

SUPERIOR COURT OF NEW JERSEY, CAPE MAY COUNTY
CHANCERY DIVISION
Docket No. C-55-22

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.

Civil Action

BRIEF OF PLAINTIFF IN OPPOSITION TO CITY OF NORTH WILDWOOD'S
MOTION FOR A DETERMINATION AS TO THE COURT'S JURISDICTION OVER
THE CITY OF NORTH WILDWOOD'S FEBRUARY 10, 2023 EMERGENCY
AUTHORIZATION APPLICATION

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TABLE OF CONTENTS

PRELIMINARY STATEMENT.....1
STATEMENT OF FACTS AND PROCEDURAL HISTORY.....3
STANDARD OF REVIEW.....6
ARGUMENT.....6

POINT I

THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE
FEBRUARY 2023 EA APPLICATION AND DEP’S DENIAL.7

- A. The Appellate Division has exclusive jurisdiction over state agency action and inaction.....7
- B. The Appellate Division may exercise its original jurisdiction over the EA denial.....10

POINT II

THE RELIEF SOUGHT BY NWW IS BEYOND THE CONSTITUTIONAL
SCOPE OF THE COURT.12

POINT III

THE FEBRUARY 2023 EA DENIAL IS NOT RIPE FOR REVIEW
BECAUSE NWW FAILED TO EXHAUST ITS ADMINISTRATIVE
REMEDIES.14

- A. NWW should be required to exhaust all avenues of administrative review.....14
- B. NWW’s reliance on the Entire Controversy Doctrine and Brunetti v. Borough of New Milford to forgo exhaustion of its administrative remedies is without merit.....18

CONCLUSION.....21

TABLE OF AUTHORITIES**Page (s)****Cases**

<u>Abbott v. Burke,</u> 100 N.J. 269 (1985)	15, 16, 19
<u>In re Application for a Rental Increase at Zion Towers Apartments (HMFA #2),</u> 344 N.J. Super. 530 (App. Div. 2001)	17
<u>Bd. of Educ. Of Upper Freehold Reg'l Sch. Dist. v. State Health Benefits Comm'n,</u> 314 N.J. Super. 486 (App. Div. 1998)	17
<u>Boldt v. Correspondence Mgmt., Inc.,</u> 320 N.J. Super. 74 (App. Div. 1999)	20
<u>Bressman v. Gash,</u> 131 N.J. 517 (1993)	12
<u>Brunetti v. Borough of New Milford,</u> 68 N.J. 576 (1975)	19
<u>City of Atlantic City v. Laezza,</u> 80 N.J. 255 (1979)	15
<u>Dept. of Community Affairs v. Wertheimer,</u> 177 N.J. Super. 595 (App. Div. 1980)	10
<u>E. Orange Bd. of Educ. v. N.J. Sch. Const. Corp.,</u> 405 N.J. Super. 132 (App. Div. 2009)	12
<u>In re Freshwater Wetlands Statewide Gen. Permits,</u> 185 N.J. 452 (2006)	16
<u>Garrow v. Elizabeth General Hospital & Dispensary,</u> 79 N.J. 549 (1979)	15
<u>Gripenburg v. Twp. of Ocean,</u> 220 N.J. 239 (2015)	19
<u>Hedges v. Dixon City,</u> 150 U.S. 182 (1893)	12
<u>Infinity Broad. Corp. v. N.J. Meadowlands Comm'n,</u> 187 N.J. 212 (2006)	7, 11

Ironbound Health Rights Advisory Commission v. Diamond Shamrock Chemical Company,
 216 N.J. Super. 166 (App. Div. 1986)14

Koza v. New Jersey Dept. of Labor,
 307 N.J. Super 439 (App. Div. 1998)12

Mutschler v. Dep't of Env'tl Prot.,
 337 N.J. Super. 1 (App. Div. 2001)7, 8, 9

N.J. Election Law Enf't Comm'n v. DiVincenzo,
 451 N.J. Super. 554 (App. Div. 2017)8, 11

New Jersey Dep't of Env'tl. Prot. v. Mazza & Sons, Inc.,
 209 N.J. Super. 13 (App. Div. 2009)9

In re NJPDES Permit No. NJ0025241,
 185 N.J. 474 (2006)16

Pascucci v. Vaggott,
 71 N.J. 40 (1976)7, 11

Perry v. Tuzzio,
 288 N.J. Super. 223 (App. Div. 1996)18

In re Protest of Coastal Permit Program Rules,
 354 N.J. Super. 293 (App. Div. 2002)13

Rosenstein v. State, Dep't of Treasury, Div. of Pensions & Benefits,
 438 N.J. Super. 491 (App. Div. 2014)10

State Farm Mut. Auto Ins. Co. v. State,
 118 N.J. 336 (1990)9

State Farm v. Dept. of Public Advocate,
 227 N.J. Super. 99 (App. Div. 1988), aff'd 118 N.J. 336 (1990)10

Matter of Valley Road Sewage Co.,
 295 N.J. Super. 278 (App. Div. 1996), aff'd 154 N.J. 224 (1998)10

Vas v. Roberts,
 418 N.J. Super. 509 (App. Div. 2011)8, 11

W. N.Y. v. Bock,
 38 N.J. 500 (1962)10

In re Waterfront Dev. Permit No. WD88-0443-1, Lincoln Harbor Final Dev., Weehawken, Hudson Cnty., 244 N.J. Super. 426 (App. Div. 1990)17

Statutes

N.J.S.A. 13:1D-9.....13
N.J.S.A. 13:19-5.....13, 17
N.J.S.A. 52:14B-2.....16
N.J.S.A. 52:14B-3.1.....16
N.J.S.A. 52:14B-3.1(b).....15

Administrative Codes and Others

N.J.A.C. 1:1-12.6.....20
N.J.A.C. 7:7-28.1.....15, 16
N.J.A.C. 7:7-28.1(g).....16, 21
New Jersey Constitution.....2, 3, 14
New Jersey Constitution Article 3, paragraph 1.....13

Rules

Rule 2:2-3(a) (2).....8
Rule 4:67-6(c) (3).....9, 14

PRELIMINARY STATEMENT

The Department of Environmental Protection ("DEP") was already forced to seek a Preliminary Injunction from the Court to stop the City of North Wildwood ("NWW") from installing an illegal bulkhead without DEP approval. Following issuance of the requested relief, NWW filed a second request for Emergency Authorization ("EA") on February 10, 2023 ("February EA") seeking to install a substantially similar bulkhead. Because this request was also denied by the DEP, NWW has asked the Court to review the February EA denial, and to take the extraordinary steps of usurping the jurisdiction of the DEP to decide the merits of NWW's objections to the denial in an administrative forum, and depriving the Appellate Division of its jurisdiction to review the DEP's ultimate decision. Moreover, NWW even asks the Court to eliminate the DEP from the equation entirely, and to relieve it from the statutory obligation to participate in the permitting process completely, preferring the Court decide whether NWW may install a bulkhead in spite of the clear delegation of that authority to the DEP by the Legislature. The Court should deny these requests by NWW, and find that it does not have subject matter jurisdiction over the February EA.

Agency permitting decision challenges are within the Appellate Division's exclusive jurisdiction because they have state-wide impacts. As such, NWW must exhaust its administrative

remedies and file a hearing request with the DEP challenging the February EA denial, which may include filing an emergency hearing request. NWW cannot circumvent the Appellate Division's exclusive jurisdiction and argue under the guise of the entire controversy doctrine that the Court has subject matter jurisdiction over a permitting decision. Permitting decisions by State agencies are made each and every day, and allowing permit applicants to skip the administrative process and/or the Appellate Division's exclusive jurisdiction to challenge such agency decisions in the Superior Court flies in the face of solidly-grounded Court Rules and case law.

NWW also improperly asks the Court to rule that it has jurisdiction over "matters that may occur subsequent thereto," and to circumvent the permitting process entirely by approving its request to install the bulkhead. However, as required in the New Jersey Constitution, the DEP was given the statutory responsibility to make permitting decisions, not the Court. It would be a violation of the separation of powers doctrine to do anything but deny NWW's request.

Finally, denying jurisdiction over the February EA application will not result in irreparable harm to NWW. NWW has multiple avenues to challenge DEP's permitting decision and always has the right to file a new EA application. Further, DEP remains

willing to discuss the beach conditions with NWW, and has communicated this to it.

Accordingly, the Court should find it does not have subject matter jurisdiction over NWW's February EA application.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

To best understand the court's limited jurisdiction here, a brief factual summary is needed. On October 5, 2022, NWW submitted an EA application with DEP that sought approval to install a bulkhead near 15th and 16th Avenues. DEP granted other parts of the October 2022 EA application, but denied NWW's request to install a bulkhead because other, nonstructural shore protection alternatives existed. See NJ Ecourts Transaction ID # CHC2022292395, dated December 7, 2023. NWW violated the October 2022 EA decision when it reshaped the dunes near 15th and 16th Avenues and represented to DEP that it was moving forward with installing the bulkhead without DEP approval. Id. Importantly, NWW failed to file an administrative hearing request challenging the October 2022 EA denial within thirty days from October 19, 2022, the date the denial was published in the DEP Bulletin, which resulted in the October 2022 EA becoming a final agency action. Id.

In response to NWW's threats to install the bulkhead without DEP approval, DEP filed an Order to Show Cause and Verified Complaint pursuant to R. 4:67-6 on December 6, 2022. DEP sought

temporary restraints and a preliminary injunction, enforcing the final agency action, which would specifically enjoin NWW from: (1) installing a bulkhead on the beach between 15th and 16th Avenues until it receives permit approval from the DEP, (2) engaging in any further excavation, placement, or regrading of sand between 14th and 16th Avenues until it has a DEP permit to do so, and (3) engaging in any oceanfront construction, reshaping of the dunes, and or reconstruction of access points at 16th and 25th Avenues until it has a DEP permit to do so. See NJ ECourts Transaction ID # CHC2022292395.

On January 4, 2023, NWW opposed DEP's application for preliminary injunctive relief and moved for leave to file a multi-count Counterclaim in DEP's summary proceeding. In its Counterclaim NWW requested extraordinary relief ... asking that the Court use its broad equitable powers to authorize the installation of a bulkhead along 15th and 16th Avenues without DEP authorization ... and claimed that DEP was in breach of its obligations pursuant to the Public Trust Doctrine. See NJ ECourts Transaction ID #s CHC20232403 and CHC2022232435, dated January 4, 2023.

After oral argument on February 1, 2023, the Court granted the relief sought in DEP's Order to Show Cause and Verified Complaint seeking temporary restraints and a preliminary injunction and enjoined NWW from, most notably, installing a bulkhead until it receives permit approval from the DEP. The Court

also granted leave to NWW to file its Counterclaim in the present proceeding. Finally, the Court directed NWW to file a new EA application with DEP within ten days seeking authorization to, in part, install a bulkhead for two municipal blocks, at 15th/16th Avenues. Shinn Certification Exhibit A.

On February 10, 2023, NWW filed the new EA application with DEP seeking to install a bulkhead spanning four municipal blocks, from 12th/13th Avenues through 16th Avenue. See Shinn Certification, Exhibit B. On February 24, 2023, DEP denied the EA application in part because adequate dune remained in the area such that an emergency did not exist for approval of a bulkhead. See Shinn Certification, Exhibit C. DEP's denial of the February EA application was published in DEP's Bulletin on March 15, 2023. Shinn Certification at ¶ 5. Of note, NWW currently has a CAFRA permit application that is in DEP technical review for a bulkhead in the same location as the February 2023 EA application.

On February 14, 2023, NWW filed its Answer with Counterclaim. Then, on February 17, 2023, NWW filed an Amended Answer with Counterclaim asserting three additional counterclaims against DEP. See Shinn Certification, Exhibit D. In Count One of its Counterclaim, NWW requests that the Court stand in the shoes of DEP and authorize specific oceanfront construction, including installation of a bulkhead between 15th and 16th Avenues, without a

DEP permit or emergency authorization. This is the same relief requested by NWW in its February 2023 EA application.

Following DEP's denial of NWW's February EA, NWW requested a case management conference with the Court. See NJ Ecourts Transaction Id # CHC202361199, dated March 3, 2023. The Court held a case management conference on March 7, 2023 and ordered expedited briefing on whether it has jurisdiction over DEP's denial of NWW's February 10, 2023 EA application. See NJ Ecourts Transaction Id # CHC202366499, dated March 9, 2023.

On March 15, 2023, DEP filed a motion to dismiss NWW's counterclaims including Count One asserting that the Court lacks jurisdiction to grant such relief. See NJ ECourts Transaction ID # CHC202371992, dated March 15, 2023.

ARGUMENT

To the extent NWW is arguing that it does not want the Court to exercise jurisdiction over the February EA itself, and instead wants the Court to order relief regarding the "circumstances that exist today" the Court should not entertain NWW's present motion. NWW has not filed a new EA regarding the "circumstances that exist today" along NWW's oceanfront and as such, DEP has not made an agency decision. Thus, there is no record regarding the circumstances that exist today until NWW files an EA application and DEP rules on that application. The Court also lacks subject matter jurisdiction over the February 2023 EA and should deny NWW's

motion as explained in further detail below.

POINT I

**THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE
FEBRUARY 2023 EA APPLICATION AND DEP'S DENIAL.**

**A. The Appellate Division has exclusive jurisdiction over
state agency action and inaction.**

The Court lacks subject matter jurisdiction over state agency actions, including the February 2023 EA permitting decision. The Appellate Division has exclusive subject matter jurisdiction over all state agency actions and inaction. Infinity Broad. Corp. v. N.J. Meadowlands Comm'n, 187 N.J. 212 (2006); Pascucci v. Vaggott, 71 N.J. 40, 52 (1976); Mutschler v. Dep't of Env'tl Prot., 337 N.J. Super. 1, 10 (App. Div. 2001).

Such exclusive jurisdiction is grounded in the 1947 New Jersey Constitution and detailed in the court rules. Pascucci, 71 N.J. at 51-52, (quoting N.J. Const. art. VI, § 5, ¶ 4).¹ While former New Jersey practice permitted persons aggrieved by action or inaction of state or local administrative agencies to seek review by prerogative writ, the 1947 Constitution superseded the writs and instead provided that the Superior Court would review "on terms and in the manner provided by rules of the Supreme Court." Id.

¹ It is well-settled that the overarching rule in New Jersey is that "every proceeding to review the action or inaction of a local administrative agency [is] by complaint in the Law Division and that every proceeding to review the action or inaction of a state administrative agency [is] by appeal to the Appellate Division." Infinity Broadcasting Corp. v. New Jersey Meadowlands Comm'n, 187 N.J. 212, 223 (2006) (quoting Central R.R. Co. v. Neeld, 26 N.J. 172, 184-85 (1958)).

Thus, "judicial review of administrative agency determinations has the support of a special constitutional provision." Vas v. Roberts, 418 N.J. Super. 509, 515-16 (App. Div. 2011) (quoting In re Senior Appeals Exam'rs, 60 N.J. 356, 363 (1972)). The Supreme Court then adopted Rule 2:2-3(a)(2), which "contemplated that 'every proceeding to review the action or inaction of a state administrative agency would be by appeal to the Appellate Division.'" Vas, 418 N.J. Super. at 516 (quoting Pascucci, 71 N.J. at 52). Accordingly, if a challenge to the action or inaction of a state administrative agency is brought in a trial court, that court has the responsibility to transfer the matter to the Appellate Division on the motion of a party or on its own initiative. Mutschler, 337 N.J. Super. at 10 (citing R. 1:13-4(a)).

"The Appellate Division's exclusive jurisdiction to review any action or inaction of a state administrative agency does not turn on the theory of the challenging party's claim, or on the nature of the relief sought." Mutschler, 337 N.J. Super. at 9. "The exclusivity of appellate court jurisdiction over agency action may not be circumvented by framing a claim as one ordinarily presented in the trial court, such as declaratory judgments, or through procedural maneuvers such as consolidating an administrative action with a legal action in the trial court." N.J. Election Law Enf't Comm'n v. DiVincenzo, 451 N.J. Super. 554,

569 (App. Div. 2017); see also Mutschler, 337 N.J. Super. at 9 (the exclusivity of appellate review also extends to claims that are joined with claims within the jurisdiction of another court or division of this court). Furthermore, if a trial court fails to transfer a challenge to state agency action to the Appellate Division and instead decides the merits, the Appellate Division may exercise its original jurisdiction on appeal from the judgment and review the underlying agency action as if the challenging party had appealed directly to the Appellate Division. Mutschler, 337 N.J. Super. at 10. In that event, the Appellate Division reviews only the agency's action, not the trial court's determination of a matter over which it had no jurisdiction. Ibid.

Here, DEP's Order to Show Cause and Verified Complaint was filed pursuant to R. 4:67-6, and the trial court's powers are limited to enforcement of DEP's denial of NWW's October 5, 2022 EA application for an emergency bulkhead because it became a final agency order when NWW failed to timely request an administrative hearing. See New Jersey Dep't of Env'tl. Prot. v. Mazza & Sons, Inc., 209 N.J. Super. 13, 22-23 (App. Div. 2009). "Rule 4:67-6(c)(3) does not permit a trial court to inquire into the validity of an agency order. The Rule simply gives agency orders the force of law with all of the law's panoply of power to punish for contempt." State Farm Mut. Auto Ins. Co. v. State, 118 N.J. 336, 344 (1990). R. 4:67-6(c)(3) states in pertinent part that "the

validity of an agency order shall not be justiciable in an enforcement proceeding.” Rather, pursuant to R. 2:2-3(a), the Appellate Division has exclusive jurisdiction to review the merits of final state agency determinations. Matter of Valley Road Sewage Co., 295 N.J. Super. 278, 290-91 (App. Div. 1996), aff’d 154 N.J. 224 (1998) (holding that only the Appellate Division has jurisdiction to review the merits of a final State agency action and that such review by a trial court is precluded by R. 4:67-6(c)(3)); State Farm v. Dept. of Public Advocate, 227 N.J. Super. 99, 131 (App. Div. 1988), aff’d 118 N.J. 336, 344 (1990); Dept. of Community Affairs v. Wertheimer, 177 N.J. Super. 595 (App. Div. 1980).

NWW is now improperly seeking review of the February 2023 EA denial, a state agency action, in DEP’s enforcement proceeding. The Court lacks jurisdiction over the merits of the February 2023 EA and should either transfer it to the Appellate Division or, as discussed further below in Point II, find that NWW has failed to exhaust its administrative remedies.

B. The Appellate Division may exercise its original jurisdiction over the EA denial.

The Appellate Division can exercise original jurisdiction when “necessary to the complete determination of any cause on review.” N.J. Const. art. VI, § 5, ¶ 3; W. N.Y. v. Bock, 38 N.J. 500, 520 (1962); Rosenstein v. State, Dep’t of Treasury, Div. of

Pensions & Benefits, 438 N.J. Super. 491, 499 n.3 (App. Div. 2014); see also R. 2:10-5. Even when a dispute has been “improvidently brought” before the Appellate Division, it may elect to exercise original jurisdiction “in the public interest.” N.J. Election Law Enf’t Comm’n, 451 N.J. Super. at 569-70 (citing Nat. Med., Inc. v. N.J. Dep’t of Health & Sr. Servs., 428 N.J. Super. 259, 267 (App. Div. 2012)). The exercise of original jurisdiction is particularly appropriate when the issue is a question of law, (Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 2:10-5 (citing Election Law Comm’n, 451 N.J. Super. at 570)), or when necessary to terminate lengthy, burdensome, and unnecessary further litigation. Id. (citing Price v. Himeji, LLC, 214 N.J. 263, 294-296 (2013)). See also Pascucci, 71 N.J. at 53 (1976) (appellate original jurisdiction appropriate where Juvenile and Domestic Relations Court has jurisdiction over some issues, but not agency action review). The Appellate Division’s original jurisdiction can be used where the record is adequate to terminate the dispute and no further factfinding or administrative expertise or discretion is involved, and thus a remand would be pointless because the issue to be decided is one of law and implicates the public interest. Vas, 418 N.J. Super. at 523-24 (internal quotations and citations omitted); see also Infinity Broad. Corp., 187 N.J. at 225 (reaffirming primary jurisdiction over all agency action in the appellate division).

This exercise of original jurisdiction can extend to agency action and can include equitable considerations. See E. Orange Bd. of Educ. v. N.J. Sch. Const. Corp., 405 N.J. Super. 132 (App. Div. 2009) (agency was not equitably estopped from removing funding after having initially allocated funds for school district projects); Koza v. New Jersey Dept. of Labor, 307 N.J. Super 439, 451 (App. Div. 1998) (agency had been unreasonable in its investigation, hearing practice, and conclusions and failed to follow remand instructions). When the Appellate Division exercises original jurisdiction, the standard is the same as that which the lower court would have used. Bressman v. Gash, 131 N.J. 517, 528-529 (1993).

Because the Appellate Division has the power to exercise its original jurisdiction to extend to equitable considerations and in the public interest, NWW's argument that the Court needs to invoke its equitable jurisdiction is unfounded given the Appellate Division's exclusive jurisdiction over agency action.

POINT II

THE RELIEF SOUGHT BY NWW IS BEYOND THE CONSTITUTIONAL SCOPE OF THE COURT.

While it is true that a chancery court possesses broad equitable powers, and that it has great flexibility to devise a remedy where equity so requires, this authority is not unlimited. See Hedges v. Dixon City, 150 U.S. 182, 192 (1893) (finding that

"equity follows the law . . ."). The Court cannot circumvent the discretionary authority that the Legislature has granted to the DEP, and any equitable relief must be consistent with the law and not violate DEP statutes or regulations.

Article 3, paragraph 1 of the New Jersey Constitution sets forth that,

The powers of the government shall be divided among three distinct branches, the legislative, executive and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.
New Jersey Constitution of 1947, Art. III, para 1.

DEP is a principal department within the Executive Branch of the New Jersey State government vested with the authority to conserve and protect natural resources, protect the environment, prevent pollution, and protect the public health and safety. N.J.S.A. 13:1D-9. DEP has exclusive authority to review permit applications under the CAFRA and EA applications brought pursuant to the CZM Rules. N.J.S.A. 13:19-5. Substantial deference to DEP's expertise in regard to construction of coastal facilities is essential to the protection of the environment and the State's natural resources. Recognizing this, the Legislature designated DEP as the exclusive discretionary authority to consider CAFRA permits and review EA applications related to the CZM Rules. N.J.S.A. 13:19-5; see also In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 337 (App. Div. 2002) (DEP must make

permit findings and “CAFRA does not authorize DEP to subdelegate” this power).

The Court cannot exercise unconstitutional authorization through the use of its equitable powers to allow NWW to install a bulkhead without proper permit approval. Doing so would be a violation of the separation of powers doctrine. See Ironbound Health Rights Advisory Commission v. Diamond Shamrock Chemical Company, 216 N.J. Super. 166, 176 (App. Div. 1986) (holding that a judicial order compelling an executive agency to take discretionary action violates the separation of powers afforded by the New Jersey Constitution). The Court only has jurisdiction pursuant to R. 4:67-6(c)(1) to enforce final agency actions, not compel a State agency to make them. Indeed, even the merits of those final agency orders are not reviewable in enforcement actions in Superior Court. R. 4:67-6(c)(3). Therefore, the Court should find that it does not have jurisdiction to grant NWW’s requested relief.

POINT III

**THE FEBRUARY 2023 EA DENIAL IS NOT RIPE FOR REVIEW
BECAUSE NWW FAILED TO EXHAUST ITS ADMINISTRATIVE
REMEDIES.**

**A. NWW should be required to exhaust all avenues of
administrative review.**

The Court should find that NWW failed to exhaust its administrative remedies, and as argued supra, the Court lacks

jurisdiction to review the February EA denial. Permit applicants and authorization applicants have a right to an adjudicatory administrative hearing under the Coastal Zone Management Rules ("CZM Rules") to contest any Department decision to issue or deny a permit pursuant to the act. N.J.A.C. 7:7-28.1. See also N.J.S.A. 52:14B-3.1(b). Ripeness for judicial review requires the exhaustion of available administrative remedies. Garrow v. Elizabeth General Hospital & Dispensary, 79 N.J. 549, 559 (1979). The doctrine of exhaustion of administrative remedies upholds several public policies. First, it "ensures that claims will be heard by a body possessing expertise in the area." City of Atlantic City v. Laezza, 80 N.J. 255, 265 (1979). It also "allows the parties to create a factual record necessary for meaningful appellate review." Ibid. Finally, it eliminates the need to resort to the courts, where the agency decision might satisfy the parties and thus moot the factual or legal issue raised. Id. at 265. In any case amenable to administrative review, a court should first consider whether exhaustion of administrative remedies will serve the interests of justice. Abbott v. Burke, 100 N.J. 269, 297 (1985).

Here, NWW has the opportunity to exhaust its administrative remedies. Specifically, NWW has the right to an adjudicatory hearing before the Office of Administrative Law ("OAL"), which decision is then reviewed and finally determined by the DEP

Commissioner before all administrative remedies are exhausted. The Administrative Procedure Act ("APA") provides that "[p]ersons who have particularized property interests or who are directly affected by a permitting decision[,]" N.J.S.A. 52:14B-3.1, have the right to a contested case hearing in the OAL. N.J.S.A. 52:14B-9(a). A challenge to a permitting decision is a prime example of a contested case. N.J.S.A. 52:14B-2; In re NJPDES Permit No. NJ0025241, 185 N.J. 474, 481 (2006).

EA applicants pursuant to the CZM Rules have a statutory right to an adjudicatory administrative hearing to contest any decision to issue or deny an EA application, which the DEP Commissioner reviews. N.J.A.C. 7:7-28.1. Judicial review in the Appellate Division then proceeds from the Commissioner's final decision. In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 463 (2006). Here, the February 2023 EA decision is not ripe for judicial review and the traditional Abbott "interests of justice" factors support the Court ordering NWW to exhaust its administrative remedies.

The merits of the February 2023 EA should "be heard, as a preliminary matter, by a body possessing expertise in the area." Abbott, 100 N.J. at 297. The CZM Rules contemplate that the DEP Commissioner reviews the ALJ's decision after an OAL adjudicatory hearing and makes a final decision for a permit challenge. N.J.A.C. 7:7-28.1(g). The Commissioner's decision is the outcome

of a “carefully tooled system” that brings together the “special insights of the Division [of Land Resource Protection], the fact-finding skills of the Office of Administrative Law and the expertise of the agency head,” to ensure “a multi-faceted analysis of permit applications so as to fulfill most effectively DEP’s statutory mission to protect the environment.” In re Waterfront Dev. Permit No. WD88-0443-1, Lincoln Harbor Final Dev., Weehawken, Hudson Cnty., 244 N.J. Super. 426, 437 (App. Div. 1990). This process completes the administrative process by reviewing the permitting decision “in a concrete way.” In re Application for a Rental Increase at Zion Towers Apartments (HMFA #2), 344 N.J. Super. 530, 535 (App. Div. 2001) (quoting N.J. Civil Serv. Assoc. v. State, 88 N.J. 605, 612 (1982)). Completing the administrative process is particularly necessary when the issues concern “the interpretation and application of statutes and regulations governing a program the administration of which has been expressly delegated to” DEP. Bd. of Educ. Of Upper Freehold Reg’l Sch. Dist. v. State Health Benefits Comm’n, 314 N.J. Super. 486, 494 (App. Div. 1998).

Here, the Legislature has exclusively delegated DEP with the responsibility of reviewing, among other things, all “development in the coastal area on any beach or dune.” N.J.S.A. 13:19-5. As such, NWW’s appeal of the February 2023 EA decision requires agency expertise to determine whether the denial of a bulkhead complied

with the CZM regulations that DEP administers under its CAFRA authority. These regulations involve technical issues and agency expertise as to its interpretation and application, which will occur when the Commissioner reviews the ALJ's decision after an adjudicatory hearing. Therefore, the Court should find that NWW needs to exhaust its administrative remedies regarding a challenge to the February 2023 EA denial.

These same principles apply to the extent the Court entertains NWW's claim that it is not seeking the Court's jurisdiction regarding the February 2023 EA denial, but rather jurisdiction over the current conditions on the oceanfront. As previously stated, NWW failed to file a new EA and there is no current record of an agency action documenting the current conditions of the oceanfront. Thus, the Court should also find that the current conditions of NWW's oceanfront is not ripe for review and even if the current conditions were submitted in a new EA application, DEP's eventual decision on that EA application should first be challenged in OAL as noted in detail above.

B. NWW's reliance on the Entire Controversy Doctrine and Brunetti v. Borough of New Milford to forgo exhaustion of its administrative remedies is without merit.

NWW cannot use the Entire Controversy Doctrine as the mechanism to forgo exhaustion of its administrative remedies. See Perry v. Tuzzio, 288 N.J. Super. 223, 230 (App. Div. 1996) (finding

that the application of the entire controversy doctrine “requires equality of forum, that is, the first forum must have been able to provide all parties with the same full and fair opportunity to litigate the issues and with the same remedial opportunities as the second forum”). Here, the Entire Controversy Doctrine is not applicable because the Law Division’s ability to enforce a final agency action is not equal jurisdiction to the OAL’s jurisdiction to review a permitting decision. The Entire Controversy Doctrine does not bar NWW from exhausting its administrative remedies. NWW’s reliance on the exceptions to exhaustion of administrative remedies as outlined in Brunetti v. Borough of New Milford do not apply here.

The court balances the interest of justice with specific and narrow exceptions to determine whether a party should not have to exhaust its administrative remedies prior to adjudication. Abbot, 100 N.J. at 298; see also Brunetti v. Borough of New Milford, 68 N.J. 576, 588-590 (1975).² Administrative remedies need not be exhausted when:

- 1) Only a question of law need be resolved;
- 2) The administrative remedies would be futile;
- 3) Irreparable harm would result;
- 4) The agency’s jurisdiction is doubtful; and

² It should be noted that NWW’s reliance on Brunetti is misplaced as the case deals with a constitutional challenge to a municipal rent leveling ordinance. Gripenburg v. Twp. of Ocean, is also not applicable because it dealt with municipal zoning ordinances. Gripenburg v. Twp. of Ocean, 220 N.J. 239 (2015). Actions in lieu of prerogative writ should be brought in the Law Division pursuant to the Court Rules, which is not comparable to a denial of a permit from a state agency.

5) An overriding public interest calls for a prompt judicial decision.

[Boldt v. Correspondence Mgmt., Inc., 320 N.J. Super. 74, 83 (App. Div. 1999) (quoting Abbott, 100 N.J. at 298).]

None of these exceptions apply here.

As to the first and second factors, the question of law as to whether or not DEP's decision to deny NWW's February 2023 EA was correct relies heavily on the facts surrounding the decision and DEP's agency expertise as to the CZM Rules and their interpretation. Therefore, the administrative remedies would be favored in this case and not futile. Seeking review in the OAL is not futile because it provides NWW with appropriate due process to challenge the February 2023 EA decision.

As to the third factor, no irreparable harm will result by requiring NWW to exhaust its administrative remedies. While NWW is concerned about the length of time of the administrative process, NWW has the right to request an emergency hearing pursuant to N.J.A.C. 1:1-12.6, which can be used a party thinks irreparable harm may result pending a final decision on the contested case. Therefore, since there is a mechanism in place in the administrative process for an emergency hearing, NWW's claim that it will suffer irreparable harm if the Court does not invoke its equitable jurisdiction is moot.³

³ NWW's 2020 CAFRA permit, that seeks a bulkhead in the same location as the February 2023 EA, has entered technical review with the DEP. DEP has committed

Finally, DEP's jurisdiction is not in doubt. The CZM Rules allow for the administrative process to be exhausted prior to adjudication. N.J.A.C. 7:7-28.1(g). As such, the Court should find that NWW needs to exhaust its administrative remedies.

CONCLUSION

The Court should find it does not have subject matter jurisdiction over NWW's February 2023 EA application.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Dianna E. Shinn
Dianna E. Shinn
Deputy Attorney General

Dated: March 20, 2023

to expediting its review of that permit application. Importantly, NWW let that permit application sit administratively deficient for over two years and its failure to move promptly to correct the administrative deficiencies, significantly delayed a decision from DEP on the application.

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 093
Trenton, New Jersey 08625
Attorney for Plaintiff,
New Jersey Department of Environmental Protection

By: Dianna E. Shinn ID 242372017
Deputy Attorney General
(609) 376-2789

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Plaintiff,

v.

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

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIV - CAPE MAY
COUNTY
DOCKET NO.: CPM-C-55-22

CERTIFICATION OF DIANNA E. SHINN IN OPPOSITION TO NWW'S MOTION FOR A DETERMINATION AS TO THE COURT'S JURISDICTION OVER THE FEB. 10, 2023 EMERGENCY AUTHORIZATION APPLICATION

I, Dianna E. Shinn, of full age, hereby certify as follows:

1. I am a Deputy Attorney General in the Division of Law's Environmental Enforcement and Environmental Justice Section. On behalf of the Attorney General, I represent the Plaintiff New Jersey Department of Environmental Protection ("Department") in the above-captioned matter.

2. I submit this certification in opposition to the City of North Wildwood's Motion for a Determination as to the Court's Jurisdiction over the February 10, 2023 Emergency Authorization Application.

3. Annexed hereto as **Exhibit A** is a true and correct copy of the Court's February 1, 2023 Order.

4. Annexed hereto as **Exhibit B** is a true and correct copy of the City of North Wildwood's February 10, 2023 emergency authorization application.

5. Annexed hereto as **Exhibit C** is a true and correct copy of the DEP's decision regarding the City of North Wildwood's February 10, 2023 emergency authorization application. DEP's denial of the City of North Wildwood's February 10, 2023 emergency authorization application was published in the DEP Bulletin on March 15, 2023.

6. Annexed here as **Exhibit D** is a true and correct copy of the City of North Wildwood's Amended Answer, Affirmative Defenses, and Counterclaim.

I certify that the foregoing statements made by me are true, and that any exhibits attached hereto are true and correct copies. I further certify that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Dianna E. Shinn
Dianna E. Shinn
Deputy Attorney General

Dated: March 20, 2023

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



P. O. BOX 9 (MAILING)
1435 ROUTE 9 NORTH (DELIVERY)
CAPE MAY COURT HOUSE, NJ 08210, USA

609-465-9857 (P)
609-465-2449 (F)
WWW.LOMAXCONSULTING.COM

Peter L. Lomax, Managing Principal
(609) 465-6700 ext. 13
plomax@lomaxconsulting.com

February 9, 2023
Via email

New Jersey Department of Environmental Protection
Division of Land Resource Protection
501 East State Street, Second Floor
Trenton, NJ 08625
ATTN: Ms. Colleen Keller and Ms. Janet Stewart

RE: Coastal Program Emergency Authorization Request
Shore Protection Measures for Installation of Oceanfront Bulkhead
Extending from Midblock Between 12th and 13th Avenues to 16th Avenue
Block 317.03, Lot 1 (portion thereof) and Block 317.02, Lot 2 (portion thereof)
City of North Wildwood, Cape May County, NJ
TLCG File No.: 22-1093.2

Dear Ms. Keller and Ms. Stewart,

On behalf of the City of North Wildwood (hereafter "City" or "Applicant"), please accept this Emergency Authorization request pursuant to the Coastal Zone Management Rules (CZMR) (*N.J.A.C. 7:7-21 et seq.*) under the authority of the NJ Department of Environmental Protection (NJDEP). Further, this submission follows an Order by the Superior Court of the State of New Jersey, Cape May County Chancery Division, Docket No.: CPM-C-5522, issued by Michael J. Blee, A.J.S.C. on February 1, 2023, which requires the City of North Wildwood to file an Emergency Authorization application with the NJDEP within 10 days of the Order date.

Summary

The nature and cause of the threat is recurrent storm damage, including during the October offshore passage of Hurricane Ian at which time the dune at 15th Avenue lost a majority of its mass, as well as subsequent unnamed coastal storm events prior to and following the October event which have continued to erode beach/dune sand reserves. This significant loss of sand from both the beach berm and remnant dune system leaves a multi-block section of the City at peril and without an effective barrier to mitigate storm surges and associated wave action. The depletion of sand from the City's overall beach/dune system has reduced the elevation of the beach such that sections of the remnant dune mass are now located at the edge of normal wave runup at a normal high tide. Therefore, any storm surge or spring tide with moderate to strong waves continues to erode into the dune toe. The rate of loss and area of impact has accelerated and expanded, respectively. Further, a nor'easter coastal storm is forecast by the National Weather Service for this coming Sunday, February 12, 2023, extending into Monday, February 13, 2023. The chance of precipitation is listed at 100%, and the predicted duration for this coastal storm event exceeds 24 hours. The predicted coastal conditions during this storm include northeast winds at 20-30 knots with gusts up to 40 knots and wave heights up to 10 feet.

The City hereby reaffirms the need for emergency shore protection, via installation of a bulkhead, on portions of Block 317.03, Lot 1 and Block 317.02, Lot 2 per the "*Engineer's Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood,*" prepared by Van Note-Harvey Associates, dated February 9, 2023 and as depicted on the "*Plan of Proposed Beachfront Bulkhead & Public Access Between 16th Ave. & Midblock 12th & 13th Ave., City of North Wildwood,*" (Sheets 1 and 2), prepared by Van Note-Harvey, dated February 9, 2023.



FEBRUARY 9, 2023
ATTN: MS. COLLEEN KELLER AND MS. JANET STEWART
PAGE 2 OF 16

The project location and existing conditions are depicted on attached Site Location Figures and Photographs for reference. The proposed bulkhead installation will most expeditiously mitigate the imminent threat to severe loss of property and further environmental degradation that will result from a breach in the remnant dune system.

Applicant:

City of North Wildwood
901 Atlantic Avenue
North Wildwood, NJ 08260
Attn: Nicholas Long, City Administrator
609-522-6464
nlong@northwildwood.com

Project Area:

From the terminus of the existing bulkhead located midblock between 12th and 13th Avenues, extending southwest between the bike path and dune, then southeast along the dune toe around the Beach Patrol facility, then southwest along the dune toe, and terminating at the southern edge of the 16th Avenue beach access, and extending from the eastern edge of the JFK Boulevard (Beach Drive) right-of-way alignment to the mean high water line, as contained within portions of Block 317.03, Lot 1 and 317.02, Lot 2.

Attachments

The following documents are provided for reference in support of this Coastal Program Emergency Authorization Request.

- **Attachment 1**, Site location map, *“Figure 1 Site Location on Aerial Photographs Depicting the Project Area Limits,”* prepared by The Lomax Consulting Group, dated December 30, 2022
- **Attachment 2**, Site photographs depicting post-storm damage and impacted areas
- **Attachment 3**, *“Plan of Proposed Beachfront Bulkhead & Public Access Between 16th Ave. & Midblock 12th & 13th Ave., City of North Wildwood,”* (Sheets 1 and 2), prepared by Van Note-Harvey, dated February 9, 2023
- **Attachment 4, including Exhibits 1-10**, *“Engineer’s Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood,”* prepared by Van Note-Harvey Associates, dated February 9, 2023

Background

This request follows a prior Emergency Authorization request submitted on October 5, 2022 on behalf of the City. Emergency Authorization was granted by NJDEP (via email) on October 7, 2022 for: a) the deployment of Jersey barriers (20’ segments) in a 400 linear foot alignment extending from the 15th Avenue northern right-of-way limit line along the landward edge of dune to the 16th Avenue southern right-of-way limit line; and b) remove/relocate existing composite/timber decking walkway from in front of the Beach Patrol building to facilitate Jersey barrier placement. Both of these activities have been completed. Emergency Authorization was denied by NJDEP (via email) on October 12, 2022 for: a) reshaping dune remnants, protecting existing dune vegetation to the maximum extent possible, to establish stabilized slopes secured landward by the Jersey barrier wall; b) installation of 404 linear feet cantilevered steel bulkhead (coated) with timber cap; c) immediately reconstruct the beach access via profile grading and



FEBRUARY 9, 2023
ATTN: MS. COLLEEN KELLER AND MS. JANET STEWART
PAGE 3 OF 16

deposition of stabilizing material within the residual upper beach berm and back beach limits, relatively minimal volumes of fill material are required to accomplish the necessary grading and restoration; and d) reconstruct the sloped ramps and landings within the access to restore the vehicular and pedestrian use, including pedestrian public access from the boardwalk and the adjoining 26th Avenue pier.

As summarized by the *“Historical Review of Oceanfront Shoreline Changes Since 1986 in North Wildwood”*, prepared by the Stockton University Coastal Research Center (**Attachment 4, Exhibit 1**), the North Wildwood shoreline has a long history of dynamic change, largely influenced by Hereford Inlet located to the north. The tide channels and associated shoaling of this inlet have altered littoral transport of sand and its associated deposition causing cyclical periods of erosion and accretion of the City’s beaches. In 1986, the beach at 15th Avenue extended approximately 1,500 feet to the east. This was the result of focused sand deposition immediately seaward of the oceanfront in North Wildwood which then migrated onto the beach shoreline expanding the beach widths. This period was then followed by a shoreline retreat from 1987 through 2005 during which a substantial portion of the beach was eroded and lost. In the early 1990’s, modifications to the City’s stormwater collection system were constructed, which presently exist today, directing stormwater discharge to two outfall locations, one at 3rd Avenue and the other at 21st Avenue. Shoreline retreat resulted in the need to modify these existing oceanfront stormwater outfalls due to the exposure of the supporting timber cribbing to unmitigated wave action and prevailing longshore currents. Due to the beach width and beach berm elevation losses, several hundred linear feet has been removed from these outfalls at both 3rd Avenue and 21st Avenue. Notwithstanding beach nourishment activity during 2009 and 2010, via hydraulic pumping of sand, and a series of sand harvesting operations from 2016 to present, multiple named storms, including Irene, Sandy, Jonas, and Ian, plus many other more moderate northeast coastal storm events, have significantly eroded the beach and dunes to a point whereby there is an imminent threat to a dune breach. Based upon the findings of Dr. Farrell of the Stockton University Coastal Research Center pursuant to the aforementioned beach losses since 1986, *the City of North Wildwood beaches, in particular 15th Avenue oceanfront location, is the most erosional site in New Jersey (Attachment 1)*.

Existing Conditions

In addition to the historic loss of beach width, the sand volume and beach elevation have diminished substantially. Most recently during Hurricane Ian’s October passage offshore, over 50,000 cubic yards of material was lost between 11th and 16th Avenues. The remaining volume of dune sand reserve at 15th Avenue is calculated at 18 cubic yards per foot, an amount significantly less than was lost in this most recent named coastal storm. *“Plan Showing Beach Erosion 12-27-2022 Beach Erosion 12/19/2022 Post-Ian Beach Loss (10/2022) Compared to Post-Beach Fill As-built (6/2022) between 16th and 11th Avenues North Wildwood Beach, City of North Wildwood,”* prepared by Van Note-Harvey, release date 1/10/2023 (**Attachment 4, Exhibit 7**), depicts a comparison of beach elevations between June 2022, at the conclusion of the backpassing beach fill project, and December 2022 for the section of beach and dunes between 11th and 16th Avenues. This comparative exhibit reveals that the location of the 7.0-foot (NAVD88) beach berm elevation established in June 2022 via beach fill sand backpassing has eroded to less than 1.0 foot (NAVD88) as of December 2022. The 7.0-foot beach berm elevation was defined by the required construction template per the USACE/NJDEP permit authorizations for the beach fill project. It should be noted that the mean high water line is located at 1.99 feet (NAVD88). Accordingly, the mean high water line exceeds the beach elevation in the former location of the design template beach berm for this section of the beach and dune system. The toe of dune is now located at the edge of normal wave runup at a normal



FEBRUARY 9, 2023
ATTN: MS. COLLEEN KELLER AND MS. JANET STEWART
PAGE 4 OF 16

high tide. The inundation at the seaward toe of the dune continues to cause erosion, which has resulted in cross-sectional area losses between the June 2022 beach fill conclusion and October 2022 of 760 square feet at 15th Avenue, 699 square feet at midblock between 15th and 16th Avenues, and 758 square feet at 16th Avenue. The referenced plan includes more recent surveyed profiles as well which clearly demonstrate successive erosional losses and a chronic retreat of the seaward dune limit through December 27, 2022. As stated in the above-referenced Stockton University Coastal Research Center report, *“Neither the current beach width at the lifeguard headquarters nor the dune width and elevation are sufficient to be regarded as “shore protection” worthy of the term.”* The crest of the former dune along with the entirety of its mass east of the crest are now gone and any storm surge or spring tide with moderate to strong wave action continues to erode into the dune unimpeded by a beach berm or any other protective measures. The above-referenced cross sections clearly demonstrate that less than 50% of the dune mass remained as of end of December 2022, and erosion has continued unabated since that time. 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). Damage will be sustained not only to the building but to other City infrastructure as well (**Attachment 2. Photographs**).

The risk of an imminent breach is no longer isolated to the 15th Avenue location in front of the Beach Patrol facility. The rate of erosion between 13th and 14th Avenues has exceeded expectations largely due to shifts in the prevailing wind and wave direction during recent minor to moderate coastal storms. The cross-section area losses in this dune are now even more pronounced than at 15th Avenue. The *“Plan Showing Beach Erosion 12-27-2022 Beach Erosion 12/19/2022 Post-lan Beach Loss (10/2022) Compared to Post-Beach Fill As-built (6/2022) between 16th and 11th Avenues North Wildwood Beach, City of North Wildwood,”* prepared by Van Note-Harvey, release date 1/10/2023 (**Attachment 4, Exhibit 7**), depicts a comparison of beach elevations between June 2022, at the conclusion of the backpassing beach fill project, and December 2022 for the section of beach and dunes between 11th and 16th Avenues. Specifically, 13th Avenue has lost a cross-section area of the dune and beach berm of 1,239 square feet in less than four months. The corresponding cross-section area of the dune and beach berm loss midblock between 13th and 14th Avenues is 1,232 square feet for the same period. This cross-section analysis further reveals additional losses since October thereby confirming that this erosional state persists and is anticipated to continue. Pursuant the City Engineer’s analysis and subsequent determination on December 29, 2022, 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 existing beach access configuration and its associated topography would essentially facilitate an overwash condition into the bike path and JFK Boulevard, exposing the storm drainage system to inundated capacity and a risk of filling with sand. Once sand enters the storm drainage system, flow and discharge will be inhibited, causing widespread, prolonged flooding within the City and the system would require substantial maintenance and even replacement of certain components.

Accordingly, and given that the City experiences the harshest storm conditions between October and May, generally consisting of nor’easters and/or extended period swells from storm systems stalled off the coast, the imminent threat continues to persist that a dune breach will occur before this year’s storm season concludes and before either the USACE’s “Hereford Inlet to Cape May Inlet New Jersey Hurricane and Storm Damage Reduction Project” (**Attachment 4, Exhibit 3**) moves to construction or the NJ Office of Coastal Engineering Office advances restoration of the beach to its original 2009 template. Moreover, these cumulative persisting conditions, coupled with insufficient time to pursue a traditional permit authorization, require that



FEBRUARY 9, 2023
ATTN: MS. COLLEEN KELLER AND MS. JANET STEWART
PAGE 5 OF 16

the proposed shore protection measures be approved by an Emergency Authorization. Please note that, consistent with previous collaborative discussions with the NJDEP and direction to keep all parties informed, this submission will be transmitted to the Bureau of Coastal and Land Use Compliance and Enforcement staff to ensure that they too are properly informed of the imminent threat and the Applicant's intent to implement emergency shore protections measures.

It should be noted that, despite the City's \$3.676 million investment in 2022 beach renourishment in advance of the summer season via the NJDEP and USACE-approved sand backpassing project, residual sand reserves were sufficiently depleted by the end of the season that little remained to withstand coastal storm events. Sand volume placed as part of the backpassing project was shaped into a dune ridge and dry beach area along the oceanfront consistent with the approved design template as is depicted by the June 2022 post beach fill line on the *"Plan Showing Beach Erosion 12-27-2022 Beach Erosion 12/19/2022 Post-lan Beach Loss (10/2022) Compared to Post-Beach Fill As-built (6/2022) between 16th and 11th Avenues North Wildwood Beach, City of North Wildwood,"* prepared by Van Note-Harvey, release date 1/10/2023 (**Attachment 4, Exhibit 7**). *"The final tally of sand moved from Wildwood beaches to the beaches of North Wildwood was provided by the municipal engineer at 361,221 cubic yards making this season's transfer the largest thus far in this "in house" effort to restore a recreational and storm protection shoreline during this period of extensive oceanfront beach erosion manifesting itself in North Wildwood since the late 1990's."* (2022 Spring Report to the City of North Wildwood on the Condition of City Beaches, Stockton University Coastal Research Center, July 25, 2022). The prior season (2021), 356,856 cubic yards of sand was backpassed by the City for renourishment, also at exceptional expense borne by the City. In total, approximately 2,058,039 cubic yards of sand has been backpassed to renourish the City's eroding beaches since 2012. Despite these efforts, prevailing coastal processes have repeatedly depleted these reserves from the beach-dune complex on an annual basis, reserves of which have now settled into offshore deposits.

The history of erosion, as well as existing conditions, on the North Wildwood beaches should be taken into consideration when evaluating the imminent threat. Without the construction of a bulkhead for shore protection, the City is at risk of irreparable and unnecessary damage to infrastructure and property. The City has addressed the NJDEP information request for the still-pending 2020 CAFRA and Freshwater Wetlands permit application; however, this submission remains under review by the NJDEP and has not yet been advanced to public comment. A final decision is, at best, still months away and cannot be completed as expeditiously as is necessary to remedy the imminent threat. Emergency authorization for the installation of a bulkhead is necessary considering the unpredictable nature of coastal storm events and accelerated erosional conditions of the beaches and dune scarping. Due to this hazard, the City has insufficient time to pursue long lead-time alternatives, many of which would be less effective anyhow, nor does the City have unconstrained time to await a lengthy permitting process before action is taken. It is therefore necessary to pursue an Emergency Authorization since the threat of a dune breach is imminent.

Emergency Actions

As a result of recent coastal storm events and in light of the depleted sand reserves whereby a dune breach is imminent, the City, as owner of the subject properties and steward of the municipal transportation, utility and public safety infrastructure, has given its permission to pursue the prescribed emergency measures below and is hereby seeking an Emergency Authorization for the following activities:



FEBRUARY 9, 2023
 ATTN: MS. COLLEEN KELLER AND MS. JANET STEWART
 PAGE 6 OF 16

Project Area: midblock between 12th and 13th Avenues – 16th Avenue (Block 317.03, Lot 1 (P/O); Block 317.02, Lot 2 (P/O))

- 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)

The above activities are depicted on the attached plans entitled “*Plan of Proposed Beachfront Bulkhead & Public Access Between 16th Ave. & Midblock 12th & 13th Ave., City of North Wildwood,*” (Sheets 1 and 2), prepared by Van Note-Harvey, dated February 9, 2023 (**Attachment 3**). Please note that the topographic contours on the site plans are vestigial indicative of conditions observed in October and December of 2022. Actual elevations and contours are rapidly changing due to chronic erosional conditions along the oceanfront.

Installation of the bulkhead and the associated public accessway ramps will result in an area of disturbance totaling 52,658 square feet (1.209 acres). The proposed bulkhead will be constructed of coated steel (cold rolled) 35-foot length pilings manufactured by Meever USA which has a 50-year life. The top 17.5 feet of the pilings will be coated. Once installed, the top of bulkhead will be at elevation 12.0 feet (NAVD88). The bulkhead cap will consist of laid boardwalk-style consisting decking of 2-inch by 6-inch copper azole treated timber fixed to two 3-inch by 6-inch (or 4-inch by 4-inch) greenheart walers (**Attachment 3, Sheet 1 Typical Bulkhead Detail**). The bulkhead will be installed at the landward toe of dune from midblock between 12th and 13th Avenue to 16th Avenue. In the location of the 16th Avenue beach access, the bulkhead will cross through the beach access ramp topography and its associated side slopes, otherwise the vertical structure will impede vehicular access at this location (**Attachment 3, Sheet 1 Proposed Vehicle Access Detail**). The proposed bulkhead will not promote or impact erosion since it will be at the landward limit of the existing dune toe. The bulkhead will, however, provide emergency coastal shore protection to the City of North Wildwood when, in the absence of beach nourishment, the existing severely eroded dune system is breached.

Due to the expanding erosional conditions to 13th and 14th Avenues, north of the Beach Patrol facility, the proposed bulkhead installation will require disturbance to 8,845 square feet (0.203 acres) of previously delineated interdunal freshwater wetlands and 25,039 square feet (0.575 acres) of freshwater wetlands transition area (**Attachment 3, Sheet 2**). It should be noted that these NJDEP-designated wetland areas formed as a result of impounded stormwater discharges from the developed lands immediately to the west. The prevailing topography along the landward toe of the dune slopes from the west, along JFK Boulevard, east towards the dune. The City’s previous stormwater system collected this flow and discharged onto the back beach areas, through multiple stormwater outfall lines, which created localized low areas with a source of artificial hydrology. As the City’s stormwater outfall and discharge locations were modified, the gravel road and bike path were installed, and the dunes were constructed, soil compaction of these disturbed areas exacerbated the stormwater sheet flow conditions towards the toe of the dune. As this stormwater was impounded and its easterly flow impeded, some hydrophytic vegetation began to colonize this area. These areas are not considered pristine, undisturbed wetlands of high resource value due to the surrounding activities from the gravel road, bike path, and residential and commercial development to the west and recreational



FEBRUARY 9, 2023
ATTN: MS. COLLEEN KELLER AND MS. JANET STEWART
PAGE 7 OF 16

beach activities to the east with beach access paths connecting west to east at each street end (**Attachment 2. Photographs**).

A Letter of Interpretation Line Verification (LOI) was issued by NJDEP on July 10, 2019, which verified the limits and resource value of the interdunal wetland area between 14th and 15th Avenues (NJDEP File No. 0507-03-0009.2 FWW180001). Pursuant to this LOI, NJDEP determined this wetland area to be of intermediate resource value with an associated 50-foot transition area. While not verified by an LOI, the immediately adjacent interdunal freshwater wetland between 13th to 14th Avenues exhibits similar characteristics as the verified wetland area between 14th to 15th Avenues. Given the consistency between these wetland areas, it would be anticipated that the wetland area between 13th to 14th Avenues should also be consistent with an intermediate resource value classification. However, it is important to note that, upon receipt of the City's 2020 CAFRA and Freshwater Wetlands permit application to authorize the construction of a bulkhead, the NJDEP opted to change its position on the resource value classification and assign a more restrictive resource value to this wetland area, changing the associated transition area from 50 to 150 feet. NJDEP reserves the right to reevaluate its wetland classification if additional or updated information is available; however, pursuant to *N.J.A.C. 7:7A-4.6 (a)*, the City was entitled to rely on the determination of NJDEP for a period of five years from its issuance of the LOI unless it is determined to have been based on inaccurate or incomplete information. The condition of the subject wetland area did not change during the 16-month interval between the issuance of the LOI and the subsequent CAFRA application. NJDEP staff had full access to the subject wetland for observational purposes and to properly assess the resource value of this feature during the 2019 LOI application review, which occurred during the period of biological activity for plant and wildlife species. Habitat factors (e.g., composition of vegetation species, availability of food, prevalence of water resources, stratum/structure, soils/gradient, surrounding disturbance, etc.) within this subject wetland did not change during this period. Habitat value within the subject wetland remains limited due to the current beach and dune condition, and these wetlands will remain at-risk to the existing erosional conditions which are exacerbated by the absence of an effective beach fill program with associated shore protection measures. It is also important to note that the NJDEP reclassification of these wetlands occurred after the City's application for the referenced bulkhead and subsequent to NJDEP Land Use Compliance and Enforcement actions commenced against the City.

A freshwater wetlands transition area, as defined in the Freshwater Wetlands Protection Act Rules (*N.J.A.C. 7:7A*), serves as *"an ecological transition zone providing temporary refuge for freshwater wetlands fauna during high water episodes, critical habitat for animals dependent upon but not resident in freshwater wetlands, and slight variations of freshwater wetland boundaries over time due to hydrologic or climatologic effects."* The freshwater wetlands transition areas between 13th and 15th Avenues do not function as such. No ecological benefit is achieved in changing the assigned transition area from 50 to 150 feet, especially given that established footprints of disturbance already exist within close proximity to these wetlands. Existing disturbances within a 50-foot transition area include a paved City street, concrete sidewalk, pre-existing timber bulkhead, concrete bike path, the Beach Patrol Headquarters building, and several beach access pathways, all of which limits the ecological function of the transition area. It is therefore anticipated that the addition of a proposed bulkhead would not negatively impact the function of the transition areas (**Attachment 3, Sheet 2**).

Recurrent site investigations performed by TLCG throughout this past growing season revealed no observations of listed or rare species within these features. The relatively limited habitat value does not substantiate the need for these features to be assigned exceptional resource



FEBRUARY 9, 2023
ATTN: MS. COLLEEN KELLER AND MS. JANET STEWART
PAGE 8 OF 16

value. Consequently, the proposed bulkhead, designed to avoid/minimize disturbance to the maximum extent practicable, is not anticipated to adversely impact listed species habitat to the extent that the continued survival of such species or the essential corridors necessary for the movement of such species results. The USACE/NJDEP-proposed "Hereford Inlet to Cape May Inlet New Jersey Hurricane and Storm Damage Reduction Project" also includes encroachment into the subject wetlands. Further, the wildlife species observed in these areas are not solely oriented to wetland features; they are more typical of those found in dune and developed barrier island areas. A robust beach nourishment project with a functional dune system would serve to provide far more beneficial ecological value to plant and wildlife species than these existing manmade impoundments. It should be noted that until a robust and large-scale beach fill project is implemented, these wetlands and functionally-limited transition areas remain at a high risk of erosion, breach and overwash.

The bulkhead installation and location were specifically designed and selected to avoid, where possible, and minimize, where practical, disturbance to these isolated NJDEP-designated wetland features. The bulkhead alignment was shifted as far west as possible; however, existing subsurface infrastructure and the existing bike path preclude it from being landward of the delineated wetland limits. Accordingly, portions of three small wetland areas, WE, WF and WG, are unavoidable. Sheet 2 of "*Plan of Proposed Beachfront Bulkhead & Public Access Between 16th Ave. & Midblock 12th & 13th Ave., City of North Wildwood,*" (Sheets 1 and 2), prepared by Van Note-Harvey, dated February 9, 2023 (**Attachment 3, Sheet 2**), depict these encroachments and associated disturbance calculations. Cantilevered steel bulkhead was selected, not only for its structural integrity and long life span, but also it is a non-polluting material and does not require extensive trenching on both sides of the sheet piles for the installation of anchoring. As such, the footprint of disturbance can be minimized consistent with that shown on the referenced plans as opposed to a more intrusive installation with greater distance and associated impacts. The bulkhead alignment was designed, as part of the 2020 CAFRA application, to be consistent with the rules and regulations associated with a Freshwater Wetlands General Permit (FWW GP) 6 and 6A to authorize disturbance in non-tributary wetlands and transition areas. However, upon receipt of this application, the NJDEP opted to change the resource value to exceptional, thereby removing General Permit availability and impeding the permitting pathway for the proposed activity. The City hereby requests reconsideration by the NJDEP of the resource value classification. The Freshwater Wetlands Protection Act (*NJSA 13:9B*) recognizes the need to disturb wetlands when there is no practicable, feasible alternative, and when doing so is in the public interest. This Emergency Authorization establishes the presence of an imminent threat based on the progressive erosion of the beach and dune and further demonstrates that the activity will greatly benefit the public interest. The proposed bulkhead is the only practicable and feasible alternative which will provide expedited shore protection for the preservation of public and private property and infrastructure as demonstrated herein.

To the extent that residual sand deposits can be accessed along portions of the City's oceanfront, excavation, relocation, placement and regrading of *in situ* sand within the project area may be necessary and advantageous to emergency shore protection response. However, these deposits are limited and will not suffice to resolve the eroded beach berm, nor will they restore the dune feature. Additionally, due the ongoing erosion of the dune, extensive scarping of this landform creates a public safety hazard to those both atop the dune remnant and walking along the base of the scarp. Despite the City's best efforts to cordon off the dune and pre-existing public accessways, the public continues to access the beach for recreation and often the dune edge out of curiosity and disbelief. Reshaping of the dune remnants in locations of scarps and or future breach(s) may be necessary to address on-going public safety



FEBRUARY 9, 2023
ATTN: MS. COLLEEN KELLER AND MS. JANET STEWART
PAGE 9 OF 16

considerations. Such activity would typically be completed per a 5-year NJDEP authorization for beach and dune maintenance; however, the City's permit application to renew an approval for this purpose is currently under review by NJDEP.

Additionally, coordination with Atlantic City Electric will be completed by the project engineer to address the overhead utility wires just north of the Beach Patrol facility in advance of the sheet pile installation so as to mitigate any construction-related conflicts with these utilities.

Reconstruction of pre-existing beach accessways at 13th through 16th Avenues is necessary for both public and emergency access, critical to oceanfront activity, public safety, 1st responders, and the DPW. The proposed activities include the reconstruction of the existing beach access paths at 13th, 14th, and 15th Avenues and the vehicle access path at 16th Avenue, which will ramp over the proposed bulkhead following its installation. In the location of these beach access paths, the bulkhead will cross through and under the beach access ramp topography and its associated side slopes. These existing feature reconstructions include 8-foot wide earthen ramps, which will not exceed a 1:12 slope, and will require the removal and reinstallation of split rail fencing as necessary, which establishes the lateral ramp limits and confines the emergency access traffic area to the ramp. The construction of these ramps will also necessitate the removal of some sections of existing composite decking and the relocation of benches at 13th and 14th Avenues. Reconstruction of the public accessway at 15th Avenue will require the installation of a new section of composite decking to link existing walkways at the Beach Patrol Headquarters to the earthen ramp (**Attachment 3**). The proposed access path at 16th Avenue is approximately 25 feet wide (varies) and composed of NJ Department of Transportation I-5 Gravel Mix 18 inches thick (compacted in 9-inch max. lifts) atop geotextile 350 ST fabric manufactured by Propex Geosolutions, and over the existing compacted subgrade. Both sides of the access path will contain a 12-inch shelf. The adjoining slope grade will be established at a 1V:2H ratio. The bulkhead will cross through the beach access ramp topography and its associated side slopes, otherwise the vertical structure would impede vehicular access at this location if shifted further to the west. Due to its proximity to the Beach Patrol Headquarters, beach vehicle access in this location is critical to oceanfront activity to accommodate access for first responders, lifeguards, and Department of Public Works staff to enhance and promote public safety and respond to oceanfront needs.

Since the offshore passage of Hurricane Ian in early October 2022 and from subsequent less intense coastal storm events, the ADA dune walkover at 15th Avenue has sustained significant damage due to ongoing erosion generated by the lack of beach berm. Incrementally, the beach path at this location has eroded to the extent that the timber dune walkover structure terminates just short of the dune scarp. Given the continuing erosion in this location and liability to public safety, this walkover has been temporarily closed (**Attachment 2. Photographs**). Due to the imminent threat of dune breach/collapse, it is anticipated that the remnants of this structure will need to be removed, particularly as the risk of failure increases.

The installation of oceanfront bulkhead in the City of North Wildwood is not new. There is a pre-existing timber bulkhead within the City (removed in some locations) extending from 2nd to 26th Avenues. Construction of a new bulkhead extension is consistent with these past practices and is an emergent measure required to protect the City from dune breach and its associated overwash impacts. The proposed bulkhead needs to be constructed easterly of the existing former bulkhead alignment to avoid a substantial concentration of legally existing infrastructure including utilities and privately-owned buildings and properties. It would therefore be impractical and financially unfeasible to construct a new bulkhead immediately adjacent to the existing bulkhead. The proposed bulkhead therefore must be constructed at the location in which it is proposed to provide sufficient shore protection.



FEBRUARY 9, 2023
ATTN: MS. COLLEEN KELLER AND MS. JANET STEWART
PAGE 10 OF 16

Alternatives Analysis

Before specifying the above emergency mitigative actions, an assessment of alternative measures was completed by the City Engineer as noted in "Engineer's Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood," prepared by Van Note-Harvey Associates, dated February 9, 2023 (**Attachment 4, including Exhibits 1-10**). Specifically, the standards applicable to emergency post-storm beach restoration under *N.J.A.C. 7:7-10.3* were evaluated, including NJDEP-preferred options under (b), for feasibility. Typically, the worst of the nor'easter storm season occurs from January through May. Considering the current eroded dune conditions and being in the midst of this storm season, the City is not in a position where alternative mitigative efforts which require long lead-times may be considered practical due to the urgent nature of this emergency. Pursuant to *N.J.A.C. 7:7-10.3 (b)*, NJDEP-preferred coastal shore protection activities for post-storm recovery include the placement of clean fill material with grain size compatible with (or larger than) the existing beach material; the bulldozing of sand from the lower beach profile to the upper beach profile; the alongshore transfer of sand on a beach; the placement of concrete, rubble or rock; and the placement of sand-filled geotextile bags or tubes. The following is a summary of the project engineer's alternatives analysis.

1) Placement of Clean Fill

Deposition of clean fill material consistent with grain size compatible with that of the existing beach material proved to be problematic in terms of sourcing, logistics, and secondary impacts. Transport of material from sand and gravel mines was assessed, and it was determined that there are several impediments to pursuing this option. The sand composition available from the proximate mines, as compared to that of the *in situ* beach material, was found to be inconsistent. Further, mainland sources will require the City's contractor to complete an intermediate sand transfer from street-legal tri-axle dump trucks to the heavy duty off-highway articulated dump trucks necessary to transit oceanfront conditions. Pursuing this option would require in excess of 13,000 tri-axle trucks loads, as well as duplicative handling of the fill material, if even suitable material could eventually be sourced within a reasonable proximity. The current oceanfront conditions and profile have, at least for now, severed the route for on-beach access to sand reserves further south of the project area limits, as well as trucking routes to deposit sand along the oceanfront from non-beach sources. The USACE's current beach berm and dune design template within the project area would require more than 209,000 cubic yards of sand to construct based on topographic conditions as of December 2022. However, due to an exceedingly high daily erosion rate, as experienced over the past several years without sand stockpiling, approximately 522,000 cubic yards of sand would actually be required to meet the USACE design template. Further, there is no practically accessible oceanfront borrow area/trucking route given the existing beach conditions and no location to stockpile sand. The volume of sand required and tedious logistics to implement the placement of clean fill would likely cost more than \$10 million, and the process would be very slow. Please note that present topography may not be representative of the conditions observed in December, and it is likely that further erosion has occurred since then. Beach berm erosion has extended a significant portion of the tide cycle to the toe of dune and waterward extent of both the 24th and 26th Avenue piers, as well as exposing stormwater outfalls, which impede the effective transport of sand to these erosional areas. Because these locations are inundated daily by the tidal cycle, the deposition of sand in these areas to re-establish trucking routes infeasible, at least until the beach profile re-forms through



FEBRUARY 9, 2023
ATTN: MS. COLLEEN KELLER AND MS. JANET STEWART
PAGE 11 OF 16

accretion. The construction of coffer dams to establish a trucking route, from either the inlet beaches to the north or Wildwood beaches to the south, to transport sand is logistically and financially not feasible. Past backpassing experience in the City, routinely since 2012, demonstrated that contractors struggle to supply and retain in service more than 8 trucks running simultaneously. A lack of available inventory, refusal of rental companies to expose their equipment to sea water, and frequency of repairs limits the trucking resources available for such a project. Given the emergent nature of this matter, there is insufficient time to pursue an option that is, at best, inefficient, slow and expensive, but also risks secondary damage to municipal infrastructure, including City streets that were not designed for the volume and frequency of heavy transport that would be required for this option. A comparative costs analysis is provided in the *“Engineer’s Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood,”* prepared by Van Note-Harvey Associates, dated February 9, 2023 (**Attachment 4**). Therefore, this shore protection measure is not feasible.

2) Bulldozing of Sand from the Lower to Upper Beach Profiles

The lack of sand reserves in the lower beach profile also makes it impossible to bulldoze sand to the upper beach profile as an alternative means of re-establishing shore protection. While hydraulic beach fill/renourishment could access sand reserves in nearshore or offshore waters, where prior backpassed sand has settled and which are unattainable via typical trucking/backpassing, these dredging projects require scheduling years in advance, and the City does not have ready access to or control the availability a dredge for this purpose. The timeline for such a process does not reconcile with the current situation faced by the City, nor does the City have the funds to pursue such a project without significant State and/or Federal participation. Additionally, bulldozing sand from the lower beach to the upper beach profile would exacerbate the erosional conditions. Sand removed from the lower beach elevations could take years to naturally replenish and until then, water depth at the lower beach elevations would increase which would in turn increase wave and tidal energy; thereby accelerating erosion. Therefore, this shore protection measure does not exist until such time as beach nourishment occurs.

3) Alongshore Transfer of Sand

As mentioned above in alternate #1, the current beach conditions have diminished previously established truck routes thereby inhibiting the alongshore transfer of sand from neighboring municipalities to the south as was completed in years prior. Notwithstanding the challenges of tidal inundation of these routes, the waterward extent of both the 24th and 26th Avenue piers and exposed stormwater outfalls south of the project area and the 2nd Avenue rock groin north of the project area impede the effective backpassing transport of sand. Consequently, neither the Wildwood beach borrow areas nor the North Wildwood inlet beaches are accessible for this purpose without the construction of coffer dams, which were determined by the City Engineer to be logistically and financially unfeasible. Additionally, this backpassing process is expensive and time consuming. The urgent nature and need for shore protection efforts do not allow for the amount of time required to implement this alternate. As previously mentioned, the City has conducted NJDEP-approved and preferred methods of shore protection by means of the sand backpassing where sand was transferred alongshore from the neighboring municipalities to the south. Since 2012, 2,058,039 cubic yards of sand was backpassed to renourish the City’s eroding beaches. These shore protection measures have cost the



FEBRUARY 9, 2023
ATTN: MS. COLLEEN KELLER AND MS. JANET STEWART
PAGE 12 OF 16

City in excess of \$20 million since 2012. All of these efforts and expenses to transfer sand have since been diminished and lost. Prior experiences with this method have shown that contractors have struggled to keep more than 8 off-road trucks running at all times due to a lack of inventory and frequent vehicle maintenance. It has also proven difficult to find vendors who are willing to place their trucks on these projects due to the exposure to water. The USACE's current dune design template would require more than 209,000 cubic yards of sand to construct, based on topographic conditions as of December 2022. However, due to an exceedingly high daily erosion rate, as experienced over the past several years without sand stockpiling, approximately 522,000 cubic yards of sand would actually be required to meet the USACE design template, as there is currently no location to stockpile sand. Please note that present topography may not be representative of the conditions observed in December, and it is likely that further erosion has occurred since then. As mentioned above, due to extensive erosion there is currently no feasible route around the piers for trucks to safely transfer sand alongshore and no effective means of retaining the sand beyond a few months at which point the beach fill will have eroded again. An analysis of this alternate is provided in the *"Engineer's Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood,"* prepared by Van Note-Harvey Associates, dated February 9, 2023 (**Attachment 4**). Therefore, this shore protection measure is not feasible.

4) Placement of Rock

The placement of rock, rubble or concrete is a very slow process, which again relies upon trucking from mainland facilities and sourcing material from out of the coastal region. This alternate creates secondary impacts to municipal infrastructure, including City streets, that were not designed for the volume and frequency of heavy transport that would be required for this option. Additional design concerns were expressed upon evaluating this option in that the placement of these materials restricts future engineering options, including facilitation of public access. The inability to drive piles for future timber walkover/ADA ramp structures would create challenges to efficient and effective public and Beach Patrol staff access to/from the beach. In addition to ready access of the Beach Patrol facility by its staff, this oceanfront safety destination also provides beachgoers with public restrooms, a first aid station, showers/footwash amenities, and shelter via the existing dune walkover/ramp structure at the 15th Avenue right-of-way alignment. A breach will destroy this access and the placement of rock, rubble or concrete will complicate or even preclude the replacement of such an access point. The placement of rock does not prevent erosion unless it is backstopped by bulkhead as noted in the *"Engineer's Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood,"* prepared by Van Note-Harvey Associates, dated February 9, 2023 (**Attachment 4**). *"Properly constructed seawalls are constructed against a solid bulkhead to prevent erosion. So even if we considered rock for wave energy dissipation, we still need a bulkhead in order to stop the erosion."* Therefore, if this option were to be considered, a bulkhead would still need to be constructed as part of the shore protection measure. Comparatively, the costs associated with constructing a stone revetment with a bulkhead (seawall) equates to approximately \$14,000 per linear foot totaling ±\$16 million, while the construction of a stand-alone bulkhead equates to roughly \$1,850 per linear foot totaling ±\$2 million. A \$16 million seawall far exceeds the City's funding capacity. Additionally, the construction of a seawall will take approximately 2 years to



FEBRUARY 9, 2023
ATTN: MS. COLLEEN KELLER AND MS. JANET STEWART
PAGE 13 OF 16

complete which is not conducive to the emergent and time sensitive need for shore protection measures. Therefore, this shore protection measure is not feasible.

5) Geotextile tubes

The placement of sand-filled geotextile tubes requires a source for beach sand material, which is not available from the existing beach conditions and is challenging to acquire from mainland sources as was previously described in detail above. To fill these tubes *in situ* would further deplete the City's oceanfront of sand resources, especially given that the prevailing trend is one of erosion in this location. Losses of sand in this system have reduced the elevation of the beach such that the dune mass is now located at the edge of normal wave runup at a normal high tide. While geotextile tubes could serve as a protective measure and means to rebuild the dune features, these applications are only effective when combined with a robust, large-scale hydraulic beach fill project whereby the tube would remain covered for an extended period of time. At present, the State and Federal authorities have not advanced a beach nourishment program of this type in partnership with the City, and it remains unclear if/when the State/Federal Island-wide Dune Construction Project may be implemented from Hereford Inlet south to Cape May Inlet to serve as hurricane and storm damage reduction, including its associated planned cyclical renourishments. An analysis of this alternate is provided in the "Engineer's Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood," prepared by Van Note-Harvey Associates, dated February 9, 2023 (**Attachment 4**). Therefore, this shore protection measure is not feasible.

6) Raising and/or Relocating the Beach Patrol Headquarters

Pursuant to the State's response to the previously filed Emergency Authorization in October 2022, NJDEP's contracted coastal engineering professional proposed an alternative mitigative effort consisting of raising and/or relocating the Beach Patrol headquarters. This method is impractical as it is an expensive endeavor and, more importantly, only serves as a temporary solution in protecting the building. This proposal does not account for the continued need for oceanfront public safety operations critical to be mobilized immediately adjacent to the beach areas. Additionally, construction activities associated with this alternate mitigative measure would take a substantial amount of time, which the City does not have being in the midst of the storm season and the continuing erosion that is confronting the City's beaches. Further, this consideration addresses only the Beach Patrol building does not offer protection of the City's infrastructure and oceanfront properties along JFK Boulevard. Therefore, this proposal is neither feasible nor practical.

7) Federal/State 5-Mile Island Project

After Superstorm Sandy in 2012, the City, in partnership with the USACE and NJDEP, committed to the "Hereford Inlet to Cape May Inlet New Jersey Hurricane and Storm Damage Reduction Project" (**Attachment 4, Exhibit 3**) to construct a coastal resiliency project which would establish a robust dune system and extensive beach area oceanward of the City as an effective barrier to flood storm surges and associated wave action. More than a decade has passed since that commitment was made, and it is unknown when this project is anticipated to commence. At present, two municipalities and multiple private property owners have yet to agree to the project and to provide the requisite easements needed to finalize design and advance the construction schedule.



FEBRUARY 9, 2023
ATTN: MS. COLLEEN KELLER AND MS. JANET STEWART
PAGE 14 OF 16

Therefore, this shore protection measure, as an immediate mitigative action, is neither feasible nor practical given the City's existing oceanfront conditions and exposure risk.

8) Bulkhead

A bulkhead, when deployed under certain oceanfront conditions where beach re-nourishment proves to be unreliable and challenging, has proven to be the more efficient and effective means of sustainable shore protection measures. These installations can be implemented rapidly and have longer useful life options where the cost-benefit ratio can be justified and effective shore protection realized. A bulkhead can be constructed more quickly than any other alternative, and due to the imminent threat, a bulkhead is the only alternative which can be constructed in a sufficient amount of time that will ensure the protection of the City, infrastructure, public and private property. Bulkheads are most easily incorporated into future beach nourishment/dune construction projects and buried within the future dune system with the least impact to future installations as compared to alternate structural shore protection measures. Additionally, the footprint of disturbance for these vertical installations can be minimized to reduce secondary impacts and avoid sensitive areas to the maximum extent practicable as compared to alternate measures requiring sloped angles of repose which would otherwise encroach extensively into sensitive areas. The bulkhead installation and location were specifically designed and selected to avoid, where possible, and minimize, where practical, disturbance to these isolated NJDEP-designated wetland features. The bulkhead alignment was shifted as far west as possible; however, existing subsurface infrastructure and the existing bike path preclude it from being landward of the delineated wetland limits. Accordingly, portions of three small wetland areas, WE, WF and WG, are unavoidable. It should be noted that these NJDEP-designated wetland areas formed as a result of impounded stormwater discharges from the developed lands immediately to the west. These areas are not considered pristine, undisturbed wetlands of high resource value due to the surrounding land uses, including commercial development to the west and recreational beach activities to the east with beach access paths connecting west to east at each street end. Existing disturbances within close proximity to these wetlands include a paved City street, concrete sidewalk, pre-existing timber bulkhead, concrete bike path, the Beach Patrol Headquarters building, and several beach access pathways, all of which limit the ecological function of the wetland transition area. The proposed bulkhead is not anticipated to adversely impact listed species habitat to the extent that the continued survival of such species or the essential corridors necessary for the movement of such species results. The bulkhead alternate minimizes the number of truck trips required to implement shore protection thereby reducing secondary impacts to the municipal infrastructure. Further, given the minimal footprint, future site improvements, including public accessways and dune construction, can be effectuated over top of and on either side of the bulkhead. The bulkhead will not impede or complicate the future USACE/NJDEP Beach Fill project, if it comes to fruition, as the bulkhead can be incorporated into and buried beneath the dune design profile template. The bulkhead will not promote or impact erosion since it will be at the landward limit of the existing dune toe and accordingly, the bulkhead has been designed to withstand wave runup forces and can be certified by the City Engineer as such. It is worth noting that the Engineers Report states that with respect to a bulkhead exacerbating the oceanfront erosional conditions, "...there is absolutely no indication that the bulkhead that has already been installed has created such problems..." and "...there has been no flanking and no scouring resulting from the construction of the bulkhead..." Accordingly, impacts to adjacent beach or dune areas and scour have not resulted following the installation of



FEBRUARY 9, 2023
ATTN: MS. COLLEEN KELLER AND MS. JANET STEWART
PAGE 15 OF 16

the existing bulkheads, and such impacts are not expected to occur following the installation of the proposed bulkhead. The bulkhead will, however, provide emergency coastal shore protection to the City of North Wildwood when, in the absence of beach nourishment, a breach occurs through a section of the dune in this most vulnerable City location. As mentioned above in alternate #4, the comparative costs for the bulkhead are significantly less than constructing a stone revetment/seawall. With an estimated construction cost of \$1,850 per linear foot totaling ±\$2 million, the bulkhead option is within the City's funding capacity. A comparative costs analysis is provided in the "Engineer's Report in Support of Application for Emergency Permit Authorization for Beach Bulkhead & Public Access Between 12th/13th & 16th Avenues, City of North Wildwood," prepared by Van Note-Harvey Associates, dated February 9, 2023 (**Attachment 4**). Therefore, this shore protection measure is the preferred alternate.

Furthermore, bulkhead materials were ordered on October 4, 2022 and there are currently 350± LF of steel sheet piles which have been delivered and remain ready to install. This length of bulkhead can be installed immediately, biased to the location of most dire need, while the balance of the steel sheet piles, ordered in January 2023, are in transit and expected to arrive within weeks. Upon the authorization of the proposed activities, the installation of the bulkhead may commence immediately.

Based on the information provided herein and attached for reference, the City hereby reaffirms its need for emergency shore protection, via installation of a bulkhead, to be initially approved as an Emergency Authorization pursuant to the Coastal Zone Management Rules (CZMR) (*N.J.A.C. 7:7-21 et seq.*). The City remains committed to the still-pending CAFRA and Freshwater Wetlands permit application for this project, which is under review by the NJDEP, but cannot wait for a final decision on that application which is, at best, still months away. Given the impending nor'easter coastal storm forecast for this coming Sunday and Monday, as well as an extended storm season still to come, it is therefore necessary to pursue an Emergency Authorization since the threat of a dune breach remains imminent.

This submission follows an Order by the Superior Court of the State of New Jersey, Cape May County Chancery Division, Docket No.: CPM-C-5522, issued by Michael J. Blee, A.J.S.C. on February 1, 2023, which requires the City of North Wildwood to file an Emergency Authorization application with the NJDEP within 10 days of the Order date.

If you have any questions or require additional information, please do not hesitate to contact me, especially given the emergent nature of this request, via office phone at 609-465-6700, mobile phone at 609-425-0240, or email at plomax@lomaxconsulting.com. Thank you for your prompt attention to this matter.

Sincerely,
THE LOMAX CONSULTING GROUP, LLC

Peter L. Lomax
Managing Principal

Enclosures



FEBRUARY 9, 2023

ATTN: MS. COLLEEN KELLER AND MS. JANET STEWART

PAGE 16 OF 16

ec: Jennifer Moriarty, Director NJDEP DLRP (w/enclosures)
Kimberly Cahall, Chief Enforcement Officer NJDEP CLUE (w/enclosures)
Michelle Kropilak, Manager NJDEP CLUE (w/enclosures)
Mayor Patrick Rosenello, City of North Wildwood (w/enclosures)
Nicholas Long, City Administrator, City of North Wildwood (w/enclosures)
Jim Verna III, PE, Van Note-Harvey Associates, Inc. (w/enclosures)
Neil Yoskin, Esq., Cullen & Dykman LLP (w/enclosures)
Anthony Bocchi, Esq. Cullen & Dykman LLP (w/enclosures)

ATTACHMENT 1

FIGURE 1: SITE LOCATION ON AERIAL PHOTOGRAPHS DEPICTING THE PROJECT AREA LIMITS

**PREPARED BY THE LOMAX CONSULTING GROUP
DATED DECEMBER 30, 2022**

BLOCK 317.03, LOT 1 (P/O); BLOCK 317.02, LOT 2 (P/O)
 CITY OF NORTH WILDWOOD, CAPE MAY COUNTY, NEW JERSEY

22-1093.2



FIGURE 1: SITE LOCATION ON AERIAL PHOTOGRAPHS
 DEPICTING THE PROJECT AREAS LIMITS

SOURCE: GIS DATA PROVIDED BY THE NJDEP, BING
 NEARMAP AND THE COUNTY PLANNING
 DEPARTMENT



DATE:
2022-12-30

DRAWN BY:
EJM

SCALE: AS NOTED



ATTACHMENT 2
SITE PHOTOGRAPHS

SITE PHOTOGRAPHS



PHOTOGRAPH 1. View north of the dune scarp (right) in October 2022, during the offshore passage of hurricane Ian, eroded to a point landward of the pre-existing dune crest between 15th and 16th Avenues in front of the City of North Wildwood Beach Patrol headquarters (left) and upper landing of dune walkover railing (background)

PHOTOGRAPH 2. View north of the dune scarp at the 14th Avenue beach access path. Note that the beach berm has been eroded which has caused normal high tides to impede on the toe of dune.





PHOTOGRAPH 3. View north of dune scarp conditions in January 2023. Note the damaged dune vegetation and negative ecological impacts of erosion.

PHOTOGRAPH 4. View south of interdunal wetland areas extending from 13th to 15th Avenues. Note the beach access path bisecting the wetland areas (in the background) and adjacent residential/commercial development to the west





PHOTOGRAPH 5. View northwest of the deployed jersey barriers in front of the City of North Wildwood Beach Patrol headquarters authorized through an Emergency Authorization submitted on October 5, 2022

PHOTOGRAPH 6. View of the dune walkover and ADA access ramp in front of the City of North Wildwood Beach Patrol headquarters. This access path has sustained significant damage since the passage of hurricane Ian in early October 2022. It is anticipated that the remnants of this structure will need to be removed, particularly as the risk of failure increases.



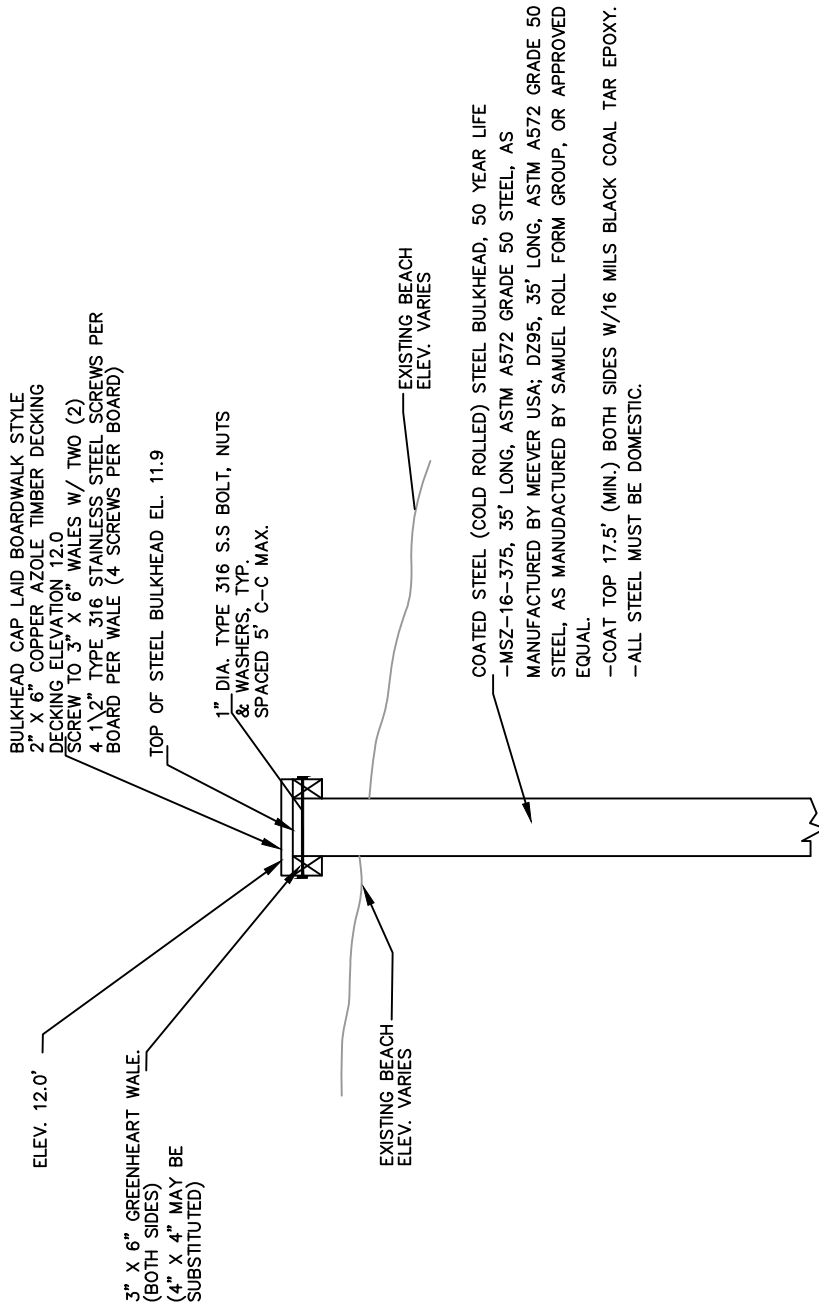


PHOTOGRAPH 7. View north of the 24th Avenue pier terminus and absence of beach berm waterward of the pier end, which precludes the sand backpassing truck route.

ATTACHMENT 3

PLAN OF PROPOSED AND EXISTING BEACHFRONT BULKHEAD BETWEEN 16TH AVENUE & MIDBLOCK 12TH & 13TH AVENUES CITY OF NORTH WILDWOOD

PREPARED BY VAN NOTE-HARVEY ASSOCIATES, INC.



TYPICAL BULKHEAD DETAIL

NOT TO SCALE

COMPOSITE
WALKWAY (TYP.)

STEPS

LOT 1

POST & RAIL
FENCE

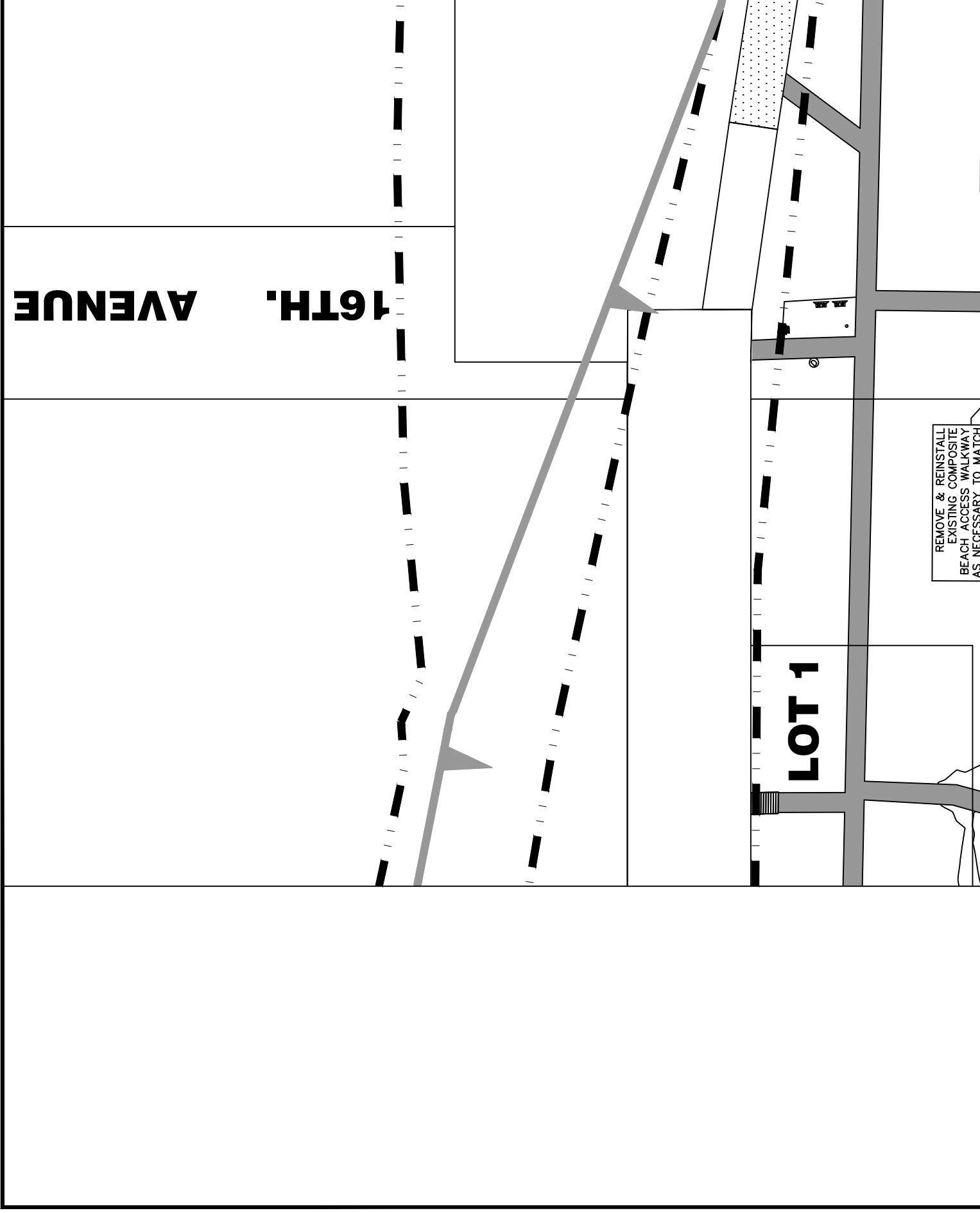
REM
EX
BEACH
AS NCE

16TH. AVENUE

16TH.

LOT 1

REMOVE & REINSTALL
EXISTING COMPOSITE
BEACH ACCESS WALKWAY
AS NECESSARY TO MATCH



ATTACHMENT 4

**ENGINEER'S REPORT
IN SUPPORT OF
APPLICATION FOR EMERGENCY AUTHORIZATION
CITY OF NORTH WILDWOOD**

PREPARED BY VAN NOTE-HARVEY ASSOCIATES, INC.

(PROVIDED AS A DROPBOX LINK DUE TO FILE SIZE)

EXHIBIT C



State of New Jersey

PHILIP D. MURPHY
Governor

DEPARTMENT OF ENVIRONMENTAL PROTECTION

SHAWN M. LATOURETTE
Commissioner

SHEILA Y. OLIVER
Lt. Governor

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

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
Mayor Patrick Rosenello, City of North Wildwood
Jim Verna, III, PE, Van Note-Harvey Associates, Inc.
Neil Yoskin, Esq.
Anthony Bocci, Esq.
Kristina Miles, DAG
Jason Kane, DAG
Kevin Fleming, DAG
Dianna Shinn, DAG

EXHIBIT D

Anthony S. Bocchi, Esq. (Bar No. 005602006)
Neil Yoskin, Esq. (Bar No. 2091982)
Steven Siegel, Esq. (Bar No. 034141992)
Ryan P. Duffy, Esq. (Bar No. 379452022)

CULLEN AND DYKMAN LLP

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(201) 488-1300
abocchi@cullenllp.com

Attorneys for Defendant/Counterclaimant City of North Wildwood

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Plaintiff,

vs.

**CITY OF NORTH WILDWOOD, “XYZ CONTRACTORS” 1-10,
“JOHN AND/OR JANE DOES” 1-10,**

Defendants.

**SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION:
CAPE MAY COUNTY**

DOCKET NO. C-55-22

CIVIL ACTION

AMENDED ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM OF THE CITY OF NORTH WILDWOOD

Defendant, the City of North Wildwood (“North Wildwood”), by way of answer to the Verified Complaint by Plaintiff, New Jersey Department of Environmental Protection (“NJDEP”), hereby states the following:

STATEMENT OF THE CASE

1. Denied.
2. Admitted.
3. North Wildwood admits only that in response to North Wildwood’s EA request,

NJDEP “determined there was neither an imminent nor ongoing threat to the loss of life or severe loss of property ...”

4. North Wildwood admits only that as a direct consequence of NJDEP's incredulous denial of its Emergency Authorization Application, North Wildwood was compelled, in the interest of the public safety of its residents, to excavate sand located at the 11th Avenue beach berm and graded the sand into the 14th and 16th Avenues. The "multiple written communications" referred to in Paragraph 4 of the Verified Complaint otherwise speak for themselves. North Wildwood denies all other allegations. The various legal conclusions set forth in Paragraph 4 of the Verified Complaint do not require a response.

5. Denied.

6. The allegations set forth in Paragraph 6 of the Verified Complaint state legal conclusions to which no response is required. To the extent that a response is required, said allegations are denied.

PARTIES

7. N.J.S.A. 13:1D-9 speaks for itself.

8. Admitted.

9. The allegations set forth in Paragraph 9 of the Verified Complaint are not directed at North Wildwood and, therefore, North Wildwood neither pleads nor responds thereto.

10. The allegations set forth in Paragraph 10 of the Verified Complaint are not directed at North Wildwood and, therefore, North Wildwood neither pleads nor responds thereto.

JURISDICTION AND VENUE

(The allegations moving forward in the Verified Complaint were improperly numbered by the NJDEP from this point on. For clarity purposes, North Wildwood will refer to the paragraph numbers using the misnumbered NJDEP version.)

7. North Wildwood admits that the Superior Court has jurisdiction over this matter. N.J.A.C. 7:7-21 and N.J.A.C. 7:7A-15 speak for themselves.

8. Rules 4:52-1, 4:67-6, and 4:67-1(b) speak for themselves. North Wildwood denies that this matter involves a “final agency order.”

9. North Wildwood admits only that venue is appropriate in Cape May County and denies all other allegations set forth in the improperly numbered paragraph 9 of the Verified Complaint.

FACTUAL ALLEGATIONS

North Wildwood’s 2020 Beach Front Bulkhead Project Application

10. North Wildwood admits only that it submitted a coastal permit application dated November 20, 2020, the provisions of which speak for itself.

11. The terms of the November 20, 2020 permit application speak for itself. All other characterizations by the NJDEP with regard to same are otherwise denied.

12. The terms of the November 20, 2020 permit application and the October 5, 2022 Emergency Authorization Application speak for themselves. All other characterizations by the NJDEP with regard to same are otherwise denied.

13. Denied.

14. The allegations set forth herein are legal conclusions to which no response is required.

Exceptional Resource Value Wetlands

15. North Wildwood is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in the improperly numbered paragraph 15 of the Verified Complaint and, therefore, North Wildwood neither pleads nor respond thereto.

16. N.J.A.C. 7:7A-3.2(b)(3) speaks for itself.

17. The allegations set forth in improperly numbered paragraph 17 of the Verified Complaint are not directed at North Wildwood and, therefore, North Wildwood neither pleads nor respond thereto.

18. The allegations set forth in improperly numbered paragraph 18 of the Verified Complaint are not directed at North Wildwood and, therefore, North Wildwood neither pleads nor respond thereto.

19. The allegations set forth in improperly numbered paragraph 19 of the Verified Complaint are not directed at North Wildwood and, therefore, North Wildwood neither pleads nor respond thereto. Further, North Wildwood is without knowledge and information sufficient to form a belief as to the truth of the allegations regarding any determination by the NJDEP alleged therein.

20. N.J.A.C. 7:7A-3.2(b)(c) speaks for itself. Further, North Wildwood is without knowledge and information sufficient to form a belief as to the truth of the allegations regarding any determination by the NJDEP alleged therein.

2022 Emergency Authorization Application

21. North Wildwood admits that on October 5, 2022 Peter Lomax, of the Lomax Consulting Group, submitted on behalf of North Wildwood an Emergency Authorization Application, the terms of both of which speak for themselves, including the fact that Mr. Lomax's e-mail references that the Emergency Authorization Application "specifically addresses the considerations [the NJDEP] highlighted in [its] email yesterday."

22. Admitted.

23. Admitted.

24. North Wildwood admits that the NJDEP emailed Mr. Lomax on October 4, 2022 regarding the Emergency Authorization Application. The terms of said email speak for itself. Further, the terms of N.J.A.C. 7:7-10.3(b) speaks for itself.

25. The allegations set forth in improperly numbered paragraph 25 of the Verified Complaint set forth legal conclusions to which no response is required. Further, N.J.A.C. 7:7-21.1 speaks for itself.

26. Admitted.

27. The terms of the October 5, 2022 Emergency Authorization Application speak for themselves.

28. The terms of both the Emergency Authorization Application and the 2020 permit application speak for itself.

29. North Wildwood admits only that the NJDEP incredulously and improperly determined that “North Wildwood did not meet any of the requirements for an emergency authorization for installing a bulkhead.” North Wildwood specifically denies the allegation that its EA request did not meet any of the requirements for installing a bulkhead.

30. North Wildwood admits only that the NJDEP incredulously and improperly denied North Wildwood’s Emergency Authorization Application. North Wildwood further avers that the NJDEP’s determinations set forth in improperly numbered paragraph 30 of the Verified Complaint will result in immediate and irreparable harm to North Wildwood and its citizens.

31. North Wildwood denies the false characterization set forth in improperly numbered paragraph 31 of the Verified Complaint that “no emergency situation exists.” Otherwise, the terms of N.J.A.C. 7:7-21.1, N.J.A.C. 7:7-1.1, and N.J.A.C. 7:7-15.11 speak for themselves.

32. North Wildwood admits only that the terms of Ms. Moriarty's October 12, 2022 e-mails sent to Peter Lomax at 3:47 p.m. speak for itself. However, North Wildwood vehemently denies, amongst other things, the improper conclusions set forth in said e-mail, particularly that "it has not been demonstrated that there is an imminent threat to the loss of life or property based on existing conditions."

33. The October 20, 2022, e-mail from the NJDEP to North Wildwood's counsel and the Mayor of North Wildwood referred to in improperly numbered paragraph 33 of the Verified Complaint speak for itself.

34. North Wildwood admits only that as a consequence of the NJDEP's incredulous and improper denial of its Emergency Authorization Application, and in order to secure the safety of its residents and property, which is of paramount concern to North Wildwood, North Wildwood could under no circumstances comply with the NJDEP's October 20, 2022 communication.

35. North Wildwood admits only that on October 20, 2022, the NJDEP issued a Notice of Violation ("NOV").

36. North Wildwood admits that Neil Yoskin, Esq. sent a response to the NJDEP regarding the NOV, as is set forth in improperly numbered paragraph 36 of the Verified Complaint. Mr. Yoskin's letter speaks for itself.

37. North Wildwood denies that the NJDEP has "continued its efforts to work with NWW to address its shoreline protection concerns."

**Stevens Institute of Technology Report Regarding Erosion
Analysis of the Dune System at 15th Avenue in NWW**

38. North Wildwood is without knowledge and information sufficient to form a belief as to the truth of the allegations set forth in improperly numbered paragraph 38 of the Verified Complaint.

39. North Wildwood is without knowledge and information sufficient to form a belief as to the truth of the allegations set forth in improperly numbered paragraph 39 of the Verified Complaint.

40. North Wildwood denies the adequacy of any and all “opinions” formed by Mr. Miller referenced in improperly numbered paragraph 40 of the Verified Complaint, specifically but not limited to the opinion that “the dune system in this area is adequate to protect upland infrastructure” and the incredulous and unsustainable “opinion” that “the need for a continuous bulkhead is not apparent.”

COUNT I

**Violation of the Coastal Zone Management Rules, Freshwater Wetland Rules
and the Coastal Area Facilities Review Act (All Defendants)**

41. North Wildwood repeats its responses to the foregoing paragraphs of the Verified Complaint as if set forth herein at length.

42. North Wildwood admits that on October 5, 2022, it submitted an Emergency Authorization Application, the terms of which speak for itself.

43. North Wildwood admits that on October 7, 2022, the NJDEP authorized, amongst other things, the use of certain temporary jersey barriers, the terms of which the October 7, 2022, authorization speak for itself.

44. North Wildwood admits that on October 12, 2022, the NJDEP denied North Wildwood's remaining portions of its Emergency Authorization Application to install a bulkhead, conduct scarp reshaping of the oceanside of the dune, and make repairs to the 25th Avenue vehicular access.

45. Denied.

46. Denied.

47. Denied.

48. Denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The NJDEP's Verified Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Moriarty e-mail dated October 12, 2022, pertaining to the Emergency Authorization Application is not a final agency determination of the NJDEP and North Wildwood has not waived any right to appeal the denial of the Emergency Authorization Application to the Appellate Division.

THIRD AFFIRMATIVE DEFENSE

The NJDEP's denial of the Emergency Authorization Application was without any justifiable basis because North Wildwood demonstrated that there existed an imminent threat to the loss of life or severe loss of property following Hurricane Ian, or an ongoing threat to the loss of life or property, as required by the Coastal Zone Management Rules.

FOURTH AFFIRMATIVE DEFENSE

At the time of the submission of the Emergency Authorization Application there was not a substantial dune and beach berm which remained that could have provided sufficient shore protection, and since that time the condition of the dune and berm has only deteriorated even more significantly.

FIFTH AFFIRMATIVE DEFENSE

The NJDEP materially breached its obligations under certain State Aid Agreements with North Wildwood and said material breaches have proximately caused significant damage to North Wildwood.

SIXTH AFFIRMATIVE DEFENSE

North Wildwood historically sought to employ various methodologies short of installing a bulkhead all of which have proven to be ineffective while North Wildwood's installation of bulkheads historically has, in fact, proven to be highly effective in providing significant shore protection.

SEVENTH AFFIRMATIVE DEFENSE

The trial court is required to conduct an evidentiary hearing to resolve factual disputes where there are contested issues of fact, as is the case here, regarding North Wildwood's ability to comply or compliance with the NJDEP's order.

EIGHTH AFFIRMATIVE DEFENSE

The court is empowered to invoke its equitable relief to declare and adjudge that North Wildwood should be permitted to install the emergency bulkhead in question.

NINTH AFFIRMATIVE DEFENSE

There exists little, if any, risk of immediate irreparable harm to the environment if North Wildwood installs the subject bulkhead. Indeed, the installation of the subject bulkhead will only serve to best protect what little dune environment is left specifically because the proposed bulkhead will be installed well behind the subject dune system.

TENTH AFFIRMATIVE DEFENSE

The proposed bulkhead complies N.J.A.C. 7:7 with N.J.A.C. 7:7-15.11.

ELEVENTH AFFIRMATIVE DEFENSE

At all times relevant to this matter, the NJDEP failed to act reasonably in assisting North Wildwood to implement adequate shore protection and beach erosion measures to the point that North Wildwood was, by every objective measure, treated different than all other surrounding coastal municipalities.

TWELFTH AFFIRMATIVE DEFENSE

The NJDEP's claims are barred by the doctrine of laches, unclean hands, and/or waiver.

THIRTEENTH AFFIRMATIVE DEFENSE

At all times relevant to this matter, North Wildwood acted reasonably and in good faith in furtherance of its obligation to protect the safety and welfare of its residents and their property.

FOURTEENTH AFFIRMATIVE DEFENSE

The proposed area in question is an erosion hazard area as defined by N.J.A.C. 7:7-9.19, and the proposed bulkhead project satisfies N.J.A.C. 7:7-19.9(b)(2).

FIFTEENTH AFFIRMATIVE DEFENSE

The NJDEP was authorized pursuant to N.J.A.C. 7:7-21.3(f) to establish a timeframe greater than 30 days for the installation of the proposed bulkhead and as such there was no basis

to deny the Emergency Authorization Application simply because it could not be completed in 30 days.

SIXTEENTH AFFIRMATIVE DEFENSE

North Wildwood reserves its right to add, alter and/or amend their defenses and affirmative defenses as the course of discovery so requires.

WHEREFORE, Defendant City of North Wildwood demands judgment in its favor and against Plaintiff, New Jersey Department of Environmental Protection:

- (a) dismissing the NJDEP's Verified Complaint with prejudice;
- (b) Awarding North Wildwood all taxable costs;
- (c) Awarding North Wildwood their attorneys' fees and litigation costs; and
- (d) Granting North Wildwood any further or other relief as the Court finds just and proper, together with costs of suit, reasonable attorneys' fees, and any further relief that this court may deem just and proper.

DEMAND FOR PRODUCTION OF DOCUMENTS

Pursuant to Rule 4:18-2, North Wildwood demands that NJDEP produce all documents referenced in its Verified Complaint within five (5) days of the date hereof.

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:25-4, Anthony S. Bocchi, Esq. has been designated as trial counsel on behalf of North Wildwood.

COUNTERCLAIM

Defendant-Counterclaimant the City of North Wildwood (hereafter, “North Wildwood”), by way of Counterclaim against Plaintiff, the New Jersey Department of Environmental Protection (hereafter, the “NJDEP”), hereby states as follows:

SUMMARY OF ACTION

1. By this action, North Wildwood respectfully seeks that the Court declare and adjudge that it may take appropriate measures to, among other things, install approximately 1,147 linear feet of steel bulkhead beginning between 12th and 13th Avenues and extending to 16th Avenue. This measure is unquestionably needed to protect not only the health and safety of North Wildwood’s residents, but also its utility and public safety infrastructure. Without the Court’s immediate intervention, North Wildwood will suffer immediate and irreparable harm because a breach condition is imminent where there has been a loss of greater than 75% of the protective dune system in the subject area and the loss of a defined beach berm.

2. The record will reflect that the NJDEP has, for reasons which remain unjustifiable, stifled North Wildwood’s ability to adequately protect itself and ameliorate the devastating effects of beach erosion which has decimated North Wildwood, including most recently with Hurricane Ian.

3. North Wildwood, like the rest of the world, is faced with unprecedented weather systems caused, in part, by climate change. Our sea levels are rising at alarming rates never seen before, and at the same time our communities are compelled to prepare for and defend against destructive weather systems that can wreak irreparable havoc on communities within a matter of minutes.

4. North Wildwood has, without any justifiable basis, been thwarted by the NJDEP through its incredulous determinations, most recently its denial of North Wildwood's Emergency Authorization Application submitted in October 2022 (hereafter, the "2022 Emergency Authorization Application"), which sought, among other things, the installation of 404 linear feet of steel bulkhead between 15th and 16th Avenues.

5. Since the inception of this case, however, North Wildwood's beach conditions have only worsened. For a number of reasons, including the continued erosion of North Wildwood's beach, North Wildwood submitted a second Emergency Authorization Application on February 10, 2023 (hereafter, the "2023 Emergency Authorization Application").

6. The 2023 Emergency Authorization Application seeks, among other things, the installation of approximately 1,147 linear feet of steel bulkhead beginning between 12th and 13th Avenues and extending to 16th Avenue.

7. Indeed, in its submission to the court, the NJDEP characterizes North Wildwood as acting "in defiance to the DEP" while at the same time advocating "there is no emergency situation." Both of these contentions will be easily demonstrated as patently false.

8. The narrative of a "rogue" community acting in defiance of a state agency is belied by a record that makes clear that North Wildwood has continually sought the NJDEP's blessing on measures sought to protect the residents of North Wildwood.

9. For whatever reason, the NJDEP has used the underlying regulatory scheme as a sword against North Wildwood, literally preventing North Wildwood from taking necessary measures to protect its shores and its citizens in the face of a situation that literally gets worse as each day passes.

10. Indeed, as described further herein, the NJDEP's actions as applied to North Wildwood have quite literally been in breach of certain State Aid Contracts which have caused North Wildwood to expend more than \$21,000,000 in budgetary funds because of the NJDEP's refusal to assist North Wildwood through these perilous times.

11. Immediate court intervention in the form of injunctive relief is required granting North Wildwood the immediate right to build the subject bulkhead as proposed in the 2023 Emergency Authorization Application as a barrier to protect what little remains of the beach – a mere thirty (30) feet of sand dunes between buildings and pounding waves.

12. In addition, the NJDEP should be compelled to reimburse North Wildwood the \$21,000,000 in funds it has been forced to expend due to the NJDEP's failure to abide by the various State Aid Contracts it entered into with North Wildwood, the most recent of which was signed by North Wildwood in 2021, that should have provided North Wildwood with significant financial assistance in addressing the serious shore protection measures required of North Wildwood to stave off beach erosion and flooding.

13. In sum, the installation of a bulkhead is an absolutely necessary emergency shore protection measure and North Wildwood's application to the NJDEP for an Emergency Authorization Application for permission to install the proposed bulkhead should not have been denied. This Court – exercising its equitable jurisdiction – should allow North Wildwood to undertake this essential emergency measure. Additionally, the court should compel the NJDEP to reimburse North Wildwood for the in excess of \$21,000,000 North Wildwood has had to bear because of the NJDEP's material breaches of the State Aid Agreements and other wrongful actions as it pertains to North Wildwood's beach renourishment and shore protection efforts.

THE PARTIES

14. North Wildwood is a municipal corporation organized under the laws of the State of New Jersey, with a principal place of business at 901 Atlantic Avenue, North Wildwood, New Jersey 08260.

15. The NJDEP is a branch of the Executive Department of the State of New Jersey with its principal offices at 401 East State Street, Trenton, New Jersey.

JURISDICTION AND VENUE

16. The Superior Court has jurisdiction over suits arising under the Coastal Zone Management Rules (N.J.A.C. 7:7-21) and the Freshwater Wetlands Regulations (N.J.A.C. 7:7A-14).

17. This matter is appropriate for the Court's discretion under Rule 4:67-1(b).

FACTS COMMON TO ALL COUNTS

North Wildwood's 2022 Emergency Authorization Application

18. On October 5, 2022, North Wildwood submitted its 2022 Emergency Authorization Application, which sought to install a bulkhead in the area of 15th and 16th Avenues.

19. At the time, the 2022 Emergency Authorization Application was filed in part due to the effects of Hurricane Ian which had stalled off the mid-Atlantic coast causing a sustained multiday period of significant coastal flooding throughout the region and more specifically catastrophic beach and dune erosion to North Wildwood's oceanfront.

20. The 2022 Emergency Authorization Application sought permission for the following five critical activities as a means of addressing the residual impacts of Hurricane Ian:

- 1) Immediate deployment of Jersey barriers (20' segments) in a 400 LF alignment extending from the 15th Avenue northern right-of-way limit line along the landward edge of dune to the 16th Avenue southern right-of-way limit line

- 2) Remove/relocate existing composite/timber decking walkway from in front of the building to facilitate Jersey barrier deployment
- 3) Reshape dune remnants, protecting existing dune vegetation to the maximum extent possible, to establish stabilized slopes secured landward by the Jersey barrier wall
- 4) Installation of 404 LF cantilevered steel bulkhead (coated) with timber cap
- 5) Reconstruct/stabilize vehicular/pedestrian access from 16th Avenue right-of-way to the beach

21. As set forth in the 2022 Emergency Authorization Application, Hurricane Ian had caused a sustained three-day period of significant coastal flooding throughout the New Jersey Shore with the most severe impacts affecting North Wildwood.

22. As further set forth in the 2022 Emergency Authorization Application, the subject area between 15th and 16th Avenues was severely compromised because of the loss of more than 75% of the protective dune system and no beach berm which resulted in an imminent breach condition. That is, as of the time the 2022 Emergency Authorization Application was submitted, there was no reliable shore protection in front of North Wildwood's Beach Patrol Building, which serves as a critical oceanfront safety facility with public access amenities.

23. The 2022 Emergency Authorization Application specifically notes that North Wildwood's then \$3.7 million investment in the 2022 beach renourishment via the NJDEP and USACE-approved sand backpassing project were completely depleted and that a dune breach was imminent.

24. As noted in the 2022 Emergency Authorization Application:

The final tally of sand moved from Wildwood beaches to the beaches of North Wildwood was provided by the Municipal Engineer at 361,221 cubic yards making this season's transfer the largest thus far in this "in-house" effort to restore a recreational and storm protection shoreline during this period of extensive oceanfront beach erosion manifesting itself in North Wildwood since the late 1990's.

25. The 2022 Emergency Authorization Application makes specific reference to North Wildwood acting in its capacity as a “steward of the municipal transportation, utility and public safety infrastructure.”

26. By letter dated October 12, 2022, the NJDEP notified North Wildwood that it was not authorizing the then remaining relief sought by the 2022 Emergency Authorization Application. The final agency determination in this regard was confirmed in writing by the NJDEP Commissioner La Tourette on December 1, 2022.

27. North Wildwood’s 2022 Emergency Authorization Application should not have been denied.

28. The denial of the 2022 Emergency Authorization Application was without any justifiable basis.

29. The NJDEP’s conclusion that North Wildwood failed to demonstrate an imminent threat to the loss of life or severe loss of property because “a substantial dune and beach berm remains in place offering sufficient shore protection” is, by every objective measure, wrong.

30. Today, there is effectively no dune and beach berm protection left in place between 15th and 16th Avenues.

31. At the time the 2022 Emergency Authorization Application was submitted in October, 2022, North Wildwood made clear that there was an absence of a defined beach berm and a loss of more than 75% of the protective dune system in front of North Wildwood’s Beach Patrol Building/Oceanfront Safety Facility. In view of this, it was determined that a breach condition was imminent.

32. Since that time, the situation has only worsened.

33. North Wildwood is now at the point where one moderate storm or even a few

smaller storms will almost certainly result in a breach.

34. Notably, there is only a few feet left of dune protection between the ocean and North Wildwood's critical infrastructure. Simply put, what little beach and dune system that remains between 15th and 16th Avenues will be unable to withstand the upcoming Nor'easter and winter storm seasons.

35. Consequently, North Wildwood requires the court's intervention to protect the citizens of North Wildwood from storm systems which can easily decimate its infrastructure and cause irreparable damage to North Wildwood.

North Wildwood's 2023 Emergency Authorization Application

36. In response to worsening beach conditions, and pursuant to Judge Blee's Order entered on February 1, 2023, North Wildwood filed its 2023 Emergency Authorization Application on February 10, 2023.

37. Since the inception of this litigation in December 2022, the existing conditions of North Wildwood's beach have only worsened.

38. At this point, 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.

39. Therefore, the risk of an imminent breach is no longer isolated to the 15th Avenue location in front of the Beach Patrol facility.

40. This is because the rate of erosion between 13th and 14th Avenues has exceeded expectations.

41. The proximity of JFK Boulevard and existing infrastructure within this right-of-way are at significant risk should a breach occur at 13th Avenue.

42. As noted in the 2023 Emergency Authorization Application, the cross-section area

losses in the dune located between 13th and 14th Avenue are now even more pronounced than at 15th Avenue.

43. In view of the foregoing, the 2023 Emergency Authorization Application seeks permission for the following six critical activities to address North Wildwood's beachfront erosion:

Project Area: midblock between 12th and 13th Avenues – 16th Avenue

- 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; and
- 6) Removal of the 15th Avenue ADA dune crossover beach access (if at risk of failure).

44. The expansion of the proposed emergency bulkhead is absolutely necessary to address the worsening conditions of North Wildwood's beach.

45. The severe erosion impacting North Wildwood will persist and is anticipated to continue.

46. As addressed in the 2023 Emergency Authorization Application, the nature and the cause of the threat to North Wildwood is recurrent storm damage, including during the October offshore passage of Hurricane Ian at which time the dune at 15th Avenue lost a majority of its mass, as well as subsequent unnamed coastal storm events prior to and following the October event which have continued to erode beach/dune sand reserves.

47. There has been significant loss of sand from both the beach berm and remnant dune

system which leaves 13th to 16th Avenues at peril and without an effective barrier to mitigate storm surges and associated wave action.

48. As set forth in the 2023 Emergency Authorization Application, the depletion of sand from North Wildwood's overall beach/dune system has reduced the elevation of the beach such that sections of the remnant dune mass are now located at the edge of normal wave runup at a normal high tide.

49. Any storm surge or spring tide with moderate to strong waves continues to erode into the dune toe.

50. The rate of loss and area of impact has accelerated and expanded, respectively.

51. The 2023 Emergency Authorization Application references the NJDEP's previous (and improper) denial of the 2022 Emergency Authorization Application. If the NJDEP had granted the 2022 Emergency Authorization Application, North Wildwood would be in a much better position to withstand the effects of increasing rates of erosion.

52. The installation of a protective bulkhead beginning between 12th and 13th Avenues and extending to 16th Avenue is critical to the protection of North Wildwood.

53. The installation of the bulkhead beginning between 12th and 13th Avenues and extending to 16th Avenue is an absolutely necessary response to an imminent threat to life and property.

54. North Wildwood cannot afford to do nothing in the midst of storm season and thereby face unprotected the next major storm – and thereby suffer a catastrophic loss of life or property as a result of the lack of an absolutely necessary shore protection measure.

55. It is well known that North Wildwood's beaches have suffered from a long history of beach erosion and that its shoreline has retreated since at least 1987.

56. North Wildwood's beachfront commenced retreat in 1987, and continued through 2005 during which a substantial portion of the beach was eroded and lost.

57. In the early 1990's, modifications to the City's stormwater collection system were constructed, which presently exist today, directing stormwater discharge to two outfall locations, one at 3rd Avenue and the other at 21st Avenue.

58. Shoreline retreat resulted in the need to modify these existing oceanfront stormwater outfalls due to the exposure of the supporting timber cribbing to unmitigated wave action and prevailing longshore currents.

59. Due to the beach width and beach berm elevation losses, several hundred linear feet has been removed from these outfalls at both 3rd Avenue and 21st Avenue.

60. Notwithstanding beach nourishment activity during 2009 and 2010, via hydraulic pumping of sand, and a series of sand harvesting operations from 2016 to present, multiple named storms, including Irene, Sandy, Jonas, and Ian, plus many other more moderate northeast coastal storm events, have significantly eroded the beach and dunes to a point whereby there is an imminent threat to a dune breach.

61. During the last decade, North Wildwood has tried to remediate the significant beach erosion issues North Wildwood has faced using various methods preferred by the NJDEP other than installation of bulkheads.

62. As demonstrated below, these efforts have cost North Wildwood excessive amounts of money all of which has effectively been squandered with no results that North Wildwood can point to. That is, all the methods we have employed short of installing a bulkhead have, unfortunately, been grossly ineffective.

63. By way of example, North Wildwood has repeatedly employed beach

renourishment efforts that have resulted in the placement of more than two million cubic yards of sand over the last decade at a cost in the amount \$18,380,815.

64. None of that sand remains on North Wildwood's beaches.

65. Additionally, North Wildwood has employed "backpassing" and hydraulic beach fill and, on occasion, have imported materials from quarries. These methods, while preferred by the NJDEP, have all proved futile in providing any coastal protection to North Wildwood.

66. By way of example, during the period of 2012 through 2019, North Wildwood completed a series of emergency beach fill projects harvesting sand from Wildwood Crest, Wildwood and Hereford Inlet. The sand volumes placed are as follows (CY = cubic yards):

- 2012 – 96,000 CY – Spring 2012
- 2013 – 150,530 CY – June 2012 Hydraulic Dredging
- 2014 – 2016 - 60,000 CY/Year
- 2016 – 15,000 CY – January 2016
- 2016 – 128,000 CY – Spring 2016
- 2016 – 30,000 CY – Fall 2016
- 2017 – 206,370 CY – Spring 2017
- 2018 – 155,000 CY – Spring 2018
- 2019 – 169,062 CY – Spring 2019

67. The above volumes total 1,129,962 CY of material, all of which have been lost due to persistent erosion. Notably, all of these methods were employed by North Wildwood with regulatory approvals from the United States Army Corp of Engineers, the NJDEP, and the U.S. Fish and Wildlife Service.

68. In further effort to combat the dire conditions, in the Spring of 2020 North Wildwood proceeded with another emergency sand back-pass project, followed by similar emergency sand back pass projects in Spring 2021 and Spring 2022. Sand volumes placed are as follows:

- 2020 – 210,000 CY – Spring 2020
- 2021 – 356,556 CY – Spring 2021
- 2022 – 361,221 CY – Spring 2022

69. The above volumes total 928,077 CY.

70. Combining the 2012 through 2019 renourishments, North Wildwood has harvested and placed 2,058,039 CY of same, none which on the beach as of this date.

71. The total amount of sand placed on the beach since 2010 is over 3.2 million cubic yards of material at a total cost of in excess of \$28.3 million.

72. This is effectively money lost to North Wildwood because these measures proved futile.

73. What has proven effective in North Wildwood's case, though, has been the installation of bulkheads from 3rd Avenue up to and including 13th Avenue.

74. Since 2012, North Wildwood has been compelled to install bulkheads which have been effective in protecting our residents from the devastating effects of coastal systems.

75. In 2012, North Wildwood installed steel bulkheads from 3rd Avenue to 4th Avenue. This installation of the bulkhead here immediately proved effective in providing significant coastal protection.

76. Thereafter, in 2018, after six years of employing the aforementioned methodologies, all of which were proven to be ineffective, North Wildwood expanded the

bulkhead from 5th Avenue to 7th Avenue. This immediately proved to be successful.

77. One year later, in 2019, because nothing else worked, North Wildwood once again was compelled to expand the bulkhead to from 7th Avenue to the midblock of 12th and 13th Avenues. Once again, this measure proved highly effective in providing coastal protection to the residents of North Wildwood.

78. It is important to recognize in almost every instance above, North Wildwood installed bulkheads behind the already existing manmade dune systems. That is, North Wildwood did not remove any dunes in any of the aforementioned bulkhead projects, but instead left whatever was left of them. This critical point is continuously ignored by the NJDEP.

79. It was against this backdrop that North Wildwood applied for the coastal permit application in 2020 referred to in the NJDEP's submission to the court. It was through this application that North Wildwood sought to legalize the bulkhead construction and to demonstrate to the NJDEP that North Wildwood's efforts were not only required, but effective.

80. For a variety of reasons, the 2020 permit application dragged on to the point where in October 2022, with the threat of the impending Nor'easter season upon us, North Wildwood felt compelled to seek the Emergency Authorization Application because there was little protection left between 15th and 16th Avenues.

81. As in the previous bulkhead projects, the proposed alignment of the steel bulkhead between beginning between 12th and 13th Avenues and extending to 16th Avenue has been strategically designed to facilitate construction/installation with the least amount of disturbance as possible to freshwater wetlands transition areas.

82. As noted in the 2023 Emergency Authorization Application, a freshwater wetlands transition area, as defined in the Freshwater Wetlands Protection Act Rules (N.J.A.C. 7:7A), serves

as “an ecological transition zone providing temporary refuge for freshwater wetlands fauna during high water episodes, critical habitat for animals dependent upon but not resident in freshwater wetlands, and slight variations of freshwater wetland boundaries over time due to hydrologic or climatologic effects.”

83. A Letter of Interpretation Line Verification (hereafter, the “LOI”) was issued by NJDEP on July 10, 2019, which verified the limits and resource value of the interdunal wetland area between 14th and 15th Avenues (NJDEP File No. 0507-03-0009.2 FWW180001).

84. Pursuant to the LOI, the NJDEP determined the aforementioned wetland area to be of intermediate resource value with an associated 50-foot transition area.

85. While not verified by an LOI, the immediately adjacent interdunal freshwater wetland between 13th to 14th Avenues exhibits similar characteristics as the verified wetland area between 14th to 15th Avenues.

86. As set forth in the 2023 Emergency Authorization Application, the freshwater wetlands transition areas between 13th and 15th Avenues do not function as such. No ecological benefit is achieved in changing the assigned transition area from 50 to 150 feet, especially given that established footprints of disturbance already exist within close proximity to these wetlands. Existing disturbances within a 50-foot transition area include a paved City street, concrete sidewalk, pre-existing timber bulkhead, concrete bike path, the Beach Patrol Headquarters building, and several beach access pathways, all of which limits the ecological function of the transition area.

87. Moreover, recurrent site investigations performed by The Lomax Consulting Group throughout this past growing season revealed no observations of listed or rare species within these features.

88. Thus, as set forth in the 2023 Emergency Authorization Application, the proposed bulkhead, designed to avoid/minimize disturbance to the maximum extent practicable, is not anticipated to adversely impact listed species habitat to the extent that the continued survival of such species or the essential corridors necessary for the movement of such species results.

89. It is noted in the 2023 Emergency Authorization Application that the bulkhead installation and location were specifically designed and selected to avoid, where possible, and minimize, where practical, disturbance to these isolated NJDEP-designated wetland features.

90. The 2023 Emergency Authorization establishes the presence of an imminent threat based on the progressive erosion of the beach and dune and further demonstrates that the activity will greatly benefit the public interest.

91. The protective bulkhead as proposed in the 2023 Emergency Authorization Application is the only practicable and feasible alternative which will provide expedited shore protection for the preservation of public and private property and infrastructure as demonstrated herein.

92. Installing the bulkhead further westward would create an impediment to reconstruct the beach access due to the required height of the bulkhead (elevation 12') versus the ground elevation of approximately 6'. It is noted the only other vehicular access to the beach is via 7th Avenue, but that access is frequently out of service due to persistent erosion and tidal conditions.

93. At the present time the dune protecting the lifeguard headquarters is susceptible to breach. Depending on the severity of the next storm event, the lifeguard headquarters could be undermined and damage well beyond the lifeguard facility would be probable.

94. For example, since the offshore passage of Hurricane Ian in early October 2022 and from subsequent less intense coastal storm events, the ADA dune walkover at 15th Avenue has

sustained significant damage due to ongoing erosion generated by the lack of beach berm.

95. Incrementally, the beach path at this location has eroded to the extent that the timber dune walkover structure terminates just short of the dune scarp.

96. Reconstruction of pre-existing beach accessways at 13th through 16th Avenues, as noted in the 2023 Emergency Authorization Application, is necessary for both public and emergency access, critical to oceanfront activity, public safety, 1st responders, and the DPW.

97. The primary drainage system for the east side of North Wildwood between Surf Avenue and the beach between 2nd and 16th Avenues is located along the beach front between 15th and 3rd Avenues with a major collection system on Ocean Avenue. Ocean Avenue is a localized low point.

98. A breach in the dune system could cause the drainage system to become inundated, resulting with capacity exceedance.

99. In addition, it would be likely for sand from the beach to wash into the drainage system, thereby rendering the system nonfunctional and resulting in widespread and potentially catastrophic flooding. This would result in significant damage to public and private infrastructure and extremely costly repairs.

100. If North Wildwood's drainage system became clogged with sand it would have to be replaced at a staggering cost exceeding approximately \$25 million. In addition, there could be the same or similar damage to North Wildwood's sanitary sewer system coming with similar or even higher replacement costs. Moreover, all properties would have to be vacated without a functioning sanitary sewer system.

101. As previously noted, North Wildwood's previous bulkhead projects since 2012 have proved to be the most prudent and effective measure employed in providing coastal

protection. Indeed, without the emergency bulkhead installation, North Wildwood's infrastructure and potentially extensive private infrastructure between 3rd Avenue and 13th Avenue would have been destroyed.

102. With the storm season upon us, North Wildwood cannot be restrained from constructing the emergency bulkhead beginning between 12th and 13th Avenues and extending to 16th Avenue. North Wildwood must be afforded the authority to be proactive in order to protect its infrastructure as was done in the past.

103. As made clear to the NJDEP in the 2022 and 2023 Emergency Authorization Applications, installing an emergency bulkhead would allow for the quickest and strongest level of protection to human life and property. Simply put, it is the most common-sense approach to the current situation that North Wildwood faces. That is, the installation of an emergency bulkhead under the beach's current conditions presents the fastest, least expensive, and longest serving solution to the problem of a potential dune breach.

104. An additional action is the failure complained of by North Wildwood are the failure of Defendant to carry out its statutory obligation to provide financial assistance for shore protection to North Wildwood and to carry out other acts in furtherance of a congressionally authorized joint state-federal shore protection project so that North Wildwood may fulfill its obligations to the citizens and residents of North Wildwood to maintain and replenish its beaches in the face of climate change, sea level rise, storms and related phenomena, and to provide public access in accordance with the statutes and common law of this state.

105. North Wildwood is an oceanfront community located on Five Mile Island, a barrier island in Cape May County. The entirety of North Wildwood's eastern shoreline is comprised of a beach which, being subject to the natural processes of a shoreline, is subject to erosion. The

erosional process has, for a multitude of reasons, accelerated over the past decade or more, as a consequence of which North Wildwood's beaches, in many locations, no longer exist or are dangerously narrow.

106. New Jersey's oceanfront beaches extend 127 miles from Cape May to Sandy Hook, spanning four counties and nearly 100 municipalities. North Wildwood's beach, as is the case with all oceanfront beaches, requires periodic restoration and nourishment.

107. As explained below, both the Federal Government and the State Government have long-standing programs for funding and conducting beach restoration and maintenance. The existence of these funding programs notwithstanding, North Wildwood has been forced to expend in excess of \$15 million over the past five years in an effort to restore and renourish its beaches, without any federal or state financial aid, with the exception of a single \$133,000 emergency grant in 2016. To the best of North Wildwood's knowledge, it is the only oceanfront community in New Jersey to not receive state or federal aid for shore protection.

The New Jersey Shore Protection Program

108. N.J.S.A. 12:6A-1, entitled "Beach Protection; powers", authorizes and empowers the NJDEP to:

...[R]epair, reconstruct, or construct bulkheads , seawalls, breakwaters , groins, jetties, beach fills, dunes and any or all appurtenant structures and work, on any and every shorefront along the Atlantic Ocean , in the state of New Jersey or any shorefront along the Delaware Bay and Raritan River, Raritan Bay, Barnegat Bay, Sandy Hook Bay , Shrewsbury River, including Nevesink River, Shark River , and the coastal inland waterways extending southerly from Manasquan inlet to Cape May Harbor, or any inlet, estuary or tributary waterway or any inland waterways adjacent to any inlet, estuary or tributary waterway along the shores of the state of New Jersey, **to prevent or repair damage caused by erosion and storm, or to prevent erosion of the shores and to stabilize the inlets or estuaries and to undertake any and all actions and work essential to the execution of this authorization and the powers granted hereby.**

[emphasis added]

109. N.J.S.A. 13:19-16.1, entitled “Shore protection fund; funding; use”, creates in the Department of Treasury a special non-lapsing fund to be known as the “Shore Protection Fund.” The statute requires that the monies in the fund be dedicated to projects for the protection, stabilization, restoration or maintenance of the State’s beaches and shorelines, and may be applied to the non-federal share of any State-Federal project. N.J.S.A. 13:19-16.1(b) also provides, in relevant part, that:

The requirements of subsection c. of Section 1 of P.L. 1997, c. 384 N.J.S.A. (13:19-16.2) notwithstanding, the Commissioner of Environmental Protection may, pursuant to appropriations made by law, allocate monies deposited in the fund for shore protection projects of an emergency nature, in the event of storm, stress of weather or similar act of God.

The Federal Shore Protection Program for New Jersey

110. The Federal Water Resources Development Act of 1986, Public Law 99-662, as amended by the Water Resources Development Act of 1999, Public Law 106-53, authorizes the Federal Government, through the U.S. Army Corps of Engineers, to undertake, in cooperation with the State of New Jersey, “the Hereford Inlet to Cape May Inlet, New Jersey Hurricane and Storm Damage Reduction Project, Project Number 6040-NW-1” (hereinafter “the Project”), a 50 year program for the reconstruction and periodic renourishment of beaches extending from Townsends Inlet in Northern Cape May County South to Cape May Inlet. The Legislation provides that the Federal Government will contribute 65% of the Federal Project cost, with the non-federal (i.e. state) sponsor responsible for 35%. The scope of the Federal Project includes the City of North Wildwood.

111. On February 1, 2016, The Assistant Secretary of the Army determined that the Project, including reconstruction and maintenance of approximately 4.5 miles of beaches and

dunes extended from Hereford Inlet in North Wildwood to Cape May Inlet in the south, was technically feasible, economically justified and environmentally acceptable.

112. Congress subsequently approved and authorized the estimated \$21,600,000 initial Project construction cost. Ordinarily, a municipality receiving aid for shore protection is required to pay 25% of the Department's 35% share of costs. However, in this case, the Project was authorized in part under the Federal Disaster Relief of Appropriations Act of 2013, as a consequence of which none of the municipalities were required to share the cost of the initial construction of the Project. The applicable federal statutes did, however, require that municipalities receiving aid to provide public access with regard to parking, restroom facilities, public access points and cross-overs to the beach.

113. On January 17, 2017, the Army Corps of Engineers and the Defendant, as the non-federal sponsor, entered into a Project Partnership Agreement for the purpose of undertaking the initial construction of the Project. The Agreement required, among other things, that the NJDEP obtain any easements required to implement the Project.

114. Typically, shore protection is accomplished using hydraulic pumping of sand from offshore borrow areas. It was decided however that, in the case of North Wildwood, a method called "backpassing" would be used instead. With backpassing, sand would be taken from locations in the City of Wildwood, where there was a surplus of sand, and placed in an area just offshore, where it would be hydraulically pumped to North Wildwood and distributed on the beaches there.

115. The hydraulic backpassing plan, for a variety of reasons, failed. It was decided that instead of pumping the sand, it would be trucked from Wildwood to North Wildwood. But because the NJDEP failed to obtain the easements necessary to implement the project (much of the beach

in Wildwood from which the sand was to be taken is privately owned), and because of other reasons having to do with the manner in which Corps projects get authorized, neither the State nor the Corps was willing to fund the work.

116. North Wildwood was instead left to its own devices. Between 2017 and 2021, the City's pleas for assistance from the NJDEP and the Corps went unheeded. Instead, it was forced to spend upwards of \$21 Million to truck sand from Wildwood in a largely unsuccessful effort to protect its beaches and dunes.

Hurricane Ian's Impacts on North Wildwood

117. North Wildwood's back passing operations became infeasible after Hurricane Ian caused catastrophic damage to the beach berm and dune system in October of 2022.

118. Hurricane Ian was a tropical storm event that had stalled off the mid-Atlantic coast causing a sustained multi-day period of significant coastal flooding throughout the region and, more specifically, potentially catastrophic beach and dune erosion to the North Wildwood oceanfront.

119. North Wildwood immediately sought to address the impacts of Hurricane Ian by filing an Emergency Authorization Application to the NJDEP for various forms of relief including, but not limited to, installing an emergency steel bulkhead between 15th and 16th Avenues. North Wildwood determined that installation of the emergency steel bulkhead was necessary to protect against the imminent threat of loss to human life and severe threat to the loss of property posed by having a severely compromised beach and dune system.

120. By way of this action, the NJDEP seeks to restrain North Wildwood from taking the foregoing actions. However, the NJDEP's proposed restraints will prevent North Wildwood from taking appropriate actions to protect its residents and its infrastructure.

The immediate installation of the protective bulkhead is a necessary interim measure until the USACE/NJDEP project provides a long-term remedy to the longstanding problem of the severe erosion of North Wildwood's beaches and dunes

121. It is expected that within the next few years the USACE and NJDEP will be expending in excess of \$20 million on a comprehensive remedy to the longstanding problem of the severe erosion of beaches and dunes of North Wildwood and adjoining municipalities.

122. The USACE/NJDEP project will use a combination of various coastal protection measures, including beach nourishment, bulkhead installation and dune creation. Moreover, the project will entail not just construction but long-term maintenance – backed by federal and state dollars. This is the long-term remedy to beach erosion that North Wildwood so desperately needs.

123. In the meantime, the immediate installation of the protective bulkhead is a necessary interim measure until the USACE/NJDEP project provides a long-term remedy to the longstanding problem of the severe erosion of North Wildwood's beaches and dunes.

124. As of the present date, North Wildwood has received 100% of the protective bulkhead materials in connection with the bulkhead as proposed in the 2022 Emergency Authorization Application. In this regard, North Wildwood is ready and able to commence installation of the bulkhead between 15th and 16th Avenues immediately.

125. In short, the installation of a protective bulkhead under the beach's current conditions presents the fastest, least expensive, and most effective interim solution to the immediate problem of severely eroded dunes and the irreparable harm to lives and property that would result in the event of a dune breach caused by even a moderate storm.

Since North Wildwood's Filing of its Motion for Leave to File a Counterclaim on January 4, 2023, the NJDEP has retaliated against North Wildwood by issuing North Wildwood three Administrative Orders and Notices of Civil Administrative Penalty Assessments (hereafter, "AONOCAPA") in the amount of \$12,818,182.00

126. On January 4, 2023, North Wildwood filed a Motion for Leave to File a Counterclaim Pursuant to R. 4:67-4 (hereafter, the "Motion").

127. The Counterclaim as proposed in the Motion sought, *inter alia*, \$21,000,000 in damages against the NJDEP.

128. Since North Wildwood filed its Motion, the NJDEP has issued three AONOCAPA's against North Wildwood.

129. On January 11, 2023 – seven (7) days after North Wildwood filed its Motion – the NJDEP issued an AONOCAPA in the amount of \$8,661,000.00 for alleged CAFRA violations, Flood Hazard Area Control Act violations, and Freshwater Wetland Protection Act violations dating back to 2020.

130. On January 24, 2023 – twenty (20) days after North Wildwood filed its Motion – the NJDEP issued a second AONOCAPA in the amount of \$2,941,000.00 for alleged CAFRA violations and Flood Hazard Area Control Act violations dating back to 2020.

131. On January 27, 2023 – twenty three (23) days after North Wildwood filed its Motion – the NJDEP issued a third AONOCAPA in the amount of \$1,216,182.00 for alleged construction and operation of a treatment works without a permit in 2020.

132. The AONOCAPA's total a sum of \$12,818,182.00 in fines assessed against North Wildwood.

133. The issuance of the AONOCAPA's against North Wildwood for alleged violations that occurred in 2020 is a retaliatory measure in response to North Wildwood's filing of its Motion.

134. Rather than allowing North Wildwood to install its emergency bulkhead to protect itself against severe erosion, the NJDEP has maliciously retaliated against North Wildwood by assessing millions of dollars in fines.

135. The NJDEP could have issued the AONOCAPA's in a timely manner when the alleged violations occurred in 2020. Yet, the NJDEP decided to wait more than two years to assess its fines, and did so only after North Wildwood filed its Motion.

136. The NJDEP's actions support the inference that it would not have issued the AONOCAPA's but for North Wildwood's filing of its Motion.

137. The NJDEP's actions further support the inference that its AONOCAPA's are meant to intimidate North Wildwood.

138. It is improper to issue AONOCAPA's to retaliate against or intimidate a New Jersey municipality.

139. If North Wildwood must turn square corners when dealing with the NJDEP, then it is also true, particularly when so much public interest is at stake, that the NJDEP must turn square corners when dealing with North Wildwood.

COUNT ONE
(Injunctive Relief)

140. North Wildwood incorporates by reference the allegations set forth above if as set forth here at length.

141. The NJDEP's refusal to allow North Wildwood's installation of a bulkhead between 15th and 16th Avenues constitutes an immediate and irreparable threat to North Wildwood's residents and infrastructure.

142. In the event that a storm breaches North Wildwood's decimated dune system, North Wildwood will experience catastrophic damage to its critical infrastructure. Moreover, private

properties located immediately adjacent to John F. Kennedy Beach Drive are at risk of facing deadly amounts of flooding.

143. If the foregoing occurs, which is imminent without the proposed steel bulkhead, North Wildwood could not be remedied by monetary damages alone.

144. North Wildwood must take action to secure its beaches and ensure its residents and infrastructure are well-protected throughout the incoming winter storm cycle.

WHEREFORE, North Wildwood demands that judgment be entered as follows:

- A. Allowing North Wildwood to install a bulkhead beginning between 12th and 13th Avenues and extending to 16th Avenue;
- B. Allowing North Wildwood to engage in further excavation, placement or regarding of sand between 14th and 16th Avenues;
- C. Allowing North Wildwood to engage in any other oceanfront construction, reshaping of dunes and/or reconstruction of the access point at 16th and 25th Avenue; and
- D. Such other relief that the Court deems just and equitable.

COUNT TWO
(Breach of Contract)

145. North Wildwood incorporates by reference the allegations set forth above if as set forth at length.

146. The State Aid Agreement between the DEP and North Wildwood, executed on November 16, 2021, provides that the NJDEP, in cooperation with North Wildwood, shall acquire perpetual easements for private properties necessary for construction, renourishment activities, and maintenance of the Hurricane and Storm Damage Reduction Project.

147. The NJDEP has breached their obligations under the State Aid agreement by failing to acquire required easements in connection with the Hurricane Storm Damage Reduction Project.

148. As a result of the NJDEP's failure to acquire the necessary easements under the State Aid Agreement, North Wildwood has been forced to spend over \$21,000,000.

149. As a result of the NJDEP's breach of the State Aid Agreement, the NJDEP has suffered and will continue to suffer damages.

WHEREFORE, North Wildwood demands that judgment be entered as follows:

- A. Reimbursement of all of the costs borne by North Wildwood in connection with funding the entirety of its beach restoration projects; and
- B. Such other relief that the Court deems just and equitable.

COUNT THREE
(Violation of the Public Trust Doctrine)

150. North Wildwood incorporates by reference the allegations set forth above if as set forth here at length.

151. P.L.2019, c. 81 provides in relevant part that "Pursuant to the Public Trust Doctrine, the State of New Jersey has a duty to promote, protect and safeguard the public's rights and ensure reasonable and meaningful public access to title waters and adjacent shorelines."

152. North Wildwood and the NJDEP have a mutual obligation to provide public beachfront access to the residents of North Wildwood and the citizens of New Jersey pursuant to the Public Trust Doctrine, both at common law and as codified at P.L. 2019, c. 81.

153. The NJDEP's failure to provide or to seek funding for the replenishment of North Wildwood's beaches, which has resulted in and will continue to result in all or a portion of North Wildwood's beaches being periodically closed to the public, constitutes a violation of the Public Trust Doctrine.

WHEREFORE, North Wildwood seeks declaratory judgment that:

- A. The failure of the NJDEP to satisfy its public access obligations are in violation of P.L. 2019, c. 81 and the Common Law of this State;
- B. That the NJDEP has an affirmative, ministerial, and nondiscretionary obligation to take any and all actions required to provide financial aid to North Wildwood; and
- C. Such other relief as the Court deems just and equitable.

COUNT FOUR
(Declaratory Judgment)

154. North Wildwood incorporates by reference the allegations set forth above if as set forth here at length.

155. The NJDEP's failure to provide financial assistance to North Wildwood by including such aid in the shore protection project priority ranking system pursuant to N.J.S.A. 13:19-6.2, its failure to provide emergency funding pursuant to N.J.S.A. 13:19-16.1(b) and its failure to obtain the easements required to implement the backpassing project were a breach of its affirmative, ministerial and non-discretionary statutory obligation to assist all New Jersey municipalities in circumstances presented here.

156. Additionally, the NJDEP's issuance of AONOCAPA's after North Wildwood filed its Motion constitutes retaliation and intimidation.

WHEREFORE, North Wildwood demands that judgment be entered as follows:

- A. The NJDEP has an affirmative duty under N.J.S.A. 12:6A-1 and N.J.S.A. 13:19-16.1(b) to take any and all steps necessary to provide financial assistance for shore protection North Wildwood;

- B. North Wildwood has no duty to pay any of the assessed fines referenced the AONOCAPA's that were issued after North Wildwood filed its Motion; and
- C. Such other relief that the Court deems just and equitable.

COUNT FIVE
(Nuisance)

157. North Wildwood incorporates by reference the allegations set forth above if as set forth here at length.

158. The State of New Jersey not only claims an interest in public trust lands, but exercises dominion over them through a statutory and regulatory scheme supported by jurisprudence.

159. The NJDEP's failure and refusal to invest the funds necessary to assist North Wildwood in maintaining its beaches in the manner contemplated by law in order to preserve public trust areas, and to instead allow them to erode and endanger both public and private property, constitutes a nuisance at common law.

160. North Wildwood, as a direct and proximate cause of the NJDEP's neglect of its lawful obligations and its maintenance of a continuing nuisance on public trust land, has suffered damages in the amount of approximately \$15 million, less any percentage of funds that it would have been required to pay as part of a cost sharing arrangement.

WHEREFORE, North Wildwood demands that judgment be entered as follows:

- A. That this Court determine that the NJDEP's actions constitute both a public and private nuisance for which it has liability as enumerated above;
- B. Preliminary and permanent injunction;
- C. Compensatory and consequential damages;
- D. Costs North Wildwood has expended in its attempts to abate the NJDEP's public

and private nuisances;

- E. Costs of suit;
- F. An award of reasonable attorneys' fees; and
- G. Such other relief as the Court may deem just and equitable.

COUNT SIX
(Violation of the Administrative Procedure Act)

161. North Wildwood incorporates by reference the allegations set forth above if as set forth here at length.

162. The Administrative Procedure Act ("APA", N.J.S.A. 52:14B-1 et seq.) sets forth the exclusive procedure by which state agencies may propose and adopt regulations; procedures which includes the publication of a Notice of Adoption in the New Jersey Register, accompanied by an explanatory comments and response document.

163. The failure of the NJDEP to propose and adopt as regulations the limitation on the use of state aid for shore protection projects as described on its website, except as the non-federal share of a federally undertaken project pursuant to the Administrative Procedure Act, is a violation of the APA.

164. The NJDEP's use of AONOCAPA's to retaliate against a New Jersey municipality is inconsistent with the purpose of the Administrative Procedure Act.

WHEREFORE North Wildwood seeks a declaratory judgment that:

- A. The NJDEP's adoption of the aforesaid limitation violates the Administrative Procedure Act, the provisions of N.J.S.A. 13:19-16.1 and 16.2 notwithstanding;
- B. North Wildwood has no duty to pay any of the assessed fines referenced in the AONOCAPA's that were issued after North Wildwood filed its Motion; and

C. Such other relief that the Court deems just and equitable.

CULLEN & DYKMAN LLP

*Attorneys for Defendant-Counterclaimant City of
North Wildwood*

/s/ Anthony S. Bocchi

By: _____

ANTHONY S. BOCCHI

Dated: February 17, 2023

CERTIFICATION

I hereby certify in accordance with New Jersey Civil Practice Rule 4:5-1 that to the best of my knowledge, information and belief the instant matter in controversy is not the subject of any other action pending in any court or of a pending arbitration, and that no other parties should be joined in this action.

CULLEN & DYKMAN LLP

Attorneys for Defendant-Counterclaimant City of North Wildwood

/s/Anthony S. Bocchi

By: _____
ANTHONY S. BOCCHI

Dated: February 17, 2023

CERTIFICATION OF SERVICE

I hereby certify that on March 20, 2023 a true copy of the Department of Environmental Protection's Opposition to the City of North Wildwood's Motion for a Determination as to the Court's Jurisdiction Over the February 10, 2023 Emergency Authorization Application and Certification of Dianna E. Shinn, DAG, with exhibits, were served on the following recipient via JEDS and by e-mail:

Anthony S. Bocchi, Esq.
CULLEN AND DYKMAN LLP
Continental Plaza
433 Hackensack Avenue
Hackensack, New Jersey 07601
Attorney for Defendant City of North Wildwood.

I further certify that all of the following statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

/s/ Dianna E. Shinn
Dianna E. Shinn
Deputy Attorney General

Dated: March 20, 2023