining Order and Injunctive Relief, and Defendants' Motion for leave to file a Counterclaim; and Kevin A. Terhune, Esq., and Dianna E. Shinn, Esq., of the Deputy Attorney General Office, having appeared on behalf of Plaintiff; and Anthony S. Bocchi, Esq., of the firm Cullen and Dykman LLP, having appeared on behalf of Defendants; and the Court having reviewed the papers submitted and having heard oral argument; and for the reasons more fully set forth on the record; and for good cause shown;

IT IS on this 1st day of FEBRUARY 2023; ORDERED and ADJUDGED as follows:

1. Plaintiff's Motion for Temporary Restraining Order and Injunctive Relief is GRANTED and Defendants are hereby enjoined from:
 - a. Installing a bulkhead between 15th and 16th Avenues until it has received a permit authorizing the installation of same from the NJDEP;
 - b. Engaging in any further excavation, placement or regrading of sand between 14th and 16th Avenues until it has received a permit authorizing the installation of same from the NJDEP;
 - c. Engaging in any other oceanfront construction, reshaping of dunes and/or reconstruction of the access point at 16th and 25th Avenues until it has received a permit authorizing the installation of same from the NJDEP.
2. Defendants' Motion for leave to file a Counterclaim is hereby GRANTED.

Prepared by the Court

3. Defendants must file an Emergency Authorization application with the NJDEP WITHIN TEN (10) DAYS of this Order, seeking to:
 - a. Allow Defendants to install a bulkhead between 15th and 16th Avenues;
 - b. Allow Defendants to engage in further excavation, placement, or regrading of sand between 14th and 16th Avenues
 - c. Allow Defendants to engage in any other oceanfront construction, reshaping of dunes and/or reconstruction of the access point at 16th and 25th Avenues.
4. This Order and Final Judgment shall be electronically filed via e-courts thereby ensuring prompt service upon all counsel of record.



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

EXHIBIT B



State of New Jersey

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

DEPARTMENT OF ENVIRONMENTAL PROTECTION
Watershed & Land Management
Mail Code 501-02A
P.O. Box 420
Trenton, New Jersey 08625-0420
www.nj.gov/dep/landuse

SHAWN M. LATOURETTE
Commissioner

February 24, 2023

VIA EMAIL

Nicholas Long, City Administrator
City of North Wildwood
901 Atlantic Avenue
North Wildwood, New Jersey 08260

**Re: City of North Wildwood Emergency Authorization Request
Division of Land Resource Protection Determination (Denial)
DLRP File No. 0507-03-0009.6 (CAF 230001)**

Dear Mr. Long:

The following is the Division of Land Resource Protection's (DLRP) determination on the City of North Wildwood's (NWW) request for an Emergency Authorization (EA). For the reasons that follow, DLRP hereby **denies** the current EA request, but notes that progress has been made toward analysis of alternative shore protection measures that could be approved if NWW submits another EA request. DLRP also looks forward to engaging with NWW as it reviews NWW's Individual Permit application (DLRP File No. 0507-03-0009.6), which was deemed administratively complete on 2/6/23, and which, in part, proposes shore protection measures in the locations at issue in the subject EA request.

North Wildwood's February 10, 2023 Emergency Authorization Request

NWW submitted to DLRP a request for an EA on February 10, 2023 with a proposal for bulkhead installation from the area between 12th and 13th Avenues, extending south to 16th Avenue. NWW stated that the proposed emergency work is necessary to address chronic erosional conditions along the oceanfront.

Within the EA request, NWW represented that, in the area between 15th and 16th Avenues, less than 50% of the dune mass remained at the end of December 2022, and erosion has continued. NWW states that "without the mass of the pre-existing dune, a moderate storm, akin to the October event, will rapidly erode through the balance of the dune and breach into the Beach Patrol facility

(Block 317.03, Lot 1).” NWW states that in the event of a dune breach, it is concerned that the Beach Patrol facility would be damaged, as well as other City infrastructure.

In addition to NWW's stated concerns for the area between 15th and 16th Avenues, NWW also requested authorization for work extending to the north, from 15th Avenue to the area between 12th and 13th Avenues. NWW represented that "it now appears that a dune breach between 13th and 14th Avenues has an equal if not greater likelihood than a breach at 15th Avenue. The proximity of JFK Boulevard and existing City infrastructure within this right-of-way are at significant risk should a breach occur at 13th Avenue. The imminent threat continues to persist that a dune breach will occur before this year's storm season concludes."

As stated above, the EA requests emergency work between the midblock of 12th and 13th Avenues to 16th Avenue (Block 317.03, Lot 1 (P/O); Block 317.02, Lot 2 (P/O)), specifically the following activities:

- 1) Installation of ±1,147 linear feet cantilevered steel bulkhead (coated) with timber cap
- 2) Excavation, placement, and regrading of residual sand within the project area
- 3) Reshaping of remnant dune in locations of scarps and or breach(s)
- 4) Reconstruction of beach access points over new bulkhead at 13th, 14th, 15th, and 16th Avenues
- 5) Removal and reinstallation of split rail fencing as necessary
- 6) Removal of the 15th Avenue ADA dune crossover beach access (if at risk of failure)

Standards applicable to Emergency Authorization Requests

For DLRP to issue an EA, the applicant must demonstrate that a threat to life, severe loss of property, or environmental degradation exists or is imminent, and can only be prevented or ameliorated through undertaking a regulated activity and is likely to occur, persist, or be exacerbated before the Department can issue authorization under a general permit or an individual permit for the preventative or ameliorative activity. N.J.A.C. 7:7-21.1.

Under N.J.A.C. 7:7-21.3 (e), if DLRP approves an emergency authorization request, the person to whom the emergency authorization is provided shall submit a complete application for an individual or general permit to authorize the activities, and under N.J.A.C. 7:7-21.3(h) and (i) the applicant must demonstrate compliance with the requirements of the CZM rules, or an explanation as to why full compliance could not be achieved, and the Department shall require design changes or restoration as necessary to ensure the requirements of the CZM rules are met to the maximum extent practicable. Thus, where, as here, the proposed emergency measure includes the installation of a permanent structure, it would not be appropriate for DLRP to authorize the activity where the applicant has failed to demonstrate the proposed activity would otherwise meet the requirements of the underlying rules.

Most relevant to this EA determination, installation of a bulkhead must comply with the Coastal Engineering Rule at N.J.A.C. 7:7-15.11. This rule requires DLRP to consider an alternatives analysis which allows structural shore protection measures, such as a bulkhead, to be authorized only upon a demonstration that non-structural and hybrid shore protection measures are not feasible or practicable. Non-structural and hybrid measures are required where feasible because

structural shore protection measures have greater environmental impact and can cause wave reflection, thus worsening erosion to the adjacent beach and dune system. This alternatives analysis is complex and technical.

DLRP's Review of the EA Request

Existence or Imminent Threat to Life, Severe Loss of Property, or Environmental Degradation

Upon receipt of the EA request, DLRP immediately reviewed the submitted information, existing condition information including aerials of the area in question, and consulted with the Department's Office of Coastal Engineering, which has experience in the design and location of shore protection measures.

With regard to the area extending from 15th Avenue north to the area between 12th and 13th Avenue, an established, vegetated dune and small beach berm are still in place within the majority of this area and would offer shore protection during a storm. Thus, DLRP determined there is no threat to life, severe loss of property, or environmental degradation. However, there is a bulkhead (that was installed without prior DLRP approval) in this location, terminating at the midpoint of 12th and 13th Avenues, and the immediate area of the terminus of this bulkhead is experiencing a higher level of erosion, exacerbated by end effect wave reflection from the currently existing, unauthorized bulkhead. Thus, DLRP finds that this isolated point at the terminus of the unauthorized bulkhead is at risk of imminent breach. However, as described in further detail below, the EA request proposing shore protection measures for the larger area is denied, and DLRP would consider a new EA request addressing alternatives for this specific location.

With regard to the area between 15th and 16th Avenues, DLRP has determined that severe erosion exists, and, due to the construction of the Beach Patrol building in a waterward location, the remaining dune may not provide protection in future storm events, making the building and nearby infrastructure vulnerable to damage. Thus, DLRP agrees with NWW that this area of the dune is at risk of imminent breach and would authorize shore protection under an EA in this location as necessary to abate the risk until DLRP can issue a decision on the pending Individual Permit application.

As indicated in N.J.A.C. 7:7-21.1 and 7:7-21.3(i), even if it determines an emergency exists, DLRP must also determine the emergency can only be ameliorated by the proposed regulated activity before it can issue an EA.

Based upon these standards, DLRP has endeavored to expediently obtain additional information for the alternatives analysis about non-structural measures that may be feasible at the subject location in NWW for the areas that require immediate shore protection, as set forth below.

Alternatives Analysis and Supplemental Information Exchange

DLRP February 14, 2023 Request

In its EA request, NWW analyzed the alternative of placement of sand to enhance the dune. Based on the initially submitted alternatives information, NWW represented that, for the area between 13th and 16th Avenues, "due to an exceedingly high daily erosion rate, as experienced over the past

several years without sand stockpiling, approximately 522,000 cubic yards (CY) of sand would be required to meet the ACOE design template”.

In an effort to fully explore the potential for alternatives that would have less impact on the adjacent beach and dune system than the installation of a bulkhead, DLRP requested additional information from NWW on February 14, 2023.

In its request, DLRP explained that meeting the ACOE design template is not necessary for purposes of the EA request. A dune with similar dimensions to what was constructed during the 2009 State/Local beachfill in this area previously by the NJDEP Office of Coastal Engineering (OCE) would afford immediate storm protection in this area in OCE’s opinion. Therefore, DLRP requested that NWW address the alternative using calculations that reflect the minimum amount of sand necessary to abate the City’s stated emergency until such time as a decision can be made on the City’s CAFRA Individual Permit application.

To offer assistance, DLRP requested that NWW provide sand volume calculations for the potential addition of sand to the existing dune to create a design profile of an approximately 20-foot wide dune at elevation +14.75 NAVD 88’ with 3:1 side slopes for the area from the northeastern portion of the beach safety patrol building extending to 300 linear feet to the vehicular accessway near 16th Avenue.

NWW February 16, 2023 Response

NWW responded on February 16, 2023 as follows:

"Given the present condition of the severely eroded beach berm and lack of a reliable trucking route for sand backpassing from either Wildwood or Wildwood Crest borrow areas, sand for the temporary beachfill would need to be imported from an extraction facility on the mainland. The estimated construction cost for this interim measure is \$339,690, which represents mobilization, required bonds and insurance, sand material and hauling, as well as grading and shaping of the temporary dune. Additional project fees and a modest construction contingency of 5%, result in a total project cost of \$471,597. As previously explained in the pending EA alternatives analysis, this type of beachfill project requires duplicate handling of the fill material, which increases the construction timeline and associated costs. The contractor must complete an intermediate sand transfer from street-legal tri-axle dump trucks importing the sand from the sand mine to the heavy duty off-highway articulated dump trucks necessary to transit oceanfront conditions to the fill site. Pursuing this temporary option would require in excess of 240 tri-axle truck loads and generate a cost of nearly a half million dollars. The City is concerned that this interim measure is not workable because of circumstances that the Department may not have taken into consideration, which is the significant change in the elevation of the beach."

DLRP February 22, 2023 Request

DLRP reviewed the information in NWW's February 16, 2023 response and provided clarification to the original request on February 22. Rather than proposing the placement of sand waterward of the dune on the existing beach berm, DLRP was requesting the assessment of possible placement of material landward of the beach berm to enhance the existing dune within the stated area of concern between 15th and 16th Avenues. The goal would be to augment the existing dune by

providing a minimum of 20 feet of additional dune crest at elevation +14.75 NAVD88 with some measure of seaward slope to tie into the existing dune along with a 3:1 backslope down to the existing parking area. Placing the material in a stable location would enhance the existing dune system from the landward side and eliminate the need for costly rehandling of material and mobilization of off-road dump trucks. Based on OCE's experience, it seems the necessary material to achieve this enhancement could be delivered from an upland quarry and would be cost effective.

NWW representatives asked for additional clarification regarding the placement location, and DLRP responded with additional guidance. DLRP stated that its design volume recommendations were based on a previously authorized project that was built in this area. However, DLRP clarified that NWW's proposal could propose additional material to increase the height and width of the dune if feasible.

NWW February 23, 2023 Response

NWW responded stating that based on the erosion rates experienced at this location over the past six months, the placement of $\pm 1,194$ CY of supplemental sand will not sustain the dune as an effective shore protection measure. Moreover, the existing beach conditions and NJDEP recommended fill project do not follow the federal template and therefore would be inconsistent with an engineered beach, as referenced in the Coastal Zone Management Rules.

In addition to the above, NWW has stated that the expansion of the dune footprint within the discussed area would impact access to the Beach Safety Patrol building and safety operations that occur in the adjacent area, specifically in the area of three storage buildings to the south. DLRP requested a description of the operations that occur in this area, but did not receive a response from NWW. However, the discussed dune enhancement would be approximately 37 feet away from the building, and NWW has not demonstrated that this would prevent access. We also note that to the extent NWW is concerned the storage buildings located south of the beach safety patrol buildings would interfere with the dune enhancement, these buildings were installed without DLRP authorization and it seems they could be relocated.

DLRP Determination

After reviewing the information submitted and the condition of the area between 15th and 16th Avenue, DLRP has determined NWW has not demonstrated dune enhancement is not feasible or practicable for the limited purpose of abating the immediate threat while DLRP reviews NWW's pending Individual Permit application, and thus, DLRP must deny the EA request. Dune enhancement is a non-structural alternative that would have less potential impact to the adjacent beach/dune system. Again, DLRP has an obligation to closely examine bulkhead proposals because a bulkhead in this location could increase erosion to the beach/dune system waterward of the structure (sand transport/volume), and to the north and south of the structure due to end-effect erosion, which could exacerbate, rather than alleviate, the problems faced by NWW in future storms.

Based on the foregoing, NWW's request for an EA to construct a bulkhead between 15th and 16th Avenues is **denied**. However, should NWW apply for a new EA proposing dune nourishment, DLRP could likely approve such an application. DLRP is more than willing to participate in a

pre-application meeting with NWW to discuss this alternative. DLRP continues to monitor conditions in this location.

With regard to the proposed bulkhead extending from 15th Avenue north to the area between 12th and 13th Avenue, the dune in this area offers sufficient shore protection pending determination on NWW's Individual Permit application. Thus, the EA request to install a bulkhead in this area is **denied**.

We again note that with regard to the immediate area of the terminus of the unauthorized bulkhead between 12th and 13th Avenues, there appears to be a specific area of erosion, likely exacerbated by end effect wave reflection from the currently existing, unauthorized bulkhead. However, this isolated area of concern does not justify installation of a bulkhead extending to 16th Avenue as requested in the current EA request. NWW could submit another EA request proposing shore protection in this area, with an alternatives analysis, for DLRP's review.

We understand materials have been delivered to the subject location in preparation for bulkhead installation. We reiterate our previous message that should the City proceed with any unauthorized work, it may be subject to enforcement action.

Should you have any questions, or if you would like to meet to further discuss options, please do not hesitate to contact me.

Sincerely,



Jennifer Moriarty
Director, Division of Land Resource Protection

C: Katrina Angarone, Assistant Commissioner, Watershed and Land Management, NJDEP
Kimberly Cahall, Chief Enforcement Officer, NJDEP
Dennis Reinknecht, Director, Resilience, Engineering, & Construction, NJDEP
Colleen Keller, Assistant Director, Division of Land Resource Protection, NJDEP
Janet Stewart, Bureau Chief, Bureau of Coastal Permitting, NJDEP
Michele Kropilak, Bureau Chief, Bureau of Coastal and Land Use Enforcement, NJDEP
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