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Honorable Julio L. Mendez
Atlantic County Superior Court
1201 Bacharach Blvd.
Atlantic City, NJ 08234

**RE: SMITH V. CITY OF NORTH WILDWOOD, ET ALS.
DOCKET NUMBER : CPM-415-16**

Dear Judge Mendez:

As you are aware we represent the Plaintiffs in the above captioned matter. Plaintiffs' reply to Defendant City of North Wildwood's brief in opposition to Plaintiffs' Verified Complaint is as follows:

- A. This Court does have primary jurisdiction over this matter. Plaintiffs did not have to exhaust administrative remedies as Plaintiffs are not seeking a zoning variance or rezoning of the subject area as referred to in N.J.S.A. 40:55D-28.
- B. Plaintiffs do have standing to bring the within action as noted in Plaintiffs' brief in support of their request for injunctive relief. Plaintiffs relied upon the case law established by In re Lead Paint Litigation, 191 N.J. 405,425 (2007); New Jersey Citizen Action v. Riveria Motel Corp. 296, N.J. Super. 402,409 (App. Div.) Certif. granted, 125 NJ 13 (1997), and appeal dismissed as moot, 152 N.J. 361 (1998); Crescent Park Tenants Ass'n v. Realty Equity Corp., 58 N.J. 98, 107 (1971); Home Builders League of South Jersey, Inc. v. Berlin Twp., 81 N.J. 127, 134-35 (1979.); In re Adoption of Baby T, 160 N.J. 332, 340 (1999); Reaves v. Egg Harbor Township, 227 N.J. Super. 360, 366 (Ch. Div. 199.); James v. Arms Technology, Inc. 359 N.J. Super. 291, 320-21 (App. Div. 2003); Elizabeth Federal Savings & Loan Ass'n v. Howell, 24 N.J. 10, 34,35, cert. den. 429 U.S. 922 (1976), Al Walker, Inc. v. Stanhope, 23 N.J. 657,661 (1957); and Jen. ELEC., Inc. v. County of Essez, 197 N.J. 627, 646 (2009), all of which stand for the collective proposition that an individual may maintain a private claim for public nuisance if that individual has suffered harm of a kind different from that suffered by other members of the public

exercising the same right. Additionally, a Plaintiff must show a sufficient stake in the outcome of the proceedings and that their position is adverse to that of Defendants. The Court has conceded that these prerequisites are fluid and in cases involving substantial public interest, but slight private interest, added to and harmonizing with the public interest is sufficient to give standing. Here, Plaintiffs have satisfied the standing requirements articulated in the above referenced case law for the reasons set forth in their originally filed brief.

- C. The Plaintiffs have not failed to join any indispensable parties to this litigation as neither the adjacent condominium association nor any other private resident of the City of North Wildwood controls, supervises, or maintains the subject area of the beach, or has power to permanently close said beach.
- D.
1. As noted in Plaintiffs' brief, Section 821C of the Restatement (Second) allows an individual to maintain an action for public nuisance and recover damages in the form of monetary damages and/or injunctive relief if said individual suffers a special injury. Additionally, Plaintiffs' individual interests in having the beach closed are harmonized with the public interest in having the subject area of the beach permanently closed so that no other unsuspecting beachgoers lose their life due to the hidden public nuisance.
 2. The conditions of the subject beach paired with the atmosphere created by the City of North Wildwood and the lifeguard's culture of turning a blind eye to the known hidden dangers on the subject beach constitute a public nuisance. Additionally, the conduct of the city in promoting said beach as safe constitute a significant interference with the public health, the public safety, the public peace, and the public convenience. Additionally, this conduct is continuous in nature and these conditions on said beach are permanent and long-lasting. The City of North Wildwood has reason to know of the dangers which cause a significant effect upon the public right.
 - i. The Public Trust Doctrine specifically allows a municipality to close a section of a beach if that section is deemed to be a danger to the public health and wellbeing.
 - ii. Plaintiffs would generally agree with Defendant's statement that public policy weighs heavily in favor of public use and enjoyment of unimproved property at their own risk. However, here there is a known continuous hidden danger. The City of North Wildwood fails to warn of this very specific and unpredictable danger, and does nothing to educate the public of said danger. Furthermore, Plaintiffs have produced two experts in the field who opined that the only way to ensure such an accident or tragic death never occurs again is to permanently close the subject area of the beach. The public is led to believe that this area of the beach

is safe. Beach goers continue to walk along the water's edge and wade in the water, and the City of North Wildwood, including the Beach Patrol continue to promote the subject area of the beach as safe and do nothing to warn said beachgoers that they are putting themselves at risk due to the fact that you cannot see the drop off when casually walking on the beach.

3. Plaintiffs have produced two experts in this matter. Both experts opine that the subject area of the beach must be closed to prevent future drownings. Defendant has failed to produce one expert who disagree.
 4. The Plaintiffs are asking that under a half a mile of nearly two miles of beach be closed to the public. The City of North Wildwood maintains over a mile and a half of public beaches which will continue to bring thousands of visitors to their town every summer. The hardships the town will encounter are minimal. Defendant would simply have to remove two sets of stairs, educate the public, post a few of the signs suggested by Dr. Griffiths, and possibly erect a fence or other barrier around the subject area of the beach.
- E. As stated in the State of New Jersey's opposition, the City of North Wildwood is fully responsible for the subject area of the beach, and has undertaken supervision and maintenance of said beach and its attached waterways. The City of North Wildwood has essentially conceded to this fact by bringing to the Court's attention the 2010 Comprehensive Master Plan Update, specifically pages 230-232. See North Wildwood's Exhibit "1".

Respectfully submitted,



Paul R. D'Amato

and



Kasi M. Gifford

cc: Michael Barker, Esquire
Brian Hunkins, Esquire
Joseph Grassi, Esquire
Sandra Smith
Clerk of the Superior Court Law Division, Cape May County