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April 26, 2023

By electronic filing & Overnight Mail

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

Re: Department of Environmental Protection v. City of North
Wildwood; "XYZ Corporations" 1-10; and "John and/or Jane
Does" 1-10

NWW's Cross-Motion for Leave to File a Second Amended
Counterclaim and Opposition to DEP's Pending Motion to
Dismiss

Dear Judge Blee:

This office represents the Department of Environmental Protection ("DEP") in the above referenced matter. DEP filed a motion to dismiss the City of North Wildwood's ("NWW") first amended counterclaim on March 15, 2023, that was originally returnable on April 14, 2023. Thereafter, on April 6, 2023, NWW sought an adjournment of DEP's motion to dismiss until May 22, 2023, and was ordered to file its opposition brief on April 21, 2023. DEP's reply brief is currently due on May 1, 2023.

On April 21, 2023, NWW simultaneously filed its opposition brief and an unexpected cross-motion for leave to file a second



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amended counterclaim alleging new facts in previously pled counterclaims two through six.

As a preliminary matter, the proposed second amended counterclaim is fatally flawed on its face, and should not be considered by the Court as submitted.¹ The proposed second amended counterclaim does not comply with the well-known requirements of Court Rule 4:9-1 and 4:5-2 because: 1) it does not contain redlined amendments; 2) NWW includes none of the newly alleged facts in the body its counterclaim; and 3) the newly alleged facts, and certain new exhibits, are not certified and, therefore, DEP cannot determine their accuracy. See R. 4:67-2 (finding that actions brought in a summary manner pursuant to R. 4:67-1 shall be verified by affidavit pursuant to R. 1:6-6). More importantly, NWW should not be permitted to rely on the facts it alleges for the first time in its second amended counterclaim as the basis for its opposition to DEP's motion to dismiss. Yet it seeks to do so.

In its opposition to DEP's motion to dismiss NWW improperly seeks to rely on numerous facts that it alleges for the first time in its second amended counterclaim. This cannot be permitted by the Court because it is procedurally improper and because it is prejudicial to the DEP. Specifically, DEP would be prejudiced if it is required to file a reply brief involving newly alleged facts in a different pleading document than the one on which its motion is based. The Court should instead decide the DEP's motion solely on the facts pled in NWW's first amended counterclaim, and should not consider the newly alleged facts at this time.

Moreover, the newly alleged facts could have, and should have, been included in NWW's first amended counterclaim, which the Court granted back on February 1, 2023. NWW's failure to include these alleged facts in its first amended counterclaim should not be rewarded now. These alleged facts were well known to NWW previously, and nothing prevented it from raising these alleged facts earlier in the litigation. NWW does not even assert the alleged facts are newly discovered. It merely alleges the new facts with the hope that the Court will consider them here and they will undermine DEP's motion to dismiss. To the contrary, NWW

¹ Currently, NWW's pending cross-motion should be heard on May 12, 2023, which is before DEP's motion to dismiss will be heard on May 22, 2023. The Court should hold NWW's cross-motion in abeyance until the Court decides DEP's pending motion to dismiss.

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only argues the new alleged facts do not change the substantive nature of each of the previously pled counterclaims. However, that argument falls flat because even a cursory review reveals that they clearly do. For example, new proposed counterclaim two is completely redrafted. And NWW now asserts that specific access points along its oceanfront remain closed since October 2022 in counterclaim three (concerning the alleged violation of the Public Trust Doctrine) because DEP did not grant the October 2022 and February 2023 Emergency Authorizations.

Importantly, NWW moves to omit counterclaim one from its second amended counterclaim as moot because on March 27, 2023 the Court ruled it does not have jurisdiction to review the merits of DEP's decision denying NWW's February 2023 Emergency Authorization application seeking to install a bulkhead. As such, NWW is essentially now admitting it needs a DEP permit to install the bulkhead. Accordingly, DEP's underlying action has been completely adjudicated and the Court should convert the preliminary injunction into a final injunction.¹

In conclusion, the second amended counterclaim does not comply with the Court Rules and should not be considered as submitted. Further, it's inclusion of newly alleged facts in its opposition is procedurally improper and prejudicial to the DEP. Accordingly, DEP respectfully requests that argument on DEP's pending motion to dismiss proceed on May 22, 2023, but based solely on the facts pled in NWW's first amended counterclaim, and that the Court not consider any newly alleged facts contained in NWW's second amended counterclaim until after the court rules on DEP's motion to dismiss.

Because the return date of DEP's motion to dismiss is currently, May 22, 2023, DEP respectfully requests an extension to file its reply brief until May, 8, 2023 and that NWW's cross-motion to file a second amended counterclaim be held in abeyance pending the Court's ruling on DEP's motion to dismiss. DEP is also open to participating in a case management conference with Your Honor to discuss the above issues and how Your Honor would like to proceed given NWW's filing.

¹ Following the Court's decision on DEP's pending motion to dismiss, the Court may find it appropriate to consider if this action should be transferred to the Law Division.

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Thank you for the Court's attention to this matter.

Sincerely yours,

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By: /s/ Dianna E. Shinn
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cc: Anthony S. Bocchi, Esq. (by e-courts)