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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

**DEFENDANT, CITY OF NORTH WILDWOOD'S NOTICE OF MOTION
SEEKING LEAVE TO FILE A COUNTERCLAIM PURSUANT
TO R. 4:67-4**

Oral argument requested

To: Matthew J. Platkin
Attorney General of New Jersey
25 Market Street, PO Box 093
Trenton, NJ 08625-0093
By: Kevin A. Terhune (046601996)
Dianna E. Shinn (242372017)
Deputy Attorneys General
Attorneys for Plaintiff, New Jersey
Department of Environmental Protection

COUNSELORS:

PLEASE TAKE NOTICE that on January 20, 2023, the undersigned attorneys for

Defendant City of North Wildwood (hereafter, "North Wildwood"), will move before the Superior Court of New Jersey, Chancery Division, Cape May County, at the Courthouse, 9 North Main Street, Cape May, New Jersey (or, in the alternative, via teleconference) for an entry of an Order granting North Wildwood's motion seeking leave to file a counterclaim pursuant to R. 4:67-4. In connection with its motion, North Wildwood will rely on: (1) Certification of Anthony S. Bocchi, Esq., (2) Letter Brief, and (3) proposed form of Order.

PLEASE TAKE FURTHER NOTICE that, pursuant to R. 1:6-2(d), North Wildwood hereby requests oral argument.

CULLEN AND DYKMAN LLP
Attorneys for Defendant
City of North Wildwood

By:



Anthony S. Bocchi, Esq.

Date: January 4, 2023

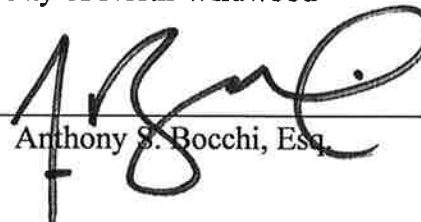
CERTIFICATION OF SERVICE

I hereby certify that on January 4, 2023 a true copy of North Wildwood's: (1) Notice of Motion; Certification of Anthony S. Bocchi, Esq; and proposed Order were served on the following recipients via JEDS:

Matthew J. Platkin
Attorney General of New Jersey
25 Market Street, PO Box 093
Trenton, NJ 08625-0093
By: Kevin A. Terhune (046601996)
Dianna E. Shinn (242372017)
Deputy Attorneys General
Attorneys for Plaintiff, New Jersey
Department of Environmental Protection

I further certify that all of the foregoing 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.

CULLEN AND DYKMAN LLP
Attorneys for Defendant
City of North Wildwood

By: 
Anthony S. Bocchi, Esq.

Dated: January 4, 2023

Anthony S. Bocchi, Esq. (Bar No. 005602006)
Neil Yoskin, Esq. (Bar No. 002091982)
Steven Siegel, Esq. (Bar No. 034141992)
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**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

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vs.

**CITY OF NORTH WILDWOOD, “XYZ
CONTRACTORS” 1-10, “JOHN
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Defendants.

**SUPERIOR COURT OF NEW JERSEY
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Docket No. C-55-22

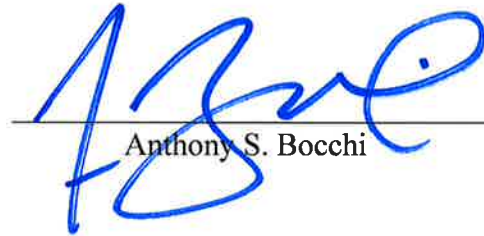
Civil Action

**CERTIFICATION OF ANTHONY S.
BOCCHI, ESQ. IN SUPPORT OF
DEFENDANT CITY OF NORTH
WILDWOOD’S MOTION FOR LEAVE
TO FILE A COUNTERCLAIM
PURSUANT TO R. 4:67-4**

ANTHONY S. BOCCHI, of full age, hereby certifies as follows:

1. I am an attorney at law of the State of New Jersey and a partner with the law firm of Cullen and Dykman LLP, attorneys for Defendant, City of North Wildwood (hereafter “North Wildwood”), in the within matter.
2. I make this Certification in support of North Wildwood’s Notice of Motion for Leave to file a Counterclaim Pursuant to R. 4:67-4.
3. Annexed hereto as **Exhibit A** is North Wildwood’s proposed Counterclaim.

I certify that the foregoing 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.



Anthony S. Bocchi

Date: January 4, 2023

EXHIBIT A

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

**CITY OF NORTH WILDWOOD’S
ANSWER, AFFIRMATIVE DEFENSES,
AND COUNTERCLAIM**

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

STATEMENT OF THE CASE

1. Denied.
2. Admitted.
3. NWW admits only that in response to NWW’s EA request, DEP “determined there was neither an imminent nor ongoing threat to the loss of life or severe loss of property ...”
4. NWW admits only that as a direct consequence of DEP’s incredulous denial of its EA, NWW 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. NWW 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 NWW and, therefore, NWW neither plead nor respond thereto.

10. The allegations set forth in Paragraph 10 of the Verified Complaint are not directed at NWW and, therefore, NWW neither plead nor respond thereto.

JURISDICTION AND VENUE

(The allegations moving forward in the Verified Complaint were improperly numbered by DEP from this point on. For clarity purposes, NWW will refer to the paragraph numbers using the misnumbered DEP 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. NWW denies that this matter involves a “final agency order.”

9. NWW 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

NWW'S 2020 Beach Front Bulkhead Project Application

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

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

12. The terms of the November 20, 2020 permit application and the October 5, 2020 EA application speak for themselves. All other characterizations by the DEP 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. NWW 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, NWW neither plead 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 NWW and, therefore, NWW neither plead nor respond thereto.

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

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

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

2022 EA Application

21. NWW admits that on October 5, 2022 Peter Lomax submitted on behalf of NWW an EA submission package, the terms of both of which speak for themselves, including the fact that Mr. Lomax's e-mail references that the EA submission "specifically addresses the considerations [the DEP] highlighted in [its] email yesterday."

22. Admitted.

23. Admitted.

24. NWW admits that DEP emailed Mr. Lomax on October 4, 2022 regarding the EA request. 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 EA request speak for themselves.

28. The terms of both the EA request and the 2020 permit application speak for itself.

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

30. NWW admits only that the DEP incredulously and improperly denied NWW’s EA request. NWW further avers that the DEP’s determinations set forth in improperly numbered paragraph 30 of the Verified Complaint will result in immediate and irreparable harm to NWW and its citizens.

31. NWW 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. NWW 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, NWW 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 DEP to NWW’s counsel and the Mayor of NWW referred to in improperly numbered paragraph 33 of the Verified Complaint speak for itself.

34. NWW admits only that as a consequence of the DEP’s incredulous and improper denial of its EA, and in order to secure the safety of its residents and property, which is of paramount concern to NWW, NWW could under no circumstance comply with DEP’s October 20, 2022 communication.

35. NWW admits only that on October 20, 2022, DEP issued a Notice of Violation (“NOV”).

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

37. NWW denies that DEP 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. NWW 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. NWW 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. NWW 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. NWW repeats its responses to the foregoing paragraphs of the Verified Complaint as if set forth herein at length.

42. NWW admits that on October 5, 2022, it submitted an EA request, the terms of which speak for itself.

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

44. NWW admits that on October 12, 2022, DEP denied NWW's remaining portions of its EA request to install a bulkhead, scarp reshaping of the oceanside of the dune, and repair of the 25th Avenue vehicular access.

45. Denied.

46. Denied.

47. Denied.

48. Denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

DEP'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 is not a final agency determination of the DEP and North Wildwood has not waived any right to appeal the denial of the Emergency Authorization to the Appellate Division.

THIRD AFFIRMATIVE DEFENSE

DEP's denial of the Emergency Authorization was without any justifiable basis because North Wildwood demonstrated 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 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

DEP 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 DEP'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, DEP 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.

TWELTH AFFIRMATIVE DEFENSE

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

THIRTEENTH AFFIRMATIVE DEFENSE

At all times relevant to this matter, NWW 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 DEP 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 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 DEP'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, NWW demands that DEP 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 NWW.

CULLEN & DYKMAN LLP

Attorneys for Defendant-Counterclaimant City of North Wildwood

By: _____
ANTHONY S. BOCCHI

Dated: January 4, 2023

COUNTERCLAIM

Defendant-Counterclaimant the City of North Wildwood (“North Wildwood”), by way of Counterclaim against Plaintiff, the New Jersey Department of Environmental Protection (“DEP”), 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 404 linear feet of steel bulkhead between 15th and 16th Avenues. 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 the DEP 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. Like the rest of the world, North Wildwood 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. Without any justifiable basis, North Wildwood has been thwarted by the DEP through its incredulous determinations, most recently its denial of North Wildwood's Emergency Authorization submitted in October 2022, which sought, among other things, the installation of 404 linear feet of steel bulkhead between 15th and 16th Avenues.

5. Indeed, in its submission to the court, the DEP 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.

6. 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 DEP's blessing on measures sought to protect the residents of North Wildwood.

7. For whatever reason, the DEP 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.

8. Indeed, as described further herein, the DEP'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 DEP's refusal to assist North Wildwood through these perilous times.

9. Immediate court intervention in the form of injunctive relief is required granting North Wildwood the immediate right to build the subject bulkhead as a barrier to protect what little

remains of the beach – a mere thirty (30) feet of sand dunes between buildings and pounding waves.

10. In addition, the DEP should be compelled to reimburse North Wildwood the \$21,000,000 in funds it has been forced to expend due to the DEP's failure to abide by the State Aid Contract it entered into with North Wildwood 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.

11. In sum, the installation of a bulkhead is an absolutely necessary emergency shore protection measure and North Wildwood's application to DEP for an Emergency Authorization 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 DEP to reimburse North Wildwood for the in excess of \$21,000,000 North Wildwood has had to bear because of the DEP'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

12. 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.

13. DEP 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

14. 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).

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

FACTS COMMON TO ALL COUNTS

16. On October 5, 2022, North Wildwood submitted an Emergency Authorization request to install a bulkhead in the area of 15th and 16th Avenues.

17. At the time, the Emergency Authorization was filed in part due to 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.

18. The Emergency Authorization 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

19. As set forth in the Emergency Authorization, 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.

20. As set forth in the Emergency Authorization, 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 as, as of the time the Emergency Authorization 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.

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

22. As noted in the Emergency Authorization:

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.

23. The Emergency Authorization makes specific reference to North Wildwood acting in its capacity as a "steward of the municipal transportation, utility and public safety infrastructure."

24. By letter dated October 12, 2022, DEP notified North Wildwood that it was not authorizing the then remaining parts of the Emergency Authorization. The final agency determination in this regard was confirmed in wiring by DEP Commissioner La Tourette on December 1, 2022.

25. The installation of the bulkhead between 15th and 16th Avenues is critical to the protection of North Wildwood.

26. The installation of the bulkhead between 15th and 16th Avenues is an absolutely necessary response to an imminent threat to life and property.

27. 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.

28. North Wildwood's application to DEP for an Emergency Authorization for permission to install the proposed bulkhead should not have been denied.

29. The denial of the subject Emergency Authorization was without any justifiable basis.

30. The DEP'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.

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

32. At the time the Emergency Authorization application was submitted in October, 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, we determined that a breach condition was imminent.

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

34. We are now at the point where one moderate storm or even just a couple smaller

storms will result in a breach.

35. 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 impending Nor'easter and winter storm seasons.

36. Consequently, we require the court's intervention to protect the citizens of North Wildwood from storm systems which can easily decimate our infrastructure and cause irreparable damage to the City.

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

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

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

40. 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.

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

42. Additionally, North Wildwood has employed "backpassing" and hydraulic beach fill and, on occasion, have imported materials from quarries. These methods, while preferred by

DEP, have all proved futile in providing any coastal protection to North Wildwood.

43. 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

44. 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 DEP, and with U.S. Fish and Wildlife.

45. 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

46. The above volumes total 928,077 CY.

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

48. 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.

49. This is effectively money lost to North Wildwood because these measures provide futile.

50. 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.

51. 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.

52. 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.

53. 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.

54. 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.

55. It is important to recognize in 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 DEP.

56. It was against this backdrop that North Wildwood sought the permit application in 2020 referred to in DEP's submission to the court. It was through this application that North Wildwood sought to demonstrate to the DEP that North Wildwood's efforts were not only required, but effective.

57. For a variety of reasons, the 2020 permit application dragged on to the point where in October 2021, with the threat of the impending Nor'easter season upon us, North Wildwood felt compelled to seek the EA because there was little protection left between 15th and 16th Avenues.

58. As in the previous bulkhead projects, the proposed alignment of the steel bulkhead between 15th and 16th Avenues has been strategically designed to facilitate construction/installation with the least amount of disturbance as possible.

59. The entire proposed bulkhead is located behind the dune system, as has consistently been the case with prior emergency bulkhead installations. The bulkhead cannot be constructed any further west toward the beach patrol building without causing significant damage to the facility during installation due to the magnitude of vibration required to drive the bulkhead sheet piling.

60. Specifically, it is acknowledged there are wetlands, albeit of minimal resource value, located to the north of the beach patrol building and North Wildwood is proposing to start/end the bulkhead at the mapped (DEP approved) limit of freshwater wetlands transition area, which is effectively a buffer from the actual wetlands.

61. In addition, the south end of the proposed bulkhead is intentionally designed to be constructed within the vehicle/pedestrian dune crossover behind the actual dune to enable

continued safe access to the beach, particularly safe emergency and public safety access. The beach access would immediately be reconstructed as soon as the bulkhead was installed to minimize the interruption in access.

62. 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 access to the beach is via 7th Avenue, but that access is frequently out of service due to persistent erosion and tidal conditions.

63. 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.

64. The primary drainage system for the east side of the City 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.

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

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

67. 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 the City'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.

68. 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.

69. With the storm season upon us, North Wildwood cannot be restrained from constructing the emergency bulkhead between 15th and 16th Avenues. North Wildwood must be afforded the authority to be proactive in order to protect its infrastructure as was done in the past.

70. As made clear to the DEP in the EA, installing the emergency bulkhead between 15th and 16th Avenues 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.

71. An additional action 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.

72. 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.

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

74. 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

75. N.J.S.A. 12:6A-1, entitled "Beach Protection; powers", authorizes and empowers DEP 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]

76. 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

77. 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.

78. 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.

79. 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.

80. 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 DEP obtain any easements required to implement the Project.

81. 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.

82. 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 DEP 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.

83. North Wildwood was instead left to its own devices. Between 2017 and 2021, the City's pleas for assistance from DEP 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

84. 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.

85. 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.

86. North Wildwood immediately sought to address the impacts of Hurricane Ian by filing an Emergency Authorization to the DEP 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.

87. By way of this action, DEP seeks to restrain North Wildwood from taking the foregoing actions. However, DEP'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

88. 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.

89. 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.

90. 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.

91. As of the present date, North Wildwood has received approximately 25% of the protective bulkhead materials, which is sufficient to commence the proposed bulkhead installation project immediately. North Wildwood expects to receive the balance of the materials for the bulkhead within two to three weeks. The installation of the bulkhead can begin immediately and likely can seamlessly continue through to substantial completion within 30 days.

92. 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.

COUNT ONE
(Injunctive Relief)

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

94. DEP'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.

95. 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.

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

97. 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 between 15th and 16th Avenues.
- 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.

COUNT TWO
(Breach of Contract)

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

99. The State Aid Agreement between the DEP and North Wildwood, executed on November 16, 2021, provides that the DEP, 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.

100. DEP has breached their obligations under the State Aid agreement by failing to acquire not a single easement in connection with the Hurricane Storm Damage Reduction Project.

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

102. As a result of DEP's breach of the State Aid Agreement, DEP 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.

COUNT THREE
(Public Trust Doctrine)

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

104. 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.”

105. North Wildwood and DEP 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.

106. DEP’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, Plaintiff City of North Wildwood requests that this Court grant declaratory relief that the failure of Defendant to satisfy its public access obligations are in violation of P.L. 2019, c. 81 and the Common Law of this State, and that Defendant has an affirmative, ministerial, and nondiscretionary obligation to take any and all actions required to provide financial aid to Plaintiff.

CULLEN & DYKMAN LLP

*Attorneys for Defendant-Counterclaimant City of
North Wildwood*

By: _____
ANTHONY S. BOCCHI

Dated: January 4, 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*

By: _____
ANTHONY S. BOCCHI

Dated: January 4, 2023

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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

**ORDER GRANTING DEFENDANT, CITY
OF NORTH WILDWOOD, LEAVE TO
FILE A COUNTERCLAIM PURSUANT TO
R. 4:67-4**

THIS MATTER having been opened to the Court by Cullen and Dykman LLP, attorneys for Defendant, City of North Wildwood (hereafter, "North Wildwood"), Anthony S. Bocchi, Esq. appearing, by way of motion seeking the entry of an Order granting North Wildwood leave to file a Counterclaim pursuant to R. 4:67-4, on notice to Matthew J. Platkin, Esq., Attorney General of the State of New Jersey (Kevin A. Terhune, Deputy Attorney General and Dianna E. Shinn, Deputy Attorney General, appearing), counsel for Plaintiff, New Jersey Department of Environmental Protection; and the Court having considered the papers submitted in support of and in opposition to the requested relief; and the arguments of counsel; and good cause having been shown

IT IS on this ____ day of January 2023:

ORDERED that Defendant, City of North Wildwood, is hereby granted leave to serve and file a Counterclaim pursuant to R. 4:67-4 within three (3) days of the date of this Order; and it is further

ORDERED that Defendant shall serve a copy of this Order upon all interested parties within one (1) day of the entry of this Order.

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

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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

CERTIFICATION OF SERVICE

ANTHONY S. BOCCHI, of full age, certifies as follows:

I hereby certify that on January 4, 2023, true copies of a Notice of Motion Seeking Leave to File a Counterclaim pursuant to R. 4:67-4, Letter Brief, Certification of Anthony S. Bocchi, Esq., and Proposed Order, were served on the following recipients via JEDS:

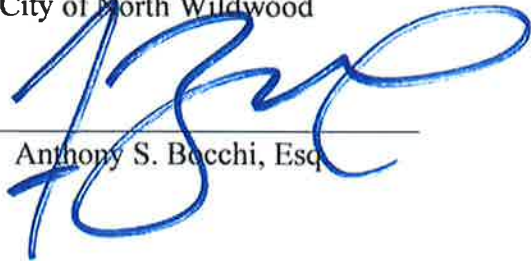
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By: Kevin A. Terhune (046601996)
Dianna E. Shinn (242372017)
Deputy Attorneys General
Attorneys for Plaintiff, New Jersey
Department of Environmental Protection

I further certify that all of the foregoing 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.

CULLEN AND DYKMAN LLP
Attorneys for Defendant
City of North Wildwood

By: _____

Anthony S. Bocchi, Esq.



Dated: January 4, 2023



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January 4, 2023

Via JEDS and Hand Delivery

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

Re: New Jersey Department of Environmental Protection v. City of North Wildwood, et al.
Docket No. C-55-22

Dear Judge Blee:

As Your Honor is aware, this office represents the defendant, the City of North Wildwood (“Defendant” or “North Wildwood”) in connection with the above-captioned matter. Please accept this letter brief in lieu of a more formal submission in support of North Wildwood’s motion for leave to file a Counterclaim in the within action pursuant to R. 4:67-4 of *The Rules Governing the Courts of the State of New Jersey*. For the reasons set forth herein, the court should grant North Wildwood’s motion so that a full and final adjudication of all issues regarding North Wildwood’s efforts to preserve and protect its beachhead can be decided in the instant action.

PROCEDURAL HISTORY

As the court is aware, this action was commenced by the Office of the Attorney General of the State of New Jersey (the “AG”) on behalf of the New Jersey Department of Environmental Protection (the “DEP” of “Plaintiff”) by way of Verified Complaint and Order to Show Cause seeking temporary and preliminary and injunctive relief to preclude North Wildwood from (i)



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installing a bulkhead between 15th and 16th Avenues until it has received a permit authorizing the installation of same from the DEP, (ii) 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 DEP, and (iii) engaging in any other oceanfront construction, reshaping or 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 DEP. On December 8, 2022, the court denied the DEP's application for temporary injunctive relief and set this matter for a hearing on Plaintiff's request for preliminary restraints for January 17, 2023. This office filed opposition to the DEP's application for preliminary injunctive relief on January 4, 2023.

LEGAL ARGUMENT

The DEP's application for preliminary injunctive relief is a summary proceeding pursuant to R. 4:67-1. Rule 4:67-4 governs the papers to be filed by any party responding to an application made pursuant to R. 4:67-1. In pertinent part, R. 4:67-4 provides:

If the order to show cause is issued ex parte pursuant to R. 4:67-1(a), the defendant shall, not later than 3 days before the return date, or within such further time as the court may allow, serve and file either an answer, an answering affidavit, or a motion returnable on the return day; in default thereof, the action may proceed ex parte. *No counterclaim or cross-claim shall be asserted without leave of court.*
[Rule 4:67-4(a).] (emphasis added)

As such, the Rule requires that in the event a responding party seeks to file a counterclaim in response to an application brought pursuant to R. 4:67-1, the responding party must first obtain leave of court. See State v. Bradley, 174, N.J.Super. 154, 158 (App. Div. 1980). However, our courts have reasoned that the application of the entire controversy doctrine, codified by R. 4:30A,



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requires a responding party that wishes to file a counterclaim in response to a summary application to seek leave to do so in order to preserve such claims. See *Peretti v. Ran-Dav's County Kosher, Inc.*, 289 N.J.Super. 618, 623 (App. Div. 1996).

- a. Application of the Entire Controversy Doctrine compels the court to permit North Wildwood leave to assert counterclaims against DEP so that North Wildwood's challenge to DEP's arbitrary and capricious conduct can be adjudicated in this proceeding.**

The entire controversy doctrine is premised upon "the fundamental principle ... that 'the adjudication of a legal controversy should occur in one litigation in only one court[.]'" *DiTrolino v. Antiles*, 142 N.J. 253, 267 (1995) (*quoting *Cogdell v. Hospital Ctr.**, 116 N.J. 7, 15 (1989)). Accordingly, all parties involved in a litigation should, at the very least, present in that proceeding all of their claims and defenses that are related to the underlying controversy. The entire controversy doctrine has three fundamental purposes: (1) the need for complete and final disposition through the avoidance of piecemeal decisions; (2) fairness to parties to the action and those with a material interest in the action; and (3) efficiency and the avoidance of waste and the reduction of delay. It is an equitable doctrine whose application is left to judicial discretion based on the factual circumstances of individual cases. See *Allstate N.J. Ins. Co. v. Cherry Hill Pain & Rehab Inst.*, 389 N.J. Super. 130 (App. Div. 2006).

Rule 4:30A codifies the entire controversy doctrine and provides, in relevant part, that

[n]on-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by Rule 4:64-5 (foreclosure actions) and Rule 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions).



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While R. 4:30A provides no further guidance as to what claims are “required to be joined” by the doctrine, the New Jersey Supreme Court has explained that the “claims must ‘arise from related facts or the same transaction or series of transactions’ but ‘need not share common legal theories.’” Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 119 (2019)¹. As such, “the polestar for the application” of the doctrine is “judicial fairness,” Dimitrakopoulos, supra, 237 N.J. at 114, and “a court must apply the doctrine in accordance with equitable principles, with careful attention to the facts of a given case.” Ibid.

Applied here, North Wildwood’s proposed Counterclaim arises from – and relates to – the same facts and occurrences that are the subject of DEP’s Complaint presently before this Court, namely, North Wildwood’s urgent need to implement bulkhead protection to its shoreline to preserve and protect its beachhead and infrastructure and the DEP’s arbitrary and capricious denial of North Wildwood’s Emergency Authorization. North Wildwood’s proposed Counterclaim seeks to (i) authorize North Wildwood to construct a bulkhead between 15th and 16th Avenues, (ii) recover approximately \$21,000,000.00 in funds that North Wildwood incurred as a result of DEP’s failure to obtain easements as contemplated by the parties’ State Aid Agreement dated November 16, 2021, and (iii) obtain declaratory relief that the DEP failed to satisfy its obligations under P.L. 2019, c. 81. See Certification of Anthony S. Bocchi, Esq., dated January 4, 2023 at **Exhibit**

¹ Although the *mandatory* claim joinder principle authorized by R. 4:30A does not extend to a proposed counterclaim in a summary action (as here), see R. 4:30A, the mere fact that mandatory claim joinder principle does not apply has no bearing on a court’s inherent equitable power to “whenever possible ... consolidate [] claims arising from a single controversy.” Dimitrakopoulos, supra, 237 N.J. at 98.



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A. The facts and circumstances asserted in North Wildwood's Counterclaims are inextricably linked to the factual basis underlying the DEP's Complaint and the relief sought by North Wildwood is directly related to DEP's unreasonable and unjustifiable denial of North Wildwood's Emergency Authorization application submitted on October 5, 2022.

As such, it is respectfully submitted that North Wildwood has satisfied the three (3) criteria under the Allstate test to be granted leave to file Counterclaims in this action as required by the entire controversy doctrine. *First*, adjudication of North Wildwood's Counterclaims will avoid "piecemeal decisions" and will allow the Court to consider both (i) the enforcement of the DEP's denial of North Wildwood's Emergency Authorization application and (ii) whether the DEP's denial should be overturned, and North Wildwood should be permitted to construct a bulkhead at the 15th Avenue location. As the facts, expert reports, and evidence all relate to the same proposed project, the Court has the ability to resolve all questions in one action, rather than deciding *only* the enforcement action now and hearing a challenge to the DEP's denial at a later date in a second action. *Second*, North Wildwood respectfully avers that the Court's adjudication of North Wildwood's Counterclaims in this action is fair to all interested parties. The issues and claims being wholly related, the parties to this action will not be forced into duplicating their efforts. Additionally, the DEP is aware of North Wildwood's objections to its decision to deny North Wildwood's October 5, 2022 Emergency Authorization application and therefore judicial review of same in this matter will not result in any cognizable prejudice to DEP, who filed this action against North Wildwood. *Third*, and finally, adjudication of North Wildwood's Counterclaims in this matter are in the interests of judicial economy and will avoid unnecessary delay, which is



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particularly important in this action where even a moderate weather event can cause immediate and irreparable harm to North Wildwood.

In summary, North Wildwood submits that application of the entire controversy doctrine compels the Court to grant leave to North Wildwood to file Counterclaims against the DEP pursuant to R. 4:67-4(a).

b. The Court has jurisdiction to adjudicate North Wildwood’s Counterclaims and the validity of the DEP’s denial of North Wildwood’s Emergency Authorization application.

Ordinarily, R. 4:67-6(c) requires that, in circumstances where a party appeals or seeks leave to appeal an interlocutory or final agency order or decision, such application must be brought before the Appellate Division. See also R. 2:2-3(a)(2). Subparagraph (c)(3) of R. 4:67-6 states that “[e]xcept as otherwise provided by subparagraph (c)(2) of this rule the validity of an agency order shall not be justiciable in an enforcement proceeding.” Ibid. However, our courts have noted that the applicability of R. 1:1-2 permits the relaxation of R. 4:67-6(c)(3), reasoning that “any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice.” Rule 1:1-2 has been utilized in agency enforcement proceedings to address challenges to the validity of an agency order where the need to do is both “urgent and important.” See Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth, 55 N.J. 501, 505 (1970). In addition, our courts have invoked R. 1:1-2 to relax the requirement of R. 4:67-6(c)(3) where there is a need to establish a factual record sufficient for appellate review. See Montclair Tp. v. Hughey, 222 N.J.Super. 441, 446 (App. Div.1987). As recited in State Farm Mut. Auto. Ins. Co. v. State,



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Dept. of Public Advocate, 227 N.J.Super. 99, 132 (App. Div. 1988), “[w]here the disposition of a state agency action calls for the exercise of the gathering of evidence, the finding of facts and the application of legal conclusions, the matter may proceed in the trial court” if there is there is an insufficient factual record amenable to appellate review. *Ibid.* (citing Montclair Tp., *supra*, at 447-48.

In Montclair Tp., the Town of Montclair sued in the Chancery Division of the Superior Court in Essex County for an injunction requiring DEP to remove radioactive soil which had been stored in 15,000 barrels at a facility in Montclair. The Chancery judge entered an order directing that DEP remove such barrels no later than June 15, 1987. The DEP determined to move the barrels of contaminated soil to the Colliers Mills Wildlife Area within the Preservation Area of the Pinelands National Reserve. Alleging that the proposed action constituted a threat to the environment and to the public health, safety and welfare, the Township of Jackson and the Ocean County Board of Chosen Freeholders brought consolidated actions in the Superior Court, Law Division, in Ocean County to enjoin the DEP from implementing Administrative Order No. EO56-2, which memorialized the agency’s decision to move the barrels of contaminated soil to Ocean County. The Essex County trial court partially remanded the matter to Ocean County for a determination of the “appropriateness of the proposed site in Colliers Mills, Jackson Township for the temporary storage of 15,000 barrels of radium contaminated soil now stored in Montclair...” It also denied DEP’s motion for transfer of the proceeding to the Appellate Division. The DEP appealed the trial court’s denial of its motion to transfer the matter to the Appellate Division.



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The Appellate Division held that the trial court properly denied the DEP's motion to transfer because the trial court needed to gather evidence and make findings of fact and conclusions of law. Further, the Appellate Division reasoned that R. 2:2-3(a)(2) "contemplates appellate review only of administrative actions of a *quasi-judicial* or *quasi-legislative* nature based on a record." Ibid. at 448 (*citing McKenna v. N.J. Highway Authority*, 19 N.J. 270, 276 (1955)).

Here, the court, in its equitable discretion, should relax the requirements of R. 4:67-6(c)(3) by invoking R. 1:1-2 because there are questions of fact and law which require the Court to develop a record with respect to the validity of the DEP's denial of North Wildwood's Emergency Authorization. The trial court has the ability to adjudicate both the enforcement action brought by the DEP as well as North Wildwood's challenge of the DEP's denial order. For the reasons set forth in Subsection (a) of this letter brief, the entire controversy doctrine compels the court to permit the filing of North Wildwood's Counterclaims and therefore, the court should invoke R. 1:1-2 to relax R. 4:67-6(c)(3) and retain jurisdiction over North Wildwood's challenge of the DEP's denial of North Wildwood's Emergency Authorization by and through its proposed Counterclaims in this matter.



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CONCLUSION

In an effort to promote judicial economy, procedural fairness, and a complete resolution of all issues involving the matter at bar, the Court should grant North Wildwood's motion to file Counterclaims against the DEP and adjudicate North Wildwood's challenge of the DEP's unreasonable and unjustifiable denial order preventing North Wildwood from protecting and preserving its community and infrastructure.

Very truly yours,
CULLEN AND DYKMAN LLP

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

ANTHONY S. BOCCHI

cc: Kevin A. Terhune, DAG (*via JEDS*)
Dianna E. Shinn, DAG (*via JEDS*)
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ANTHONY S. BOCCHI
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January 4, 2023

Via JEDS

Clerk, Chancery Division
Superior Court of New Jersey
Cape May County Courthouse
9 North Main Street
Cape May, New Jersey 08210

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

Dear Sir/Madam:

Our office represents Defendant, City of North Wildwood, in connection with the above-referenced matter. Enclosed herewith for filing please find the following documents:

1. Notice of Motion Seeking Leave to File a Counterclaim Pursuant to R. 4:67-4, with Certification of Service;
2. Letter Brief;
3. Certification of Anthony S. Bocchi, Esq.;
4. Proposed form of Order.

Please charge the appropriate filing fee to our firm's Collateral Account No. 145431.

Thank you for your attention to this matter.

Very truly yours,

CULLEN AND DYKMAN LLP

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

Anthony S. Bocchi

ASB/rc
Encls.

cc: Hon. Michael J. Blee, A.J.S.C. (Courtesy Copy, via Courier)
Kevin H. Terhune, D.A.G. (via JEDS)
Dianna E. Shinn, D.A.G. (via JEDS)

