

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL
PROTECTION,**

Plaintiff,

vs.

**CITY OF NORTH WILDWOOD,
"XYZ CONTRACTORS" 1-10,
"JOHNAND/OR JANE DOES" 1-
10,**

Defendants.

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

Docket No. C-55-22

Civil Action

**REPLY BRIEF OF DEFENDANT CITY OF NORTH WILDWOOD
IN FURTHER SUPPORT OF ITS MOTION FOR A DETERMINATION AS TO
WHETHER THIS COURT HAS JURISDICTION OVER NJDEP'S DENIAL OF NORTH
WILDWOOD'S FEBRUARY 10, 2023 EMERGENCY AUTHORIZATION
APPLICATION AND MATTERS THAT MAY OCCUR SUBSEQUENT THERETO**

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PRELIMINARY STATEMENT

By this reply brief, North Wildwood responds to the arguments that were put forth by NJDEP in its brief opposing this Court's continuing jurisdiction over NJDEP's February 24 denial of North Wildwood's second Emergency Authorization (EA) application "and matters that may occur subsequent thereto." As fully set forth herein, NJDEP's grab-bag of arguments -- seeking to defeat this Court's broad equitable jurisdiction -- do not withstand scrutiny.

First, NJDEP, in substance, seeks *de facto* reconsideration of this Court's February 1, 2023 ruling that: (1) the Court has subject matter jurisdiction over this dispute between North Wildwood and NJDEP, including North Wildwood's Counterclaim; and (2) the Entire Controversy Doctrine strongly militates in favor of the Court exercising that jurisdiction. However, the Court's February 1 ruling is manifestly correct. Reconsideration of the Court's ruling is unwarranted. See Point I, *infra*.

Second, NJDEP asserts that this Court's continuing jurisdiction is precluded by the doctrine of the exhaustion of administrative remedies. However, the exhaustion rule is inapplicable because: (1) the controversy between North Wildwood and NJDEP is already before this Court; and (2) when the Superior Court has jurisdiction over a matter between an administrative agency and an aggrieved party, the agency is divested of jurisdiction. Significantly, NJDEP has failed to address – let alone refute – this point. See Point II, *infra*.

Third, in the alternative, the doctrine of exhaustion of administrative remedies is inapplicable because exhaustion is not required "where administrative review will be futile, where there is a need for prompt decision in the public interest... and where irreparable harm will otherwise result from denial of immediate judicial relief." Brunetti v. Borough of New Milford,

68 N.J. 576, 588 (1975). Here, all three Brunetti exceptions are applicable. NJDEP has failed to refute the applicability of the three Brunetti exceptions. See Point III, infra.

Fourth, in the alternative, an administrative appeal of NJDEP's second denial of North Wildwood's EA should be rejected by this Court because the relief here sought does not constitute review of NJDEP's February 24 denial of the EA. Rather, the requested relief seeks an equitable remedy and the prevention of irreparable harm as applied to the circumstances that exist today. This form of relief lies at the core of Chancery's jurisdiction. See Point IV, infra.

Fifth, contrary to NJDEP's contention, this Court's exercise of equitable jurisdiction does not violate the separation of powers under the New Jersey Constitution. Instead, the requested equitable relief is quintessentially within the jurisdiction and power of the Chancery Court. See Point VA, infra.

Sixth, NJDEP asserts that this Court lacks jurisdiction over this matter because the Appellate Division purportedly has jurisdiction over this dispute. However, NJDEP's assertion is legally unsustainable in light of: (1) the fact that there is no final judgment that would trigger the Appellate Division's as-of-right jurisdiction; and (2) NJDEP's own contradictory contention that North Wildwood has failed to exhaust its administrative remedies (which, if true, would deprive the Appellate Division of jurisdiction over this matter). See Point VB, infra.

Seventh, NJDEP asserts that this Court lacks jurisdiction over this matter because: (1) this litigation originally was commenced by NJDEP as an enforcement action pursuant to R. 4:67-6; and (2) "Rule 4:67-6(c)(3) does not permit a trial court to inquire into the validity of an agency order" *in the context of an ongoing enforcement action*. However, although this action began as an enforcement action it is no longer an enforcement action as of the current date because NJDEP's original enforcement claim has been fully adjudicated and there remains for adjudication by this

Court various equitable claims within the subject matter jurisdiction of the Chancery Division.

See Point VC, infra.

For all of the foregoing reasons, (1) this Court has the requisite jurisdiction over NJDEP's February 24 denial of North Wildwood's second Emergency Authorization (EA) application "and matters that may occur subsequent thereto; and (2) this Court properly should exercise its jurisdiction over the entire dispute in the interest of judicial economy and consistent with the principles of the Entire Controversy Doctrine and in order to prevent irreparable harm.

LEGAL ARGUMENT

POINT I

IN SUBSTANCE, NJDEP SEEKS RECONSIDERATION OF THIS COURT’S FEBRUARY 1, 2023 RULING THAT: (1) THE COURT HAS SUBJECT MATTER JURISDICTION OVER THIS DISPUTE BETWEEN NORTH WILDWOOD AND NJDEP, INCLUDING NORTH WILDWOOD’S COUNTERCLAIM; AND (2) THE ENTIRE CONTROVERSY DOCTRINE STRONGLY MILITATES IN FAVOR OF THE COURT EXERCISING THAT JURISDICTION. HOWEVER, RECONSIDERATION OF THIS COURT’S PRIOR RULING IS UNWARRANTED

NJDEP argues that “NWW’s reliance on the Entire Controversy Doctrine ... is without merit.” NJDEP Br., at 18. However, as discussed below, this Court already has ruled that the Entire Controversy Doctrine is fully applicable to this litigation. See Bocchi Cert., Exhibit “C” (Tr. of 2/1.23 ruling, 56:18 to 57:19). To the extent that NJDEP seeks to argue otherwise, NJDEP is, in effect, seeking reconsideration of this Court’s February 1, 2023 determination in this litigation. However, reconsideration is unwarranted.¹

By its February 1, 2023 ruling, this Court granted leave to North Wildwood to file a Counterclaim against NJDEP. Bocchi Cert., Exhibit “A” (Order). The Counterclaim includes a count seeking injunctive relief that would authorize North Wildwood to install a protective

¹ A motion for reconsideration of an interlocutory order is governed by R. 4:42-2 (“in the sound discretion of the court in the interest of justice”). Regardless of whether an order is interlocutory or final, there are “very limited circumstances where reconsideration is appropriate.” State v. Puryear, 441 N.J. Super. 280, 295 (App. Div. 2015). Reconsideration of interlocutory orders “is a matter within the sound discretion of the Court. . . [but] [a] litigant should not seek reconsideration merely because of dissatisfaction with a decision of the Court.” D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Reconsideration of an interlocutory order, rather than a motion for leave to appeal, should be utilized “only for those cases which fall into that narrow corridor in which either (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence.” Id. at 401.

Here, NJDEP does not even attempt to offer any cogent argument that the Court acted on a “palpably incorrect or irrational basis” or that it “did not consider, or failed to appreciate,” counsel’s arguments.

bulkhead on the landward side of the beach and remaining dune in the vicinity of 15th and 16th Avenues. Bocchi Cert., Exhibit “B” (North Wildwood’s Counterclaim, Count One). The purpose of the protective bulkhead would be to prevent irreparable harm to persons and property that would otherwise result from a moderate storm. Id.

In granting leave for North Wildwood to file its Counterclaim, this Court stated:

When an Order to Show Cause is issued *ex parte*, no counterclaim shall be asserted without leave of Court Rule 4:67-4... Defendants, in summary actions, are not precluded from requesting Leave of Court to File a Counterclaim. **Rather, the Court, in its discretion may grant or deny such a request based on equitable considerations and unique facts of each case.**

Chief of these equitable considerations that are principles laid out in the Entire Controversy Doctrine, which requires litigants to consolidate claims arising from a single controversy or else run the risk of forfeiting such claim. The polestar for the application of this doctrine is judicial fairness. Here the equities are in favor of allowing the defendants leave of court to file a counterclaim. **The counterclaims conceivably arise out of the same transactions and occurrence.**

There is -- appears to be, on its face, a common nucleus of operative fact. ... **The counterclaim does not petition the Court to grant relief outside its equitable authority.** So the Court grants that application.

[Bocchi Cert., Exhibit “C” (2/1/23 Tr., 56:18 to 57:19) (citations omitted) (emphasis added)]

Against this backdrop, NJDEP argues that the Entire Controversy Doctrine is inapplicable to this litigation because “[t]he Entire Controversy Doctrine does not bar NWW from exhausting its administrative remedies.” NJDEP Br., at 19. However, although the Entire Controversy Doctrine **itself** does not bar North Wildwood from exhausting its administrative remedies, *other well-established principles of law have precisely this effect as applied to this litigation: i.e., “exhaustion of remedies will not be required where administrative review will be futile, where there is a need for prompt decision in the public interest... and where irreparable harm will otherwise result from denial of immediate judicial relief.”* Brunetti v. Borough of New Milford,

68 N.J. 576, 588 (1975). See also Gripenburg v. Twp. of Ocean, 220 N.J. 239, 261 (2015); N.J. Civil Serv. Ass'n v. State, 88 N.J. 605, 613 (1982); Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 561 (1979). For further discussion of the applicability of the three exceptions to the exhaustion rule, see North Wildwood Initial Br., at 9-13; see also Point III, infra.

Moreover, it is critical to the jurisdictional question presented by this motion that the exhaustion rule is -- in any event -- “**not** jurisdictional.” See Brunetti, supra, 68 N.J. at 588. Instead, the exhaustion rule “will be waived where the interest of justice so requires.” Ibid.

As this Court is well aware, the issue presented on this motion is whether “this Court has jurisdiction over the most recent emergency application and anything that may occur subsequently.” Bocchi Reply Cert., Exhibit “A” (March 7, 2023 Tr., 13:5 to 13:7). Because NJDEP raises only the exhaustion rule as the purported legal basis by which to defeat the applicability of the Entire Controversy Doctrine and because the exhaustion rule *is not even jurisdictional*, this Court’s jurisdictional question (that is the subject of this motion) is necessarily answered in the affirmative. Furthermore, three exceptions to the exhaustion rule apply to this litigation. See North Wildwood Initial Br., at 9-13; see also Point III, infra.

In short, this Court’s February 1, 2023 ruling – that the Entire Controversy Doctrine applies to this litigation – is manifestly correct. See Bocchi Cert., Exhibit “C” (2/1/23 Tr., 56:18 to 57:19). NJDEP’s *de facto* motion for reconsideration of this Court’s ruling is properly rejected.

POINT II

THE DOCTRINE OF THE EXHAUSTION OF ADMINISTRATIVE REMEDIES IS INAPPLICABLE BECAUSE: (1) THE CONTROVERSY BETWEEN NORTH WILDWOOD AND NJDEP IS ALREADY BEFORE THIS COURT; AND (2) WHEN THE SUPERIOR COURT HAS JURISDICTION OVER A MATTER BETWEEN AN ADMINISTRATIVE AGENCY AND AN AGGRIEVED PARTY, THE AGENCY IS DIVESTED OF JURISDICTION. *NJDEP HAS FAILED TO ADDRESS – LET ALONE REFUTE – THIS POINT*

As fully set forth in Point II of our Initial Brief, the doctrine of the exhaustion of administrative remedies is inapplicable to this litigation because: (1) the controversy between North Wildwood and NJDEP is already before this Court; and (2) when the Superior Court has jurisdiction over a matter between an administrative agency and an aggrieved party, the agency is divested of jurisdiction. See, e.g., *Kramer v. Bd. of Adjustment, Sea Girt*, 80 N.J. Super. 454, 463 (Law. Div. 1963) (holding that “while the suit challenging the validity of the board’s recommendation to grant a variance was pending in the Superior Court, the board was without jurisdiction to take further action except on remand by the court”) (citing *Application of Plainfield-Union Water Co.*, 14 N.J. 296, 302 (1954) (holding that, in general, judicial review “divests the lower court [or agency] of jurisdiction”); *Cicchine v. Twp. of Woodbridge*, 413 N.J. Super. 393, 400-401 (Law Div. 2010) (providing “[t]he filing of a notice of appeal [to the Law Division in a prerogative writ action] divests the [agency] of jurisdiction except as reserved by statute or rule”); *Gandolfi v. Town of Hammonton*, 367 N.J. Super. 527, 548 (App. Div. 2004) (“[g]enerally speaking, once an applicant has received a decision of the board and appealed in lieu of prerogative writs, the board is divested of jurisdiction absent a remand”).

In short, because this Court has subject matter jurisdiction over the matter, the agency lacks subject matter jurisdiction for so long as the matter is pending before the Court. *Appl. of Plainfield-Union Water Co.*, supra, 14 N.J. at 302; *Kramer v. Bd. of Adjustment*, supra, 80 N.J.

Super. 454; Cicchine v. Twp. of Woodbridge, *supra*, 413 N.J. Super. at 401. For this reason alone, the ordinary rule of exhaustion of administrative remedies is inapplicable.

NJDEP has failed to address – let alone refute – this point.

POINT III

IN THE ALTERNATIVE, THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES IS INAPPLICABLE BECAUSE EXHAUSTION IS NOT REQUIRED “WHERE ADMINISTRATIVE REVIEW WILL BE FUTILE, WHERE THERE IS A NEED FOR PROMPT DECISION IN THE PUBLIC INTEREST... AND WHERE IRREPARABLE HARM WILL OTHERWISE RESULT FROM DENIAL OF IMMEDIATE JUDICIAL RELIEF.” BRUNETTI V. BOROUGH OF NEW MILFORD, 68 N.J. 576, 588 (1975). *HERE, ALL THREE EXCEPTIONS ARE APPLICABLE.*

As more fully discussed in Point III of our Initial Brief, “exhaustion of remedies will not be required where administrative review will be futile, where there is a need for prompt decision in the public interest... and where irreparable harm will otherwise result from denial of immediate judicial relief.” Brunetti v. Borough of New Milford, *supra*, 68 N.J. at 588. See also Gripenburg v. Twp. of Ocean, *supra*, 220 N.J. at 261; N.J. Civil Serv. Ass'n v. State, *supra*, 88 N.J. at 613; Garrow v. Elizabeth Gen. Hosp. & Dispensary, *supra*, 79 N.J. at 561. Here, all three Brunetti exceptions are applicable.

NJDEP contends that none of the three Brunetti exceptions are applicable to this litigation. See NJDEP Br., at 20-21. However, as discussed below, NJDEP’s contention is devoid of merit.

A. NJDEP fails to address – let alone rebut – the legal and factual basis for a finding of futility on this record

In Point IIIB of our Initial Brief, we set forth the legal and factual basis for a finding of futility on this record. In brief, in light of nearly ten years of North Wildwood’s direct empirical evidence, the evidence is overwhelming that: (1) the depositing of sand on North Wildwood beaches is an ineffective coastal protection measure; and (2) the installation of a bulkhead on North

Wildwood beaches is a very effective coastal protection measure. See Initial Br., at 11-13. Notwithstanding the foregoing, NJDEP has twice declined to approve North Wildwood's proposal to install a protective bulkhead.

Moreover, the record further reflects that on October 12, 2022, NJDEP denied North Wildwood's first EA application for the installation of an emergency bulkhead because it determined that North Wildwood "*had not demonstrated that there is an imminent threat to the loss of life or severe loss of property based on existing condition.*" NJDEP. Br., at 6. Yet, on October 7 -- just five days prior -- NJDEP acknowledged in writing that the condition of the North Wildwood beach in the vicinity of 15th Avenue poses "a threat to severe loss of property" and requires an "emergent" response. NJDEP submission, Moriarty Cert., Exhibit "B". The record reflects that nothing changed in the intervening five days. Instead, NJDEP simply changed its mind -- for reasons left unexplained.

On this record the conclusion is inescapable that any further resort to NJDEP administrative process in connection with North Wildwood's EA application for a bulkhead will prove futile. By itself, this conclusion of "futility" precludes the applicability of the exhaustion rule. Brunetti v. Borough of New Milford, *supra*, 68 N.J. at 588.

B. NJDEP's sole argument in opposition to the second and third of the Brunetti factors (i.e., the need for a "prompt decision" and the avoidance of "irreparable harm") is that there exists an OAL rule that potentially authorizes expedited treatment of a matter in the context of the administrative appeal process. However, if the mere existence of the OAL rule were actually sufficient to defeat these two Brunetti factors, then these factors would be rendered a nullity in every possible OAL case in which these factors are otherwise applicable

The exhaustion rule is inapplicable "when ... when irreparable harm would result,.. or when an overriding public interest calls for a prompt judicial decision." New Jersey Civil Serv. Ass'n v. State, 88 N.J. 605, 613 (1982). As fully set forth in Point IIIA of our Initial Brief (as well

as in prior briefs and certifications to this Court), the relief sought in Count One of the Counterclaim satisfies both of these two exceptions to the exhaustion rule. See North Wildwood’s January 4 Br., at 17-33. Indeed, NJDEP itself has acknowledged that, as of October 7, the condition of the North Wildwood beach in the vicinity of 15th Avenue poses “a threat to severe loss of property” and requires an “emergent” response. See NJDEP submission, Moriarty Cert., Exhibit “B” (October 7 email of Jennifer Moriarty, Director of NJDEP Land Resource Protection). Furthermore, NJDEP – by its February 24 2023 decision denying North Wildwood’s second EA application, -- re-stated its conclusion that “[w]ith regard to the area between 15th and 16th Avenues... [NJDEP] agrees with {North Wildwood} that this area of the dune is in risk of imminent breach.” Bocchi Cert., Exhibit “D” (NJDEP 2/24/23 decision, at 3). Finally, the record discloses that the existence of a “severe” and “imminent” threat continues to this day and the condition of the beach and dune has continued to deteriorate since NJDEP’s February 24 decision. See Verna 3/13/23 Cert., ¶¶3-8.

On this undisputed record the exhaustion rule is inapplicable because “there is a need for prompt decision in the public interest... and ...irreparable harm will otherwise result from denial of immediate judicial relief.” Brunetti v. Borough of New Milford, *supra*, 68 N.J. at 588.

Confronted with this record of undisputed facts, NJDEP’s response is as follows:

As to the third factor, no irreparable harm will result by requiring NWW to exhaust its administrative remedies. While NWW is concerned about the length of time of the administrative process, NWW has the right to request an emergency hearing pursuant to N.J.A.C. 1:1-12.6, which can be used by a party [who] thinks that irreparable harm may result pending a final decision on the contested case. Therefore, since there is a mechanism in place in the administrative process for an emergency hearing, NWW’s claim that it will suffer irreparable harm is moot.

[NJDEP Br., at 20]

Thus, NJDEP’s sole argument in opposition to the second and third of the Brunetti factors (i.e.,

the need for a “prompt decision” and the avoidance of “irreparable harm”) is that there exists an OAL rule that potentially authorizes expedited treatment of a matter in the context of the administrative appeal process.² However, if the mere existence of the OAL rule were actually sufficient to defeat these two Brunetti factors, then these factors would be rendered a nullity in every possible OAL case in which these factors are otherwise applicable. Bur NJDEP has not cited any authority – and there is none – that recognizes a carve-out to these two Brunetti factors in any matter in which the administrative process is undertaken in the OAL.

Quite frankly, if this is not a case in which “irreparable harm would [otherwise] result” or “when an overriding public interest calls for a prompt judicial decision,” New Jersey Civil Serv. Ass'n v. State, supra, 88 N.J. at 613, then it is a difficult to conceive of a case that would ever implicate these exceptions to the exhaustion rule.

POINT IV

IN THE ALTERNATIVE, AN ADMINISTRATIVE APPEAL OF NJDEP’S SECOND DENIAL OF NORTH WILDWOOD’S EA SHOULD BE REJECTED BY THIS COURT BECAUSE THE RELIEF HERE SOUGHT DOES NOT CONSTITUTE REVIEW OF NJDEP’S FEBRUARY 24 DENIAL OF THE EA. RATHER, THE REQUESTED RELIEF SEEKS AN EQUITABLE REMEDY AND THE PREVENTION OF IRREPARABLE HARM AS APPLIED TO *THE CIRCUMSTANCES THAT EXIST TODAY*. THIS FORM OF RELIEF LIES AT THE CORE OF CHANCERY’S JURISDICTION

As fully set forth in Point IV of our Initial Brief, an administrative appeal of NJDEP’s second denial of North Wildwood’s EA should be rejected by this Court for yet another reason:

² Moreover, the OAL rule confers upon the *agency head* (i.e., the NJDEP Commissioner) – rather than the Administrative Law Judge in the OAL -- the discretion to grant or deny emergency relief. See N.J.A.C. 1:1–12.6 (b). In light of this designation of authority to the NJDEP Commissioner to grant or deny emergency relief, the aforementioned “futility” exception (to the exhaustion rule) is applicable for the same reason that this exception is applicable generally. See Point IIIA, supra.

That is: the relief here sought does *not* constitute review of NJDEP’s February 24 denial of the EA. Rather, the requested relief seeks an equitable remedy *for the circumstances that exist today*.

This is not an academic or hair-splitting distinction. The record on this motion establishes that the condition of the North Wildwood beach and dunes is materially different as of the current date as compared with the condition that existed as of the date of the NJDEP’s denial of the EA. See Verna 1/4/23 Cert., ¶10; Verna 2/13/23 Cert., ¶¶3-8. More particularly, the record reflects that the affected North Wildwood beach and dunes continue to deteriorate -- and thereby further endanger the lives and property of the residents of North Wildwood. See id.

In light of this dynamic and ever-changing circumstance, only this Court (rather than an administrative appeal that is “locked-in” to the record of the second EA application) has the present and continuing jurisdiction over the beach and dune conditions that exist today. Furthermore, this Court possesses the “broad discretionary power in the balancing of all hardships and equities in shaping an equitable decree,” Salorio v. Glaser, 93 N.J. 447, 469 (1983), including the prevention of irreparable harm. See Crowe v. De Gioia, 90 N.J. 126, 132 (1982) (holding that Chancery’s grant of injunctive relief is based, most importantly, on the prevention of irreparable harm). Moreover, this Court – with its broad and flexible equitable powers – can respond to, and fashion a remedy, that is tailored to “the changing circumstances ... and the complex relations of all the parties.” U.S. Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 476 (2012).

For these reasons, this Court should continue to assert its broad and flexible equitable jurisdiction in light of the present condition of the beach and dunes -- which even NJDEP concedes constitutes a “severe” and “imminent” threat to the City. See Bocchi Cert., Exhibit “D” (NJDEP 2/24/23 decision, at 3). (stating that a portion of the North Wildwood dune “is in risk of imminent breach.”).

POINT V

THE REMAINING ARGUMENTS PUT FORWARD BY NJDEP WERE ALREADY CONSIDERED AND REJECTED BY THIS COURT IN THE CONTEXT OF THIS COURT’S DECISION GRANTING NORTH WILDWOOD LEAVE TO FILE ITS COUNTERCLAIM. THIS COURT PROPERLY REJECTED NJDEP’S ARGUMENTS BACK IN JANUARY AND RECONSIDERATION OF THESE SAME ISSUES IS UNWARRANTED

NJDEP puts forward a grab-bag of additional arguments relating to the jurisdiction of the Appellate Division and the separation of the powers of the various branches of State government. This Court carefully considered and rejected all of these arguments in the course of its February 1, 2023 decision that granted North Wildwood leave to file its Counterclaim. In granting leave, this Court determined that “[t]he counterclaim does not petition the Court to grant relief outside its equitable authority/... [s]o the Court grants that application.” Bocchi Cert., Exhibit “C” (2/1/23 Tr., 57:16 to 57:19). Here again, NJDEP seeks *de facto* reconsideration of this Court’s February 1 decision. However, reconsideration is unwarranted.³

In any event, we briefly address each of NJDEP’s additional arguments.

A. Contrary to NJDEP’s assertion, this Court’s exercise of equitable jurisdiction does not violate the separation of powers under the New Jersey Constitution.

Just as it argued back in January, NJDEP argues again that the relief sought by the Counterclaim is constitutionally infirm by operation of separation of powers principles. See NJDEP Opp. Br., at 14. This Court rejected this contention by its February 1 ruling – just as it should reject NJDEP’s present rehash of the same argument.

NJDEP flatly asserts:

This Court cannot exercise unconstitutional authorization through the use of its equitable powers to allow NWW to install a bulkhead without proper permit approval. Doing so would be a violation of separation of powers principles.

³ As stated in note 1, supra, NJDEP has not even attempted to satisfy the demanding standard governing a motion for reconsideration.

[Ibid.]

For this proposition, NJDEP relies on Ironbound Health Rights Advisory Commission v. Diamond Shamrock Chemical Company, 216 N.J. Super. 166, 176 (App. Div. 1986), wherein the Appellate Division held that a judicial order compelling an executive agency to take discretionary action violates the separation of powers afforded by the New Jersey Constitution. Ibid. However, NJDEP's reliance on Ironbound is misplaced. The relief sought by the plaintiffs in Ironbound has no relationship whatsoever to the relief here sought.

In Ironbound, a citizens group brought action against NJDEP to require clean-up of dioxin-contaminated area in a manner approved by court. The suit was brought under the Environmental Rights Act ("Act"). Thus, the plaintiffs were limited to the rights and remedies under the Act – which were directed against polluters, not the State. The Appellate Division held that the plaintiff could not use the Act against the State – as distinct from the polluter. See Ironbound, supra, 216 N.J. Super. at 174

Here, by contrast, North Wildwood is not relying on a statutory right of redress against the State. Thus, this portion of the Ironbound decision has no application to this case.

Also at issue in Ironbound was the common law writ of mandamus. The remedy of mandamus is limited to compelling the state "to perform a required nondiscretionary function." Id at 174. The Court in Ironbound held that the remedy of mandamus was not applicable. This was so because: (1) the plaintiffs had sought a court order requiring the State "to address the medical condition of those previously exposed to dioxin"; id. at 177; and (2) the foregoing relief sought by the plaintiffs against the State was not required under statutory law. Ibid. Because the relief sought by the plaintiffs against the State was not related to an action that the State was required to undertake under statutory law, the remedy of mandamus could not attach. Ibid. The point is: the

remedy of mandamus only applies against the State when the State is required under law to undertake a nondiscretionary act and the State has failed to do so.

Here – in stark contrast to Ironbound -- North Wildwood is not seeking the remedy of mandamus. Indeed, North Wildwood is not requesting this Court to order NJDEP to take any action whatsoever.

More particularly, North Wildwood is *not* asking the Court to order NJDEP to install the bulkhead. **Rather, the Counterclaim asks this Court to allow North Wildwood itself to install the bulkhead – in response to emergent circumstances.** The requested equitable relief is quintessentially within the jurisdiction and power of the Chancery Court. In short, the remedy of mandamus – unlike in Ironbound – has no application to this record. Therefore, NJDEP’s reliance on the Appellate Division’s decision in Ironbound is misplaced.

We briefly summarize once more the scope and breadth of this Court’s equitable powers. Long ago, the State’s highest court long ago laid down this cardinal principle:

Equitable remedies “are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.”

[Sears, Roebuck & Co. v. Camp, 124 N.J.Eq. 403, 411–12 (E. & A.1938)]

In the many decades that followed the Sears Roebuck decision, our Supreme Court has repeatedly reaffirmed this fundamental principle governing equity’s broad jurisdiction and flexible powers to fashion a remedy. See, e.g., U.S. Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 476 (2012) [quoting Sears, Roebuck]; Brenner v. Berkowitz, 134 N.J. 488, 514 (1993) (quoting Sears, Roebuck); Salorio v. Glaser, 93 N.J. 447, 469 (1983) (quoting Sears Roebuck and noting, “[w]e

are not unmindful of our broad discretionary power in the balancing of all hardships and equities in shaping an equitable decree”); Vasquez v. Glassboro Serv. Ass'n, Inc., 83 N.J. 86, 108 (1980) (citing Sears Roebuck). More recently, our Supreme Court underscored that “[a court [of equity] **must exercise its inherent equitable jurisdiction** and decide the case based upon equitable considerations.” Thieme v. Aucoin-Thieme, 227 N.J. 269, 287 (2016) (emphasis added).

In light of the foregoing, the relief sought in the Counterclaim falls squarely within this Court’s equitable jurisdiction. Conversely, this Court’s exercise of equitable jurisdiction does not violate the separation of powers under the New Jersey Constitution.

B. NJDEP asserts that this Court lacks jurisdiction over this matter because the Appellate Division purportedly has jurisdiction over this dispute. However, NJDEP’s assertion is legally unsustainable in light of: (1) the fact that there is no final judgment that would trigger the Appellate Division’s as-of-right jurisdiction; and (2) NJDEP’s own contradictory contention that North Wildwood has failed to exhaust its administrative remedies (which, if true, would deprive the Appellate Division of jurisdiction over this matter).

NJDEP contends once more that the Appellate Division – not this Court – has jurisdiction over this dispute. Here again, this Court rejected this contention by its February 1 ruling – just as it should reject NJDEP’s present iteration of the same argument.

As a threshold matter, we are puzzled by NJDEP’s present stated position regarding the Appellate Division’s jurisdiction – given that NJDEP repeatedly *also* argues that North Wildwood has failed to exhaust its administrative remedies. See NJDEP Br., 14 (“The Court should find that NWW failed to exhaust its administrative remedies.”). In other words, NJDEP contends that: (1) NJDEP *itself* has administrative jurisdiction over this matter; and (2) consequently, there is no final judgment in this matter that would give rise to the as-of-right jurisdiction of the Appellate Division. See R. 2:2-3(a)(2).

Query: How can NJDEP simultaneously argue that: (1) North Wildwood has failed to

exhaust its administrative remedies and that NJDEP itself has administrative jurisdiction over this matter; and (2) the Appellate Division has jurisdiction over this matter? Both of NJDEP's contentions cannot simultaneously be true. If NJDEP has jurisdiction over this matter, then the Appellate Division cannot possibly also have jurisdiction over this matter.

Of course, ironically, neither of NJDEP's contradictory contentions is true. *This Court has jurisdiction over this matter.* See Points I through III, *supra*.

C. NJDEP asserts that this Court lacks jurisdiction over this matter because: (1) this litigation originally was commenced by NJDEP as an enforcement action pursuant to R. 4:67-6; and (2) "Rule 4:67-6(c)(3) does not permit a trial court to inquire into the validity of an agency order" *in the context of an ongoing enforcement action*. However, although this action began as an enforcement action it is no longer an enforcement action as of the current date because NJDEP's original enforcement claim has been fully adjudicated and there remains for adjudication by this Court various equitable claims within the subject matter jurisdiction of the Chancery Division

NJDEP again asserts that this Court lacks jurisdiction over this matter because: (1) this litigation originally was commenced by NJDEP as an enforcement action pursuant to R. 4:67-6; and (2) "Rule 4:67-6(c)(3) does not permit a trial court to inquire into the validity of an agency order" in the context of an ongoing enforcement proceeding. NJDEP Br., at 9-10. NJDEP's assertion lacks merit.

This action is plainly *not* subject to the R. 4:67-6(c)(3) "procedural bar" applicable to enforcement actions. Although this action *began* as an enforcement action, it is no longer an enforcement action as of the current date because NJDEP's original enforcement claim has been fully adjudicated and there remains for adjudication by this Court various equitable claims that are within the subject matter jurisdiction of the Chancery Division.

Furthermore, NJDEP asserts: "DEP's Order to Show Cause and Verified Complaint was filed pursuant to R. 4:67-6, and the trial court's powers are limited to DEP's denial of NWW's

October 5, 2022 EA application.” NJDEP Br., at 9. NJDEP’s assertion makes no sense. As NJDEP well knows, the present subject of this litigation is not NJDEP’s denial of North Wildwood’s *October 5, 2022* EA application. Instead, the present subject of this litigation is NJDEP’s denial of North Wildwood’s *February 10, 2023* EA application. There is no pending enforcement action brought by NJDEP in connection with the February 10, 2023 EA application.

In short, there being no pending enforcement action in connection with the February 10, 2023 EA application, the “procedural bar” of R. 4:67-6(c)(3) – upon which NJDEP relies – is inapplicable.⁴

⁴ Even if the “procedural bar” of R. 4:67-69(c)(3) were applicable to this litigation (which it is not), the so-called “procedural bar” may be relaxed in appropriate circumstances. More particularly, R. 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.” Bd. of Ed. of Elizabeth v. City Council 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).

These standards are plainly applicable to this litigation. There can be no question but that the validity of NJDEP’s order denying the second EA is “urgent and important.” Bd. of Ed. of Elizabeth v. City Council of Elizabeth, *supra*, 55 N.J. at 505. Furthermore -- at the very least -- there is a compelling need to develop a factual record of the emergent circumstances and imminent threat of irreparable harm present on North Wildwood’s oceanfront. Montclair Tp. v. Hughey, *supra*, 222 N.J. Super. at 446

CONCLUSION

For the reasons set forth above: (1) this Court has the requisite jurisdiction over NJDEP'S February 24 denial of North Wildwood's second Emergency Authorization (EA) application "and matters that may occur subsequent thereto; and (2) this Court properly should exercise its jurisdiction over the entire dispute in the interest of judicial economy and consistent with the principles of the Entire Controversy Doctrine and in order to prevent irreparable harm .

CULLEN AND DYKMAN LLP
Attorneys for Defendant
City of North Wildwood

By: 

Anthony S. Bocchi, Esq.

Dated: March 24, 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

**REPLY CERTIFICATION OF ANTHONY
S. BOCCHI, ESQ. IN FURTHER
SUPPORT OF DEFENDANT CITY OF
NORTH WILDWOOD'S MOTION
SEEKING DETERMINATION OF
JURISDICTION**

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 Reply Certification in further support of North Wildwood's Notice of Motion on Short Notice Seeking Determination of Jurisdiction.

3. Annexed hereto as **Exhibit A** is a true and correct copy of the February 1, 2023 Court Transcript of the Order to Show Cause and Motion for Leave to File a 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: March 24, 2023

EXHIBIT A

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

NEW JERSEY DEPARTMENT OF)
ENVIRONMENTAL PROTECTION)
)
PLAINTIFF)
)
V)
)
CITY OF NORTH WILDWOOD)
)
DEFENDANT)

TRANSCRIPT OF
ORDER TO SHOW CAUSE
AND
MOTION FOR LEAVE
TO FILE COUNTERCLAIM

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

DATE: FEBRUARY 1, 2023

BEFORE:

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

TRANSCRIPT ORDERED BY:

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

APPEARANCES:

KEVIN A. TERHUNE, ESQUIRE
DIANNA E. SHINN, ESQUIRE and
KEVIN FLEMING, ESQUIRE
(DEPUTY ATTORNEY GENERALS
FOR THE STATE OF NEW JERSEY)
Attorneys for the Plaintiff

ANTHONY S. BOCCHI, ESQUIRE
NEIL YOSKIN, ESQUIRE and
RYAN P. DUFFY, ESQUIRE
(CULLEN AND DYKMAN, LLP)
Attorneys for the Defendant

Transcriber: Nance M. Bernard, T/A P.S.C.S.
P. O. Box 682, Mays Landing, NJ 08330
CS Recorded/Recording Operator: R.S.

I N D E X

OVERVIEW:

BY: The Court - p. 5

SHOW CAUSE ORDER; RESTRAINING ORDER; INJUNCTIVE RELIEF

FOR THE PLAINTIFF:

BY: Mr. Terhune - p. 6; 34

FOR THE DEFENSE:

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LEAVE TO FILE COUNTERCLAIM

FOR THE DEFENSE:

BY: Mr. Bocchi - p. 36, p. 44

FOR THE PLAINTIFF:

BY: Mr. Terhune - p. 41

RULING

DECISION:

BY: The Court - p. 46

1 THE COURT: Once again, good morning. I'm
2 Michael Blee. I'm the Assignment Judge for Vicinage I.
3 We'll start with appearances of counsel. Counsel, will
4 be kind enough if you have clients with you or decision
5 makers to introduce them to the Court, that would be
6 appreciated. This is the matter of the New Jersey
7 Department of Environmental Protection versus the City
8 of North Wildwood under Docket #C-55-22. Counsel,
9 please enter your appearance starting with plaintiffs.

10 DAG TERHUNE: Good morning, Your Honor. Kevin
11 Terhune, Deputy Attorney General for Department of
12 Environmental Protection.

13 THE COURT: Morning.

14 DAG SHINN: Dianna Shinn, DAG for DEP.

15 THE COURT: Morning.

16 DAG FLEMING: And Kevin Fleming. Also, Deputy
17 Attorney General for DEP.

18 THE COURT: Good morning.

19 DAG FLEMING: Good morning.

20 THE COURT: Are there any --

21 DAG TERHUNE: Your Honor, first --

22 THE COURT: -- representatives here from the
23 DEP?

24 DAG TERHUNE: Oh, we do. We have Colleen
25 Heller, Michele Propelac (phonetic) and Jennifer Kern.

1 THE COURT: Morning, everyone --

2 UNIDENTIFIED SPEAKER: Good morning, Your
3 Honor.

4 THE COURT: -- and welcome. Thank you.
5 Defendants?

6 MR. BOCCHI: Good morning, Your Honor. May it
7 please the Court, Anthony Bocchi from the law firm of
8 Cullen & Dykman, LLP, on behalf of the City of North
9 Wildwood.

10 THE COURT: Good morning.

11 MR. YOSKIN: Good morning, Your Honor. Neil
12 Yoskin. Also of the firm of Cullen & Dykman, LLP, for
13 the defendant of City of Wildwood, North.

14 THE COURT: Good morning.

15 MR. DUFFY: Good morning, Your Honor. Ryan
16 Duffy of Cullen & Dykman, LLP, on behalf of the City of
17 North Wildwood.

18 THE COURT: Good morning. And are any
19 principals here from the City of North Wildwood? If
20 you'd be --

21 MR. BOCCHI: Yes.

22 THE COURT: -- kind enough --

23 MS. SHINN: Yeah.

24 THE COURT: -- to introduce them.

25 MR. BOCCHI: Yes.

1 MR. DUFFY: Yes, Your Honor.

2 MR. BOCCHI: Yes, Your Honor. We have Mayor
3 Rosenello up here.

4 THE COURT: Mayor, --

5 MAYOR ROSENELLO: Good morning, Your Honor.

6 THE COURT: -- good morning. Okay. Let me
7 just summarize why we're here and discuss the process.
8 Before the Court is an Order to Show Cause filed by the
9 plaintiff, New Jersey Department of Environmental
10 Protection seeking a -- a restraining order, injunctive
11 relief. In anticipation of today's proceeding, the
12 Court has considered and will rely upon the following
13 December 6th complaint and brief in support of temporary
14 restraints. The Order to Show Cause filed December 8th.
15 These are all the submissions by the plaintiff. The
16 defendant on January 4th filed a brief in opposition.
17 There's also a request for a site visit on January 9th.
18 Plaintiff, by way of a letter, opposed defendant's
19 request for the site visit on January 11th. Plaintiff
20 filed a reply brief. Also before the Court is
21 defendant's Motion seeking Leave to File a Counterclaim.
22 That was filed on January 4th. On January 13th,
23 plaintiff filed a brief in opposition to defendant's
24 motion on January 18th. The defendants filed a reply
25 brief and we are here for oral -- oral argument. I have

1 reviewed everything. Everything was so well done on
2 both sides. I know we have a bunch of attorneys here.
3 I would just ask one attorney just -- who will be
4 arguing to -- to do so. If you want to divide up
5 certain portions of the argument, you can, but I don't
6 want all three of you participating. Okay? Who will be
7 arguing on behalf of the State?

8 DAG TERHUNE: Your Honor, I will be.

9 THE COURT: Very well. We'll hear an Order to
10 Show call (sic) -- for Order to Show Cause first. Then
11 we'll hear opposition. We'll have a reply and then I
12 would ask defendants then to talk about the application
13 for a counterclaim. Give you a chance to oppose that,
14 counsel, and, also, a chance to reply. I should be in a
15 position to render findings today. Thank you.

16 MR. TERHUNE: Thank you, Your Honor. Good
17 morning. May it please the Court, Kevin Terhune, Deputy
18 Attorney General for New Jersey Department of
19 Environmental Protection. As Your Honor pointed out, we
20 are here for an Order to Show Cause. That we submitted
21 an Order to Show Cause and Verified Complaint on
22 December 6th pursuant to Rule 4:67-6 at which time we
23 were seeking, among other relief, to temporarily and
24 preliminarily enjoin the City of North Wildwood from
25 installing a bulkhead at 15th and 16th Avenues on their

1 oceanfront, engaging in any further excavation or
2 placement of sand between 14th and 16th Avenues without a
3 permit and engaging in any further ocean strength --
4 oceanfront construction, reshaping of dunes, and/or any
5 type of reconstruction of all of these without a permit
6 and DEP approval. In response to that, Your Honor, a
7 letter was submitted by the -- on behalf of the City of
8 North Wildwood and in that letter the City acknowledged
9 that the -- the emergency does - it did not appear that
10 there was any emergency at this point and that the City
11 intended to first seek an emergency authorization before
12 it did anything further on the beachfront. Then the
13 next day, Your Honor had executed the order to show --
14 the order in which it denied our Department of
15 Environmental Protection's temporary restraints and set
16 today's date for the hearing. Since that day, just to
17 summarize, DEP representatives and counsel for DEP have
18 reached out to counsel for -- for the City on numerous
19 occasions to offer assistance including any type of pre-
20 approval or pre -- Excuse me. -- not pre-approval, but
21 pre-review of any anticipated or draft emergency
22 authorizations. As -- As represented they indicated
23 that if an emergency -- it was deemed necessary to act
24 further and submit an emergency authorization that it
25 was intended to do so. And in -- in an effort to assist

1 with that, we offered to -- to pre-review any
2 application to discuss any type of issues that we
3 thought might be needed to be addressed. No emergency
4 authorization has since been signed. This -- The
5 original emergency authorization that we're here for
6 today was submitted back in October originally. Okay?
7 Rather than submitting an emergency authorization, Your
8 Honor, the -- the City has filed as Your Honor put out,
9 a -- a Motion for Leave to File a Counterclaim in this
10 case at which -- in which time not only are they
11 alleging new information, including a breach of contract
12 claim, but they are asking this Court to go through the
13 extraordinary requested relief of asking this Court to
14 authorize them to install a bulkhead without a permit
15 issued by the DEP. Okay. Our position is very clear.
16 We are here for the limited person (sic) -- purpose of
17 enforcing our -- our orders and we -- we do not feel the
18 Court has any jurisdiction to not only dispute the -- or
19 examine the issues set forth in that order as far as the
20 merits of that order, but, in fact, this Court, really
21 the jurisdiction that we're here for today is that you
22 are to enforce the orders that were entered by the DEP.
23 Okay? This case, Your Honor, has a very long history
24 of, unfortunately, going back -- all the way back to
25 2012 where there's a history of non-compliance with the

1 DEP and the statutes and regulations for this -- for
2 this beachfront. Most relevant in 2022 -- Or excuse
3 me. -- 2020, Northwest (sic) Wildwood -- or North
4 Wildwood -- Excuse me. -- destroyed and disturbed more
5 than 6 acres of mature densely vegetated dunes and
6 installed a vinyl and steel bulkhead from 3rd Avenue to
7 13th Avenue without applying for or receiving any type
8 of required DEP approvals. While not directly relevant
9 to this case, it does establish, Your Honor, a history
10 of the City moving forward without getting proper
11 approvals. Okay? DEP was alerted to those violations
12 back in 2 -- 2020 and issued a notice of violation for
13 that. These areas are strictly regulated, Your Honor.
14 They're regulated by the Coastal Facilities of Coastal
15 Area Facility Review Act, the Fresh Water Wetlands
16 Protection Act and, also, the Flood Hazard Area Control
17 Act. Okay. As such, the DEP is the one agency that's
18 responsible for enforcing regulations for those.
19 Subsequent to those that knows the violation, the North
20 Wildwood did submit a permit in 2020 to try to legalize
21 the unauthorized work and that permit is currently
22 pending administratively. The -- That process has not
23 gone into technical review at this point. There is a
24 remaining issue that has to be resolved by the -- the
25 City to get that in front of the DEP for technical

1 review. We understand that they are working on a way to
2 resolve that issue and look forward to receiving that
3 permit. Okay? Immediately, what we're here for today,
4 Your Honor, is a situation that rose post-Hurricane Ian
5 at the end of September, beginning of October.
6 Hurricane Ian did some damage to the coastline and in
7 response to that the City filed an Emergency Request
8 Authorization pursuant to NJAC 7:7-21.1. In that
9 authorization, North Wildwood sought the immediate
10 installation of Jersey barriers at the City's Beach
11 Patrol building, future installation of bulkhead in the
12 same location, and requested among other things the
13 reshaping of the ocean side of the dune that went across
14 the building -- in front of that building, Your Honor.
15 This is approximately between the 15th, 16th Avenue areas
16 that we mentioned earlier. They also requested repair
17 of right-of-way access to the beach at 16th and 25th
18 Avenues. Okay? DEP reviewed those -- that application.
19 They immediately granted partial relief pursuant to
20 that, Your Honor. Those -- What was initially, they
21 approved the installation of temporary Jersey barriers
22 and, also, the removal and relocation of some composite
23 timber decking walkway that -- to allow for the
24 installation of those barriers. DEP later, after
25 further request -- or further review of the application

1 on October 12th, denied the remainder of that including,
2 specifically, any type of reshaping or construction work
3 on the ocean waterfront side of the dune. Also, any
4 type of repair to the 16th and 25 -- 25th Avenue access
5 points. The DEP determined that the threat was no
6 longer existing. The storm had passed. That there was
7 a substantial amount of dune remaining and that there
8 was no emergent condition that would affect that area.
9 As Your Honor's aware, the City disagreed with that
10 assessment and instead of doing anything further,
11 decided that they were going to act on their own behalf
12 and contin -- and did their own reshaping of the dune
13 without authorization, without permit. The next day on
14 the -- Excuse me, Your Honor. If I could go back also
15 as far as timing is concerned? After the decision on
16 the 12th, that decision was memorialized in the DEP's
17 bulletin record on October 19th, 2022, making that an
18 official order. On the 20 -- October 20th, the City had
19 reached out to DEP and indicated that they were going to
20 be proceeding with the unauthorized dune reshaping,
21 which was specifically denied in that EA request, Your
22 Honor. And, in fact, that day a contractor for the
23 City, in fact, did proceed with that work. Not only did
24 that -- they proceed from that work, they took sand from
25 another area of the beach in front of 11th Avenue and

1 took that sand and moved that to the area between 15th
2 and 16th Avenues without a CAFRA permit. So there was
3 violations not only for did they violate the emergency
4 authorization, but they also did additional beachfront
5 construction, which was not requested in violation and
6 without a CAFRA permit. From those violations, Your
7 Honor, a Notice of Violation was issued on October 20th,
8 2022. Okay. Since -- Since that point, the -- the
9 City -- or -- Excuse me. -- the department had received
10 letters on November 9th and 16th, both indicating from
11 the mayor; indicated they were going to be proceeding
12 with the installation of arrangements for installing a
13 bulkhead in that -- in that location. Your Honor, that
14 was the -- the -- that's really what precipitated the --
15 the State's involvement at this crisis at least as far
16 as the division of laws that have representation of DEP
17 to work into stopping them from moving forward without
18 authorization or -- or -- or emergency authorization or
19 permit. As Your Honor knows, we were in -- this is --
20 so they have a substantial history of acting without
21 permits and we were trying to resolve this issue early
22 on and get it worked out. In question, there's a
23 particular sensitive area, Your Honor, north -- just
24 immediately north of the -- the lifeguard building is an
25 area that's -- has freshwater wetlands and a freshwater

1 wetlands transitional of that is also an important
2 habitat for certain endangered migratory raptors. It's
3 a very environmentally sensitive area, Your Honor. And
4 it's for these reasons alone that certain permits and
5 everything else when you are looking to disturb these
6 areas, they're particularly required for the DEP to
7 carefully look at. Your Honor, we talked earlier about
8 why we're here, but -- and I also just like to emphasize
9 the Court's jurisdiction in this case. What the Court
10 has jurisdiction to do is enforce the Court order and
11 that's why we are here in a summary matter. Okay? The
12 DEP partially denied the emergency application and that
13 left the City with certain options. They could have
14 gone and made -- filed an -- an administrative appeal
15 pursuant to NJAC 7:7-28.1(b). They did not file any
16 type of appeal to -- administratively. North Wild (sic)
17 could also have attempted to seek review of the partial
18 denial to the Appellate Division in the interest of
19 justice. That's pursuant to Rule 2:2-3(a)(2). That had
20 to be done within 45 days of the publication of the
21 order pursuant to Rule 2:4-1(b) (sic). That was not
22 done. They did not file any type of proceedings with
23 the Appellate Division. Rather, they came before Your
24 Honor with the extraordinary request that Your Honor not
25 only make -- make some type of factual determinations as

1 to the conditions as they existed and the conditions as
2 set forth in their applications as to whether or not
3 they warranted approval or not approval, but they are
4 now seeking the extraordinary relief of asking Your
5 Honor to approve the installation of a bulkhead and go
6 completely around the DEP. Court doesn't have this type
7 of jurisdiction, Your Honor. The Court does have broad
8 discretion in -- as far as -- as court of equity to
9 remedy fashion -- remedy -- to provide remedies that --
10 to address specific facts and situation, but this
11 Court's jurisdiction can only go so far. This -- What
12 they're asking is completely above and beyond what the
13 courts -- Court's rules provide. Rule 4:67-6(c)(1)
14 specifically sets forth that the Court's jurisdiction in
15 this case would be to enforce a final agency action,
16 which is what DEP is asking this Court to do in this
17 matter. 4:67-3(c)(3) specifically holds that the merits
18 of a final agency decisions are not reviewable in the
19 enforcement actions in the Superior Court. That is
20 exactly what they're asking you to do today, which is
21 completely contrary to the Rules of Court. Any
22 arguments or evidence submitted in -- in connection with
23 the motion or in opposition should not be considered by
24 this Court as the Court does not have jurisdiction to
25 hear those. Regardless, I will say for as far as the

1 application for preliminary injunction, Your Honor,
2 the -- the case law is clear that we are -- the State is
3 entitled to injunctive relief pursuant to -- Not only we
4 believe that we would satisfy the Crowe factors as we
5 will go into later as set forth in Crowe v. DeGioia at
6 90 NJ 126 et seq., but also we would say that just
7 simply by the violations of the State statutes in
8 question that we are entitled to injunctive relief.
9 Specifically, injunctive relief is available for
10 violations of the Coastal Area Facilities Act, which is
11 also known as CAFRA NJSA 13:19-18 et seq., the Coastal
12 Zone Management Rules, NJAC 7:7-29.8A(1), the Flood
13 Hazard -- Flood Hazard Act, which was NJSA 58:60A-63C,
14 and the Freshwater Protection Act. All of these
15 statutes allow for injunctive to -- relief to be issued
16 in this case. Where a statute is violated, the courts
17 are clear there is no -- we do not need to show any type
18 of irreparable harm made by the party that's seeking the
19 injunction, nor should the Court -- must the Court
20 consider whether injunction is in the public interest.
21 That can be found not only in 42 and/or second
22 injunctions, section 23, but also the Department of
23 Environmental Protection vs. Interstate Recycling, 267
24 NJ Super 574. And that's an Appellate Division case in
25 1993. That case held that the department need not show

1 actual environmental damage for the Court to enjoin
2 repeated violations of environmental statutes, which is
3 exactly what we have in this case, Your Honor. Also, we
4 have that -- that case cited Hoffman vs. Garden State
5 Farms, 76 NJ Super 189, Matawan Regulatory -- Regulatory
6 Association vs. Matawan-Aberdeen Board of Education, 212
7 NJ Super 328. In that case moving need not show
8 irreparable harm to be entitled to injunctive relief
9 where injunctions are creatures of statute. All that
10 need be proven is a statutory violation. Your Honor, we
11 have statutory violations in this case. Notices of
12 violation were issued by the DEP and they were clearly
13 set forth in these proceedings. Regardless, we -- Your
14 Honor, even if the Court were to determine that we are
15 entitled to injunctive relief by statutory violations
16 alone, we feel that we have satisfied the equitable
17 factors set forth in Crowe vs. DeGioia. In that case,
18 Your Honor, a -- the -- and for seeking injunctive
19 relief, we must show that a reasonable probability of
20 success on the merits based on well-settled law. This
21 factor should -- should be noted, should be -- should be
22 relaxed if we're seeking status quo, which is, in fact,
23 what we're doing here. We are simply seeking that they
24 do not act further in this case. The balance of
25 hardships favor the party requesting relief. The party

1 seeking relief would suffer irreparable harm in the
2 absence of an injunction and, also, that the public
3 interest will not be harmed by the granting of an
4 injunction. In this case, Your Honor, regardless of the
5 statutory entitlement that we're entitled to, an
6 injunction in this case, we are likely to prevail on the
7 merits as set forth clearly. The City has moved forward
8 without a permit and in violation of -- of -- of CAFRA
9 and the EA that was issued by the State and proceeded to
10 go forward and do -- do beachfront construction work
11 after they were advised not to do it and without a
12 permit. We also would argue that it is very important
13 at this point for -- for the Court to consider that
14 jurisdiction. Aside, it's very important for the DEP
15 themselves to be looking at the applications and permits
16 and that's one of the reasons why it is so important and
17 that the statutes are in place. That is a -- the DEP is
18 the experts. They are -- They are the -- the fact
19 deciders and they will be -- they are responsible for
20 reviewing the application to make sure that the statutes
21 and regulations are in full compliance. We -- We would
22 argue that the balance of the -- the heart -- any
23 hardships and equities favor the State. The State is
24 responsible for the natural -- holds the natural
25 features in trust for the protection of the health

1 selfty (sic), weight (phonetic) safety, and welfare of -
2 - and the environment and perpetuity. Installation of
3 the bulkhead at this time is not an emergency. We made
4 it very clear, not only did the -- the immediate concern
5 from Hurricane Ian pass back in October. Okay? At that
6 point in October, their claim was that the breach of
7 this dune system was imminent. It's now been 4 months
8 since the -- since that storm had passed and there has
9 been no breach of this dune system. Okay? In January,
10 in their latest application, they said breach is
11 imminent. It's going to happen. In the next storm it's
12 going to happen. Nothing has happened. Your Honor,
13 there is no emergency and --

14 THE COURT: That's what --

15 DAG TERHUNE: -- because of that --

16 THE COURT: I thought you indicated there
17 was -- there's not another application that betwine --
18 between the time of the filing and the time the Court
19 denied the ex parte temporary restraints that there
20 had -- that there had been discussions, but no
21 application.

22 DAG TERHUNE: There has been no additional
23 emergency applications filed, Your Honor, despite
24 representations that were -- that it was -- it would --

25 THE COURT: No, I --

1 DAG TERHUNE: -- would be filed and if an
2 emergency was -- it made it necessary, and instead of
3 filing an emergency application when they deemed that
4 the breach was imminent again in January, they filed the
5 motions with the Court instead of filing --

6 THE COURT: I --

7 DAG TERHUNE: -- an emergency --

8 THE COURT: I understand.

9 DAG TERHUNE: -- application.

10 THE COURT: Okay. Thank you. I thought there
11 was something that I wasn't aware of that was filed.

12 DAG TERHUNE: Nope.

13 THE COURT: Okay.

14 DAG TERHUNE: Your Honor, without thorough
15 review of the proposed bulkhead including its proposed
16 location within and adjacent to the sand dunes and the
17 freshwater transition areas and endangered migratory
18 species habitat, Your Honor, it's -- it's essential that
19 the DEP has the opportunity to review any applications
20 for disturbing these sensitive areas and, in
21 particular -- in particular, reviewing what kind of
22 results might happen with the installation of a bulkhead
23 in this area. These areas are classified under CAFRA as
24 critical wildlife habitat and under the F -- the Fresh
25 Water Pollution Act rules as having exceptional resource

1 value and because of that and again in of itself. DEP
2 are the experts in this case. They need to examine what
3 permits are going to be done for what construction is
4 going to be done in this case. As -- As saying before,
5 the DEP has reached out to counsel on multiple occasions
6 and offered for them to discuss options. What they
7 would be willing to do. They looked in at the -- to
8 pre-review any type of emergency application. Nothing
9 was submitted, Your Honor, and until these -- the motion
10 that was submitted to Your Honor in January. Since that
11 time, there's been additional discussions between
12 counsel as to whether or not they were going to be
13 submitting an emergency application. Again, assistance
14 for pre-review of that application was offered to
15 address any immediate concerns they had as far as the
16 imminent breach of the dune or any type of onsite
17 conditions. No -- No emergency application was filed in
18 a draft form or in any -- in any form which would give
19 DEP the opportunity to try to work with them to see what
20 they would permit and what they would not permit.
21 Rather, Your Honor, they're looking for you to make that
22 decision. Okay? There is immediate and irreparable
23 harm to this area as discussed. This is an
24 environmentally sensitive area. Any disturbance of this
25 could result in substantial harm that's in -- that's

1 irreparable. Not only is it, the injunctive relief,
2 specifically authorized by statute, but the further risk
3 of harm by putting a bulkhead in this sensitive location
4 and destroying vegetated dunes is incredibly damaging to
5 the environment. Okay? As far as the going -- finally
6 going to enjoining the defendants from unpermitted
7 activities is squarely in the public interest, Your
8 Honor. We are -- We are a society of laws and
9 regulations. There is avenues. If the -- the laws and
10 regulations need to be revised, there could be there --
11 that's -- that's for the legislature. It is very
12 important that the public has an interest in making sure
13 that the laws and regulations that are in place are
14 followed, not by -- not just by private people, but also
15 by municipal corporations as well. It certainly --
16 certain -- restrain -- North Wildwood serves the public
17 interest just by not only by ensuring compliance with
18 those environmental statutes and regulations, but also
19 in submitting a permit, Your Honor. It actually comes
20 with a period of public comment to give the public
21 themselves the opportunity to be heard and to weigh in
22 on what that application is. What they're asking today,
23 Your Honor, which we will address at -- later in the --
24 in the hearing is for the Judge -- or for Your Honor to
25 decide a case and make a determination without the

1 required jurisdiction and completely take the public out
2 of the process, Your Honor. That's one of the reasons
3 why permits are required and gives the public the
4 opportunity to be heard on the case and, therefore,
5 there is no greater interest in our determination that
6 the -- would be -- weigh not in favor of the DEP in this
7 case, Your Honor.

8 THE COURT: Thank you very much. Mr. Terhune,
9 as indicated. after we hear from defense counsel, I will
10 give you a chance to reply on this issue. Okay? Thank
11 you. Who will be arguing on behalf of the defendant.

12 MR. BOCCHI: I will, Your Honor. Thank you.

13 THE COURT: Thank you.

14 MR. BOCCHI: Thank you. Your Honor, I
15 appreciate your time. Appreciate that you've read all
16 of the papers. I'll try to be brief and respond to some
17 of the statements that were made by counsel just now. A
18 lot of which we obviously disagree with. But first
19 things first. What the Court should understand is that
20 what's before you today is not North Wildwood's seeking
21 to relitigate, as they indicated in their reply brief,
22 what took place back in October. It's not to relitigate
23 whether or not the issuance of that EA back in October
24 should have, in fact, been granted. We believe it
25 should have been, but that's not why we're here before

1 Your Honor. They would like to limit this matter back
2 to October. And limit it in the sense to say as he
3 indicated, well, you know, you should have triggered the
4 Appellate Court's jurisdiction. You're in the wrong
5 forum to make these arguments. But that's not true,
6 because this is a unique case. And we do not have the
7 luxury, unfortunately, of making hyper-technical
8 arguments in terms of limiting the Court's analysis with
9 respect to existing conditions that took place back in
10 October. We are seeking the Court to invoke its
11 equitable jurisdiction and we cited two Sears Roebuck
12 cases. Supreme Court case from 1938 which has been
13 adopted by the Supreme Court over the last 80 years and
14 by the Appellate Division in New Jersey where Mr.
15 Terhune indicates that there has to be a limit to your
16 jurisdiction where, in fact, the Supreme Court of New
17 Jersey specifically held that there is no limit with
18 respect to a court's equitable jurisdiction to fashion
19 remedies to changing circumstances as the court sees
20 fit. And I cannot think of another instance where
21 circumstances are changing faster than which exists in
22 this matter. Anyone who has lived near the Atlantic
23 Ocean understands the velocity at which these things can
24 change. And that's precisely what the Sears Roebuck
25 court was talking about in terms of a courts vast

1 equitable powers to step in and to invoke its powers to
2 protect the public interest. So we have not triggered
3 the Appellate Court's jurisdiction. We are not looking
4 for the Court, as Mr. Terhune just said, to make certain
5 factual findings. There -- There's a bit of a gap
6 between where we're coming from and the arguments that
7 have been set forth by the DEP. And I hope my oral
8 argument can sort of bridge that gap. And what I mean
9 by that is we agree that the -- this is the province of
10 the DEP. I agree with Mr. Terhune's comments that the
11 DEP has been deemed by the legislature as the experts
12 with respect to this issue. I agree with you on that.
13 We're not asking for the Court to invoke its
14 jurisdiction and put on the DEP hat. That would be
15 improper. Your Honor is not situated to do that. But
16 the work has already been done for Your Honor by the
17 experts. By the experts themselves. Exhibit B to the
18 Moriarty certification dated October 7, 2021 -- 2022, an
19 email that states:

20 "Giving the threat to severe loss of property
21 in the emergent nature of the work at the
22 Beach Patrol building."

23 Your Honor, the experts have already made the
24 determination with respect to the fact that a severe
25 threat already exists at that location and we have

1 submitted an abundance of quantitative data that is
2 unrebutted, because it cannot rebe -- be rebutted, that
3 this is the most erosional site in the State of New
4 Jersey and we have submitted quantitative data which
5 unequivocally shows that the conditions have only
6 worsened in the four months since that determination in
7 October that there was a severe threat. Yes, the -- the
8 dune has not breached. By the grace of God, it is not
9 breached. We're just lucky that it hadn't happened, but
10 we have submitted certifications that have indicated --
11 And I think they will have to agree to this. -- that if
12 there's a moderate storm, it's over. There is nothing
13 left there. Zero feet of beach berm as of the time of
14 the certifications. So when you look at it from the
15 perspective of we don't have the luxury of just looking
16 at it when did it exist, what happened in October, what
17 existed then. That's not what I'm talking about. I'm
18 talking about what exists now. What exists now is
19 they're citing to case law that says Your Honor doesn't
20 need to look at the public interest. Is that the
21 position that DEP's taking in this case, because we've
22 submitted materials to Your Honor that say once this
23 breaches, there is a drainage system that runs right
24 along that area that will cause mayhem if it is backed
25 up. We have submitted certifications to the Court that

1 have said there will be private property damage and
2 public property damage. And, obviously, we've set forth
3 case law under the Crowe vs. DeGioia standard with
4 respect to meeting irreparable harm standard. Now with
5 respect to their invocation and they're being the DEP's
6 invocation of Crowe vs. DeGioia, their own papers don't
7 even satisfy the standard. Page 4 of their reply brief,
8 footnote 3:

9 "Nonetheless, installation of a required shore
10 protection mever (sic) -- measure such as a
11 bulkhead will likely cause irreparable harm."
12 Well, words matter. That's not the standard under Crowe
13 vs. DeGioia. It's not we think there might be
14 irreparable harm. It may happen. The standard under
15 Crowe vs. DeGioia is there is immediate irreparable harm
16 and the Court needs to intervene. So even under their
17 own words they fail to set forth the irreparable harm
18 analysis that would be required for the Court to invoke
19 an injunction against Wildwood (sic). So they can't
20 even meet the standard under Crowe vs. DeGioia. And I
21 can walk you through that, but I know Your Honor has --
22 has read the papers. But at the end of the day don't
23 take my word. Take their own words. Their own words
24 were a severe imminent threat existed. And if you look
25 at NJAC 7:7-21, now they're trying to unring the bell

1 that was rung and it cannot be unring. If you look at
2 the Administrative Code provision that is being invoked,
3 there's no analysis to say it's a severe threat for
4 certain measures, but not a severe enough threat for
5 other. The code speaks nothing of that. There's a
6 legal analytical framework that is set forth in the
7 code. Have we checked off those boxes? They said yes.
8 Yet, days later, somehow, they said no. And now in
9 today's submission before the Court, they have a
10 certification that presents an exhibit that says there
11 is a severe threat. Yet, on page 32 of their brief and
12 in the oral argument today, they say there is no threat.
13 So which one is it? Either you're pregnant or you're
14 not. There's no in between. So with respect to whether
15 or not an injunction should be issued to enjoin North
16 Wildwood from taking any measures at the subject site,
17 their entire application was premised on previous
18 correspondence and threats of we're going to move
19 forward anyway and they ran to Court. And we submitted
20 a letter to the Court that said now that the Court is
21 involved, we're not going to do anything. Their entire
22 application was based on we think they're going to build
23 this bulkhead without any permitting process. And our
24 ability to in -- have the Court invoke its equitable
25 jurisdiction, which is broad and limitless, and having

1 the DEP be involved with respect to the permitting
2 process for the building of this bulkhead, those are two
3 things that are not mutually exclusive. That's the
4 disconnect. We, in fact, have resubmitted the permit
5 that dates back to 2020. There were some procedural
6 issues. We submitted it last night. It's been
7 submitted. Okay? So that is -- we are not taking the
8 position before Your Honor. Let me be clear. Judge,
9 enter an order that allows us to build this bulkhead and
10 put the DEP to the side, they have no in -- no
11 involvement with respect --

12 THE COURT: So -- But --

13 MR. BOCCHI: -- to this pros --

14 THE COURT: -- you just use -- you're using a
15 lot of hand gestures --

16 MR. BOCCHI: Yeah, I'm sorry, sir.

17 THE COURT: -- that I appreciate. But you're
18 kind of pointing --

19 MR. BOCCHI: Yeah, I'm sorry.

20 THE COURT: -- to your adversaries. I don't
21 think that's professional, --

22 MR. BOCCHI: I don't --

23 THE COURT: -- sir.

24 MR. BOCCHI: I don't mean that. I don't mean
25 to point to them.

1 THE COURT: Point to the Court, but don't
2 point to your adversary, okay?

3 MR. BOCCHI: But my point --

4 THE COURT: Really shouldn't point to the
5 Court either, but --

6 MR. BOCCHI: I appreciate that.

7 THE COURT: Thank you.

8 MR. BOCCHI: I'm sorry, Your Honor. But my --
9 I -- I use my hands a lot. It's something --

10 THE COURT: Understood.

11 MR. BOCCHI: -- I have to stop doing.

12 THE COURT: Just don't point to your
13 adversary, okay?

14 MR. BOCCHI: I understand.

15 THE COURT: Thank you.

16 MR. BOCCHI: My -- My point, though, Your
17 Honor, is that we think that given the fact that the
18 permit has, in fact, been filed, there is a methodology
19 that can be employed by this Court to invoke its
20 jurisdiction to allow us to deal with that bulkhead at
21 the same time for this permit to be analyzed by the DEP.
22 To the extent that there are any issues with that, we
23 will be back before Your Honor, because they've chosen
24 to bring this matter. And Rule 4:67-4, in fact, does
25 allow for the Court, upon its discretion, to make a

1 determination whether or not a case is so unique as
2 is -- as in this case, that there should be a
3 counterclaim. And that's the arguments that we've
4 offered to the Court, because, yes, there is a long
5 history between the parties here and I think our rules
6 and the Entire Controversy Doctrine and the like called
7 for joinder of issues wherever possible so that there's
8 not piecemeal litigation. So we think, Your Honor, we
9 presented materials to you that allow you to invoke your
10 equitable jurisdiction to allow us to -- to do what is
11 so severely needed and to allow us to do what a mayor
12 and council is obligated to do, which is to serve to
13 protect its residence. And that is all that the city of
14 North Wildwood is looking to do with respect to this
15 matter. At the end of the day, what's before Your Honor
16 is we're seeking to invoke the Court's jurisdiction to
17 allow us to protect the residents of the city of North
18 Wildwood. And it's not to keep the DEP to the sidelines
19 and have no involvement with them. In fact, there is a
20 permit that is now before them that they have had since
21 2020 and I, you know, I wasn't involved in 2020. So I
22 can only speak to my involvement now. So --

23 THE COURT: Well, they've had it since last
24 night.

25 MR. BOCCHI: No, no. But, no, I understand --

1 THE COURT: The revised permit.

2 MR. BOCCHI: -- that. But --

3 THE COURT: Okay.

4 MR. BOCCHI: -- they have it is all -- is all
5 that I can say. I mean if we could have gotten it to
6 them earlier, of course, we would have gotten to them
7 earlier. But the point of it is, Judge, with respect to
8 their application for today's purposes, it was premised
9 on the fact of they're going to build this bulkhead and
10 we submitted to the Court and have been consistent with
11 that in terms of saying now that the Court has
12 jurisdiction over this matter, we're going to wait
13 before we come before Your Honor before we do anything.
14 And we think we have based on this record presented
15 enough of a record for you to be able to invoke your
16 jurisdiction to step in and, quite frankly, to stop the
17 madness, hopefully, to allow these protected measures to
18 be employed while at the same time to allow the experts
19 to review the permit process. But with respect to the
20 notion of, Judge, they're inappropriately asking you to
21 make factual findings, we're not, because they've
22 already done that analysis and these conditions have
23 only gotten worse. So that's -- that -- that pertains
24 primarily with respect to the allegations that have been
25 raised. Now the case law they cite to with respect to

1 repeated violations that counsel made reference to, you
2 know, and their reply brief speaks of a brief point
3 about repeated violations. And it seems like, although
4 they're not invoking it here, the -- there's a long
5 history here. Look at what happened in 2020 and they
6 want to sort of bootstrap the violations from 2020 and
7 try to make an all-encompassing argument to the Court
8 here to date to say look at the past sins and now, you
9 know, there has to be some sort of order that prevents
10 them from doing that moving forward. And my response to
11 that, Your Honor, is what are the past sins with respect
12 to the subject site at issue? Right? They said they --
13 the -- the -- there was some reshaping of dunes. They
14 took some sand from another location. That's the
15 analysis that I would think that the Court is limited to
16 for this day in terms of whether or not an injunction
17 should be issued to prevent North Wildwood from taking
18 action to provide coastal protection to its residents.
19 I think it's improper for the Court to look back to --
20 going back to 2012 and to utilize that as a basis for an
21 injunction against North Wildwood in this case today.
22 And I say that because if you look at the case law that
23 they cite to, these are cases that involve the dumping
24 of toxic waste repeatedly. One of the cases involved
25 the Milk Control Act in 1950 where there was obligations

1 upon milk dealers. They couldn't raise certain prices
2 and there was a violation of that statute repeatedly.
3 And one of the other cases that they cited to was a
4 recycling center who repeatedly operated as a recycling
5 center without any license, but that's not what this
6 case is about. They're -- This is not a private party
7 who's breaching or -- or violating statutes for their
8 own -- for their own private gain. This is a
9 municipality that is taking actions in order to try to
10 protect its residents. So the case law just doesn't
11 jive with the, you know, the facts of this matter. So
12 for those reasons, Your Honor, Your Honor should -- Your
13 Honor correctly denied the TRO request and on this
14 record. The record has been developed to a point to
15 show why there would be no basis to upend that decision
16 into -- and to enjoin North Wildwood from taking any
17 action. So I -- I know we've made other arguments with
18 respect to why we think we're entitled to an injunction,
19 but I'll save those for --

20 THE COURT: The counterclaim. Okay.

21 MR. BOCCHI: -- for the counterclaim, --

22 THE COURT: Very well.

23 MR. BOCCHI: -- Your Honor.

24 THE COURT: Thank you. Mr. Terhune, --

25 DAG TERHUNE: Yes, Your --

1 THE COURT: Your reply on the --

2 DAG TERHUNE: -- Honor. Thank you.

3 THE COURT: -- the injunctive relief. Thank
4 you.

5 DAG TERHUNE: I appreciate it. Just -- Just
6 briefly, Your Honor. Number one, I'd like to point out
7 again, it is true that Ms. Moriarty, who I
8 misidentified earlier as Doriety (phonetic) -- I
9 apologize for -- Correct the record for that. That is
10 Jennifer Moriarty and not Jennifer Doriety (phonetic).
11 She did, in fact, issue that statement in the email.
12 And, again, the DEP has never, not once, maintained
13 that there is not concerns for the area in question at
14 this site. That, however, they felt that the emergency
15 authorization request that was submitted in October was
16 not sufficient and not appropriate for the conditions.
17 And, again, that the requested relief was above and
18 beyond what they felt was necessary to work on
19 addressing the issues. There is a series of
20 alternative options other than short of installing a
21 bulkhead that the DEP believes should be considered and
22 should be addressed in the emergency application. And
23 based on the application that was submitted, that's the
24 application that was denied. The -- North Wildwood
25 says that they're -- they've submitted a ton of

1 additional information and that these situations
2 changes drastically on a day-to-day basis, and that
3 continues to change. Your Honor, that is exactly why
4 if they believe that the situation has changed, they
5 need to file an emergency authorization request for the
6 DEP to consider what changed circumstances or what
7 additional information they may have. It's not Your
8 Honor's purview to make that decision. It's they --
9 They have the obligation to make the request and submit
10 the information to the proper agency that's responsible
11 for reviewing that information. We made it very clear
12 that we'd be willing to work with them on pre-reviewing
13 any additional applications they made from back in
14 October through now, okay? Your Honor, we just found
15 out in court that they resubmitted a permit. They are,
16 themselves, specifically acknowledging that the DEP is
17 the par -- is the agency that's responsible for
18 reviewing requested relief that they're doing. They've
19 acknowledged it in the -- in their original submission
20 of their emergency application, their acknowledgement
21 throughout the period that if an emergency arose that
22 they would resubmit another emergency application. They
23 made that representation to Your Honor that they were
24 going to do that. Rather than do any of that, despite
25 them saying that the next storm could take out the

1 dune, they never submitted an emergency application,
2 Your Honor. The permit -- I'm happy that they
3 corrected the 2020 permit. I completely disagree that
4 references to prior violations is not relevant to this
5 case. Your Honor, that's why we're here today.
6 This -- That -- The injunctive right is based
7 specifically on statutes. We are here today because
8 they violated the statutes in October when they did --
9 October 20th when they did unauthorized work. It was
10 specifically denied in the DEP's review of their
11 emergency application. And then an additional
12 violation by removing sand from a different area and
13 putting it somewhere where they wanted it on the beach
14 without a CAFRA permit. Those are violations of
15 statutes, Your Honor, and the State is entitled to an
16 injunction to make sure that no additional beachfront
17 work is done without permit or emergency applic --
18 authorization from the DEP.

19 THE COURT: Thank you, counsel. We'll now
20 move to the defendant's Motion for Leave to File a
21 Counterclaim. Mr. Bocchi, we'll start with you.

22 MR. BOCCHI: Thank you, Your Honor. Your
23 Honor, I touched upon some of this, so I'll try to be
24 brief. Rule 4:67-4 speaks to summary actions,
25 specifically allows for the Court to consider, in its

1 discretion, whether or not a counterclaim can be issued
2 in a matter like this. And I understand the DEP's
3 position with respect to -- And I spoke to it in my
4 beginning presentation with respect to limiting this to
5 the October, you know, time period, but that's not what
6 this case is about, and that's the whole point of the
7 counterclaim. What this case is about from North
8 Wildwood's perspective is that there are certain
9 obligations, the State aid agreement that the DEP has
10 failed to abide by in terms of failing to procure
11 certain easements that are allowed for the beach
12 renourishment project through the Army Corps of
13 Engineers, with oversight by the New Jersey Department
14 of Envir -- Environmental Protection, would allow that
15 to be administered in North Wildwood. And because of
16 the fact that the DEP has breached its obligation under
17 that agreement, North Wildwood has, in fact, had to
18 undertake significant efforts on its own -- on its own
19 dime to the tune of more than \$20-million in terms of
20 significant beach replenishment efforts that they have
21 undertaken themselves that no other municipality that
22 I'm aware of has been required to do. That issue is
23 inextricably linked with respect to the matters that
24 have been raised on the initial application of the
25 Order to Show Cause by the DEP. In fact, one of the

1 cases that the DEP cites to, the Mazza case allows for
2 the Court to consider contested issues of fact and
3 allows the Court to conduct an evidentiary hearing to
4 resolve factual disputes with repec (sic) -- with
5 respect to a party's compliance or non-compliance. The
6 Mazza court actually says that. I'll read it to you.

7 "Moreover, if there is contested issue of
8 fact regarding the defendant's compliance
9 with the order or ability to comply, the
10 trial court must conduct a evidentiary
11 hearing to resolve the factual (indiscernible
12 word)."

13 So I understand that in the traditional context of a
14 summary proceeding, yes, you're limited to looking at,
15 okay, have they, in fact, violated this agency order.
16 And, yes, typically the Appellate Division reserves
17 jurisdiction with respect to challenging that agency
18 order, but that's not what our counterclaim is about.
19 Our counterclaim is not about, Judge, you need to look
20 back and overstep the bounds of the Appellate Division
21 and say that we should have gotten that EA back in
22 October. That's not what it's about. But what the
23 counterclaim is about is because of the DEP's failed
24 actions in this matter, we have been forced -- North
25 Wildwood has been forced to undertake efforts at its

1 own costs in order to try to protect its residents. So
2 those two issues are inextricably linked, and the
3 Entire Controversy Doctrine screams for the Court to
4 step in and to allow for all of these weighty issues to
5 be addressed in one litigation, before one judge, so
6 that a record is developed now. Obviously, that's not
7 the purposes for today, the -- you know, sufficiency of
8 those arguments and the like. But the point of our
9 submissions, Your Honor, is that Rule 4:67-4 allows you
10 to make that decision if it's in your -- in your
11 discretion. And we think based on all the equitable
12 powers that we cited to in our papers, that you have,
13 in fact, the authority to do that, and you have the
14 authority to do that under the rules, under the
15 specific rule. So 4:67-4 allows you to step in, Your
16 Honor, and to retain jurisdiction with respect to this
17 matter so that these disputes, which we will agree have
18 been longstanding, can be flushed out by the Court,
19 because that would be appropriate. We are against
20 piecemeal litigation. There shouldn't be one
21 proceeding for the Appellate Division, something else
22 regarding a contract before the -- before the trial
23 court. A record should be developed. North Wildwood
24 should be given the opportunity to make its claims.
25 The DEP should be given the opportunity to answer that

1 complaint and defend itself with respect to whatever
2 their position is in the matter, and a record should be
3 developed. In 4:67-4, while if you read the first half
4 of the rules it seems limiting in nature, 4:67-4, in
5 fact, calls for it and allows for it. We also cite
6 to -- As, you know, I'll never forget. -- to New Jersey
7 practice as -- in law school and my professor said to
8 me *if you remember one thing from this class, Rule 1:1-*
9 *2, the rules are meant to be relaxed.* All right.
10 Okay. Well, we don't like to argue that unless we have
11 to. And so -- But I remember Professor Carabella
12 (phonetic) saying that a long time ago. And, Judge,
13 he's right. The rules are meant to be relaxed. And we
14 cite case law where, in fact, the rules had been
15 relaxed in this context where there's an agency action
16 and the rules were relaxed to allow for the development
17 of a record before a court. And that's what our
18 application is about, and that's the disconnect. I
19 understand the DEP's trying to make this about October,
20 but as I -- the first words I said is we don't have the
21 luxury of just looking at this just in October, because
22 there's too much at issue. There's too much to lose
23 if, in fact, a storm comes in and there are problems.
24 And that's why we think the Court should retain
25 jurisdiction, allow us to assert this counterclaim,

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

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

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

1 which -- I think, Your Honor, I -- I think there's some
2 conflation as to what was done back in October and what
3 the current conditions are now as, Your Honor, we had
4 discussed there's mechanisms in place to address
5 current conditions and con -- and conditions since
6 October. The January filing -- Despite what they're
7 saying that they're not asking you to do, in count one
8 is specifically asking you to do what they're saying
9 they're not asking you to do. They're asking you to
10 look at the current facts, look at all this additional
11 information that they want in the guise of the Entire
12 Controversy Doctrine and ask the Court for the
13 extraordinary relief of acting in the seat of an
14 administrative agency. Your Honor, they -- the plea --
15 the proposed counterclaim itself is so above and beyond
16 what is allowed as far as the jurisdiction and should
17 not be considered. And it should not be considered as
18 part of an entire controversy argument. It is not the
19 same controversy. It's a different controversy.
20 They're arguing conditions as they exist after the
21 current application was made to the Court. This is not
22 the same -- the same controversy. It's not the same
23 conditions. They're admitting that the conditions are
24 changing. It is not the same controversy in question.
25 The statutes were violated in October. That's why

1 we're seeking preliminary injunction, to prevent future
2 violations and future actions without the proper review
3 by DEP. That being said, also the application for the
4 counterclaim is not ripe. They're making a contractual
5 claim which violates the contract lia -- Contractual
6 Liability Act, which filed against the State of New
7 Jersey. If someone is seeking damages for a breach of
8 contract, they have to give the DEP, the State, notice.
9 They have since done -- given that notice. It's 90
10 days before they can file a counterclaim related to a
11 breach of contractual claim. It could not be more
12 plain in the current statutes as to what is required,
13 Your Honor. Not to say that the issue cannot be
14 considered by Your Honor in April, when it's timely.
15 But as of right now it is not. They're making
16 arguments that not for monies that they've incurred
17 since October, Your Honor. They're making arguments
18 for monies they've spent over the last decade for beach
19 restoration. And arguably there's a lot of facts that
20 need to be -- need to be heard, not only requiring what
21 was done, but what they might have done, which might
22 have exacerbated their own conditions, Your Honor.
23 But, again, not going into the merits of the case, we
24 reserve our right to specifically file a motion to
25 dismiss the counterclaim later if the Court does give

1 them leave to (indiscernible few words) to file the
2 counterclaim. But the counterclaim, as it currently
3 exists in front of the Court is so far beyond that, we
4 think the motion itself should be denied in its current
5 form. Thank you, Your Honor.

6 THE COURT: Thank you, counsel. Reply?

7 MR. BOCCHI: Your Hon -- Your Honor, I'll be
8 brief, --

9 THE COURT: Thank you.

10 MR. BOCCHI: -- 'cause I'm going to repeat
11 myself and say seven things I've already said to you,
12 but with respect to the New Jersey Contractual
13 Liability Act, counsel is right. We did, in fact, file
14 that notice of claim on January 18th. And in our reply
15 brief at point 6 we indicate to the Court that in light
16 of this, you know, brief interval of time, and from a
17 practical perspective, we -- the Court should permit
18 the filing of a counterclaim. At this time and
19 thereafter allow the passage of the 90-day period
20 through April 18th. And the disposition of -- of -- of
21 that mo -- of that motion, in that way, I agree with
22 counsel. There are a lot of issues to address. It's a
23 tortured history. But, again, these are issues that
24 we -- where I disagree is they are inextricably linked.
25 The failure to abide by that State aid -- or the

1 allegation of the failure to abide by that State aid
2 ob -- agreement is, in fact, directly related to the
3 actions that North Wildwood has taken in the past. The
4 actions that North Wildwood is seeking to do in the
5 future through the authority of the Court. It's all
6 linked together. So the Court should address that and
7 allow the parties to take discovery and get into those
8 issues and allow the parties to flush out those issues,
9 because this is a unique case, and 4:67-4 allows you to
10 step in and to make that decision based on your
11 discretion. And for those reasons, Your Honor, we
12 think that the -- the -- there is a basis for you to --
13 to grant that motion, allow us to file that
14 counterclaim, and we'll deal with any motions I think
15 is appropriate. File a motion to dismiss. We'll deal
16 with the motion to dismiss. We'll deal with the case
17 as it goes on in the normal course just like every
18 other case that we have. Thank you, Your Honor.

19 THE COURT: Thank you, counsel. Folks, we've
20 been here about an hour. Why don't we take a 5-minute
21 recess and I'll come back and make my findings, okay?

22 UNIDENTIFIED COUNSEL: Thank you, Your Honor.

23 UNIDENTIFIED COUNSEL: Thank you.

24 SHERIFF'S OFFICER: All rise.

25 (Off the record. Back on the record.)

1 THE COURT: Let's wait 'til everyone's back.
2 Okay. The Court having considered all of the written
3 submissions that I identified in the beginning of the
4 proceeding.

5 (Court and staff confer - computer issues.)

6 THE COURT: Even in person I have computer
7 issues.

8 (Court and staff continue to confer.)

9 UNIDENTIFIED COUNSEL: We can go back and
10 appear by Zoom.

11 COURT STAFF: Okay. We're good.

12 THE COURT: We're good? Okay. The Court,
13 having considered all the written submissions that I
14 identified at the beginning of this proceeding, as well
15 as oral argument here today, I hereby make the
16 following findings of fact and conclusions of law. I
17 will start with the Order to Show Cause and a Motion
18 for Temporary Restraining Order, Injunctive Relief,
19 then deal with the Counterclaim. This matter comes
20 before the Court by way of plaintiff's Order to Show
21 Cause and Verified Complaint filed on or around
22 December 6th, 2022, by the New Jersey Department of
23 Environmental Protection against the City of North
24 Wildwood and its unknown agents. Plaintiff challenges
25 the defendant's alleged conduct of disregarding a final

1 order from New Jer -- from the NJDEP and engaging in
2 unauthorized oceanfront construction. Plaintiff seeks
3 temporary restraints and injunctive relief against
4 defendants. The arguments of the parties are as
5 follows: Plaintiff argues that defendants failed to
6 exhaust their administrative remedies before bringing
7 this action. Plaintiff contends the defendants had to
8 first seek administrative or appellate review of
9 defendants' emergency authorization application before
10 seeking in this Court. Plaintiff argues the defendants
11 instead chose to proceed with construction and ignore
12 the NJDEP's denial. Defendants assert the following
13 timeline of events: October 5, 2022, defendant
14 submitted their emergency authorization request.
15 October 7, 2022, the NJDEP partially granted the
16 request, but sought additional time to review the
17 remaining three requests. October 12, 2022, the NJDEP
18 denied the remaining three requests. On October 19,
19 2022, NJDEP finally published its denial of the
20 request. On Oct -- October 20, 2022 defendant sent a
21 letter to the NJDEP saying they're nonetheless moving
22 forward with the project. Plaintiff argues that from
23 the October 19 publication date, defendants had 30 days
24 to file an administrative appeal, which -- which it did
25 not do. Additionally, they could have pursued a appeal

1 to the Appellate Division within 45 days and they
2 failed to do so; therefore, they have failed to exhaust
3 their administrative remedies, and the Court should
4 grant the relief. Plaintiff argues that he's entitled
5 to temporary restraints and injunctive relief to
6 prevent further unauthorized work. Plaintiff argues
7 that they're entitled to injunctive relief where a
8 statute specifically provides a court with the right to
9 enjoin non-compliance with the statute's provisions.
10 Plaintiff contends that CAFRA is one such statute.
11 They argue that when a statute is violated the party
12 seeking an injunctive -- injunction does not need to
13 show irreparable harm, nor does the Court need to
14 consider whether the injunction is in the public
15 interest. Plaintiff argues that to obtain temporary
16 restraints and injunctive relief pursuant to CAFRA, in
17 addition to that, the Fresh Water Wetlands Protection
18 Act, the Flood Hazard Area Control Act, and the Coastal
19 Con -- Coastal Zone Management Rules, they only must
20 show that defendants violated and continue to violate
21 the relative statutes and regulations. Plaintiff
22 asserts that on October 20, 2022, the same day
23 defendants replied to the NJDEP via letter, defendants
24 then again worked without a CAFRA permit. They contend
25 defendants have violated statute and intend to keep

1 violating through performing construction without a
2 permit, specifically moving some sand from another area
3 to that area and also doing some work on the sand in
4 that specific area. Plaintiff also argues that they
5 meet all four prongs under the Crowe vs. DeGioia
6 standard. They contend they have a reasonable
7 probability of success on the merits because the
8 decision to deny the request was correct. Defendants
9 need a permit to legally install the bulkhead. They
10 argued that defendants failed to timely appeal the
11 denial, which was fatal. Moreover, the equities
12 balance more in favor of the plaintiff as the State is
13 there to protect the natural features in -- and then a
14 protection to pursue health, safety and welfare in the
15 environment in the surrounding area, pointing to some
16 wildlife that -- that would be affected by this
17 activity. Moreover, plaintiff argues the public
18 interest will be -- will not be harmed by enjoining the
19 actions and argue under Waste Management that the Court
20 should grant it as maintaining the status quo.
21 Defendant opposes. Defendant argues that the Court
22 should use its equitable powers to allow defendants to
23 install a protective bulkhead. Defendants argue that
24 equity requires the installation of the bulkhead
25 because it is an essential emergency measure to protect

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

1 October 5, 2022 and October 12th determinations denying
2 the application because it is a final agency action,
3 and the defendants have failed to exhaust their
4 administrative remedies and cannot relitigate issues
5 without pursuing that. The material facts and
6 procedural history is as follows: During the evening of
7 October 3, 2022, plaintiff received email
8 correspondence from a consultant working for defendants
9 indicating defendants would be submitting an emergency
10 authorization request to protect their Beach Patrol
11 building on 15th Avenue. On October 4, 2022, plaintiff
12 replied indicating it would expedite review, review its
13 request. On October 5, 2022, defendants submitted an
14 emergency authorization request stating a breached
15 condition of their dune was imminent -- dune system was
16 imminent and that they lost more than 75% of their dune
17 system in front of the Beach Patrol building.
18 Defendants requested an immediate installation of
19 jersey barriers at its Beach Patrol building; future
20 installation of a bulkhead at the same location;
21 reshaping of the dune in the area; and repair of the
22 16th and 25th Avenue access ways to the beach. On
23 October 7, 2022, plaintiff partially granted
24 defendants' request for the installation only of
25 temporary jersey barriers and a removal of a timber

1 walkway to allow for those barriers. Plaintiff denied
2 remaining requests on October 12th, 2022, finding that
3 they were unnecessary to prevent immin -- imminent
4 threat. Plaintiff, in its denial, reasoned defendants
5 did not demonstrate an imminent threat to loss or (sic)
6 life or property, as well as the emergency authoriat
7 (sic) -- authorizations are not meant for immediate
8 action and a proposed bulkhead would not be immediate.
9 Plaintiff published the action on October 19th.
10 Immediately thereafter, October 20, 2022, defendants
11 indicated, via letter, that they were nonetheless
12 moving forward on the projects plaintiff rejected. On
13 that same day, plaintiff issued a notice of violation
14 to North Wildwood. On October 28, 2022, plaintiff
15 issued another notice of violation to defendants'
16 contractor, H4 Enterprises, LLC, for sand excavation
17 and dune grading. On October 9th and 16th, plaintiff
18 received letters from North Wildwood's Mayor indicating
19 that they were moving forward with constructing a
20 bulkhead in the vicinity of 15th and 16th Avenues. The
21 standard of review for injunctive relief is as follows:
22 Trial courts have the inherent authority to grant
23 interrogatory injunctive relief, which is an
24 extraordinary equitable remedy utilized primarily to
25 forbid and prevent irreparable injury, Zoning Board of

1 Adjustment vs. Service Electric Cable Television, Inc.
2 198 NJ Super 370 at 379, Appellate Division 1985.
3 Injunctive relief is intended to maintain a status quo
4 and must be administered with sound discretion and
5 consideration of the equities involved, Christiansen
6 vs. Milk Drivers and Dare (sic) -- Dairy Employers, 127
7 NJ Equity 215, 219 and 20, 1940. This application is
8 made under two different standards. One, the -- the
9 general standard of Crowe vs. DeGioia, which has four
10 factors, but they also made the application under what
11 is known as the express statutory authority for this
12 type of relief. For the following reasons I grant the
13 preliminary injunction: There's been comment about the
14 fact that the Court did not grant this relief when the
15 initial application came in. It is really this
16 practice to give everyone -- have a chance and an
17 opportunity to be heard so all the issues could be
18 properly vetted. So nothing should be read into the
19 Court's original denial of the ex parte restraints
20 other than I wanted the defendant to have an
21 opportunity to be heard. The Court finds when a
22 statute specifically provides the right to enjoin non-
23 compliance with the statutes' provisions, a court may
24 grant injunctive relief pursuant to the statute rather
25 than principles of equity, Matawan Teachers Association

1 vs. Matawan Aberdeen Regional Board of Education, 212
2 NJ Super 328, 335. And the Court finds that CAFRA,
3 NJSA 13:9-18C(1), the CZee (sic) -- CZM Rules, NJAC,
4 section 7:7-29.8A(1); the FHCA NJSA section
5 58:16A-63C(1) and the FWPA NJSA section 13:9B-21C(1)
6 were all such statutes providing the right to enjoin
7 noncompliance. When such statutes have been violated,
8 the moving party no longer has to show irreparable
9 harm, nor must the court consider the public interest,
10 State Department of Environmental Protection vs.
11 Interstate Recycling, Inc. 267 NJ Super 547, at 577-78.
12 All that needs to be proven from injunctive relief to
13 be granted is the statute was violated. Here a long
14 stan -- stan -- standing maximum of equity bears
15 repeating. The equity follows the law. Hedges vs.
16 Dixon City (sic), 150 U.S. 182 at 192, 1893.
17 Defendants really did not dispute that after being
18 placed on notice of the -- of the sit -- of the DEP's
19 decision that they would not grant the emergent
20 application, that they specifically wrote to them the
21 next day indicating that they were going to proceed.
22 That is a direct violation of -- of -- of the -- of the
23 authority of the DEP. Moreover, the defendants had a
24 plain avenue of appeal, and for some reason made the
25 decision not to exhaust their administrative remedies.

1 Instead, they made an intentional decision to forego
2 the appeal process and filed their response and their
3 counterclaim. I'll now deal with the counterclaim. I
4 incorporate my findings on the record and will proceed.
5 Defendants seek leave of the Court to file a
6 counterclaim. They argue that pursuant to the court
7 rules when an Order to Show Cause is issued ex parte,
8 the responding party must first obtain leave of court
9 befi -- before filing a counterclaim. Defendants
10 contend that the Entire Controversy Doctrine compels
11 this Court to permit defendants Leave to File a
12 Counterclaim so that the plaintiffs conduct can be
13 adjudicated and proceed. Defendants argue that
14 fundamental principle doctrine is fairness and judicial
15 economy and, therefore, the Court should grant the
16 relief. The court -- They ordered that the Court has
17 jurisdiction to adjudicate its counterclaims rather
18 than the Appellate Division because Rule 4:67-6(c)(3)
19 may be relaxed or dispensed with by the Court if
20 adherence would result in an injustice. Defendants
21 contended the Court, in its equitable discretion,
22 should relax the rule requirements because there are
23 questions of law and of fact requiring the Court to
24 develop a record. In opposition, plaintiff argues
25 defendants' request for leave to file counterclaim must

1 be denied because it's procedurally insufficient and
2 request relief that cannot be resolved in a summary
3 matter. They contend defendants failed to provide
4 sufficient facts indicating that are authorized by a
5 rule or statute to proceed in a summary manner fail to
6 plead sufficient facts for the Court to determine
7 whether relief should be granted. They further argue
8 that with respect to count two the -- there is a notice
9 requirement that was not met and, in fact, defendants
10 agree with that, that the defendants asked the Court to
11 simply keep the case that the notice under the Contract
12 Act was filed on January 18th, 2023 and the 90 day would
13 expire 18 -- April 18th, and, therefore, the Court just
14 could keep the -- keep the action open. Moreover, the
15 plaintiffs argue that count one is rehashing the
16 October decision, which, in their position, is now a
17 final decision because of their failure to exhaust
18 their administrative remedies. When an Order to Show
19 Cause is issued ex parte, no counterclaim shall be
20 asserted without leave of Court Rule 4:67-4, State vs.
21 Bradley, 174 NJ Super 154 at 158, Appellate Division
22 1980. Defendants, in summary actions, are not
23 precluded from requesting Leave of Court to File a
24 Counterclaim. Rather, the Court, in its discretion may
25 grant or deny such a request based on equitable

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

1 barriers. Although defendants have foregone the appeal
2 process pertaining to their earlier emergent
3 application, defendants are in no way barred from re-
4 filing an emergent application. In fact, it was
5 discussed by counsel today in oral argument.
6 Defendants may have a cause to file a new emergency
7 action re -- requested immediately in light of the --
8 the assertions by North Wildwood of the continued
9 degradation of their coastal protection system.
10 Currently North Wildwood has zero feet of beach berm
11 between 11th and 16th Avenues. It has suffered a loss
12 of 12,382 cubic yards of protective dune from 15th --
13 15th and 16th Avenues; that is the James certification
14 in paragraph 3. These are just assertions, but they --
15 it is based on expert opinion. I'm not making findings
16 that it's accurate, but it is being asserted. It is
17 alleged the defendants have lost more than 75% of the
18 protected dune system in front of their Beach Patrol
19 building. Defendants' expert, who has worked with
20 North Wil -- North Wildwood for 20 years to stave off
21 erosion believes conditions will only worsen,
22 particularly in the upcoming nor'easter system, and
23 even a moderate storm could, as he says, easily
24 decimate the town's infrastructure as things stand.
25 Defendants' expert asserts a -- what appears to be

1 somewhat of a persuasive argument and is apparent to
2 the Court that whatever metric of sufficient shore
3 protection one goes by, it appears to be lacking here.
4 It is significant defendants have found success with
5 their use of bulkheads in stark contrast to the extent
6 of a continued loss of dredged sand. They are just
7 comments by the Court. I'm not making a finding, but
8 I'm going to order North Wildwood to file an emergent
9 authorization based on the change in conditions within
10 ten days. Now, I make some comments. I -- I order
11 that recognizing that the defendants' belief, through
12 their counterclaim, that they can continue to pursue
13 the relief that they're seeking some -- basically which
14 is granting them the permission to do exactly what they
15 want to do, build the bulkhead and some other relief.
16 I am not making that decision today. That is not the
17 appropriate time to make that decision. However,
18 through motion practice, now that the counterclaim is
19 in, the -- the -- the State could make an application
20 that the Court has no jurisdiction over any of this
21 because of the lack of -- of -- of failure to exhaust
22 their administrative remedies. If that were to happen,
23 North Wildwood does not file the emergent application,
24 North Wildwood may not be without relief. The State
25 essentially came to oral argument saying we know that

1 there's evidence of further deterioration. We've
2 reached out to say if you file something we'll even
3 help you file it. It doesn't mean they're going to
4 grant it. But North Wildwood can continue these --
5 this dispute on two tracks. At some point though, as a
6 matter of law, this Court may determine what track was
7 appropriate. And the State seems to suggest -- Not
8 making any guarantees. -- that they would grant a new
9 emergent authorization, but they certainly would have
10 an obligation to review it and hopefully work together
11 to reach a solution. On the counterclaim, the State
12 made some very persuasive arguments on the merits. I'm
13 granting the Leave to File a Counterclaim. But as I
14 see this case progressing, I see that there will be
15 extensive motion practice at some point. One, the
16 State could make a motion tomorrow that I should strike
17 that count under the contract law because there's been
18 no notice of the 90 days haven't expired. They can
19 make the motion or they could wait. They could make
20 the motion and wait to determine that after 90 days
21 still is a matter of law. They made an argument -- an
22 oral argument under count one that -- relitigating what
23 should have been litigated during the appeal process in
24 October. I did not make a finding on that. That would
25 have -- would have to entertain motion practice. I'm

1 not suggesting I'm going to deny it or grant it. But
2 that really is the posture of the case now. I asked
3 for the representatives to -- to be here. I would like
4 to have some discussions in chambers. I want to start
5 first with counsel, and Mayor, and the DEP reps, if
6 you'd be kind enough just to stay in the courtroom. We
7 have a conference room and I may want to talk together
8 if that's okay? All right? Thank you. My staff will
9 prepare an appropriate order.

10 UNIDENTIFIED COUNSEL: Thank you.

11 UNIDENTIFIED COUNSEL: Thank you very much.

12 THE COURT: Thank you.

13 SHERIFF'S OFFICER: All rise.

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C E R T I F I C A T I O N

I, NANCE M. BERNARD, the assigned transcriber, do hereby certify the foregoing transcript of proceedings, dated February 1, 2023, recorded 10:00:57-AM to 11:02:37-AM and 11:13:25-AM to 11:36:57-AM, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

/S/ Nance M. Bernard
Nance M. Bernard

201
AOC Number

T/A P.S.C.S.
Agency Name

February 10, 2023
Date

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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, ESQ., hereby certifies to the Court as follows:

1. On March 24, 2023 a true copy of the Reply Certification of Anthony S. Bocchi, Esq. with exhibit and the City of North Wildwood's Reply Brief in Further Support of its Motion for a Determination as to Jurisdiction was served on the following recipients via JEDS and by e-mail:

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

Email: Dianna.Shinn@law.njoag.gov

Debra.Allen@law.njoag.gov

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

Dated: March 24, 2023



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ANTHONY S. BOCCHI
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March 24, 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. Reply Brief in Further Support of the City of North Wildwood's Motion for a Determination as to Jurisdiction;
2. Reply Certification of Anthony S. Bocchi; and
3. Certification of Service.

Thank you for your attention to this matter.

Very truly yours,

CULLEN AND DYKMAN LLP


ANTHONY S. BOCCHI

ASB/rc
Encl.

cc: Hon. Michael J. Blee, A.J.S.C. (Courtesy Copy, via Regular Mail)
Dianna E. Shinn, D.A.G. (via JEDS and E-mail)
Debra A. Allen, D.A.G. (via JEDS and E-mail)

