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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 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 again 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