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PLEASE REPLY TO
ATLANTIC COUNTY OFFICE

December 30, 2016

Direct Filing/Law Division
Cape May County Superior Court
9 North Main Street
Cape May Court House, New Jersey 08210

Re: Sandra Smith, Individually and as Executrix of the Estate of George Bradley Smith and as Guardian Ad Litem for her children, Cole smith, Brandy Smith, Nicole Gaeta and Kyle Smith v. City of North Wildwood, State of New Jersey
Docket Number: CPM-L-415-16
Date of Event: July 2, 2012
Our File Number 60289-01

Dear Sir/Madam:

As you are aware, we represent the Defendant City of North Wildwood in the above captioned matter.

We enclose for filing an original and one (1) copy of Notice of Motion to Dismiss on behalf of Defendant, City of North Wildwood. Please return a filed copy in the self-addressed, stamped envelope provided, charging any applicable filing fee to this Law Firm's Account Number 140568.

Re: Sandra Smith, Individually and as Executrix of the Estate of George Bradley Smith and as Guardian Ad Litem for her children, Cole smith, Brandy Smith, Nicole Gaeta and Kyle Smith v. City of North Wildwood, State of New Jersey
Docket Number: CPM-L-415-16
Date of Event: July 2, 2012
Our File Number 60289-01

Thank you.

Very truly yours,

BARKER, GELFAND & JAMES
a Professional Corporation

By: A. Michael Barker
A. Michael Barker, Esquire

AMB/gb

Cc: ***with copy of enclosure to:***
Paul R. D'Amato, Esquire
Attorney for Plaintiff

Kristine Miles, Esquire
Deputy Attorney General
Attorney for Defendant, State of New Jersey
Kristina.Miles@dol.lps.state.nj.us

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Honorable Julio Mendez, J.S.C.
Courtesy copy

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Our File Number: 60289-01
Attorney for Defendant, City of North Wildwood

SANDRA SMITH, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF GEORGE BRADLEY SMITH, AND AS GUARDIAN AD LITEM FOR HER CHILDREN KOLE SMITH AND BRANDY SMITH, NICOLE GAETA, KYLE SMITH, Plaintiff, v. CITY OF NORTH WILDWOOD, STATE OF NEW JERSEY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY DOCKET NO. CPM-L-415-16 Civil Action **NOTICE OF MOTION TO DISMISS**

TO: Paul R. D'Amato, Esquire
D'AMATO LAW FIRM
2900 Fire Road ~ Suite 200
Egg Harbor Township, New Jersey 08234
Attorney for Plaintiff

PLEASE TAKE NOTICE that on Friday, January 20, 2017, at 9 o'clock a.m., or as soon thereafter as counsel may be heard, the undersigned shall move before the above-named Court located at 9 North

Main Street, Cape May Court House, New Jersey 08210, for an Order granting a Motion to Dismiss Pursuant to R. 4:6-2 on behalf of the Defendant, the City of North Wildwood.

PLEASE TAKE FURTHER NOTICE that at the time and place aforesaid, Defendant shall rely upon the Brief and Certification of Counsel attached thereto, in support of Defendant's Motion to Dismiss Pursuant to R. 4:6-2.

A proposed form of Order is attached.

Trial Date: None

Arbitration Date: None

BARKER, GELFAND & JAMES
a Professional Corporation

By: A. Michael Barker
A. Michael Barker, Esquire

Dated: December 30, 2016

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Our File Number: 47620-149-01
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SANDRA SMITH, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF GEORGE BRADLEY SMITH, AND AS GUARDIAN AD LITEM FOR HER CHILDREN KOLE SMITH AND BRANDY SMITH, NICOLE GAETA, KYLE SMITH, Plaintiff, v. CITY OF NORTH WILDWOOD, STATE OF NEW JERSEY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY DOCKET NO. CPM-L-415-16 Civil Action **BRIEF IN SUPPORT OF MOTION TO DISMISS**

On the Brief:
A. Michael Barker, Esquire

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TABLE OF AUTHORITIES

I. PREAMBLE

It is undeniable that Plaintiffs have suffered a tragedy in the loss of Brad Smith. As a result, Plaintiffs seek to permanently close Inlet Beach to the public. While Plaintiffs' actions may be well intentioned, they are not in a position to represent and speak for the many people that live, work, and vacation in North Wildwood. In that regard, there is no indication that Plaintiffs ever intend to return to North Wildwood for vacation, but from their residences in Pennsylvania they are pursuing a court order to deprive the many people that do benefit, directly and indirectly, from Inlet Beach.

As will be explained below, Plaintiffs' action should be dismissed for numerous reasons under the law. First, this Court lacks primary jurisdiction over this matter. It is undisputed that the City of North Wildwood passed a resolution approving a "Beach Management Plan" and a "Public Access Plan" affecting the "Inlet Beach," which Plaintiffs seek to close. Plaintiffs have not established that they applied to the City of North Wildwood Council to alter or repeal the Public Access Plan or the Beach Management Plan. Furthermore, Plaintiffs lack standing to bring the instant lawsuit as Plaintiffs have not demonstrated a substantial likelihood of harm if this lawsuit does not end in their favor. On the contrary, Plaintiffs will undisputedly not be harmed if the Inlet Beach remains open. Additionally, Plaintiffs have failed to join indispensable parties to their lawsuit, such

as the local property and business owners adjacent to Inlet Beach, who certainly have a significant stake in the outcome of this lawsuit. Finally, Plaintiffs' action should be dismissed because Plaintiffs have failed a state a legally cognizable claim, as the Verified Complaint and Plaintiff's expert report enclosed as an exhibit to the Verified Complaint make clear, the alleged nuisance is natural condition of unimproved property which North Wildwood has no duty to abate.

II. STATEMENT OF FACTS

1. The City of North Wildwood's "Master Plan," which North Wildwood is required to prepare pursuant to N.J.S.A. 40:55D-28, encompasses the beach that is the subject of this lawsuit (hereinafter sometimes referred to as "Inlet Beach") as a "Conservation Zone" which is open to the public. (See, Exhibit 1 Sections 6.5.3, Excerpt of City of North Wildwood's Master Plan).[1]

2. The Master Plan also recognizes that North Wildwood's beaches are recreational areas for residents and also attracts tourists to North Wildwood. (See, Exhibit 1 Sections 12.2.3, Excerpt of City of North Wildwood's Master Plan).

[1] Given the length of the Master Plan, North Wildwood has included only a relevant excerpt. The full Master Plan is viewable online at: http://northwildwood.com/departments/master-plan/NWW%20COMP%20MP%20UPDATE%20-%20FINAL%20DRAFT-sm.pdf

3. On August 4, 2009, the City of North Wildwood Mayor and Council passed a resolution (No. 175-09), approving a Beach Management Plan. (See, Exhibit 2 North Wildwood Resolution No. 175-09).

4. Inlet Beach is subject to this Beach Management Plan. (See, Exhibit 3 Beach Management Plan, page 20).

5. On October 2, 2012, the City of North Wildwood Mayor and Council passed a resolution (No. 162-12) approving a Public Access Plan. (See, Exhibit 4 North Wildwood Resolution No. 162-12).

6. According to Resolution 162-12 the Public Access Plan was sent to the New Jersey Department of Environmental Protection for review and approval. (See, Exhibit 4 North Wildwood Resolution No. 162-12).

7. Among the goals of the Public Access Plan is a provision to "[p]rovide meaningful public access to and use of tidal waterways and their shores" and a provision to "[p]rovide opportunities for public access." (See, Exhibit 5 Public Access Plan, page 2).

8. The Public Access Plan states its goal is to "[p]rovide the maximum access possible to the ocean and tidal waters in all areas surrounding the City of North Wildwood. (See, Exhibit 5 Public Access Plan, page 6).

9. On November 4, 2016, in response to this lawsuit, the Board of Directors of The Pointe @ Moore's Inlet (PMI), a sixty-unit condominium complex, sent

a letter "imploring" this Court to deny Plaintiffs' request for injunctive relief based on the significant negative impact the closure of Inlet Beach would have on both rental income and the enjoyment of their property. (See, Exhibit 6 November 4, 2016, letter from PMI).

10. Plaintiff produced a report, dated April 19, 2016, and prepared by Dr. J. Richard Weggel, Ph.D., P.E., D.CE. (See, Exhibit T of Verified Complaint April 19, 2016 Report of Dr. J. Richard Weggel).

11. Dr. Weggel opines in his April 16, 2016 report that a submerged slope on which the Smiths and Sunderlands were walking, failed, causing the group to slide into the inlet and into the ebb flowing current. (See, Exhibit T of the Verified Complaint, April 19, 2016 Report of Dr. J. Richard Weggel, p. 13).

12. Dr. Weggel does not state or opine in his April 19, 2016 report that Brad Smith's death was the result of anything other than a natural condition of the shoreline. (See, Exhibit T of the Verified Complaint, April 19, 2016 Report of Dr. J. Richard Weggel).

III. LEGAL ARGUMENT

A. Legal Standard

Pursuant to N.J. Crt. R. 4:6-2, a defendant may raise the following defenses by affirmative motion: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) insufficiency of process, (d) insufficiency of service

of process, (e) failure to state a claim upon which relief can be granted, (f) failure to join a party without whom the action cannot proceed, as provided by R. 4:28-1.

The Court may consider matters outside the pleadings when analyzing dismissal under all but section (e) above without converting the motion for dismissal into one for summary judgment. See, Hoffman v. Supplements Togo Mgmt., LLC, 419 N.J. Super. 596, 611 n.7 (Super. Ct. App. Div. 2011) ("The trial court appropriately considered, with respect to the motion to dismiss for lack of subject matter jurisdiction under Rule 4:6-2(a), matters outside the pleadings, without converting that specific application to a summary judgment motion.").

B. This Court lacks primary jurisdiction over the subject matter of this action

In the instant case, Plaintiffs' action asks this Court to enjoin Defendant North Wildwood to close the Inlet Beach; however, this Court lacks the jurisdiction to make such a determination absent Plaintiffs establishing that they exhausted their administrative remedies by making the appropriate application to the City of North Wildwood Council to seek an amendment of North Wildwood's Beach Management Plan and/or Public Access Plan, which detail the public's right for access to the Inlet Beach. See, N.J.S.A. § 40:55D-10 (authorizing municipalities to conduct hearings regarding any application for "development, adoption, revision or amendment of the master plan" and "any review undertaken by a planning board"); N.J.A.C. 7:7-16.9(i) (setting forth the process for the NJDEP's review and approval of a municipal

Public Access Plan and the incorporation of the Public Access Plan into the Master Plan); N.J.A.C. § 7:7-16.9(l) (noting that NJDEP approval is necessary for revisions to a Public Access Plan). "Primary jurisdiction comes into play whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." Borough of Closter v. Abram Demaree Homestead, Inc., 365 N.J. Super. 338, 349, 839 A.2d 110, 116 (Super. Ct. App. Div. 2004).

C. Plaintiffs have not shown that they have exhausted their administrative remedies

Plaintiffs have not shown that they have exhausted their administrative remedies in seeking to close Inlet Beach. "It is a basic tenet of administrative law that a plaintiff must exhaust all required administrative remedies before bringing a claim for judicial relief." Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997). In the instant case, Plaintiffs have not demonstrated that they have made the appropriate application to the North Wildwood Council to alter the Master Plan, the Public Access Plan and/or the Beach Management Plan, in order to close Inlet Beach or take some other less restrictive measure, nor have Plaintiffs demonstrated that they presented any proposal to the City of North Wildwood Council for an ordinance closing Inlet Beach. See, e.g., Del Corp Enters. I, LLC v. Twp. of Ocean, 2014 N.J.

Super. Unpub. LEXIS 2593, *11 (Law Div. Oct. 9, 2014)[2] ("Here, the court finds that the appropriate remedy is an administrative remedy, namely that Del Corp should request the Township to amend the Redevelopment Plan to remove the "for-sale" requirement on the 115 market rate units. Upon the Township's denial, Del Corp may appeal to the court by a prerogative writ challenge under R. 4:69-6 with a record for review."). Thus, in the instant case, this Court should deny Plaintiffs' motion for a preliminary injunction as this matter is not ripe for this Court's adjudication.

D. Plaintiffs do not have standing to bring the instant suit for a permanent injunction

Plaintiffs do not have standing to bring the instant suit for injunctive relief and the Verified Complaint should be dismissed on that basis. "A lack of standing by a plaintiff precludes a court from entertaining any of the substantive issues presented for determination." In re Adoption of Baby T, 160 N.J. 332, 340, 734 A.2d 304, 308 (1999).

The cases cited in Plaintiffs' brief do not establish Plaintiffs having standing in the instant case. For example, the Stanhope case, cited in Plaintiffs brief, is clearly distinguishable from the instant case. See, Walker, Inc. v. Stanhope, 23 N.J. 657 (1957). In Stanhope, the Court found that a retailer located 4 miles from the

[2] Unpublished case attached as Exhibit 7.

defendant Borough had standing to challenge an ordinance. Id. at 661-66. In other words, the plaintiff in Stanhope demonstrated the requisite "substantial likelihood of harm" to establish standing to challenge the ordinance. Unlike the moving party in Stanhope, and the moving party in the other cases cited in Plaintiffs' brief, in the instant case the Plaintiffs have made no showing that they will suffer any harm if the Inlet Beach is not closed. To the contrary, it is plainly evident that there is no "substantial likelihood" that Plaintiffs will suffer any harm if the Inlet Beach remains open to the public. Plaintiffs attempt to circumvent this fact by improperly conflating the issue of whether they have standing to bring an individual claim for compensatory damages based on Brad Smith's death with the issue of whether they have standing to bring an injunctive relief action to close a public beach. Furthermore, it is undisputed that Plaintiffs are not residents of the State of New Jersey and Plaintiffs do not allege any business or financial interests related to the closure of the Inlet Beach; thus, Plaintiffs do not have standing to seek closure of the Inlet Beach as residents, property owners or business owners. See, e.g., Feld v. City of Orange Twp., 2015 N.J. Super. Unpub. LEXIS 664, at *7 (Super. Ct. App. Div. Mar. 26, 2015)[3] ("[The plaintiff] is neither a resident nor a property or business owner in Orange. He lives and pays property taxes in the same county, Essex, but not in the same municipality. He does not have the standing of a resident or property

[3] Unpublished case attached as Exhibit 8.

or business owner of Orange to challenge its municipal actions."). In the instant case, Plaintiffs simply cannot establish standing based on Smith's death because the fact of Smith's death does not establish that Plaintiffs will suffer "some harm" if Inlet Beach is not closed. See, e.g., Figa v. Raritan Twp. Planning Bd., 2011 N.J. Super. Unpub. LEXIS 1100, at *1 (Super. Ct. App. Div. May 3, 2011)[4] (affirming the lower court's finding that the plaintiff landowners lacked standing to challenge the defendant Planning Board's denial of a subdivision application because the contract between the plaintiffs and third-party developer terminated at the time the application was denied and therefore plaintiff could not show the requisite "substantial likelihood of harm"). Finally, it is undisputed the Inlet Beach has remained open to the public during the four (4) years since Brad Smith's death and Plaintiffs have not articulated any harm they allegedly suffered in those four (4) years due to the Inlet Beach remaining open.

E. Plaintiffs have failed to join all indispensable parties

In the instant case, Plaintiffs have failed to establish that they made any attempt to notice much less join any indispensable parties other than the named public entities. The letter from the PMI Board of Directors demonstrates residents, property owners and businesses will be significantly impacted if Plaintiffs' are granted injunctive relief.

[4] Unpublished case attached as Exhibit 9.

> *Whether a party is indispensable depends upon the circumstances of the particular case. As a general proposition it seems accurate to say that a party is not truly indispensable unless he has an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily effecting the absentee's interest.*

Grow Farms Corp. v. Nat'l State Bank, 167 N.J. Super. 102, 113 (Super. Ct. 1979).

In the instant case, it is evident that there are parties with significant interests, such as property owners, businesses and recreational associations, which have not been noticed much less joined in this lawsuit. Accordingly, Plaintiff has failed to join all parties necessary for this action to proceed.

F. Plaintiffs have failed to state a legally cognizable claim upon which relief can granted

1. Plaintiff's public nuisance claim fails as a matter of law

Plaintiffs' public nuisance clam fails as a matter of law because it is undisputed that North Wildwood did not "create" the alleged nuisance. "[A] public entity may be liable for ***creating*** a nuisance under the TCA." Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 185, 793 A.2d 607, 615 (2002) (*emphasis added*). In the instant case, it is undisputed that North Wildwood did not "create" the alleged nuisance but rather the alleged nuisance is simply a natural condition of the land. That condition is "natural" as conceded Plaintiff's expert, Dr. Weggel, in his report (which was enclosed as Exhibit T to the Verified Complaint). Dr. Weggel states that his "finding indicate that the inlet beach is occasionally undermined by ebbing tidal

currents to produce an unstable slope that can collapse," i.e. a natural condition of the land. (See, Exhibit T of Verified Complaint). Thus, Plaintiffs' public nuisance claim fails as a matter of law.

"[T]he *Restatement of Torts* draws a distinction between nuisances resulting from artificial and natural conditions of land. The former are actionable, the latter are not." Scannavino v. Walsh, 445 N.J. Super. 162, 168 (Super. Ct. App. Div. 2016) (finding landowner had no duty to abate the "nuisance" caused by the natural condition of tree roots where the trees had not been planted or preserved by the landowner); see also, Lee v. State, 2009 N.J. Super. Unpub. LEXIS 1661, at *3-5 (Super. Ct. App. Div. June 23, 2009)[5] ("[The] plaintiff highlights the testimony of Garcia, the Park ranger, acknowledging that he would typically 'find swimmers just about every day' in the river at certain times of the year. Plaintiff also points to statements in the record from Thomas C. Keck, a Regional Superintendent within the State Park Service, conceding that the upper portion of the Delaware River contains 'swift currents' and that the location is a 'very unsafe place to swim.' These assertions are insufficient, however, to overcome the clear immunities mandated by the TCA. The hazards described by the witnesses are inherent in the Delaware River itself, an unimproved and natural condition."); Gourley v. Twp. of Monroe, 2013

[5] Unpublished case attached as Exhibit 10.

N.J. Super. Unpub. LEXIS 34, at *11 (Super. Ct. App. Div. Jan. 8, 2013)[6] (finding that the defendant Township did not "create" the alleged nuisance, flooding, because the flooding was a natural occurrence of the land and the mere issuance of construction permit in area of high elevation was not sufficient to establish that the Township "created" the alleged nuisance); Mignano v. Jim Sullivan, Inc., 2016 N.J. Super. Unpub. LEXIS 1217, at *32 (Super. Ct. App. Div. May 26, 2016)[7] ("Moreover, there is no evidence that the Township created the dangerous condition of the property. Indeed, the Township played no role in the contamination of the site."); Darby v. Societe Des Hotels Meridien, 88 Civ. 7604 (RWS) (S.D.N.Y. Aug. 18, 1999) (Finding that a rip current is a naturally occurring condition and not a man-made hazard and "as such a landowner has no legal duty to warn of a natural phenomena occurring in ocean beaches."). Thus, Plaintiffs public nuisance claim fails as a matter of law and this action should be dismissed.

The recognized distinction between a nuisance that is artificial and a nuisance that is natural squares seamlessly with the doctrine of sovereign immunity for public entities preserved by the New Jersey Tort Claims Act. Specifically, N.J.S.A. §59:4-8 provides that, "[n]either a public entity nor a public employee is liable for an injury

[6] Unpublished case attached as Exhibit 11.
[7] Unpublished case attached as Exhibit 12.

caused by a condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach."

> Sections 59:4-8 and 59:4-9 reflect the policy determination that it is desirable to permit the members of the public to use public property in its natural condition and that **the burdens and expenses of putting such property in a safe condition as well as the expense of defending claims for injuries would probably cause many public entities to close such areas to public use.** In view of the limited funds available for the acquisition and improvement of property for recreational purposes, **it is not unreasonable to expect persons who voluntarily use unimproved public property to assume the risk of injuries arising therefrom as part of the price to be paid for benefits received.** A similar statutory approach was taken by the California Legislature. [....]
>
> The exposure to hazard and risk involved is readily apparent when considering all the recreational and conservation uses made by the public generally of the foregoing acreages, both land and water oriented. **Thus in sections 59:4-8 and 59:4-9 a public entity is provided an *absolute immunity irrespective* of whether a particular condition is a *dangerous one.***

Troth v. State, 117 N.J. 258, 266-67 (1989) (quoting, N.J.S.A. §59:4-8 & 9, *N.J. Attorney General Task Force Comments*) (emphasis added).

It is overwhelmingly apparent that the New Jersey Legislator believed it was within the best interests of the public that public entities should not be subjected to the costs and expenses of defending against tort liability and the costs of satisfying potential adverse judgments. Similarly, if the Legislator intended to immunize public entities from incurring the costs and expenses that result from conventional tort liability, the same rationale should apply to the costs and expenses of defending

against claims for injunctive relief, and certainly should immunize public entities from incurring the costs and expenses of permanently closing an area of unimproved property, such as a beach.

In the companion case of The Estate of George Bradley Smith v. City of North Wildwood, et. al., Docket # CPM-L-331-14, Plaintiff ("The Estate") is seeking monetary damages for the alleged wrongful death of George Bradley Smith. In The Estate's Brief in Opposition to NWW's Motion for Summary Judgment, which The Estate filed on or about December 23, 2016, at page 9, The Estate quotes Fluehr v. City of Cape May, 303 N.J. Super. 481 (App. Div. 1997): "'there can be no liability for injuries which occur solely due to conditions encountered in that unimproved body of water.' 303 N.J. Super. 481, 488-89 (App. Div. 1997). Additionally, the Court noted that ***the public entity has no obligation to provide supervision or warning signs.*** Id. at 489." (Emphasis added). If the statutory law and case law undisputedly provides, and Plaintiffs acknowledge, that a public entity has no obligation to provide protective services at unimproved public properties, it is astounding that Plaintiffs are convinced they will be able to persuade this Court that it has the legal authority to impose such obligations upon a public entity.

In Plaintiffs' reply in support of a preliminary injunction[8], Plaintiffs argued:

> *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*

[8] A course of action Plaintiffs subsequently abandoned.

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 constitutes 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 danger which caused a significant effect upon the public right.

This is simply a red herring argument which completely avoids the actual issue in this lawsuit. First, it is undisputed that Inlet Beach has no lifeguard stands. In that regard, Plaintiffs are not seeking injunctive relief to add lifeguards to Inlet Beach or otherwise increase lifeguard supervision of Inlet Beach. Nor is Plaintiff seeking for the City of North Wildwood to stop "promoting" Inlet Beach as being safe. Rather, Plaintiffs are seeking to close Inlet Beach because they allege that a steep drop-off near the shore is a dangerous condition which constitutes a public nuisance. Thus, the issue in the instant case is whether North Wildwood and/or the State of New Jersey "created" a nuisance at Inlet Beach which should be abated by a permanent injunction enjoining the beach's closure. Since it is completely undisputed that alleged "drop-off" at Inlet Beach is a natural condition of unimproved property, it is clear that, as a matter law, Defendants did not "create" the nuisance, and are also immune from liability pursuant to N.J.S.A. 59:4-8.

2. Plaintiffs cannot establish that they will suffer an irreparable injury

Equitable relief in the form of a permanent injunction is an extraordinary remedy. "A permanent injunction requires proof that the applicant's legal right to such relief has been established and that the injunction is necessary to prevent a continuing, irreparable injury." Verna v. Links at Valleybrook Neighborhood Ass'n, 371 N.J. Super. 77, 89, 852 A.2d 202 (App. Div. 2004), citing, McCullough v. Hartpence, 141 N.J. Eq. 499, 502, 58 A.2d 233 (Ch. 1948)).

In the instant case, based on the Verified Complaint with attached exhibits, it is clear that Plaintiffs cannot demonstrate that the injunctive relief is necessary to prevent a "continuing, irreparable injury." To the contrary, it is undisputed that Plaintiffs have no plans to return to Inlet Beach and even if they had any such plans it is evident that the Plaintiffs are aware of, and in a position to avoid, any alleged "hazards" regarding the topography of Inlet Beach. Moreover, there is also no evidence that the public at large will suffer an irreparable harm if the permanent injunction is not granted as Plaintiffs have not alleged that any individuals have drowned in the area in question since Brad Smith's death in July of 2012 (and, indeed, Plaintiffs are well aware that no one has drowned in that area since Brad Smith).

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss the instant action, with prejudice.

Respectfully Submitted:
BARKER, GELFAND & JAMES
a Professional Corporation

By: A. Michael Barker
A. Michael Barker, Esquire

Dated: 12/30/16.

Exhibit List

Ex.	Description
1	Excerpts from North Wildwood Master Plan
2	North Wildwood Resolution No. 175-09
3	Beach Management Plan
4	Resolution No. 162-12
5	Public Access Plan
6	November 4, 2016, letter from PMI
7	Del Corp Enters. I, LLC v. Twp. of Ocean, 2014 N.J. Super. Unpub. LEXIS 2593 (Law Div. Oct. 9, 2014).
8	Feld v. City of Orange Twp., 2015 N.J. Super. Unpub. LEXIS 664 (Super. Ct. App. Div. Mar. 26, 2015).
9	Figa v. Raritan Twp. Planning Bd., 2011 N.J. Super. Unpub. LEXIS 1100 (Super. Ct. App. Div. May 3, 2011).
10	Lee v. State, 2009 N.J. Super. Unpub. LEXIS 1661 (Super. Ct. App. Div. June 23, 2009).
11	Gourley v. Twp. of Monroe, 2013 N.J. Super. Unpub. LEXIS 34 (Super. Ct. App. Div. Jan. 8, 2013).
12	Mignano v. Jim Sullivan, Inc., 2016 N.J. Super. Unpub. LEXIS 1217 (Super. Ct. App. Div. May 26, 2016).

Exhibit 1

2010 COMPREHENSIVE MASTER PLAN UPDATE

CITY OF NORTH WILDWOOD, Cape May County, New Jersey

Statement of Objectives, Principles, Assumptions, Policies & Standards

Land Use Plan Element

Housing Plan Element

Circulation Plan Element

Utility Service Plan Element

Community Facilities Plan Element

Open Space & Recreation Plan Element

Conservation Plan Element

Economic Plan Element

Historic Preservation Plan Element

Recycling Plan Element

Statutory Provisions

Appendix

Prepared by

RV&W REMINGTON VERNICK WALBERG ENGINEERS

for the Planning Board of

NORTH WILDWOOD
SUN AND SAND
NEW JERSEY

August 12, 2010

NORTH WILDWOOD PLANNING BOARD

Robert Davis, Chairman

Jay Coleman, Vice Chairman

Edward Einhaus

John Harkins

Chief Robert Matteucci

William Green (Alternate 1)

John P. Klug (Alternate 2)

J. Richard Ogen, Mayor's Designee

Robert L. McCullion, Councilman

Elizabeth Caulkins, Planning Board Secretary (to April 2010)

J. Eric Gundrum, P.P., AICP, Planning Board Secretary (April 2010 to Publication)

Dean Marcolongo, Planning Board Solicitor

Ralph Petrella, Jr. P.E., P.P., PLS, Planning Board Engineer

The original of this document has
been signed and sealed pursuant
to N.J.S.A. 45:14A-12

Respectfully Submitted:
REMINGTON, VERNICK & WALBERG ENGINEERS
By:

Stuart B. Wiser, P.P., AICP
N.J. Professional Planners License # LI005598

Edward J. Walberg, P.E., P.P., C.M.E.
N.J. Professional Planners License # LI0544

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ACKNOWLEDGEMENTS

This project commenced with the naming of a Master Plan Steering Committee on or about September 2007. The first meeting of the Steering Committee was held in October 2007. Subsequent Steering Committee meetings were held (generally) monthly until submission of a draft document to the Planning Board in January 2010.

In addition to the members of the North Wildwood Planning Board and Governing Body, Remington, Vernick & Walberg, as the authors of this document, wish to acknowledge the following individuals, who have made valuable contributions to this effort.

MASTER PLAN STEERING COMMITTEE

Planning Board Representatives
Robert Davis, Planning Board Chairman
Jay Coleman, Planning Board Vice Chairman[1]
Robert McCullion, Councilman

Zoning Board Representatives
James Flynn, Zoning Board Chair
Jodie DiEduardo, Zoning Board Vice-Chair
J. Richard Ogen[2]

City of North Wildwood Representatives
Patrick Rosenello, City Council President
J. Richard Ogen[3]
Raymond Townsend, City Administrator
Louis M. Belasco, City Tax Assessor
Lou Ostrander, City Zoning Officer[4]
Eric Gundrum, P.P., AICP[5]

REMINGTON, VERNICK & WALBERG ENGINEERS

Marc DeBlasio, P.E., P.P., C.M.E.
Eric Gundrum, P.P., AICP
Stuart B. Wiser, P.P., AICP

[1] Full member of Committee to January 14, 2009. Alternate January 14, 2009 to Publication.

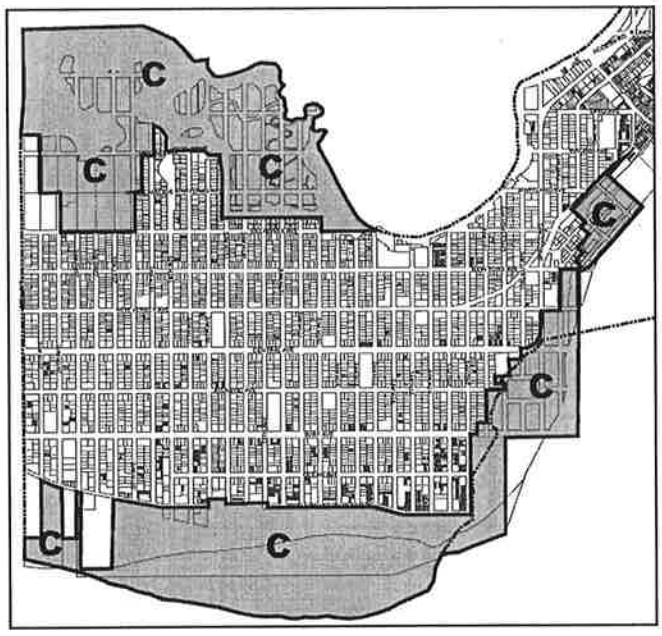
[2] to January 15, 2008

[3] January 16, 2008 to Publication

[4] To April 2010

[5] Mr. Gundrum was employed by Remington, Vernick & Walberg Engineers from project inception to April 2010. From April 2010 to Publication, Mr. Gundrum was employed by the City of North Wildwood as the Zoning Officer / Planning & Zoning Board Secretary.

6.5.3 C Conservation



A. Principal permitted uses on the land and in buildings.

(1) Public playgrounds, public conservation areas, public parks and public open space.

(2) Public purpose uses as defined in Article II of this Chapter.[132]

B. Accessory uses permitted.

(1) Those uses ordinarily associated with the principal permitted uses on the lands, including parking, where appropriate, on the dunes.

(2) Tennis courts and other usual recreational facilities.

C. Maximum building height. No building height shall exceed 35' in height and 2½ stories except as provided in §276-47 of this Chapter.

D. General requirements. All uses and activities must comply with appropriate state and federal regulations, specifically, the state aid agreement between the City and the state (May 22, 1973), under the Shore Protection Program, and the New Jersey State Division of Coastal Resources (N.J.A.C. 7:7E-1.1 et seq.).

E. Recommendations

(1) At Publication:

a. The City's Land Use Plan contained a single, Conservation Zone applicable to environmentally-sensitive lands in the Beach, Inlet and Bay. Permitted Principal Uses in this Zoning District are limited to appropriate public uses and open space.

While the City recognizes the need to protect its natural resources, opportunities exist in certain portions of the Conservation Zone to expand permitted uses to include environmentally-related recreation and eco-tourism activities.

[132] "The use of land or buildings by the governing body of the City or any officially created authority or agency thereof."

b. Accessory Uses in the Conservation Zone include "uses ordinarily associated with the principal permitted uses", "tennis courts and other usual recreational facilities" and "parking, where appropriate, on the dunes".

   Tennis Courts and other usual recreation facilities are more appropriately classified as Principal Uses in a Conservation Zone.

   The concept of parking on the dunes is in conflict with NJDEP regulations regarding Dunes and their preservation.

c. While regulations for the Conservation Zone specify a maximum building height, no other bulk regulations are included.

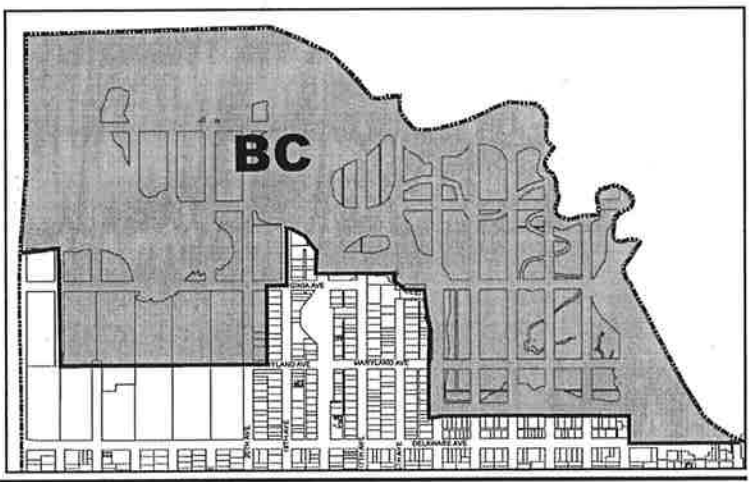
(2) A growing trend in the Tourism Industry is the concept of Ecological Tourism.[133] This trend recognizes the many benefits that the natural environment has to offer and attempts to capitalize on them.

Situated on a barrier island between the Atlantic Ocean and the bay area known as Grassy Sound, North Wildwood is uniquely suited to take advantage of its varied marine habitat. While primarily a seasonal / shoulder month activity, more hearty Eco-Tourists also enjoy the environment in the winter.

North Wildwood has historically been home to sport fishing, excursion and tour boat operations. The availability of waterfront land along Grassy Sound and Ottens Basin provides an excellent opportunity for an expanded water fleet. Whale / dolphin watching, bird watching, recreational fishing and other similar activities, either as commercial ventures or by private boat-owners, should be encouraged.

(3) In light of the foregoing, it is recommended that the unitary Conservation Zone be divided into three (3) separate Zoning Districts with regulations as follows:

a. *BC Bayside Conservation*



[133] "Eco-Tourism"

i. *Purpose*

Recognizing that North Wildwood is located on a barrier island in New Jersey's Coastal Zone and that its bayside shoreline is extremely environmentally sensitive, the Bayside Conservation Zone was crafted to protect this natural environment , while permitting appropriate use of the City's bayside waterfront for water-dependent, tourist-related uses and facilities, including uses and facilities related to eco-tourism.

The regulations established for the Bayside Conservation Zone are those of the City of North Wildwood. While such regulations were designed to conform with CAFRA and the Coastal Zone Management Rules, they do not substitute for CAFRA, the CZM, or any other law, code, rule or regulation established by any State or Federal agency. All development within the Bayside Conservation Zone shall comply with such laws, codes, rules and regulations as applicable.

ii. *All Structures and Uses in the Bayside Conservation Zone shall be considered Conditional Structures and Uses and shall be subject to approval by the Planning Board or Zoning Board of Adjustment, as the case may be:*

iii. *Permitted Principal and Accessory Structures and Uses:*[134]

[a] *Recreational marinas;*

[b] *Rental of personal watercraft;*

[c] *Public Parks, Playgrounds and other Open Space, whether active or passive;*

[d] *Public Conservation Areas;*

[e] *Such educational, recreational or eco-tourism structures and activities as may be permitted by relevant Governmental*

[134] Such uses may be freestanding or combined with other Permitted Uses on a lot.

Agencies having jurisdiction over this section of the City, including observation decks, overlooks, scenic / nature trails, environmental interpretation stations and like and similar uses, including normal and customary parking and ancillary uses;

[f] *Public Utility (Central) Substations and Public Utility Cabinets; and*

[g] *Such environmental protection measures structures and/or activities as may be required by relevant Governmental Agencies having jurisdiction over this section of the City.*

iv. *Bulk Requirements for Principal and Accessory Structures:*

No requirements established.

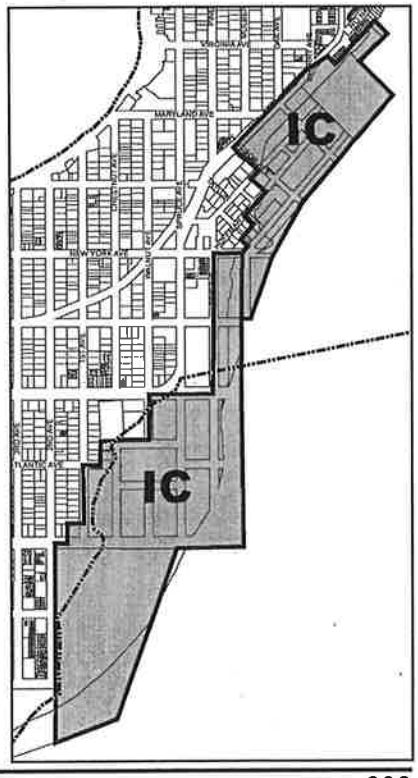
This Chapter defers specific requirements for physical development in the Bayside Conservation Zone to the various Governmental Agencies having jurisdiction over this section of the City.

b. *IC Inlet Conservation*

(1) *Purpose*

North Wildwood's Hereford Inlet is waterway connecting the Atlantic Ocean to the Bay at the Anglesea section of the City.

While officially navigable, Hereford Inlet is an ever changing tidal channel whose waters, until recently, threatened to claim the lands along the City's northern edge.[135]



[135] The City has completed installation of a stone and masonry seawall along Hereford Inlet to stabilize and protect North Wildwood's northern shoreline from tidal erosion. Repairs are ongoing.

The Inlet Conservation Zone was crafted to recognize the natural environment along Hereford Inlet and to limit the land uses permitted in this area accordingly.

The regulations established for the Inlet Conservation Zone are those of the City of North Wildwood. While such regulations were designed to conform with CAFRA and the Coastal Zone Management Rules, they do not substitute for CAFRA, the CZM, or any other law, code, rule or regulation established by any State or Federal agency. All development within the Inlet Conservation Zone shall comply with such laws, codes, rules and regulations as applicable.

(2) *All Structures and Uses in the Inlet Conservation Zone shall be considered Conditional Structures and Uses and shall be subject to approval by the Planning Board or Zoning Board of Adjustment, as the case may be:*

(3) *Permitted Principal and Accessory Structures and Uses:*[136]

[1] *Passive Public Open Space and Public Conservation Areas;*

[2] *Such educational, recreational or eco-tourism structures and activities as may be permitted by relevant Governmental Agencies having jurisdiction over this section of the City, including observation decks, overlooks, scenic / nature trails, environmental interpretation stations and like and similar uses, including parking and ancillary uses normal and customary to such uses;*

[3] *Public Utility Cabinets; and*

[4] *Such environmental protection measures, structures and/or activities as may be required by relevant Governmental Agencies having jurisdiction over this section of the City.*

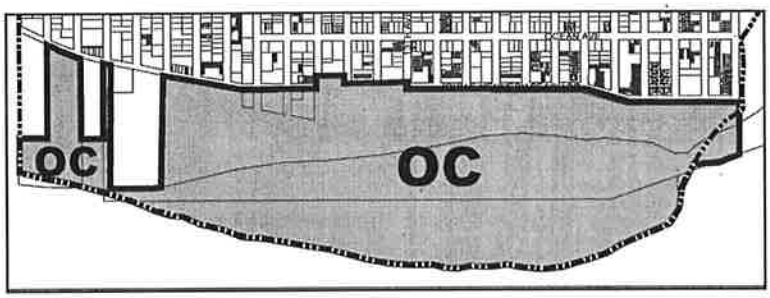
(4) *Bulk Requirements for Principal and Accessory Structures:*

[1] *No requirements established.*

[136] Such uses may be freestanding or combined with other Permitted Uses on a lot.

This Chapter defers specific requirements for physical development in the Inlet Conservation Zone to the various Governmental Agencies having jurisdiction over this section of the City.

c. *OC Oceanfront Conservation*



i. *Purpose*

As a seaside resort, North Wildwood's economic health is inextricably tied to the Beach and Ocean. Recognizing the special nature and economic opportunities presented by these elements, the Oceanside Conservation Zone was created to allow for unique and imaginative development and uses while protecting and preserving the precious environmental resources in this area.

Regulations for the Oceanside Conservation Zone reinforce the City's policy to ensure the continued unobstructed view from the Boardwalk to the Beach and Ocean, to ensure continued use of these resources for the City's residents and visitors and to ensure the vitality of the Beach as a natural resource.

The regulations established for the Oceanside Conservation Zone are those of the City of North Wildwood. While such regulations were designed to conform with CAFRA and the Coastal Zone Management Rules, they do not substitute for CAFRA, the CZM, or any other law, code, rule or regulation established by any State or Federal agency. All development within the Oceanside Conservation Zone shall comply with such laws, codes, rules and regulations as applicable.

ii. *All Structures and Uses in the Oceanside Conservation Zone shall be considered Conditional Structures and Uses and shall be subject to approval by the Planning Board or Zoning Board of Adjustment, as the case may be:*

iii. *Permitted Principal and Accessory Structures and Uses:*

[a] *Public Open space and bathing beaches;*

[b] *Such shore / environmental protection measures, structures and/or activities as may be required by relevant Governmental Agencies having jurisdiction over this section of the City;*

[c] *Such educational, recreational or eco-tourism structures and activities as may be permitted by relevant Governmental Agencies having jurisdiction over this section of the City, including pedestrian accessways, observation decks, overlooks, scenic / nature trails, environmental interpretation stations, play stations / structures, and like and similar uses, including ancillary uses normal and customary to such uses;*

[d] *Temporary seasonal recreation, entertainment and/or athletic activities and/or events, including temporary facilities for same;*

[e] *Seasonal recreation and/or tourist-related concessions and other commercial activities not involving permanent structures;*

[f] *Governmentally sponsored public safety and public use structures, uses and amenities designed to service the beach and Boardwalk;*

[g] *Grading and maintenance of beach land in accordance with a Beach Maintenance Plan approved by the New Jersey Department of Environmental Protection and with an expressed written permit issued by the City's Commissioner of Public Works.*

iv. *Bulk Requirements for Principal and Accessory Structures:*

No requirements established. This Chapter defers specific requirements for physical development in the Oceanside Conservation Zone to the various Governmental Agencies having jurisdiction over this section of the City.

d. *General regulations for all Conservation Zones:*

i. *All seasonal activities may remain in place during the period of May 1 thought October 31, provided that any structure required for said activities does not exceed 64 s.f. in area, and further provided that no excavation, grading or filling is required for such structure.*

Equipment or facilities not meeting such standards must be removed each day at the end of the hours of operation.

ii. *All Uses are required to remove garbage daily.*

iii. *Hours of operation: 10:00 a.m. to 5:30 p.m., unless otherwise approved by the Planning Board or Zoning Board of Adjustment, as the case may be, during the approval process.*

Special Event Permits to allow uses to exceed such hours of operation may be issued by the City in accordance with its standard Special Event permit process. All Special Event Permits shall include specific requirements for hours of operation, length of event and daily garbage and litter collection and removal.

As a coastal community, the City is subjected to tidal flooding caused by normal astrological (moon) tides and coastal storms. Under normal astrological conditions, property damage is relatively infrequent. Property damage routinely occurs during coastal storm events, primarily northeastern (Nor-Easter) storms, which are a common event, especially during the winter and spring seasons. Depending on the severity of the storm and astrological conditions occurring at the time of the event, significant flooding occurs.

Attempts to minimize potential flood damage are addressed via the City's Land Development Ordinance, FEMA and NJDEP / CAFRA regulations, all of which regulate land use and development within the City.

The City's oceanfront is protected by a bulkhead from Hereford Inlet south to 15th Avenue, and the Anglesea Beach Colony section of the City (located in and along the Hereford Inlet), protected by a seawall. The homes in Anglesea are located *very* close to this seawall, and experience significant splash-over during coastal storm events.

Planning for growth in this mature resort community presents a challenge. Limited vacant parcels, growing residential and commercial demand and environmental constraints unique to North Wildwood must be balanced in order to preserve the quality-of-life City residents ~ both permanent and seasonal ~ have come to expect. An ongoing goal of the community is to maintain natural habitat and open space while providing the amenities and services required by residents and visitors.

12.2.3 Beaches

A. North Wildwood's Beach is 1½ miles long and represents approximately 30% of the City's land area. The City's beach is a flat, low profile beach averaging 1,000' in width. While the beach has had a long history of accretion,[435] a sustained period of erosion began in 1998. Since then, the City's beaches have witnessed severe retreat, especially along the North end. The extensive fore-dune system between 2nd Avenue and 13th Avenue has been reduced significantly, and in some places wiped out completely.

   The winter of 2002 - 2003 saw more storms with more intense wave activity than any other winter on record. The less intense winter of 2003 – 2004 produced less beach damage, which was followed by better recovery and landward migration of sand to the beach. In North Wildwood, the oceanfront beach retreated an additional 152' following the 210' retreat in the 18 months between spring 2001 and fall 2002. The beach saw over 200 cubic yards of sand move to Hereford Inlet or south into Wildwood (City) since 2001.

   Had such erosion occurred in any New Jersey City other than the Wildwoods', with its extremely-wide beaches, serious property damage would have resulted.

[435] Caused by the Cape May (a.k.a. Cold Spring) Inlet jetties.

During this same period, the City has gained significant beach along Hereford Inlet ~ between 2nd Avenue and the Hereford Inlet Lighthouse at Central and 1st Avenues. The inlet beach, known locally as Moore's Beach, has lost some width but remains stable. Where the low water line was once located at the Seawall, the City now enjoys a wide beach-front along the inlet; thereby creating an intertidal environment.

Atmospheric events routinely alter the natural features of the shoreline[436] and threaten people and property. Construction of new and reconstruction of existing development, as well as the conversion of single-family dwellings into multi-unit dwellings, continue in hazardous areas. Although application of more stringent construction standards and techniques has improved storm-resistance, the value of property at risk has appreciably increased. With sea levels anticipated to rise and storm frequency anticipated to increase in frequency and intensity, vulnerability to coastal hazards may be expected to worsen and the cost of damage and loss resulting therefrom to increase. Such events require prior planning in terms of rapid response and post-event recovery.

B. Coastal Protection

(1) The NJDEP Bureau of Coastal Engineering has recently undertaken an oceanfront beach renourishment project for several Cape May County communities, including North Wildwood. Details regarding this $25.5 million project may be found in sections 12.2.3 B. and 13.7.4 A. herein.

(2) The City has a bulkhead from 2nd Avenue to approximately 17th Avenue and rock-revetment/concrete-capped seawall from the Angelsea beach colony in the northwestern portion to 2nd Avenue. Bulkheads are installed along the oceanfront and bay waters to minimize flooding and to protect land. Details regarding the Inlet Seawall project may be found in section 9.4 herein.

(3) The City has groin structures at 2nd, Atlantic and Surf Avenues. Their purpose is to control the rate of sand transport and reduce the rate of sand lost in the Hereford Inlet section of North Wildwood.

C. Beach Recreation

In addition to coastal protection, North Wildwood's beaches, with their gentle slope and concomitant shallow surf afford the City with the opportunity to develop unique but environmentally friendly recreation and entertainment attractions on selected areas east of the Boardwalk. Such attractions include, but need not be limited to, the Indoor Waterpark anticipated for the Seaport Pier Redevelopment Area (section 6.6 herein).

[436] beaches, dunes and wetlands

The Wildwoods beaches continue to be recognized destination for the vacationing public, a fact supported by recent honors from two of the country's most influential companies:

A. Time.com placed the Wildwoods on its list of "50 Authentic American Experiences" for 2009. Time chose one location from each of the 50 states to be part of the list. The Wildwoods was chosen not only for being one of New Jersey's most important musical sites, but for its one-of-a-kind Boardwalk and its unique Doo-Wop ambiance.

B. Sherman's Travel (one of the country's leading publishers of top travel deals and destination advice) named the Wildwoods Boardwalk to its list of the nation's "Top 10 American Boardwalks". Sherman's included the Boardwalk for its amusement piers, water parks, tram cars and exceptional food, and because it "offers something for everyone in the family ~ from kids to adults".

Additionally, the Wildwoods won the 2008 award as New Jersey's Best Beach from the New Jersey Marine Sciences Consortium and Richard Stockton College' Coastal Research Center.

12.3 Geology

North Wildwood City is located within the New Jersey's Coastal Plain, a seaward-dipping wedge of unconsolidated sediments that range in age from Cretaceous to Holocene. These sediments, for the most part, are classified as Continental, Coastal or Marine-type deposits. These Coastal Plain deposits thicken seaward from less than 1' at the Fall Line (north / northeast of Trenton) to more than 6,500' at the southern tip of Cape May County. The City is located at the southern tip of Cape May County, where the coastal plain has a thickness of more than one (1) mile.

12.3.1 Soils[437]

Soils in North Wildwood City consist of a variety of upland and lowland types, as well as those soils that fall somewhere in between. Uplands are characterized as well-drained soils that have a relatively deep seasonal high water table. These soils usually occupy high positions in the landscape. Lowland-type hydric soils drain poorly and are usually associated with low positions in the landscape such as stream corridors and depressions.

The following soils classifications have been mapped for the City of North Wildwood City by the United States Department of Agriculture:[438]

[437] Exhibit 33

[438] Soil Survey of Cape May County, New Jersey (2002)

Exhibit 2

CITY OF NORTH WILDWOOD
Cape May County, New Jersey
RESOLUTION

A Resolution Approving a Beach Management Plan for the Protection of Federally and State-Listed Endangered or Threatened Species

WHEREAS, the City of North Wildwood (herein after known as "City") desires to adopt a Beach Management Plan to provide a framework for cooperation between the City, the New Jersey Division of Fish and Wildlife (NJDFW) and the United States Fish and Wildlife (USFWS) and the United States Army Corps of Engineers to protect federally and state-listed endangered and threatened beach-nesting birds and flora occurring on the City of North Wildwood beaches; and

WHEREAS, the Army Corps of Engineers Philadelphia District provides federally-funded beach nourishment projects, and the New Jersey Department of Environmental Protection provides state-funding to the Cape May County area and the City of North Wildwood that benefits the City by providing storm protection and enhanced recreational opportunities; and

WHEREAS, accepting the federally-funded beach nourishment projects requires the City to accept responsibility to protect and manage federally and state-listed species that are attracted to the widened beaches and to ensure the protection of such species consistent with Federal Endangered Species Act and the New Jersey Endangered and Nongame Species Conservation Act; and

WHEREAS, by implementing the Beach Management Plan, the City of North Wildwood, NJDFW, USFWS, and the Army Corps of Engineers, seek to provide for the long-term protection and recovery of the species population in the City and the State of New Jersey by increasing the nesting success of listed bird species and to foster the continued recovery of listed plant species in the City of North Wildwood by reducing detrimental human activities and decreasing predation and minimizing potential conflicts between recreational uses and species protection; and

WHEREAS, the adoption of the Beach Management Plan will increase the City's ability to provide a greater diversity of recreational offerings to the public, such as more recreation in some areas and more passive beach activities in other areas such as bird-watching, nature walks, and shell collection which will benefit the residents and visitors of the City's beaches.

NOW, THEREFORE, BE IT RESOLVED, by the City Council of the City of North Wildwood, in the County of Cape May and State of New Jersey that:

1. The City of North Wildwood Beach Management Plan for the Protection of Federally and state-listed species, dated February 2009, in the form attached hereto as Exhibit A is hereby approved and adopted.

The Mayor and Clerk are hereby authorized to execute the Memorandum of Agreement (MOA) and to implement the Beach Management Plan on behalf of the City of North Wildwood, and to effectuate all the terms and conditions set forth therein and take any and all other actions necessary in connection therewith.

OFFERED BY: KOEHLER **SECONDED BY:** DUNCAN

STATE OF NEW JERSEY
COUNTY OF CAPE MAY

I, Janet H. Harkins, Clerk of the City of North Wildwood, in the County of Cape May, State of New Jersey, do hereby certify that the foregoing is a correct and true copy of a Resolution adopted by the Mayor and Council of the City of North Wildwood at a meeting duly held on the 4th day of August 2009.

Dated: August 4, 2009

Signed _____
W. Scott Jett / Deputy City Clerk

Approved: _____
William J. Henfey - Mayor

	Aye	Nay	Abstain	Absent		Aye	Nay	Abstain	Absent
Duncan	x				Koehler	x			
Maschio	x				Ogen	x			
Tolomeo	x				Rosenello	x			
McCullion	x								

#

175-09

Exhibit 3

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I. INTRODUCTION

A. PURPOSE

The purpose of this Beach Management Plan (Plan) is to provide a framework for cooperation among the City of North Wildwood (City), the New Jersey Division of Fish and Wildlife's (NJDFW) Endangered and Nongame Species Program (ENSP), and the United States Fish and Wildlife Service's (USFWS) New Jersey Field Office (NJFO) in the stewardship of federally and State-listed endangered and threatened beach-nesting birds and flora (listed species) occurring on the City's beaches. Through this Plan, the parties seek to provide for the long-term protection and recovery of species populations in the City and the State, while balancing potentially conflicting missions. In the Plan, the parties define and describe the roles and responsibilities of the City, the NJDFW, and the USFWS in the protection and management of listed species within the City. Protective statutes and regulations are summarized in Section B of this Introduction.

Through this Beach Management Plan, the parties endeavor to increase the nesting success of listed bird species and to foster the continued recovery of listed plant species in the City by reducing detrimental human activities and decreasing predation. Through this Plan, the parties hope to effect a progressive shift of specific beach management responsibilities to the City and citizens of North Wildwood, particularly for those aspects of management that protect listed species from activities permitted, encouraged, sponsored, or performed by the City. This Plan is the result of meetings and discussions among the City's Mayor, Council, Administrator, Clerk, Police, Beach Patrol, Animal Control & Code Enforcement, and Public Works Departments; the NJDFW; and the USFWS.

This Plan is consistent with the USFWS's Recreational (Appendix A) and Fireworks (Appendix B) Guidelines, and with the State Coastal Zone Management Rules (Appendix C). This Plan also satisfies the Terms and Conditions of the December 2005 Programmatic Biological Opinion between the USFWS and the U.S. Army Corps of Engineers, Philadelphia District (Corps) (Appendix E) with respect to municipal beach management planning for the City, and is intended to meet the conditions of permits issued by the New Jersey Department of Environmental Protection's (NJDEP) Division of Land Use Regulation (DLUR) requiring management planning in municipalities receiving beach nourishment. Development and implementation of Service and NJDFW approved Plans is also directed by the Final Natural Resources Restoration Plan (2004) that resulted from the *Anitra* Oil Spill that occurred in the Delaware Bay in May 1996 and moved north along New Jersey's Atlantic Coast.

The parties to this Plan acknowledge that the aforementioned guidelines, rules, terms, and conditions may be periodically revised, and agree to adjust the management of listed species as appropriate to ensure continued compliance, including revision of this Plan if necessary.

B. APPLICABLE LAWS AND REGULATIONS

The following summarizes the Federal and State laws and regulations applicable to the Plan.

1. Federal

Clean Water Act (33 U.S.C. 1344 *et seq.*) (CWA): Regulates discharges into waters of the United States. The CWA is administered by the U.S. Environmental Protection Agency and the Corps.

Endangered Species Act of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*) (ESA): Establishes that endangered and threatened animals and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the nation and its people. Section 4 provides for listing wildlife and plants as threatened or endangered, including criteria for listing and de-listing species. Section 6 authorizes cooperative agreements and funding for States to establish programs for conservation of threatened and endangered species. Section 7 directs all federal agencies to consult with the USFWS regarding any proposed federal action that may affect a federally listed species. Section 9 prohibits take of federally listed wildlife and restricts collection, destruction, and transport of endangered plants. Section 10 establishes permits for scientific collection, and permits for take of listed wildlife that is incidental to an otherwise lawful non-federal action contingent upon preparation of a Habitat Conservation Plan. Implementing federal regulations are found at 50 CFR 17 and 50 CFR 402. The federal list of threatened and endangered species is found at 50 CFR 17.11 and 17.12. The ESA is administered jointly by the USFWS and the National Marine Fisheries Service.

Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703-712) (MBTA): prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests except when specifically authorized by the U.S. Department of the Interior. The MBTA is administered by the USFWS.

2. State

New Jersey Endangered and Nongame Species Conservation Act of 1973, as amended (N.J.S.A. 23:2A *et seq.*): Establishes a list of wildlife species designated by the State of New Jersey as threatened and endangered, and prohibits taking, possessing, transporting, exporting, processing, selling, or shipping listed species. Implementing State regulations are found at N.J.A.C. 7:25-4. The State list of threatened and endangered wildlife is found at N.J.A.C. 7:25-4.13 and 4.17. The Act is administered by the ENSP.

New Jersey Endangered Plant Species List Act (N.J.S.A. 13:1B *et seq.*): Finds that plant species have medicinal, genetic, ecological, educational and aesthetic value to the citizens of New Jersey and that the perpetuation of many native plant species is in jeopardy. The Act establishes an official State list of endangered plants found at N.J.A.C. 7:5C1-1 *et seq.* The Act is administered by the Office of Natural Lands Management (ONLM).

New Jersey Coastal Zone Management Rules (N.J.A.C. 7:7E): Constitute the substantive rules of the NJDEP regarding the use and development of coastal resources, to be used primarily by the DLUR in reviewing permit applications under the New Jersey Coastal Area Facility Review Act (N.J.S.A. 13:19-1 *et seq.* as amended to July 19, 1993) (CAFRA), the New Jersey Wetlands Act of 1970 (N.J.S.A. 13:9A-1 *et seq.*), the New Jersey Waterfront Development Law

(N.J.S.A. 12:5-3), Water Quality Certification (Section 401 of the CWA), and federal Consistency Determinations (Section 307 of the federal Coastal Zone Management Act (104 Stat. 4779; 16 U.S.C. 3951 *et seq.*)). The Rules are administered by the DLUR.

C. LISTED SPECIES

The following summarizes the list of species either known to occur on the City's beaches, or that may potentially occur on the City's beaches. The lists come from published reports, annual monitoring, and NJDFW's databases.

1. Species Known to Occur on the City Beaches

The following species have been documented on the City's beaches. The parties to this plan anticipate the continuing presence of these species in the City and the continued suitability of City beaches as habitat for these species.

(a) Piping Plover (*Charadrius melodus*)

Piping plovers are small, territorial shorebirds present on the New Jersey shore between March and August. Nests consist of a shallow scrape in the sand located above the high tide line. Flightless chicks are led by their parents to feeding areas, including the intertidal zone. The plover diet consists of invertebrates. Historically, from 1988-1996 there were between one (1) and five (5) pairs of plovers that nested on the City's oceanfront beach. Currently, between one (1) and four (4) pairs of plovers have nested on the City's Inlet beach since 2002. The piping plover nesting area is confined, to date, to the "Protected Zone" within the City, between Surf Avenue and Central Avenue along the Hereford Inlet beach (see Figure 1). Piping plovers are federally listed as threatened, State-listed as endangered, and protected by the MBTA.

(b) Least Tern (*Sterna antillarum*)

Least terns are small, colonial-nesting sea birds, present on the New Jersey shore between April and September. Nests consist of a shallow scrape in the sand located above the high tide line. Flightless chicks remain in the colony, where they are fed by their parents. The least tern diet consists of fish. Tern colonies in the City have ranged from zero to over 245 pairs of birds since 2002. The tern colony nesting location is confined, to date, to the "Protected Zone" within the City, between Surf Avenue and Central Avenue along the Hereford Inlet beach (see Figure 1). Least terns are State-listed as endangered and protected by the MBTA.

(c) Black Skimmer (*Rynchops niger*)

Black skimmers are colonial beach-nesting sea birds that currently use the City as an important staging area (adjacent to Hereford Inlet) during the fall migration (September – October), but may potentially nest on the City's beaches. Currently there is a significant Black Skimmer colony on "Champagne Island", within the Hereford Inlet System, and Northwest of the City's "Protected Zone" with 1627 adults/719 nesting pairs in 2007. Black skimmers are State-listed as endangered and protected by the MBTA.

(d) American Oystercatcher (*Haematopus palliatus*)

American Oystercatchers are territorial nesters, nesting on New Jersey beaches from April – August. They make their nests on beaches by scraping a shallow depression in the sand just above the high tide line and also nest on back bay islands. Two (2) to three (3) pairs have nested in the "Protected Zone" " within the City, between Surf Avenue and Central Avenue, since 2002. Oystercatchers are a State species of concern (currently proposed) and protected by the MBTA.

(e) Red Knot (*Calidris canutus rufa*)

Red knots are migratory shorebirds that travel from South America to the Arctic to breed and use the Delaware Bay as a critical stopover site for feeding and resting. Currently, the City is identified as an important migratory staging area for the red knot for feeding or roosting activities. Specific management components are included in the Plan to address the management practices and conservation needs for this species. Red knots are a Federal candidate species under consideration for inclusion on the list of endangered and threatened wildlife under the ESA, are State-listed as threatened, and protected by the MBTA.

2. Species That May Potentially Occur on the City Beaches

The following species have not been documented in the City, but could become established in the future. The parties to this Plan will work cooperatively to manage these species if they colonize the City's beaches. The habitat management and species protections laid out in this Plan are expected to be sufficient to protect the following species, if they become established; therefore, plan revision would likely not be necessary.

(a) Seabeach Amaranth (*Amaranthus pumilus*)

Seabeach amaranth is an annual plant, visible on New Jersey's Atlantic coastal beaches between May and November. Seabeach amaranth is usually found growing in nearly pure sand. The species requires sparsely vegetated upper beach habitat that is not flooded during the growing season. Seeds are dispersed by wind and water, and are present on the beach year-round. Seabeach amaranth is federally listed as threatened and State-listed as endangered.

(b) Seabeach Evening Primrose (*Oenothera humifusa*): Requires beach and dune habitats and is State-listed as endangered.

(c) Seabeach Sandwort (*Honckenya Peploides*): Requires beach and salt marsh habitats and is State species of concern.

D. GOVERNMENT ENTITIES

The following summarizes those government entities referred in or that have authority within the Plan.

City: City, North Wildwood, Cape May County, New Jersey.

Corps: U.S. Army Corps of Engineers, Philadelphia District. The Corps Regulatory Program issues permits for placement of fill material in waters of the United States and for construction activities in navigable waters, pursuant to Section 404 of the federal CWA and Section 10 of the Rivers and Harbors Act of 1899 (30 Stat. 1151, as amended; 33 U.S.C. 403 *et seq.*), respectively. Corps permits are required for activities such as wetland fill, beach nourishment, and construction or maintenance of ocean groins and jetties. The Corps' Civil Works Planning Program carries out shore protection, flood control, navigation, and ecosystem restoration projects as directed by Congress, including the New Jersey Shore Protection Study that includes beach nourishment in the City.

DLUR: New Jersey Department of Environmental Protection, Division of Land Use Regulation. The DLUR administers the State permitting program for activities in wetlands and within New Jersey's Coastal Zone. Permits from the DLUR are required for activities such as disturbance of wetlands, beach and dune maintenance, construction or maintenance of structures on the beach, beach nourishment, and construction or maintenance of groins, jetties, seawalls, and bulkheads.

ENSP: New Jersey Department of Environmental Protection, Division of Fish and Wildlife, Endangered and Nongame Species Program. The ENSP is responsible for listing, monitoring, and managing State-listed wildlife species, and administration of the New Jersey Endangered and Nongame Species Conservation Act.

NJDEP: New Jersey Department of Environmental Protection. The NJDEP is the State Department that oversees environmental laws and policies, and includes the DLUR, the NJDFW, and the ONLM.

NJDFW: New Jersey Department of Environmental Protection, Division of Fish and Wildlife. The NJDFW is charged with protecting and managing the State's fish and wildlife to maximize their long-term biological, recreational, and economic values. In addition to the ENSP, the NJDFW includes the Bureaus of Wildlife Management, Freshwater Fisheries, Marine Fisheries, Shellfisheries, and Information and Education, and the Office of Environmental Review.

NJFO: New Jersey Field Office, Ecological Services, U.S. Fish and Wildlife Service. Within New Jersey, the NJFO's responsibilities include review of federal water-resources projects, monitoring and management of federally listed species (both wildlife and plants), and administration of the ESA.

OEM: The City Office of Emergency Management. The OEM is the City office responsible for managing States of Emergency.

ONLM: New Jersey Department of Environmental Protection, Division of Parks and Forestry, Office of Natural Lands Management. The ONLM is responsible for administration of the New Jersey Natural Heritage Database on biodiversity resources, promulgation and amendment of New Jersey's Endangered Plant Species List, and administration and management of State-owned lands designated to the Natural Areas System.

USFWS: U.S. Fish and Wildlife Service. The USFWS is the principal agency through which the federal government carries out its responsibilities to conserve, protect, and enhance the nation's fish and wildlife and their habitats for the continuing benefit of the people. The primary responsibilities of the USFWS are migratory birds, endangered species, certain marine mammals, anadromous fish, and wildlife resources on federal land.

E. ACRONYMS AND DEFINITIONS

ATV: all-terrain vehicle.

beach nourishment: addition of sand in designed contours to extend a beach and the near shore shallows seaward.

Biological Opinion: a document that includes: (1) the opinion of the USFWS as to whether or not a proposed federal action is likely to jeopardize the continued existence of federally listed species; (2) a summary of the information on which the opinion is based; and (3) a detailed discussion of the effects of the action on federally listed species. Issuance of a Biological Opinion concludes formal consultation between the USFWS and a federal action agency pursuant to Section 7 of the ESA, and an accompanying Incidental Take Statement authorizes, if appropriate, limited incidental take of federally listed wildlife in the course of implementing the federal action.

brood: a group of young birds hatched at one time and cared for by the same parents.

Conservation Measures: actions to benefit or promote the recovery of listed species that are included by a federal agency as an integral part of a proposed action. These actions will be taken by the federal agency and serve to minimize or compensate for project effects on the federally listed species impacted by the proposed action. Conservation Measures are usually included in a Biological Opinion.

consultation: the process required by Section 7 of the ESA through which the USFWS works with a federal action agency to determine if a proposed federal action is likely to adversely affect a listed species under USFWS jurisdiction, or jeopardizes the continued existence of such a species. Federal actions include actions that are carried out, funded, or authorized by a federal agency.

Declared Emergency: a state declared by City, County, State, and/or federal governments in anticipation of, during, or following an event that threatens human health, safety, or property.

Throughout this plan, "State of Emergency" (SOE) signifies a state of Declared Emergency. The term "emergency" is defined below.

Within the City, the Mayor or Office of Emergency Management (OEM) declares all Emergencies, and the OEM manages the Emergency. A copy of the Emergency Declaration Document is on file at the City Municipal Clerks Office, 901 Atlantic Avenue. Once the Emergency has been declared, the OEM, Mayor, or Chief of Police confirm and notify the City Clerk. Activities responding to a State of Emergency (SOE) may include the following:

SOE Beach Nourishment: placement of clean sand on the beach to protect human life or health or public or private structures, signified by a Declared Emergency and eligibility for DLUR permits under N.J.A.C. Section 7:7E-3A.3 of the New Jersey Coastal Zone Management Rules. Emergency Beach Nourishment is included in the definition of "SOE Post-storm Beach or Dune Restoration."

SOE Clean-up: removal from the beach of large debris that poses a threat to human health or safety using vehicles and equipment, signified by a Declared Emergency.

SOE Raking: mechanical beach raking necessary to remove from the beach debris that poses a threat to human health or safety (*e.g.*, medical waste, hazardous materials), signified by a Declared Emergency.

SOE Post-storm Beach or Dune Restoration: activities listed at Section 7:7E-3A.3(b) of the New Jersey Coastal Zone Management Rules to restore beaches or dunes impacted by coastal storms with a recurrence interval equal to or exceeding a 5-year storm event, signified by a Declared Emergency and eligibility for DLUR permits under Section 7:7E-3A.3. Placement of sand and other materials (beach nourishment) and sand scraping (defined below) are among the activities listed at 7:7E-3A.3(b).

emergency: a situation presenting imminent risk to human life, health or safety.

emergency vehicle: a vehicle responding to an emergency.

essential vehicle: a vehicle required to provide for safety, law enforcement, maintenance of public property, or access to private dwellings not otherwise accessible.

feral: wild, untamed or un-owned, referring to animals that are normally pets such as cats or dogs.

Fireworks Guidelines: the USFWS document entitled *Guidelines for Managing Fireworks in the Vicinity of Piping Plovers and Seabeach Amaranth on the U.S. Atlantic Coast* (Appendix B).

fledged: able to fly. Piping plover, least tern, and black skimmer chicks are presumed to have survived the nesting season once fledged; monitoring and management restrictions are usually relaxed once all chicks are fledged. For management purposes, piping plover chicks are considered fledged at 35 days of age or when observed in sustained flight for at least 15 meters, whichever occurs first.

growing season: the time of year when seabeach amaranth is present on the beach; usually May 15 through November 30.

harass: an act which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

harm: an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

incidental take: take of listed fish or wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity.

listed species: for the purposes of this plan, a species that is: (1) listed or proposed for listing as endangered or threatened, or designated as a candidate for listing, by the USFWS pursuant to the ESA and its implementing federal regulations; (2) listed as endangered or threatened by the State pursuant to the New Jersey Endangered and Nongame Species Conservation Act and its implementing State regulations; (3) listed by the State as endangered pursuant to the New Jersey Endangered Plant Species List Act; and/or (4) listed as a State species of concern by the NJDFW or the ONLM.

nesting area: an area occupied by nesting piping plovers, least terns, and/or black skimmers in the current or recent nesting seasons, including areas used for courtship, territorial displays, egg-laying and incubation, and chick brooding and foraging.

nesting season: the time of year when nesting piping plovers, least terns and/or black skimmers are present on the beach; usually March 15 through August 31 if both plovers and colonial nesters are present.

predator exclosure: staked wire fencing that encircles a piping plover nest as a barrier to predators while permitting passage of plover adults and chicks; netting is normally installed on the top of the structure to prevent entry by avian predators.

predator management: activities to reduce the adverse effects of predators on listed bird species, including but not limited to monitoring, minimizing food sources, use of predator exclosures, and predator population control through trapping or other means of removal.

productivity: a measure of piping plover, least tern, and black skimmer nesting success measured as chicks fledged per pair of nesting birds.

Programmatic Biological Opinion: a Biological Opinion that addresses a federal program rather than a single federal action; such programs typically guide implementation of future agency actions by establishing standards, guidelines, or governing criteria to which future actions must adhere.

Recreational Guidelines: the USFWS document entitled *Guidelines for Managing Recreational Activities in Piping Plover Breeding Habitat on the U.S. Atlantic Coast to Avoid Take Under Section 9 of the Endangered Species Act* (Appendix A).

routine: not associated with a State of Emergency (SOE).

sand scraping: mechanical redistribution of sand from the lower beach profile to the upper beach profile, or alongshore; also known as sand mining or sand transfer.

service animal: any guide dog, signal dog, or other animal individually trained to provide assistance to a person with a disability (*e.g.*, seeing-eye dogs).

SOE: State of Emergency; see Declared Emergency.

supervised beach: a life-guarded bathing beach.

symbolic fencing: string-and-post fencing marked with flagging and signs, intended to protect listed species by restricting human entry into an area.

take: to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect a listed species, or attempt to engage in any such conduct.

Terms and Conditions: specific methods by which a federal action agency must implement actions necessary or appropriate to minimize the extent of incidental take of federally listed wildlife in the course of carrying out an otherwise lawful federal action. Terms and Conditions are usually included in an Incidental Take Statement that accompanies a Biological Opinion.

wrack: organic material including seaweed, seashells, driftwood, and other materials deposited on beaches by tidal action; often forms a "wrack line" along the high water mark.

II. MANAGEMENT ZONES

Presently, there are three (3) separate management zones identified on the City beaches consisting of one Protected Zone, one Precautionary Zone, and one Recreational Zone (see Figure 1) that are based on their current and historical use by beach-nesting birds and potential colonization by listed plants. The relative importance of protective management practices in each management zone considers existing human uses, habitat conditions, and past distribution and occurrence of listed species.

PROTECTED ZONE: ***(Surf Avenue to Central Avenue, along Hereford Inlet Beach)***

This zone will be managed to promote the protection and recovery of listed species and the enhancement of their habitat (beach raking will not be permitted). Recreational uses will be accommodated consistent with species protections. Emergency vehicle access is permitted, otherwise vehicle use and municipal activities will be restricted during the nesting/growing

seasons. Some limitations on public access and use will also be in effect during periods critical for migratory shorebirds. Beach raking is not permitted in this zone.

PRECAUTIONARY ZONE: ***(Central Avenue to western terminus of the beach at New York Avenue, along Hereford Inlet Beach)***

This zone comprises of the western end of the Hereford Inlet Beach. A balance of recreational use and species protection is the goal for this zone. Limited uses include emergency access, hand cleaning of debris, police patrols, and beach/dune maintenance and inspections when necessary. Beach raking is not permitted in this zone.

RECREATIONAL ZONE: ***(Ocean front beaches from 2nd to 26th Avenues and along Hereford Inlet Beach from ocean front/JFK Boulevard to Surf Avenue)***

This zone is comprised of the developed recreational beaches on the ocean front and the eastern side of the Hereford Inlet Beach. Community sponsored beach - events are traditionally held between 15th and 21st Avenues. Any listed species documented in this zone will receive protection as required by applicable State and federal laws and regulations. Use includes daily beach raking from April to October.

*It should be noted that piping plovers have historically nested on the oceanfront beaches although no protected zone on the recreational beachfronts is being established at this time. As conditions and usage change once replenishment is completed, definition of the Management Zones may have to be revisited.

Figure 1.
The City of North Wildwood's Beach Management Zone

III. RECOVERY GOALS

The parties to this plan consider the following to be realistic, sustainable targets for listed species on the City's beaches. Populations of listed species above these goals will continue to be protected in accordance with applicable State and federal laws and regulations.

Piping plovers:
- 2-4 pairs in the Protected Zone

- Productivity greater than or equal to the USFWS recovery goal of 1.5 chicks fledged per pair.

Least terns:
- One colony of birds in the Protected Zone with at least moderate productivity ($\geq$0.5 to $\leq$1.00 chicks fledged per pair) when a colony is present.

American Oystercatchers:
- 2-3 pairs in the Protected Zone.

Red knot, Black Skimmers, and Other Migratory Shorebirds:
- Allow for undisturbed feeding and roosting activities.

Seabeach amaranth:
- The presence of plants and to effectively protect any plants that occur.

IV. MANAGEMENT ISSUES

Management issues form the basis or framework for this plan. The major issues are defined, and the roles and responsibilities of each party to the plan are set forth to address each issue.

A. BIOLOGICAL MONITORING

➢ Background

Basic biological information is routinely collected about listed species on the City of North Wildwood's beaches. The NJDFW monitors beach-nesting birds to determine habitat use, numbers of nesting pairs, nest locations, and reproductive success. The USFWS surveys and monitors (when funding is available) seabeach amaranth to determine plant numbers, size, reproductive status, location, and condition. Additional plants of concern that may occur are recorded incidentally during the USFWS surveys. This information is essential in evaluating species trends and progress towards recovery, and assessing the effectiveness of beach management practices.

Note: ONLM has conducted annual state-wide surveys documenting any federal or State-listed threatened or endangered plants occurring on New Jersey's coastline and provided that information to the USFWS.

➢ **City Actions**

The City will post and maintain Vehicle-Restriction posts delineating the Protected Zone during the period of time when beach nesting bird or migratory shorebird fence and signs are not posted (November 1 – Mid-March/April).

➢ **NJDFW/USFWS Actions**

- The NJDFW will continue intensive surveys, monitoring, and management of nesting birds throughout the City's beaches, as per agreement with the USFWS pursuant to Section 6 of the ESA. The NJDFW currently staffs the City's nesting areas at least three (3) days per week during the nesting season, including weekends and holidays.

- The USFWS will conduct (subject to available funding) annual seabeach amaranth surveys that include the City to monitor population trends and distribution, and plans to initiate limited early-season survey work to identify seabeach amaranth plants at risk of damage or destruction.

- The NJDFW will post signs and symbolic fencing in the area defined as the "Protected Zone." Symbolic fencing will be posted mid-late March for beachnesting birds and remain until October 31 to protect migratory birds such as the red knot and staging black skimmers.

- The NJDFW and the USFWS will promptly report any new or expanded occurrence of a listed species to the City within the Recreational Zone.

- The NJDFW and the USFWS will regularly report relevant biological information to the City (see Section G).

B. PREDATOR MANAGEMENT

➢ **Background**

Predation is a factor impairing piping plover and least tern productivity in the City. The primary predators in the City are feral cats (*Felis catus*), gulls (*Larus* spp.), and crows (*Corvus* spp.). Other potential predators include raccoons (*Procyon lotor*), Norway rats (*Rattus norvegicus*), and striped skunks (*Mephitis mephitis*). Reducing predation will involve reducing or eliminating provisions of food from refuse and hand feeding, using predator exclosures, educational outreach, and if necessary, predator removal.

Predators (herbivores) of seabeach amaranth (if plants are present in the City) may include moth caterpillars belonging to the Lepidopteran families Noctuidae (cutworms) and Pyralidae (webworms), and aphids. Other potential herbivores include grasshoppers and mammals. Seabeach amaranth may also be affected by fungal diseases.

➢ **City Actions**

- Through the Animal Control Service (TriCounty), the City will conduct removal of cats in problem areas when necessary, preferably through humane live trapping. If the Animal Control Service (TriCounty) is unable to effectively manage cats in problem areas, the City will explore other alternatives with the NJDFW assistance. Primary responsibility for control of feral cat populations lies with the City.
    - At this time, there is no pre-season trapping required, however, if feral cat colonies are identified, extended trapping efforts may be required.
    - The City will promote a "cats indoors" program for its residents and seasonal visitors.
- The City will emphasize the importance of its ordinance prohibiting dogs, cats and any other animals on the Inlet / Protected Zone beach.
    - By ordinance, the City prohibits dogs, cats, and any other domestic animals on the Hereford Inlet Beach (*i.e.*, from the Jetty located at 2nd Avenue to the westward terminus of the beach at New York Avenue, year-round in order to minimize the impact of pets on all beach nesting, migratory, and wintering bird species (City Ordinance Code 138-3 (O)).
    - The City will enforce the seasonal prohibition of animals on the beach through the City's Police Department, and will take any other necessary steps to provide adequate enforcement such as posting signs regarding the pet prohibition at each entrance to the beach.
- Consistent with current State and local regulations, the City will not actively block measures to control predator populations recommended and/or undertaken by the NJDFW or the USFWS. The City will not enact any new ordinances to prohibit predator management activities.
- By way of signature to this plan, the City gives the NJDFW and the USFWS written permission to engage in predator control activities on City beaches, including removal of feral cats, foxes, and other predators including herbivores of seabeach amaranth.
- See also Education and Outreach (Section F).

➢ **NJDFW Actions**

- The NJDFW will continue to monitor the extent of predation on nesting birds within the City (Section A), and will include this in the information reported to the City (Section G).
- The NJDFW will erect predator exclosures on piping plover nests where and when appropriate. Use of predator exclosures to reduce plover nest predation will generally be tried prior to undertaking predator removal, unless the NJDFW has cause to believe that

exclosures could worsen predation pressures (certain predators are known to target exclosures). In addition, control of predator populations may be necessary to reduce predation on plover chicks, or on least tern and black skimmer eggs and chicks, none of which are protected by exclosures.

- Any predator population control (other than for feral cats) will be the responsibility of the NJDFW. The NJDFW will pursue control when necessary and appropriate.

- The NJDFW will notify the City Clerk and the City Police at least two (2) days before engaging in any predator control activities; by way of this plan the City grants the NJDFW permission for these activities, as indicated above. The NJDFW will adopt the City's recommendations for timing, methods, or other aspects of control operations to the extent possible.

- If the City is unable to obtain assistance from the City's Animal Control Service with cat removal, the NJDFW will assist the City in exploring other alternatives, including carrying out removal with the NJDFW or contract staff.

➢ **USFWS Actions**

- Upon request and within the limits of available staff time and funding, the USFWS will assist the City and/or the NJDFW in control of predator populations, such as arranging for removal through the U.S. Department of Agriculture's Animal and Plant Health Inspection Service or other qualified vendors.

- In the course of annual seabeach amaranth surveys, the USFWS will monitor the extent of seabeach amaranth herbivory and disease within the City (if applicable) (Section A), and will include this in the information reported to the City (Section G).

- In the course of annual seabeach amaranth surveys, the USFWS will note any observations of herbivory and disease of other listed plant species (Section A), and report this information to the City (Section G) and the ONLM.

- If herbivory and/or disease threaten the seabeach amaranth recovery goals specified in this plan, the USFWS will recommend and/or implement necessary actions, potentially including application of appropriate pesticides. By way of this plan, the City grants the USFWS permission for these activities, as indicated above. The USFWS will initiate early coordination with the City upon detection of an herbivory/disease problem, and will include the City in the planning of any proposed control measures. The USFWS will notify the City Clerk in writing at least 10 days before implementing any herbivore/disease control activities, and will adopt the City's recommendations for timing, methods, or other aspects of control operations to the extent possible. The USFWS will post signs in any treated areas as necessary and appropriate. Any USFWS actions are subject to the Intra-Service consultation requirements of Section 7 of the ESA, as well as all applicable regulations regarding pesticide handling and use.

C. HUMAN DISTURBANCE

➢ Background

The broad area of human disturbance includes any human activities that directly or indirectly harm or harass listed plants or birds, including interference with incubation and care of chicks. Recreational beach users and municipal employees may directly harm listed species by crushing beach-nesting bird eggs or plants. In addition, unfledged plover, tern, and skimmer chicks are highly sensitive to disturbance. Nesting birds may experience low success if exposed to frequent harassment by vehicles, pedestrians, sunbathers, pets, or kites.

Additionally, threats to beach nesting birds from *motorized vehicles* include direct impacts such as running over nests or unfledged chicks and more generalized disturbance of territorial, nesting, or foraging activities. Vehicles can also create ruts, which are especially difficult for unfledged piping plover chicks to navigate, and in some cases can trap young and lead to them being run over. Vehicle usage is generated by a variety of sources, including from ORV's driven by the public and municipal vehicles or equipment operated by the City for purposes of health and public safety.

➢ City Actions

- The City will assist the NJDFW with pre-season symbolic fencing, or will identify volunteers to assist with this task if needed by NJDFW. (See NJDFW Actions, below.)

- If seabeach amaranth plants remaining on the beach after August 31 are threatened by human activities (*e.g.*, a large population of plants near a beach access structure, a City-sponsored clean-up or event in an area of species occurrence), the City will erect and maintain symbolic fencing, posted with appropriate signs, as recommended by the USFWS (in addition to any seabeach amaranth or other listed plants that are incidentally fenced areas by NJDFW). The City will remove fencing once all plants are gone or the threat is abated, as recommended by the USFWS. (See USFWS Actions, below.)

- The City will regulate permanent and temporary private structures and storage of private property within the Protected Zone and Precautionary Zone (*e.g.*, catamarans, volleyball nets, shelters), as needed to protect listed species or their habitat.

- Within the Protected Zone and Precautionary Zone, the City will not designate any new recreational areas (*e.g.*, supervised beaches) or take any actions to promote increased recreational use without written concurrence from the NJDFW and the USFWS that, such designation or action would not adversely affect listed species or their habitats.

- The City will work with the NJDFW and the USFWS to regulate existing and new recreational activities, as needed to protect listed species.

- The City will prohibit and discourage kite flying within 200 meters of posted nesting areas between March 15 and August 31 through ordinance (City Ordinance 138-3 (A)), signs, and education.

- In the Recreational Zone, the City may conduct, permit, or sponsor any organized recreational activities or events (*e.g.,* tournaments, races, games, musical events) at any time with no restrictions unless the City has been notified that listed species are present. If listed species are present, the City will adopt restrictions such as timing, fencing, or alternate locations as recommended by the NJDFW and/or the USFWS.

  In the Protected and Precautionary Zones, the City will not schedule organized events.

MOTORIZED VEHICLES ON BEACH (Municipal)

- The City Police Department maintains supervised and unsupervised beaches throughout the City. Patrols are conducted on ATVs and four-wheel drive vehicles. The City will implement driving restrictions in the Protected Zone consistent with the USFWS's Recreational Guidelines (Appendix A) and the City's Beach Vehicle Use Regulations (Appendix E). Specifically:

  - Between March 15 and November 30th, Police and other Official Beach Patrols will restrict patrol driving to the Recreational Zone, except as allowed during determined times by NJDFW and USFWS (*i.e.*, if listed species are not present). Police patrols will be permitted in the Precautionary Zone, however, access will be via a sand vehicle ramp constructed off the seawall in this zone. Patrols will be limited to the minimum deemed necessary.

  No restrictions apply when Police are responding to an emergency as defined in this plan.

  No driving restrictions will apply to City vehicles in the Recreational Beach Zone unless the City has been notified that listed species are present. If listed species colonize the Recreational Zone, the City will coordinate with the NJDFW and the USFWS to develop a Recreational Zone Vehicle Use Policy. The policy will be consistent with the Recreational Guidelines if plovers establish nesting in the Recreational Zone.

- In addition to Police patrols, municipal vehicles, contractor, and vendor vehicles are occasionally driven on the City's beaches (*e.g.*, City Public Works Department, Beach Patrol, and Beach Tag Program). Other than Police Emergency Responses, no municipal, contractor, or vendor vehicles (except Public Works for the outfall pipe maintenance or for beach cleanups, see Beach Management and Maintenance Section E of this plan) will be driven in the Protected Zone and Precautionary Zone from March 15 – November 30. It is the City's responsibility to limit contractor and any vendor vehicles to the same restrictions as the municipal vehicles.

- The City will make all efforts to ensure clean-ups with Public Works vehicles are conducted before March 15 in the Protected Zone and Precautionary Zone.

- The City will inform, in writing, all appropriate City Departments (*e.g.,* Police, Public Works, City Clerk, Beach Patrol, and Beach Tag) and any contractors and vendors of the need to avoid vehicle travel in the Protected Zone and Precautionary Zone from March 15 through November 30, except in bonafide emergency or SOE situations.

MOTORIZED VEHICLES ON BEACH (Recreational)

The public will be allowed use of 4-wheel drive vehicles on the City of North Wildwood's beaches with the following date and location restrictions:

PROTECTED/PRECAUTIONARY ZONES: Surf Avenue to the western terminus of the beach at New York Avenue.

- Prohibition on public ORV use from March 15th through Labor Day.

RECREATIONAL ZONE: Beachfront from 2nd to 26th Avenues and along Hereford Inlet Beach from ocean front/JFK Boulevard to Surf Avenue

- Public ORVs shall be allowed on Recreational Zone beaches from October 1st through March 14th.

A speed of 15 MPH or less must be maintained. Vehicles are only allowed to operate on the hard sand, not more than 50 feet above the existing mean high water line of the Atlantic Ocean (except when entering or exiting the beach), and not within 50 feet of a sand dune. While entering and exiting the beach, vehicle operators must take care not to drive across or cause damage to any sand dune.

Access to and from the beach shall be made at 2nd Avenue, 5th Avenue, 15th Avenue, and operators are to use the access closest to their destination beach.

A permit must be obtained from the City to operate a vehicle on the beach. Permits are issued from September 1st through September 30th each year. Decals are issued to permit holders to display on their vehicles in plain view and certain emergency equipment must be kept in the vehicle.

By allowing fence/signage to remain up year-round in the vicinity of migratory birds and shorebirds that occur at Hereford Inlet during the fall and spring migrations and over wintering period can help minimize impacts from vehicles. Strict enforcement of the City's ordinance, which does not permit vehicles more than 50 feet above the high tide line should assist in this protection effort. The City will post signs (Figure 3) near the eastern edge of the Protected Zone, to indicate the area above the high tide line where public vehicles were not allowed during the period (November 1 – Mid-March/April) when fence and signs are not already present.

Figure 2.
The City of North Wildwood Has Placed Posts to Notify Drivers of Restricted Zones

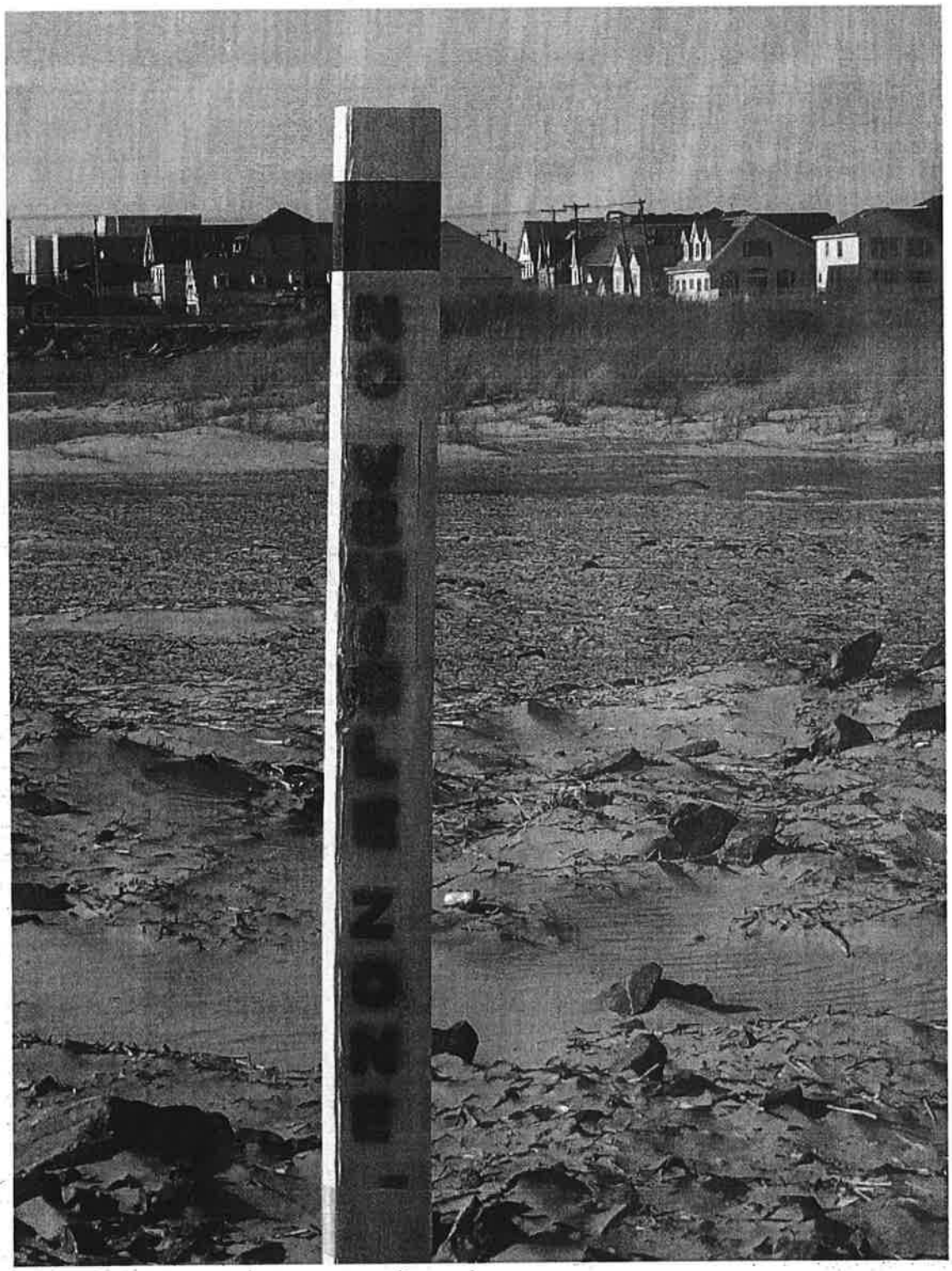


Figure 3: Aerial of Protected Zone

North Wildwood
Hereford Inlet Beach
Protected Zone

DUFFIELD ASSOCIATES
Consultants in the Geosciences

➢ **NJDFW Actions**

- With City assistance, if needed, the NJDFW will be responsible for pre-season fencing, and will continue to post signs for all nesting areas. The NJDFW will conduct pre-season fencing with symbolic fencing in areas of suitable nesting habitat as necessary and appropriate (in any Beach Zone) in late March or early April. The NJDFW will coordinate annually with the City regarding the extent of areas that will be pre-season fenced.

- The NJDFW will post all active nesting areas (in any beach Zone) with appropriate signs and symbolic fencing, including enlarging or adjusting pre-season fencing based on observed nesting activity. Within the limits of available funding, the NJDFW will also assist in fencing and posting of limited areas identified by the USFWS where seabeach amaranth or other listed plants are at risk of being damaged (primarily in vicinity of beach nesting birds).

- The NJDFW will remove fencing by October 31st, unless fencing is needed to protect any seabeach amaranth plants. All fencing will be removed promptly when it no longer provides protection to listed species.

- The NJDFW will inform the City Municipal Clerk, Chief of Police, Superintendent of Public Works, and Beach Patrol Supervisor within two (2) working days of any areas that have been fenced.

- The NJDFW will provide a timely response to City notification of planned events, and will provide recommendations to protect listed species.

➢ **USFWS Actions**

- The USFWS (subject to available funding) will conduct limited early-season surveys to identify areas where seabeach amaranth or other listed plants are at risk of being damaged or destroyed, in order to make fencing recommendations.

- The USFWS will make recommendations after August 31, to the City, regarding the extent and duration of symbolic fencing needed to protect seabeach amaranth. Recommended fencing will be limited to areas where plants are at clear risk of being damaged or destroyed by human activity.

- The USFWS will generally recommend that the NJDFW and/or the City remove amaranth fencing once all plants are gone, or by August 31, whichever comes first. In the unlikely event that plants remaining on the beach past August 31 are at continued risk of being damaged or destroyed by human activities, the USFWS will recommend that the City erect and maintain symbolic fence in limited areas, as needed to protect these plants (*e.g.*, a large population of plants near a beach access structure, a City-sponsored clean-up or event in an area of species occurrence). The USFWS will recommend that the City remove the fencing material promptly once all plants are gone for the season, or

the threat is abated (*e.g.*, the event is over).

- The USFWS (subject to available funding) will assist the City with any fencing needed after August 31 to protect seabeach amaranth.

- The USFWS will provide seabeach amaranth signs to post on symbolic fencing.

- The USFWS will continue work on Seabeach Amaranth Fencing Guidelines, and will provide these to the City and the NJDFW if and when approved.

- If justified by the State-wide species distribution, the USFWS will investigate creating a Seabeach Amaranth Steward position with seasonal field duties. The Steward would oversee the fencing and protection of seabeach amaranth during the growing season, and the implementation of beach management plans with regard to listed plants. At this time, it is unclear if the Steward would be employed by a Federal or State agency or a private organization, and potential funding sources have not been secured. The USFWS will ensure coordination with the City if and when a Steward position is created.

- The USFWS will provide a timely response to City notification of planned events, and will provide recommendations to protect listed species.

D. FIREWORKS

➢ Background

Listed species in the vicinity of a fireworks launch site can be directly harmed (eggs or chicks injured or destroyed, plants crushed) by explosions, debris, equipment, or launch personnel. Listed species within a fireworks viewing area, which may be distant from the launch site, may be directly harmed by spectators, illegal pyrotechnics, and off-road vehicle patrols by public safety personnel. In addition, listed birds are indirectly affected by fireworks. Normal breeding, feeding, and sheltering activities can be disrupted by noise and activity at both launch and viewing areas, and increased trash in viewing areas attracts predators. Many of these impacts are worsened because fireworks events are conducted at night, limiting visibility of plants, eggs, chicks, and symbolic fencing.

There are currently NO fireworks-events in the City of North Wildwood. Thus, this section is being for reference and guidance purposes ONLY. Should the City plan a fireworks-event in the future, the following management practices are required:

➢ City Actions

- The City will inform the NJDFW and the USWFS, in writing, of any planned fireworks events and the location proposed at least 30 days in advance.

- The City will coordinate with the NJDFW and the USFWS to arrange for a seabeach amaranth survey and fencing (if plants present) within the fireworks primary and secondary viewing area in the week preceding the event.

- To protect listed species in the Protected Zone, the City will take the following protective measures:

    - Keep the launch and primary viewing areas to areas that minimize disturbance to nesting birds to the extent possible. In no case will a launch area be closer than 0.75 mile to a nesting area unless the NJDFW and the USFWS concur in writing that the proposed launch site is not likely to adversely affect listed birds

    - Provide adequate law enforcement and other personnel to the Protected Zone and the Precautionary Zone during events to enforce listed species protections, including prohibiting entry in fenced areas and use of illegal personal fireworks. The City will coordinate with the NJDFW to determine the number of required enforcement personnel.

    - Prohibit driving of municipal, contractor, and vendor vehicles in the vicinity of nesting areas during these nighttime events, unless responding to an emergency. Law enforcement patrol vehicles and any other essential municipal vehicles will remain on the street behind the dunes, from which personnel can access the beach front on foot.

    - Ensure that monitors and enforcement personnel receive accurate, current information about the locations of listed species so they can minimize any disruptions from their own activities.

    - Prohibit all pets except service animals on the beach (especially near nesting areas) during fireworks events, and ensure compliance with this prohibition. Service animals near active nesting areas will be required to stay on a leash and will not be permitted in fenced areas.

    - Remove any trash or litter from the vicinity of nesting areas immediately following the event, except any trash located within fenced areas, which will be left until daylight and then removed by or under the supervision of the NJDFW monitors. Further, any vehicles needed to remove trash will be operated during daylight hours, under supervision of a NJDFW monitor, and consistent with the Recreational Guidelines.

- If nesting becomes established within the Recreational Zone, the City would establish the above protective measures in the Protected Zone and will take the following additional actions:

    - Relocate the primary viewing area and/or the launch site to minimize disturbance to nesting birds to the extent possible. In no case will a launch area be closer than

0.75 mile to a nesting area unless the NJDFW and the USFWS concur in writing that the proposed launch site is not likely to adversely affect listed birds.

- Extend to nesting areas in the Recreational Zone all the protective measures listed above for the Protected and Precautionary Zones, and work with the NJDFW to implement all relevant additional protective measures listed in the Fireworks Guidelines, including enhanced survey efforts, expanded fencing (100-foot instead of 50-foot buffers), and control of beach access and parking lots.

➢ **NJDFW Actions**

- The NJDFW will provide a timely response to any request from the City to review specific fireworks plans and will provide recommendations to protect listed species.

- To protect listed species in the Protected Zone, the NJDFW will take the following protective measures:

  - Provide a monitor to the Protected Zone during fireworks events, as needed, to assist the City in enforcement of listed species protections.

  - Provide a monitor the following day as needed to oversee trash removal from fenced areas, and any trash removal requiring a vehicle.

- If nesting becomes established within the Recreational Zone, the NJDFW will continue the above protective measures in the Protected Zone, and will take the following additional actions:

  - Review proposed relocated primary viewing areas and/or launch sites to determine if fireworks events are likely to adversely affect listed birds.

  - Extend to nesting areas in the Recreational Zone all the protective measures listed above for the Protected Zone, and will also work with the City to implement all relevant additional protective measures listed in the Fireworks Guidelines, including enhanced survey efforts, expanded fencing, and control of beach access and parking lots.

➢ **USFWS Actions**

- The USFWS will provide a timely response to any request from the City to review specific fireworks plans and will provide recommendations to avoid impacts to listed species.

- The USFWS will continue to conduct in a timely manner consultation with the U.S. Coast Guard regarding authorization of City fireworks events pursuant to Section 7 of the ESA.

- The USFWS (subject to available funding) will survey the primary viewing area within the Recreational Zone and the Protected Zone within the week preceding the event and

will erect symbolic fencing around seabeach amaranth or other listed plants to provide a minimum 3-meter buffer zone around plants.

E. BEACH MANAGEMENT AND MAINTENANCE

Beach maintenance includes activities that the City undertakes to physically maintain the City's beaches and dunes, including mechanical beach raking, refuse and large debris removal, dune maintenance, beach nourishment, sand scraping, and oversight of beach access structures. These activities can impact habitat quality, disturb nesting birds, and destroy nests, chicks, and plants.

1. Beach Raking

➢ Background

Beach rakes can inadvertently destroy unprotected nests, kill chicks, and remove plants. Beach raking can also diminish the suitability of nesting habitat by removing shell fragments and sparse vegetation. Habitat quality is also diminished by removal of natural wrack, an important foraging area for piping plovers and a key growing zone for seabeach amaranth. Beach raking is regulated by the New Jersey Coastal Zone Management Rules. The City will prohibit raking the Protected and Precautionary Zones year-round.

City Actions

- No raking restrictions will apply in the Recreational Zone unless the City has been notified that listed species are present, except as otherwise regulated or prohibited by the New Jersey Coastal Zone Management Rules. If listed species colonize the Recreational Zone, the City will include raking in the Recreational Zone Vehicle Use Policy to be developed with the NJDFW and the USFWS. The policy will be consistent with the Recreational Guidelines if plovers establish nesting in the Recreational Zone and will include protective measures for seabeach amaranth.

- The City will not rake the Protected and Precautionary Zones year-round, except during an SOE (*i.e.*, potentially harmful debris must be removed from the beach to protect public health and safety).

- The City will notify the NJDFW and the USFWS promptly upon Declaration of an Emergency (notice by fax with confirmation of receipt is acceptable). In any beach Zone, the City will implement the protective measures listed in Table 1 when conducting SOE Raking in the vicinity of an active nesting area or seabeach amaranth occurrence. When implemented with these protective measures the NJDFW and the USFWS will not object to SOE Raking of the Protected and Precautionary Zones to remove medical waste, hazardous trash, or other unusual debris; SOE Raking may proceed once any required authorizations are obtained from the DLUR.

➢ **NJDFW and USFWS Actions**

- The NJDFW will monitor nesting activity and regularly inform the City through the Municipal Clerk's office, Police, Beach and Public Works Departments of nest and brood locations so that changes in raking procedures effected by nesting status can be implemented on a timely basis.

- The NJDFW and the USFWS will promptly review requests from the City for SOE Raking in the Protected and Precautionary Zones, and will make recommendations to protect listed species.

- The NJDFW and/or the USFWS will provide an on-site monitor during SOE Raking, if determined that it is needed.

- The NJDFW and the USFWS will recommend to the DLUR that normal raking prohibitions in the Protected and Precautionary Zones be waived to permit SOE Raking and other provisions in the Plan that will be carried out with the protective measures listed in Table 1.

- See also the section on education and outreach regarding presentations to City employees.

Table 1.
Seasonal Protections for Listed Species When Motorized Vehicles or Equipment are Required to Respond to a State of Emergency (SOE)

	Protections for Listed Birds	Protections for Listed Plants	Protections for All Listed Species
January			
February			
March 1 – March 14			
March 15 - April	▪ SOE response will be supervised by the NJDFW monitors; ▪ vehicle use will take place during daylight hours; ▪ vehicles will not exceed 5 miles per hour when and where unfledged plover chicks are present; ▪ vehicles will not enter fenced areas; and ▪ vehicles will temporarily halt or change route as requested by the NJDFW monitors to avoid harassment of listed birds.		▪ vehicles will minimize removal of wrack material; and ▪ SOE response will proceed in accordance with any other recommendations of the NJDFW or the USFWS to protect listed species.
May		▪ vehicles will avoid crushing or removing seabeach amaranth and State-listed plants.	
June			
July			
August			
September			
October			
November			
December			

2. Large Debris Removal

➢ Background

Large debris washes up on City beaches and must be removed periodically. An annual clean-up is conducted through the NJDEP Clean Shores Program. Additional clean-ups are sometimes carried out by the City Community Organizations. Removal of large debris requires motorized vehicles and equipment that can impact listed species.

➢ City Actions

- No restrictions on clean-ups will apply in the Recreational Zone unless the City has been notified that listed species are present. If listed species colonize the Recreational Zone, the City will include clean-ups in the Recreational Zone Vehicle Use Regulations to be developed with the NJDFW and the USFWS. The Regulations will be consistent with the Recreational Guidelines if plovers establish nesting in the Recreational Zone and include protective measures for seabeach amaranth.

- The City will ensure that any community-sponsored beach clean-ups and the NJDEP-sponsored Clean Shores Program in the Protected and Precautionary Zones are conducted between November 30th and March 14.

- The City will not conduct, sponsor, or authorize routine clean-ups (separate from the Clean Shores Program) of the Protected and Precautionary Zones using motor vehicles between March 15 and November 30.

- The City will make all efforts to ensure clean-ups with Public Works vehicles are conducted before March 15 in the Protected Zone.

The City's long term plans include replacement of or changes to the outfall pipe at Central and Walnut Avenues, which will minimize or eliminate the need for regular maintenance. As this maintenance requires use of heavy equipment (vehicle) on the beach, which passes through the Protected Zone, and is located in the Precautionary Zone, and may have impacts on nesting birds, the NJDFW and USFWS supports the City's plans. In the interim, the City will ensure that any necessary outfall pipe maintenance at Central and Walnut Avenues is conducted no more than once a week during the egg laying portion of the piping plover nesting season. Once chicks are present, the City will further reduce maintenance activities to no more than once a month and will coordinate activities closely with NJDFW. As determined by NJDFW, a monitor (provided by NJDFW) may be necessary when chicks are present. Restrictions will not apply for emergency maintenance of the outfall pipe; however, routine maintenance is not classified as an emergency.

- The City will notify the NJDFW and the USFWS promptly upon Declaration of an Emergency (notice by fax with confirmation of receipt is acceptable). In any beach Zone, the City will implement the measures listed in Table 1 when conducting SOE Clean-ups

in the vicinity of an active nesting area or seabeach amaranth occurrence. When implemented with these protective measures, the NJDFW and the USFWS will not object to SOE Clean-ups to remove hazardous trash or other unusual debris to protect public health and safety; SOE Clean-ups may proceed once any required authorizations are obtained from the DLUR.

➢ **NJDFW and USFWS Actions**

- The NJDFW will assist the City in coordinating with the Clean Shores Program to schedule the annual NJDEP-sponsored clean-up in the Protected and Precautionary Zones between September 1 and March 14.

- The NJDFW and the USFWS will provide timely review of notifications of City-sponsored clean-ups (both routine and SOE), and will provide recommendations to protect listed species.

- The NJDFW and/or the USFWS will provide a monitor to oversee SOE Clean-ups in the Protected and Precautionary Zones between March 15 and August 31.

3. Refuse Containers

➢ **Background**

Regular servicing of trash cans and recycling containers increases vehicle traffic on the beach with inherent risks to listed species. However, minimizing trash on the beach benefits listed birds by limiting food scraps that attract predators.

Containers are placed along the City Beachfront and at the street end of some beach access paths. Trash from near the wrack line is also collected.

➢ **City Actions**

- The City will continue existing trash collection practices within the Recreational Zone unless notified that listed species are present. If listed species colonize the Recreational Zone, the City will include refuse removal in the Recreational Zone Vehicle Regulations to be developed with the NJDFW and the USFWS. The policy will be consistent with the Recreational Guidelines if plovers establish nesting in the Recreational Zone and include protective measures for seabeach amaranth.

- The City will ensure that all refuse containers on the beach and in the vicinity of the beach along the inlet (including the Protected and Precautionary Zones) are covered with predator-resistant lids.

4. Dune Management and Invasive Plant Species Control

➢ Background

Steep, stabilized dunes do not provide suitable habitat for the beach-dependent listed species included in this plan. The dune management goal in the Protected Zone is the development of a natural dune system, featuring an irregular face, occasional breaches, and a low-lying sparsely vegetated fore-dune. Limiting the width of the dune zone is also important to ensure sufficient low, unstabilized, sparsely vegetated back beach habitat, which is essential to listed species. A more natural dune system can also provide habitat for diverse native vegetation and wildlife. Dune creation and maintenance are regulated by the New Jersey Coastal Zone Management Rules (Section 7:7E-3A.4). Invasive plant species (*e.g.*, Asiatic sand sedge [*Carex kobomugi*]), either exotic or native, can degrade or eliminate native habitat for listed species.

City Actions

- The City will adopt recommendations of the NJDFW and the USFWS to manage dunes and control invasive plant species in the Protected and Precautionary Zones in ways that enhance suitability of habitat for listed species, and dunes that provide for adequate storm protection. Dunes will be managed to promote a diverse assemblage of native vegetation and in accordance with N.J.A.C. 7:7E-3A.4.

- The City will provide plans for review by the NJDFW and the USFWS at least 30 days before carrying out routine dune management or invasive plant species control activities at any time of year in the Protected and Precautionary Zones, or in the vicinity of any nesting area or seabeach amaranth occurrence that may be documented in the Recreational Zone. The City will incorporate any recommendations of the NJDFW or the USFWS to protect listed species and their habitats.

- For routine dune management or invasive plant species control in the vicinity of a nesting area in any beach Zone, the City will schedule work between September 1 and March 14. Work in the vicinity of a seabeach amaranth occurrence will be carried out between December 1 and May 14. Both seasonal restrictions will apply where seabeach amaranth coincides with listed birds.

- The City will coordinate any SOE Post-storm Beach or Dune Restoration with the NJDFW and the USFWS. The need for such activities will be signaled by a Declared Emergency, and eligibility for DLUR permits under Section 7:7E-3A.3 of the New Jersey Coastal Zone Management Rules. The City will notify the NJDFW and the USFWS promptly upon Declaration of an Emergency (notice by fax with confirmation of receipt is acceptable).

  In any beach Zone, the City will implement the protective measures listed in Table 1 when conducting SOE Restoration activities in the vicinity of an active nesting area or seabeach amaranth occurrence. When implemented with these protective measures, the NJDFW and the USFWS will not object to SOE Restoration activities; SOE Restoration

may proceed once any required authorizations are obtained from the DLUR. The parties anticipate that SOE Restoration activities will have low potential to impact listed species, as suitable nesting/growing habitat is likely to be damaged or destroyed by the erosional or storm event(s) that caused the SOE.

➢ **NJDFW and USFWS Actions**

- The NJDFW and the USFWS will provide technical assistance to the City to develop dune management strategies that enhance suitability of habitat for listed species while meeting storm protection needs. The NJDFW and USFWS will provide technical assistance to the City for controlling invasive plant species to enhance suitability of habitat for listed species. The NJDFW and the USFWS recommendations will promote a diverse assemblage of native dune vegetation, and will be consistent with N.J.A.C. 7:7E-3A.4

- The NJDFW and the USFWS will provide a timely response to any request from the City to review specific routine dune management activities, and will provide recommendations to protect listed species and their habitat(s).

- The NJDFW and the USFWS will provide timely recommendations upon City notification of SOE Post-storm Beach or Dune Restoration activities.

- The NJDFW and the USFWS will provide timely recommendations upon City notification of invasive plant species control activities.

- The NJDFW and/or the USFWS will provide a monitor to oversee SOE Beach or Dune Restoration activities, as necessary.

5. Beach Nourishment

➢ **Background**

Prior to beach nourishment, many sites within the U.S. Army Corps of Engineers, Philadelphia District (Corps) Program Area (Program Area) for beach nourishment activities now occupied by piping plovers and seabeach amaranth had become unsuitable due to previous shoreline stabilization efforts. Sandy beach habitats had eroded and new habitats were precluded from forming by the extensive system of hard stabilization structures and upland development found along the New Jersey coast. Nourishment of oceanfront beaches can create nesting habitat for piping plovers and suitable sites for seabeach amaranth.

It can be anticipated that, following initial construction of the federal/state nourishment projects within the Program Area, similar creation of potentially suitable habitat for piping plovers and seabeach amaranth will occur in areas where these species are currently absent, or in the case of seabeach amaranth, are present in only very low numbers. It should also be noted that although the nourishment projects will create sandy beach habitat that may attract piping plovers, the

habitat created can be expected to be of lesser quality than habitat that is formed through natural coastal processes such as overwash. Habitat creation alone will not create a beneficial effect for either species if the habitat is suboptimal and does not provide foraging habitat for plover chicks or if disturbance from municipal and recreational users cannot be managed to avoid loss of nests of chick or loss of plants.

Pursuant to Section 7 of the ESA, the Corps completed formal consultation with the USFWS for beach nourishment activities under the USFWS's December 2005 Programmatic Biological Opinion (PBO) on the effects of federal beach nourishment, re-nourishment, stabilization, and restoration activities along the Atlantic Coast of New Jersey within the Corps, Philadelphia District on the federally listed (threatened) piping plover (*Charadrius melodus*) and seabeach amaranth (*Amaranthus pumilus*).

Relevant conservation measures proposed by the Corps for protection of federally listed species and reasonable and prudent measures imposed by the USFWS to minimize take of federally listed species are specified within the USFWS's PBO and are applicable to all projects carried out under the Corps program. To be exempt from the take prohibitions of Section 9 of the ESA, the Corps must implement all pertinent reasonable and prudent measures and terms and conditions, as stipulated in the USFWS's PBO, to minimize the impact of anticipated incidental take of piping plovers.

Nourishment or operation and maintenance activities will be scheduled and sequenced to avoid or minimize construction activities during the piping plover nesting season within known piping plover nesting areas. For areas where habitat conditions have changed substantially, such that a suitable habitat is no longer present, a case-by-base evaluation of the site will be conducted by the USFWS in coordination with the Corps and the NJDEP. All construction activities will avoid any delineated locations of seabeach amaranth to the greatest practicable extent.

In the future, the City and/or the NJDEP may decide to sponsor beach nourishment in the City to supplement the Corps' program. In addition, the City and/or the NJDEP may conduct beach nourishment as part of an SOE Post-Storm Beach or Dune Restoration. Whether routine or SOE, any beach nourishment outside of the Corps program would require federal and State permits from the Corps and the DLUR, respectively.

➢ **City Actions**

- The City will work with the USFWS, NJDEP, and the Corps to implement the provisions of the 2005 Programmatic Biological Opinion, and of each streamlined consultation, during each renourishment of the City's beaches under the Corps' nourishment program. Key provisions of the Programmatic Biological Opinion include fencing, avoidance, and possibly salvage and replacement of seabeach amaranth plants; and a seasonal restriction (March 15 to fledging of the last chick) on construction within 1,000 meters of piping plover nesting areas, as defined in this plan.

- The City will work with the USFWS and the Corps to ensure that any routine nourishment activities sponsored by the NJDEP and/or the City (requiring federal

permits) include Conservation Measures at least as protective as the provisions of the Programmatic Biological Opinion that governs implementation of the Corps' beach nourishment program. Protection would be achieved mainly through seasonal restrictions on construction within 1,000 meters of plover nesting areas, fencing, avoidance, and possibly salvage and replacement of seabeach amaranth plants.

- SOE Beach Nourishment may be necessary when conditions pose a clear danger to human life or health (*e.g.*, ocean front beach erosion has occurred that makes public access points onto the beach dangerous or impossible to use), or pose a clear danger of damage to public or private structures lying landward of the ocean-front seawall or primary dune line, such as private homes, public buildings, streets, water lines and sewer lines. Placement of clean fill material is among the activities listed at N.J.A.C. 7.7E-3A.3(b); therefore, SOE Beach Nourishment qualifies as "SOE Post-storm Beach or Dune Restoration" as defined in this plan.

  The City will coordinate any SOE Post-storm Beach or Dune Restoration (including SOE Beach Nourishment) with the NJDFW and the USFWS. The need for such activities will be signaled by a Declared Emergency, and eligibility for DLUR permits under Section 7:7E-3A.3 of the New Jersey Coastal Zone Management Rules. The City will notify the NJDFW and the USFWS promptly upon Declaration of an Emergency (notice by fax with confirmation of receipt is acceptable).

  In any beach Zone, the City will implement the protective measures listed in Table 1 when conducting SOE Restoration activities in the vicinity of an active nesting area or seabeach amaranth occurrence. When implemented with these protective measures, the NJDFW and the USFWS will not object to SOE Restoration activities; SOE Restoration may proceed once any required authorizations are obtained from the DLUR and the Corps. The parties anticipate that SOE Restoration activities (including SOE Beach Nourishment) will have low potential to impact listed species, as suitable nesting/growing habitat is likely to be damaged or destroyed by the erosional or storm event(s) that caused the SOE.

➢ **NJDFW Actions**

- The NJDFW will provide current information on the status and locations of listed birds before and during any re-nourishment (whether sponsored by the Corps, the NJDEP, or the City) to aid in the implementation of relevant Conservation Measures and Terms and Conditions.

- In the course of planning for beach nourishment projects, the NJDFW will provide: (1) current and historical nesting data and locations; and (2) recommendations for habitat enhancements that could be incorporated into the project.

- The NJDFW will provide a timely response to any request from the City to review specific beach nourishment plans.

- The NJDFW will provide timely recommendations upon notification of SOE Post-storm Beach or Dune Restoration activities that include SOE Beach Nourishment.

➢ **USFWS Actions**

- The USFWS will provide updated information of the locations of seabeach amaranth before and during any re-nourishment (whether sponsored by the Corps, NJDEP, or the City) to aid in the implementation of relevant Conservation Measures and Terms and Conditions.

- In the course of planning for beach nourishment projects, the USFWS will provide: (1) current and historical locations of seabeach amaranth; and (2) recommendations for habitat enhancements that could be incorporated into the project.

- The USFWS will work with the Corps to complete promptly streamlined consultation for each re-nourishment of the City's beaches under the Corps' program.

- The USFWS will work with the Corps, applicant, and the City to complete promptly consultation regarding Corps permits to authorize routine or SOE beach nourishment sponsored by the NJDEP and/or the City.

- Regardless of the project sponsor, the USFWS will provide the City with copies of relevant documents resulting from the consultation process regarding beach nourishment, including key sections of Biological Opinions.

- The USFWS will provide timely recommendations upon notification of SOE Post-storm Beach or Dune Restoration activities that include SOE Beach Nourishment.

6. Sand Scraping

➢ **Background**

Use of motorized equipment to conduct sand scraping (mechanical redistribution of sand; also called sand transfers or sand mining) can directly harm listed species by crushing eggs, chicks, plants, or seeds; can harass nesting birds through disturbance; and can adversely impact habitats for listed species by creating ruts and removing shells, wrack, and natural debris. Sand scraping is regulated by the New Jersey Coastal Zone Management Rules. The City will prohibit sand scraping in the Protected and Precautionary Zones year-round.

➢ **City Actions**

- No restrictions on sand scraping will apply in the Recreational Zone unless the City has been notified that listed species are present, except as otherwise regulated or prohibited by the New Jersey Coastal Zone Management Rules. If listed species colonize the Recreational Zone, the City will develop appropriate policies for sand scraping with

NJDFW and the USFWS. The policy will be consistent with the Recreational Guidelines if plovers establish nesting in the Recreational Zone.

- The City will not conduct sand scraping in the Protected and Precautionary Zones at any time of the year except as a necessary part of SOE Post-storm Beach or Dune Restoration.

- Mechanical redistribution of sand is among the activities listed at N.J.A.C. 7.7E-3A.3(b); therefore, sand scraping under SOE conditions qualifies as "SOE Post-storm Beach or Dune Restoration," as defined in this plan.

  The City will coordinate any SOE Post-storm Beach or Dune Restoration with the NJDFW and the USFWS. The need for such activities will be signaled by a Declared Emergency and eligibility for DLUR permits under Section 7:7E-3A.3 of the New Jersey Coastal Zone Management Rules. The City will notify the NJDFW and the USFWS promptly upon Declaration of an Emergency (notice by fax with confirmation of receipt is acceptable).

  In any beach Zone, the City will implement the protective measures listed in Table 1 when conducting SOE Restoration activities in the vicinity of an active nesting area or seabeach amaranth occurrence. When implemented with these protective measures, the NJDFW and the USFWS will not object to SOE Restoration activities; SOE Restoration may proceed once any required authorizations are obtained from the DLUR and the Corps. The parties anticipate that SOE Restoration activities will have low potential to impact listed species, as suitable nesting/growing habitat is likely to be damaged or destroyed by the erosional or storm event(s) that caused the SOE.

7. Beach Access Structures

➢ Background

Public access to New Jersey's beaches is a central goal of the NJDEP's Coastal Management Program, as reflected in the State Coastal Zone Management Rules. Public access is also a key requirement of federal and State rules governing beach nourishment carried out with public funds. However, an excess number of beach access structures in the Protected Zone bring more recreational users into potential conflict with listed species. Such structures can also lead to unauthorized impacts to dunes, as recreational beach users create new, unauthorized walkways through the dunes; these gaps in the dune line fragment nesting and growing areas.

➢ City Actions

- The City will work with the NJDFW and the USFWS to develop written materials, and signage at vehicle access points regarding protections for listed species and dunes.

- The City will not propose any new beach access points/structures within the Protected Zone as the current number and locations of access points is sufficient and meets current

State requirements. If the City determines additional beach access (or a change in location of current access points) is necessary or is required to provide additional access, the City will work with the NJDFW and the USFWS to locate (or relocate), design, and construct any proposed new public access structures to minimize adverse impacts to listed species.

- The City will work with the NJDFW and the USFWS to place appropriate signs regarding protections for listed species and dunes at or near public access points. (See the section on education and outreach.)

➢ **NJDFW and USFWS Actions**

- The NJDFW and the USFWS will provide recommendations regarding any proposed new (or relocated) public beach access structures; if it is determined such changes are necessary.

- The NJDFW and the USFWS will provide appropriate signs to post at or near public beach access points (see the section on education and outreach).

- The NJDFW and the USFWS will work with the City to develop a sand access ramp in the Precautionary Zone to be used for limited vehicle access.

F. EDUCATION AND OUTREACH

➢ **Background**

This component of the management plan encompasses all of the management issues discussed above for the purposes of reducing predation, human disturbance, and the detrimental impacts of beach maintenance. Education and outreach include on-site and off-site distribution of educational materials, educational displays, lectures, beach walks, interpretive signs, and other elements that provide information on the biology of listed species, the impact of various human activities and predators, and recommended actions to help protect and restore populations of listed species.

➢ **City Actions**

- The City will work with the NJDFW and the USFWS to post appropriate signs at beach entry points and on the beach regarding protections for listed species and dunes refuse policies, the City's pet ordinance, and activities prohibited or discouraged on the beach.

- Through the Gazette Leader and the City's Website, the City will inform residents, vacation homeowners, and renters about protections for listed species and dunes, refuse policies, the City's pet ordinance, and activities prohibited or discouraged on the beach. The City will also publish or post to their website, periodic updates on the nesting

success, population status, species biology, and management activities for listed species (information provided by the agencies).

- Through the Gazette Leader or City website, the City will inform residents, vacation homeowners, and renters about the importance of keeping cats indoors. The information will discourage cat owners from allowing their pets to roam freely outdoors, and from abandoning pet cats. The newsletter articles will also discourage feeding feral cats.

- The City will post signs within the City to discourage feeding of wildlife, with the exception of backyard bird feeders.

- To promote compliance with the aforementioned prohibition, the City will discourage kite-flying near nesting areas through signs and educational materials.

➢ **NJDFW and USFWS Actions**

- The NJDFW and the USFWS will assist the City in developing educational outreach materials by supplying existing materials and necessary information, and providing technical review.

- The NJDFW and the USFWS will provide information for the City's website, newsletter articles and/or other publications. Upon request of the City, the agencies will author articles within limits of available staff time.

- The NJDFW will provide copies of the brochure, "CATS Indoors" to the City for general distribution.

- The USFWS will provide copies of the seabeach amaranth fact sheet developed by the ONLM (as needed), and the USFWS's Beach Management Planning and Piping Plover Factsheets upon request and as available. NJDFW will provide brochures on beach-nesting birds upon request and as available.

- The NJDFW and the USFWS will place interpretive signs on the beach annually regarding listed species, as available. The NJDFW and the USFWS will consult the City in locating interpretive signs.

- The NJDFW will conduct beach walks to show beach nesting bird areas and nesting activity to North Wildwood City Officials as requested by the City and scheduled at least once per season.

- Upon request of the City, the NJDFW and/or the USFWS will conduct periodic educational talks and/or beach walks for the City employees, contractors, residents, or visitors within limits of available staff time.

G. OTHER PROVISIONS

- The NJDFW and the USFWS will regularly inform the City regarding changes in listed species locations, distribution, populations, habitat, and/or nesting activity that may affect any of the provisions of this plan, or that would be of general interest to the City.

- The NJDFW will provide regular notification regarding nesting activity including but not limited to biweekly faxes or e-mails during the nesting season sent to the Municipal Clerk, Chief of Police, Director of Public Works, and the Beach Supervisor. The faxes or e-mails will provide the current location of nests and chicks, the NJDFW management activities, and other important information.

- The NJDFW and the USFWS will provide the City with a brief summary of endangered species recovery status and management, with recommendations by the end of each calendar year.

- The NJDFW and the USFWS will provide maps of species locations within the City, upon request.

- The NJDFW and the USFWS will work with the City to support implementation of this Plan.

APPENDIX A

U.S. Fish and Wildlife Service Guidelines for Managing Recreational Activities in Piping Plover Breeding Habitat on the U.S. Atlantic Coast to Avoid Take Under Section 9 of the Endangered Species Act

APPENDIX B

U.S. Fish and Wildlife Service Guidelines for Managing Fireworks in the Vicinity of Piping Plovers and Seabeach Amaranth on the U.S. Atlantic Coast

APPENDIX C

Excerpts from the New Jersey
Coastal Zone Management Rules

APPENDIX D

City of North Wildwood Coastal General Permit for

Beach and Dune Maintenance

DLUR File No.: 0507-03-0009.1 CAF 030001

APPENDIX E

Summary of the Binding Provisions of the December 2005 Programmatic Biological Opinion Between the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers, Philadelphia District, on the effects of Federal Beach Nourishment Activities along the Atlantic Coast of New Jersey on the Piping Plover (*Charadrius melodus*) and Seabeach Amaranth (*Amaranthus pumilus*)

This document provides a summary of the binding provisions of the Programmatic Biological Opinion (PBO) issued by the U.S. Fish and Wildlife Service (Service) for the U.S. Army Corps of Engineers, Philadelphia District's (Corps) ongoing program of beach nourishment of Ocean, Atlantic, and Cape May counties in New Jersey pursuant to Section 7 of the Endangered Species Act of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*) (ESA). Additional binding provisions may be developed during streamlined consultation that is required before each scheduled re-nourishment. The PBO addressed the federally listed (threatened) piping plover (*Charadrius melodus*) and seabeach amaranth (*Amaranthus pumilus*).

Definitions

Sections 4(d) and 9 of ESA, as amended, prohibit *taking* (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct) of listed species of fish or wildlife without a special exemption. *Harm* is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. *Harass* is defined as actions that create the likelihood of injury to listed species by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. *Incidental take* is any take of listed animal species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by the federal agency or the applicant.

Incidental Take

The PBO issued by the Service includes an Incidental Take Statement. Under the terms of Section 7(b)(4) and Section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered a prohibited taking provided that such taking is in compliance with the provisions of the PBO. All the binding provisions of the PBO, as described below, are non-discretionary and must be undertaken by the Corps for the exemption in Section 7(o)(2) to apply. The Corps has a continuing duty to implement the activity covered by the PBO. If the Corps: (1) fails to implement the provisions; or (2) fails to require all contractors to adhere to the provisions, the protective coverage provided by Section 7(o)(2) to the Corps and its contractors may lapse. In order to monitor the impact of incidental take, the Corps must report the progress of the action and its impact on the species to the Service as specified in the Incidental Take Statement.

Binding Provisions

The binding provisions of this PBO include: (1) the Conservation Measures incorporated by the Corps into their project description for the protection of listed species; and (2) the Terms and Conditions of the Incidental Take Statement issued by the Service to reduce the level of anticipated incidental take of piping plovers.

CONSERVATION MEASURES PROPOSED TO MINIMIZE IMPACTS TO FEDERALLY LISTED SPECIES

1. Materials and Materials Placement

All nourishment material used in Corps sponsored or permitted projects will consist of clean sand fill material (*i.e.*, 90 percent or greater sand) obtained from approved off-shore borrow areas. Grain size of fill material will be suitable for beach nourishment and will be similar in composition to the existing beach substrate on the targeted deposition site.

2. Materials Stockpiling and Equipment Storage

No materials or equipment associated with beach nourishment or hard structure repair or replacement will be stockpiled or stored within 100 meters of known piping plover nesting areas or sites colonized by seabeach amaranth. Any materials or equipment stored adjacent to known plover nesting areas will be removed prior to the nesting season (March 15th).

3. Dune Stabilization and Vegetation Planting

The Corps will work with the Service, the NJDEP, and the USDA to develop guidelines for planting and maintaining dune and beach vegetation and erecting sand fence on Corps nourished beaches that are protective of federally listed species while not diminishing the overall required beach protection function and/or dune stability. Vegetation and sand fencing should be maintained at densities that will not displace federally listed species from occupied sites, deter future colonization of unoccupied sites, or impede chick movements.

4. Extension of Outfall Structures

Following placement of sand, extension of some existing outfall structures may be required. Work associated with outfall structure extension is an integral part of a beach fill project and will be conducted in accordance with all proposed conservation measures to protect federally listed species.

5. Access Into Construction Areas

The Service and the ENSP, or their designated representatives, will be given access to Program construction areas, subject to site safety plans, for the purpose of surveying; monitoring; posting; symbolically fencing of piping plover courtship, nesting, and brood rearing areas; and erecting predator exclosures around nests. In addition, the Service and the NJDEP, Natural Heritage Program (NHP), Office of Natural Lands Management (ONLM), or their designated representatives, will be given access to Program construction areas, subject to site safety plans, to survey potentially suitable areas for seabeach amaranth.

6. Contractor Notification

The Corps will ensure that all contractors and employees will be adequately informed of ESA concerns, and contract specifications will be written accordingly.

7. Legal Easements

The local project sponsor will obtain legal easements allowing Service, State, and Corps representatives access to all portions of the project area over the life of each individual project for the purposes of carrying out endangered species management activities, including, but not limited to, installation of protective fencing, observation, and data collection.

8. Conservation Measures to Protect Piping Plovers

a. Pipeline Placement

On newly nourished beaches outside of current nesting areas and established buffer areas, pipelines may be placed and remain on the beach during construction activities. Pipelines can be placed within nesting areas during the non-nesting season provided they are removed prior to March 15.

b. Project Scheduling, Timing Restrictions, and Buffers

(1) Beach Nourishment

No construction will take place during the nesting season (March 15th to August 15th) within a protective buffer area extending from each nesting area. Within nesting and buffer areas, work will be completed by March 15th or will proceed following conclusion of the nesting season. In general, known piping plover nesting areas will be afforded a 1,000-meter buffer so as not to interfere with courtship activities, nest site selection, and brood rearing. However, if due to eroded beach conditions or other beach features, no potentially suitable piping plover habitat is likely to be present within the buffer area during the affected nesting season, the buffer area may be reduced on a case-by-case basis by the Service.

(2) Repair and Maintenance of Hard Structures

Repair and maintenance of hard structures and associated operations and maintenance activities will be scheduled and sequenced to avoid or minimize construction activities during the nesting season (March 15th to August 15th) within known piping plover nesting areas or areas likely to be occupied during the affected nesting season.

c. Beach Profile Surveys

Yearly beach profile surveys will be conducted outside of the nesting season to the greatest extent possible. If work must be done during the nesting season, the Corps will prioritize

historical nesting areas vs. non-nesting areas to schedule surveys of sensitive areas outside of the nesting season.

d. Contractor Access Into Nesting and Buffer Areas

No contractor shall be allowed into designated nesting areas without being accompanied by a qualified biologist. If it is necessary to enter a nesting area after nesting has begun, the Corps or its designated representative will coordinate with the ENSP and / or the Service to ensure that plover monitors are on site to escort workers through the nesting area. No motorized vehicles will be operated within the unfledged chick and nesting buffer areas unless authorized by the Service on a case-by-case basis and intensive monitoring is in place. Motorized vehicles will not be authorized access within 100 meters of unfledged chicks or nests under any circumstances except in the case of a *bona fide* emergency.

e. Monitoring and Management During Construction Events

The Corps will implement a monitoring program to ensure that construction activities occurring during the piping plover nesting season (March 15th to August 15th) minimize or avoid adverse impacts to the species.

f. Monitoring and Management Following Construction of Civil Works Projects

The Corps will fund a comprehensive program to monitor piping plovers on a yearly basis within each project area, beginning with the first nesting season after initial project construction and continuing for the life of the project or until assumed by the State or local project sponsor. Monitoring and management efforts will be consistent with the Service's (1994) *Guidelines for Managing Recreational Activities in Piping Plover Breeding Habitats on the U.S. Atlantic Coast to Avoid Take Under Section 9 of the Endangered Species Act* (Guidelines). Following construction or re-nourishment, beach management activities will be the responsibility of the local municipality or other appropriate landowner. To ensure the protection of federally listed species following project construction, the Corps will require the non-federal sponsor (NJDEP) to work with each municipality or other appropriate landowner to prepare site-specific endangered species management plans. Plans will be implemented under the guidance of the Service, the ENSP, and the Corps. The management plans will describe site-specific protective measures for piping plover, including: establishment of protective zones; restrictions on beach raking, beach maintenance, and other municipal activities; actions to reduce impacts to the local plover population from predators and humans; and other management as appropriate for individual site conditions.

g. Habitat Enhancement

h. Measures Specific to Townsends Seawall Project

9. Conservation Measures to Protect Seabeach Amaranth

a. Surveys

Prior to project construction, a Corps biologist, contracted biologist/botanist or designated representative will survey the project area within the seabeach amaranth growing season (May 1 – November 1) to document the presence or absence of seabeach amaranth.

b. Monitoring and Protection of Seabeach Amaranth Plants

In the event that seabeach amaranth is found within a project area, information including plant locations, numbers of plants, and size of plants will be recorded and provided to the Service and NHP.

If construction personnel or vehicles are active in proximity to the site or might transit the site, symbolic fencing will be erected, encompassing a 3-meter protective buffer around the plant(s). The buffers will be adjusted as necessary to protect the plants and, where appropriate, will be combined into a single larger buffer area to better accommodate larger numbers of seabeach amaranth plants.

All construction activities will avoid any delineated locations of seabeach amaranth to the greatest practicable extent. Construction activities include, but are not limited to, staging, surveying, operation, and sand transport activities. The Corps will undertake all practicable measures to avoid damaging or destroying seabeach amaranth by avoiding areas where the species is present.

c. Restoration of Seabeach Amaranth Areas Likely to be Destroyed

(1) Transplantation of Plants

Individual plants that would be covered with sand, or that occur where impacts from construction equipment cannot be avoided, will be transplanted to a similar habitat near or within the project area.

(2) Seed Collection

When possible, seeds from plants to be translocated will be harvested prior to plants being moved.

(3) Stockpiling Sand Substrate

If translocation or seed collection is not a viable alternative, or has been proven ineffective, construction will be avoided around the plant and buffer area until individual plants die back. The top layer of sand substrate, including the plant site and the surrounding 3-meter buffer area, will be "scraped" and stockpiled. After the area has been graded to the design profile, the stockpiled "scraped sand" will then be re-spread within the project area in an area with suitable habitat conditions for seabeach amaranth.

d. Long-term Management

If seabeach amaranth is found within the project area, the appropriate municipal endangered species management plan(s) will be amended to include site-specific protective measures for this species. Such measures will include establishment of protective zones, restrictions on beach raking, fencing to prevent damage from vehicle and pedestrian use, monitoring, and other management as appropriate for individual site conditions.

REASONABLE AND PRUDENT MEASURES (with implementing TERMS AND CONDITIONS, refer to USFWS's 2005 PBO)

RPM 1: *Ensure that all Corps project engineers, staff, contractors, cooperators, and / or permittees are fully informed and compliant with all conservation measures contained within the Program description,RPMs, and terms and conditions of this Biological Opinion.*

RPM 2: *Ensure that the piping plover construction monitor is qualified to identify piping plovers and their habitats.*

RPM 3: *Ensure that efficient and effective communication and coordination occurs among Corps project engineers, staff, contractors, cooperators, piping plover construction monitor and / or permittees and the Service, NJDEP, municipal, and any other construction and monitoring staff.*

RPM 4: *Practice adaptive management of projects within the Program Area and adjust protective measures as needed or as new information becomes available.*

RPM 5: *Ensure that the Corps piping plover monitoring and management program is sufficient to monitor and minimize disturbance to nesting piping plovers from recreational users on Corps Program Area beaches.*

RPM 6: *Seek ways to preserve or enhance piping plover habitat within the Program Area while meeting shore protection goals.*

RPM 7: *Ensure that dune and beach management actions carried out by the State and local project sponsors and / or permitees over the life of the Program are compatible with piping plover habitat requirements.*

RPM 8: *Secure increased cooperation and participation of local beach managers in endangered species protection to augment conservation measure commitments summarized in the Program description.*

RPM 9: *Report on the progress of the action and its impact on the species, as required pursuant to 50 CFR 402.14(i)(3).*

APPENDIX F

CITY BEACH VEHICLE USE REGULATIONS

(to be inserted upon finalization by
Solicitor / Police Department)

APPENDIX G

TABLE OF ACTIONS ON THE CITY OF NORTH WILDWOOD BEACHES, CITY OF NORTH WILDWOOD BEACHES MANAGEMENT PLAN, EFFECTIVE, FEBRUARY 2009

APPENDIX H

EMERGENCY CONTACT LIST

APPENDIX H

EMERGENCY CONTACT LIST

Todd Pover Beach Nesting Bird Project Manager CWFNJ on behalf of NJDEP – ENSP Woodbine, NJ	(609) 628-0401
USFWS New Jersey Field Office Pleasantville, NJ	(609) 646-9310
USFWS Law Enforcement Office Elizabeth, NJ	(973) 645-5910
NJDEP Southern Regional Law Enforcement Office Sicklerville, NJ	(856) 629-0555 weekdays 1-877-927-6337 weekends
Amanda Dey, Senior Biologist William Pitts, Wildlife Technician Migratory Shorebird Project Endangered & Nongame Species Program, NJDEP Robbinsville, NJ	(609) 259-6967/6963 (609) 259-8155 FAX Amanda.dey@dep.state.nj.us William.pitts@dep.state.nj.us
Tuckahoe Field Office Division offish & Wildlife, NJDEP	(609) 628-2103 (609) 628-2734 FAX
City of North Wildwood Office of Emergency Management	(609) 522-0191
City of North Wildwood Police Department	(609) 522-2411
Marine Mammal Stranding Network Brigantine, NJ	(609) 266-0538
City Hall City of North Wildwood	(609) 522-2030

Exhibit 4

CITY OF NORTH WILDWOOD
Cape May County, New Jersey

RESOLUTION

APPROVING THE MUNICIPAL PUBLIC ACCESS PLAN

WHEREAS, the North Wildwood Municipal Public Access Plan was submitted to the City Council and reviewed at the regular meeting of October 2, 2012, and

WHEREAS, the governing body has approved the plan as submitted,

NOW, THERFORE, BE IT RESOLVED by the City Council of the City of North Wildwood,, the North Wildwood Municipal Public Access Plan," a copy of which is attached, is hereby approved.

NOW, THEREFORE, BE IT FURTHER RESOLVED a copy of the plan shall be sent to the New Jersey Department of Environmental Protection for review and approval in accordance with N.J.A.C.7.7 and 7.7E.

OFFERED BY: KOEHLER **SECONDED BY:** KANE

STATE OF NEW JERSEY **COUNTY OF CAPE MAY**

I, Janet H. Harkins, Clerk of the City of North Wildwood, in the County of Cape May, State of New Jersey, do hereby certify that the foregoing is a correct and true copy of a Resolution adopted by the Mayor and Council of the City of North Wildwood at a meeting duly held on the 2nd day of October, 2012.

Dated: October 5, 2012

Signed: Janet H. Harkins – City Clerk

Approved: William J. Henley – Mayor

	Aye	Nay	Abstain	Absent		Aye	Nay	Abstain	Absent
Tolomeo	✓				Koehler	✓			
Zampirri	✓				Bishop	✓			
Kane	✓				Rosenello	✓			
Del Conte	✓								

RESOLUTION # 162-12

Exhibit 5

NORTH WILDWOOD PUBLIC ACCESS PLAN

Submitted by: City of North Wildwood

Date of Current Submittal October 3, 2012

Approved by the New Jersey Department of Environmental Protection
#######

Adoption by the City: October 2, 2012

Prepared By: City of North Wildwood

APPROVAL OF THIS PLAN DOES NOT ELIMINATE THE NEED FOR ANY FEDERAL, STATE, OR MUNICIPAL PERMITS, CERTIFICATIONS, AUTHORIZATIONS, OR OTHER APPROVALS THAT MAY BE REQUIRED BY THE APPLICANT, NOR SHALL THE APPROVAL OF THIS PLAN OBLIGATE THE DEPARTMENT TO ISSUE ANY PERMITS, CERTIFICATIONS, AUTHORIZATIONS, OR OTHER APPROVALS REQUIRED FOR ANY PROJECT DESCRIBED IN THIS PLAN

INDEX

INTRODUCTION

Public rights of access to and use of the tidal shorelines waters, including the ocean, bays, and tidal rivers, in New Jersey are founded in the Public Trust Doctrine. Influenced by Roman civil law, tenets of public trust were maintained through English common law. Adopted by the original 13 Colonies and the subsequent states this right has been sustained by the judicial decisions in New Jersey.

The intent of this document is to provide a comprehensive public access plan for the City of North Wildwood, which lays out their vision for providing access to tidal waters and shorelines within the municipal boundary. This Municipal Public Access Plan (MPAP) was developed in accordance with N.J.A.C.7:7-8.11 and has been submitted to the NJDEP for approval so that public access requirements for permits will be waived in North Wildwood. The development and implementation of this MPAP supports the policy of local determination of public access locations and facilities, while safeguarding regulatory flexibility and potential funding opportunities for North Wildwood.

AUTHORITY FOR PULIC ACCESS PLANNING RESPONSIBILITY

The authority for a municipality to develop a MPAP is derived from the Coastal Zone Management Rules, N. J. A. C. 7:7E. The premise of the authorization of Municipal Public Access Plans is that public access to tidal waters is fundamentally linked to local conditions. Municipalities have a better awareness and are more responsive to these conditions than a broader State "one size fits all" mandated public access plan. The voluntary development of a MPAP by North Wildwood enables the municipality to better plan, implement, maintain, and improve the provision of public access for its residents and visitors.

As of the date of submittal, public access planning responsibility remains with the New Jersey Department of Environmental Protection. Upon approval of the submitted plan, the City of North Wildwood will become the authority responsible for ensuring that public access to tidal waterways is provided in according with N. J. A. C. 7:7-8-11.

STATE OF NEW JERSEY PUBLIC ACCESS GOALS

Through the New Jersey Coastal Zone Management Rules, the State of New Jersey establishes a broad set of coastal protection goals, including the following specifically addressing public access.

Effectively manage ocean and estuarine resources through sustainable recreational and commercial fisheries, as well as through the safe and environmentally sound use of coastal waters and beaches.

Provide meaningful public access to and use of tidal waterways and their shores

Preserve public trust rights to tidal waterways and their shores

Preserve and enhance views of the coastal landscape to enrich aesthetic and cultural values and vital communities

The enhancement of public access by promoting adequate affordable public facilities and services

Create and enhance opportunities for public access to tidal waterways and their shores, on a non-discriminatory basis

Maintain all existing public access to and along tidal waterways, and their shores

Provide opportunities for public access to tidal waterways and their shores through new development

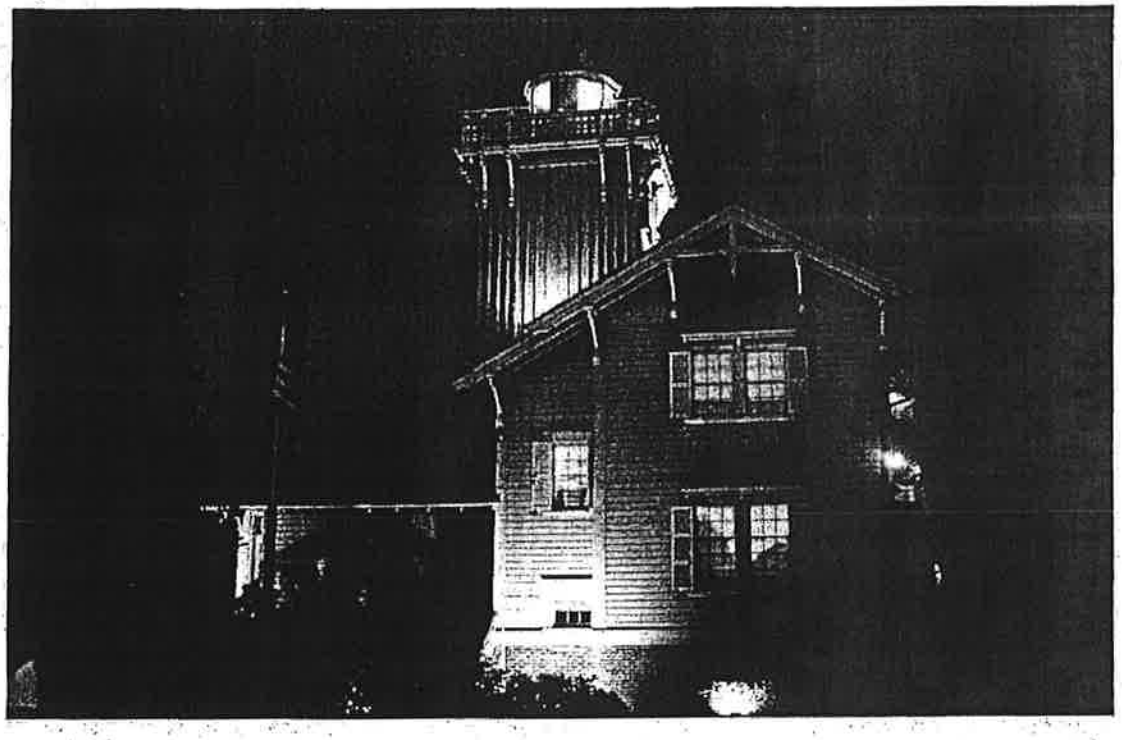
Provide public access that does not create conditions that may be reasonably expected to endanger public health and safety, damage the environment, or create significant homeland security vulnerability

I. MUNICIPAL PUBLIC ACCESS VISION

OVERVIEW OF MUNICIPALITY

The City of North Wildwood is located in Cape May County, on the north end of the Five Mile Beach area known as the Wildwood's. The water of the Atlantic Ocean forms the border on the East/Northeast side of the City, Hereford Inlet on the Northeast/North portion and the tidal bay waters to the Westerly side. The City was originally settled in the early 1800's as a fishing village known as Anglesea. Anglesea incorporated into the Borough of Anglesea on June 13, 1885. The Borough of Anglesea was reincorporated into the Borough of North Wildwood on May 16th, 1906. The Borough of North Wildwood reincorporated into the City of North Wildwood on April 30th, 1917. The original way of life in early Anglesea the fishing village slowly declined due to natural events, including the loss of navigational ability of Hereford Inlet. As transportation improved thru railroad and cars the city became a tourist destination. The 2 square mile area slowly developed to the diverse community of today. The City of North Wildwood is a coastal resort community is a coastal resort community with a composition of natural resources along with residential and business districts. The diversity of residential areas, general commercial areas, entertainment district, and an amusement district containing 3 large piers serves along with residents and a large seasonal influx of visitors.

. The influx of seasonal residents has remained fairly consistent. The year round population has also remained between 3500 to 5000 residents. The 2010 United States Census reported a year round population of 4,041 in the City of North Wildwood. The summer average seasonal population is estimated to be in the 85,000 range. These numbers are approximately down 18% from the last census in the 90's. The real estate boom of 2000's did change many older multi-occupancy buildings into larger second home residents. The number of Condominium buildings has stayed relatively the same.

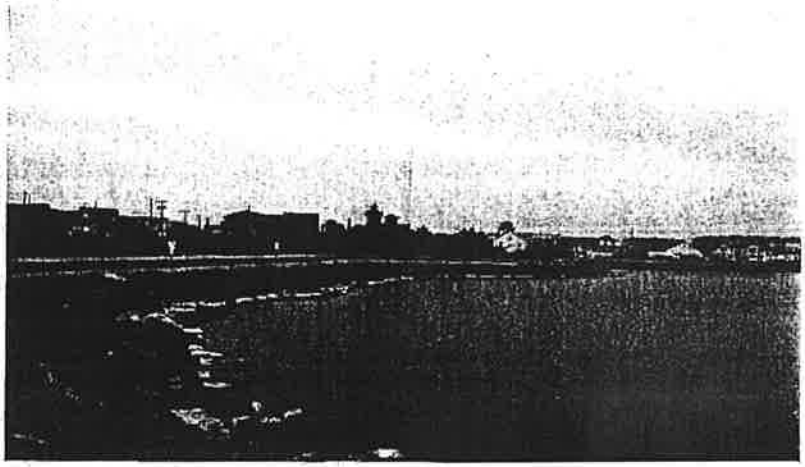


HISTORIC HEREFORD INLET LIGHTHOUSE AND PARK

Public access to **clean free Beaches** and the bay tidal water resources has always been the reality of North Wildwood. The continuous effort to provide facilities to all visitors and residents is challenging at times. The City of North Wildwood has committed to provide the infrastructure to give access to these resources, without the benefit of revenue from Beach Fees. Even still, the City of North Wildwood's Beaches were ranked the Fourth Best Beach in New Jersey in 2008, according to the New Jersey Marine Sciences Consortium. It has continued to achieve similar ratings over the years.

The City of North Wildwood provides Beach front access practically along it entire coastal length. This access includes vehicular traffic at certain times of the year for fishing and relaxation. It provides three parking lots serving the Beach front, and one parking lot in the Bay side Marina. In addition, Street parking is available at all locations. In addition, the City has created one of the most unique Seawall Promenade's along the Jersey shoreline. The City has approximately 2.5 miles of shoreline with combined ocean front and bay waters. The Seawall Promenade along the ocean front is composed of concrete topped Seawall walkway, JFK Boulevard, and the Boardwalk. The connection of these areas allows one to start in the north end of the City and follow the entire ocean shoreline, while keeping the view of the ocean, except where the Dunes limit the view. In the walk you would also pass the access point to Historic Hereford Lighthouse. The City has successfully provided the resources to manage the complexity of residences and business districts within its borders. Not only did they maintain access to the tidal waters, they significantly increased the amount of access with enhanced facilities over the years.

SEAWALL PROMENADE AT HEREFORD INLET LIGHTHOUSE



SEAWALK LOOKING BACK AT HEREFORD LIGHTHOUSE

As part of the planning process, this MPAP has been reviewed and is consistent with the following goals, elements, policies established in the City Of North Wildwood's Master Plan.

MUNICIPAL PUBLIC ACCESS GOALS

Maintain consistency with the land use planning objectives as outlined in the North Wildwood Master Plan.

Protect the City's natural resources of the tidal waters, while increasing and improving the facilities for the public to have an enhance experience and appreciation for those resources.

Provide the maximum access possible to the ocean and tidal waters in all areas surrounding the City of North Wildwood.

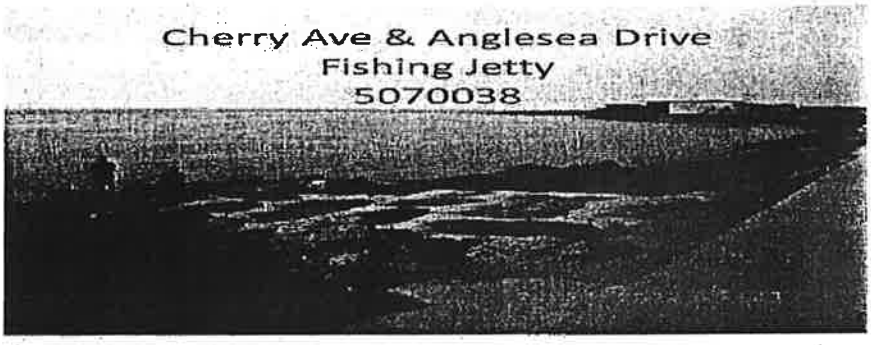
Provide regulations that safeguard the public from restricted areas and hazards, while attempting to utilize the resources to their optimum levels.

Provide coordinated planning for emergencies in cooperation with the Office of Emergency Management to safeguard the natural resources and facilities.

Restore damaged areas of the natural resources in a reasonable time frame to allow public usage to as soon as possible.

II. OVERVIEW OF EXISTING PUBLIC ACCESS FACILITIES

The City of North Wildwood has approximately 2.5 miles of combined shoreline of ocean and bay waterways. The beachfront has 38 locations to access the beach and Hereford Inlet, and the Seawall. The City lifeguards are stationed at 23 locations. In 2012 they provided over 1270 documented transports to the beach for injured or handicapped individuals and Surf Chairs for disabled individuals on over 725 occasions. The City provides 5 ADA Bathrooms along the beach and bay fronts. They also provide 16 regular seasonal portable bathrooms, and 3 ADA seasonal portable bathrooms. Additionally, the City has created three parks and two playgrounds within steps of the tidal waterways.



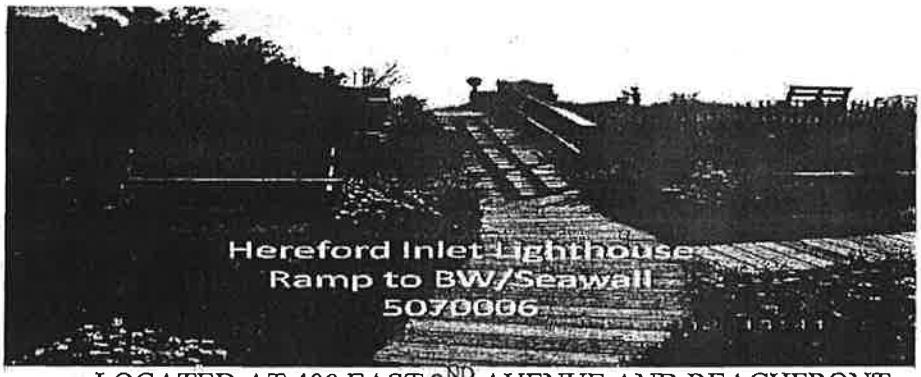
The City provides 3 Beachfront parking lots, plus additional street parking along the Beachfront. Ramp access exists along and under the Boardwalk in most locations.

Access path ways over the protective Dunes on the beachfront continue from 2nd Avenue the length of the Front Beach to 26th avenue. Access pathways to Hereford Inlet and the beaches and the seawall are from 2nd and Ocean Avenues to Anglesea Drive. The Seawall provides access to the Historic Hereford Lighthouse and its gardens. The Lighthouse gardens were awarded the Pennsylvania Horticulture Society Suburban Greening Award along with many other awards.

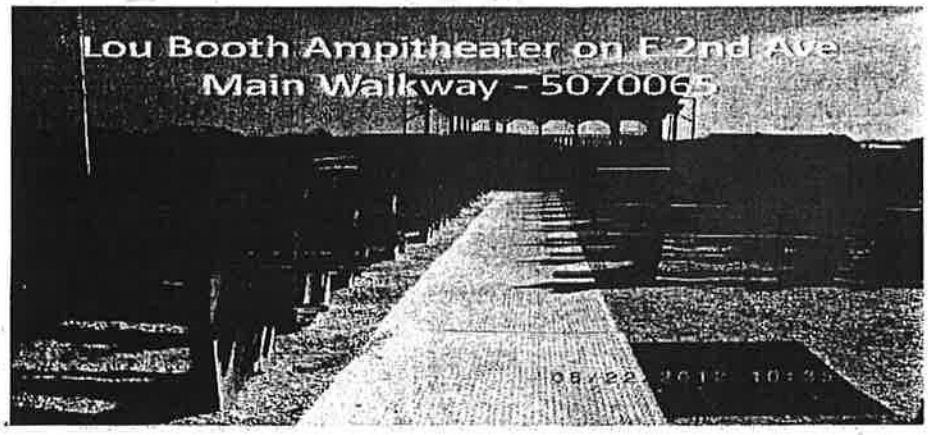
The 3rd and JFK Gazebo allows access to the beach, seating, and an informational Community Bulletin Board announcing special events and other pertinent information. The view allows one to see both Hereford Inlet and the Atlantic Ocean.
3 blocks are earmarked for surfing by the Beach Director according to local conditions. Foot rinse is available at the 15th Street Beach Headquarters.

Fishing on the Beachfront in the summer season is in designated areas. All other seasons fishing access is anywhere on the beachfront by foot or permitted vehicles. Sections of the beach can be closed to protect nesting shorebird species. Fishing access along the seawall is available all seasons. The City bike path connects to the beach at 5th Avenue and along the beachfront to 21st Avenue. The Boardwalk is also another elevated bike path option with a view of the Ocean for bikes with specific seasonal restrictions. Observation points and seating areas exist at 2nd and JFK, 18th and Delaware, 2nd and Surf, 3rd And JFK, along the Boardwalk (east side), Margaret Mace Park, and Lou Booth Amphitheater and Nature Park.

LOCATED AT CHESTNUT AND CENTRAL AVENUE



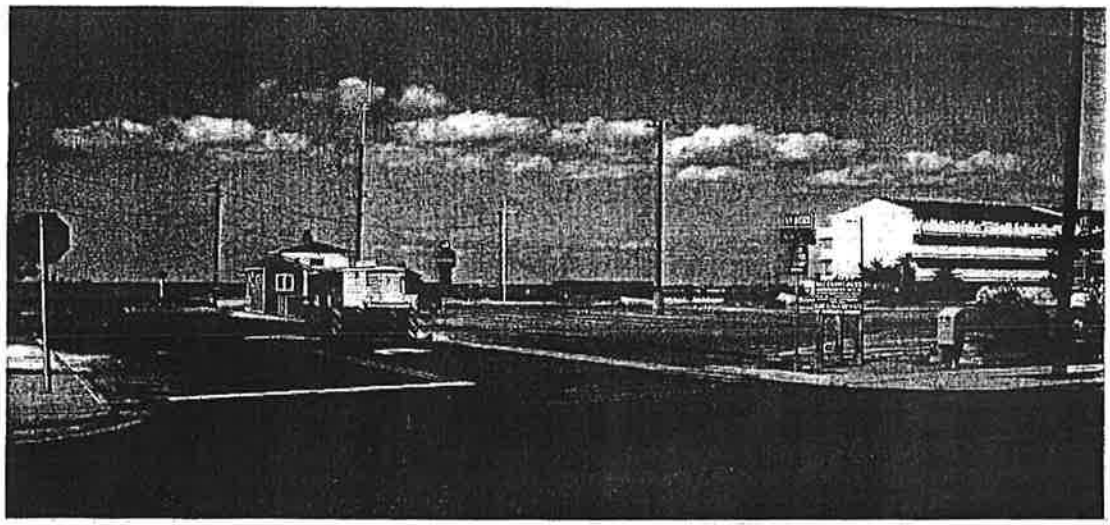
LOCATED AT 400 EAST 2ND AVENUE AND BEACHFRONT

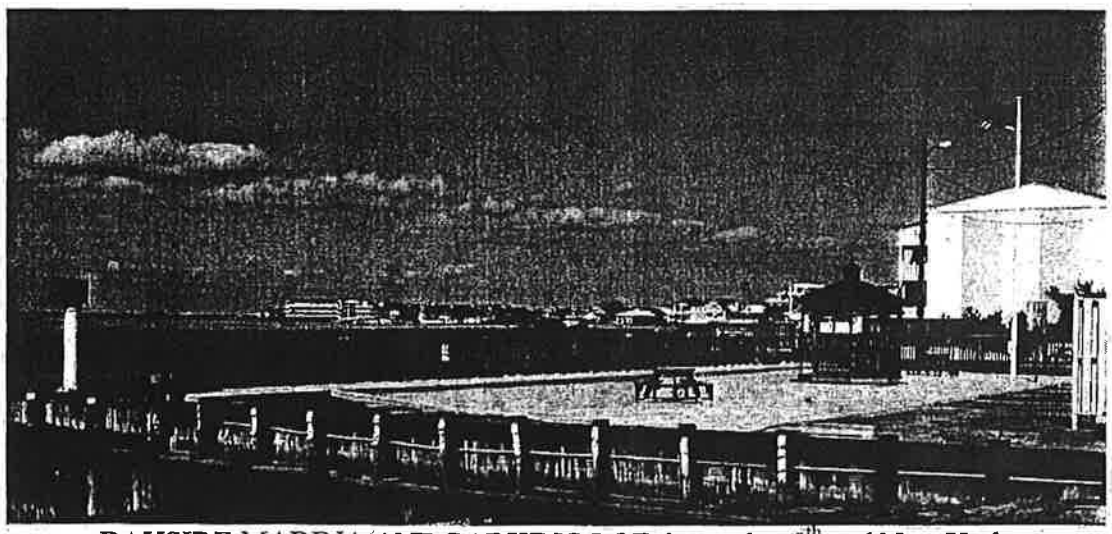


The Lou Booth Amphitheater provides a seating area for free seasonal entertainment events, a stage with additional seating. The Amphitheater area provides a ramp to the Seawall and Beach. In addition, a passive natural park with seating is adjacent to the Amphitheater grounds. Street parking is available in the front of the park.

The 5th Avenue Bayside Marina is located along the bay front at between 4th and 5th Avenue and New York Avenue. The City operates this Bay Front Marina, which includes handicapped bathrooms, 2 boat ramps, fishing area, fish cleaning station, a seating pavilion, and parking for cars and trailers. This Marina offers access to the all of the tidal bay water resources. This would include access to the marsh estuaries and the intercoastal waterway. Access to the intercoastal waterway's during lower tides. The Bay shoreline extends from the State Bridge on route 147 at Beach Creek to 18th Avenue

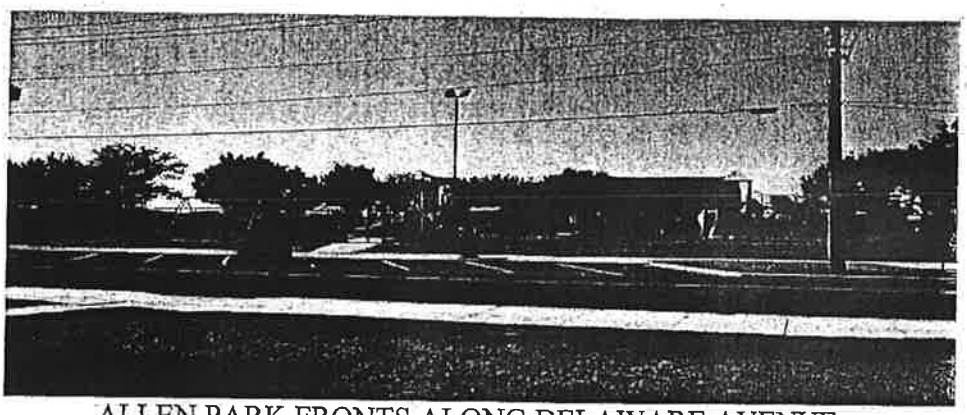
and the Canal. Besides the aid of launching or hauling a boat, this access enhances the fishing and crabbing opportunities. This is seasonally staffed by the City.



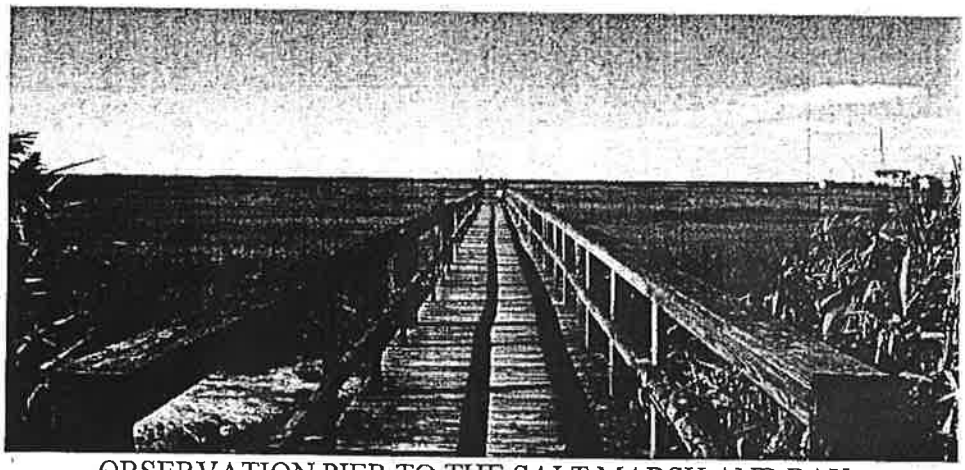


BAYSIDE MARINA AND PARKING LOT located at 5th and New York Avenue.

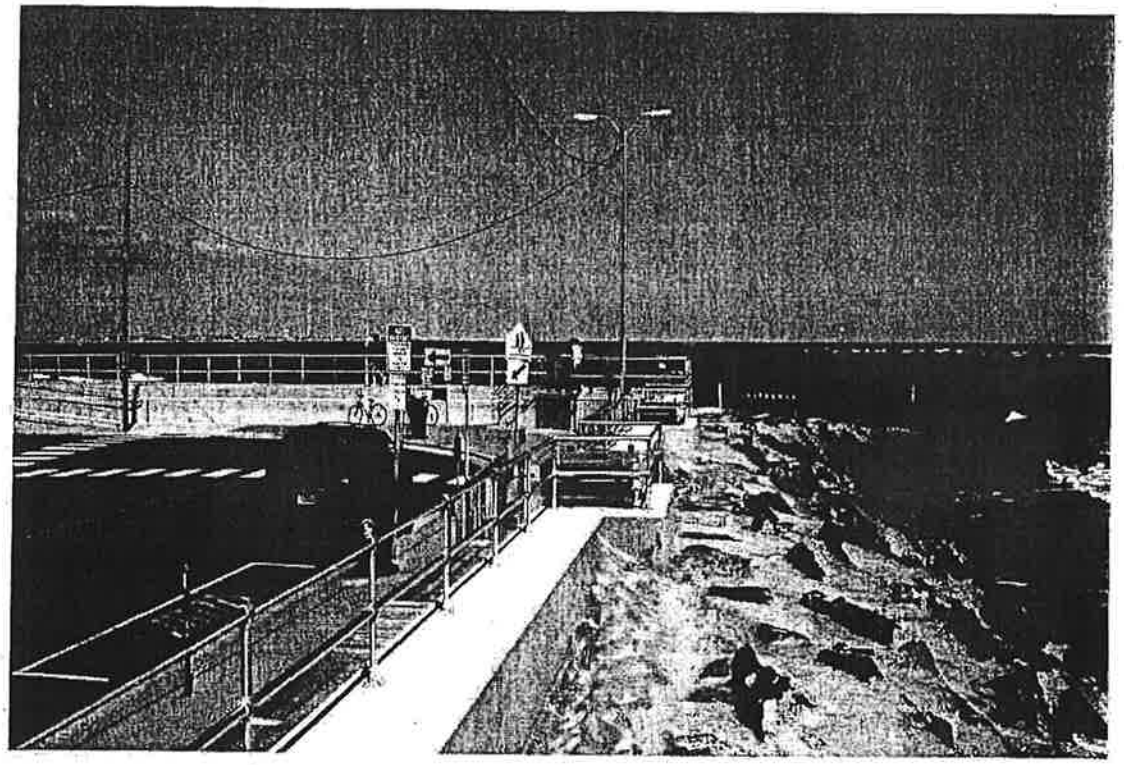
ALLEN PARK RECREATION PARK COMPLEX is located in the bayside shoreline along the western side of Delaware Avenue. The Allen Park Recreation Complex provides a skateboard park, street hockey rink, playground, ADA bathrooms, tennis courts, basketball court and a pier which grants a view of the bay waters and salt water marsh environment. It provides frontal off street parking and is staffed seasonally. Allen Park Recreation Complex covers a 5 block area along Delaware Avenue intersecting with 19th Avenue thru 24th Avenue.



ALLEN PARK FRONTS ALONG DELAWARE AVENUE



OBSERVATION PIER TO THE SALT MARSH AND BAY



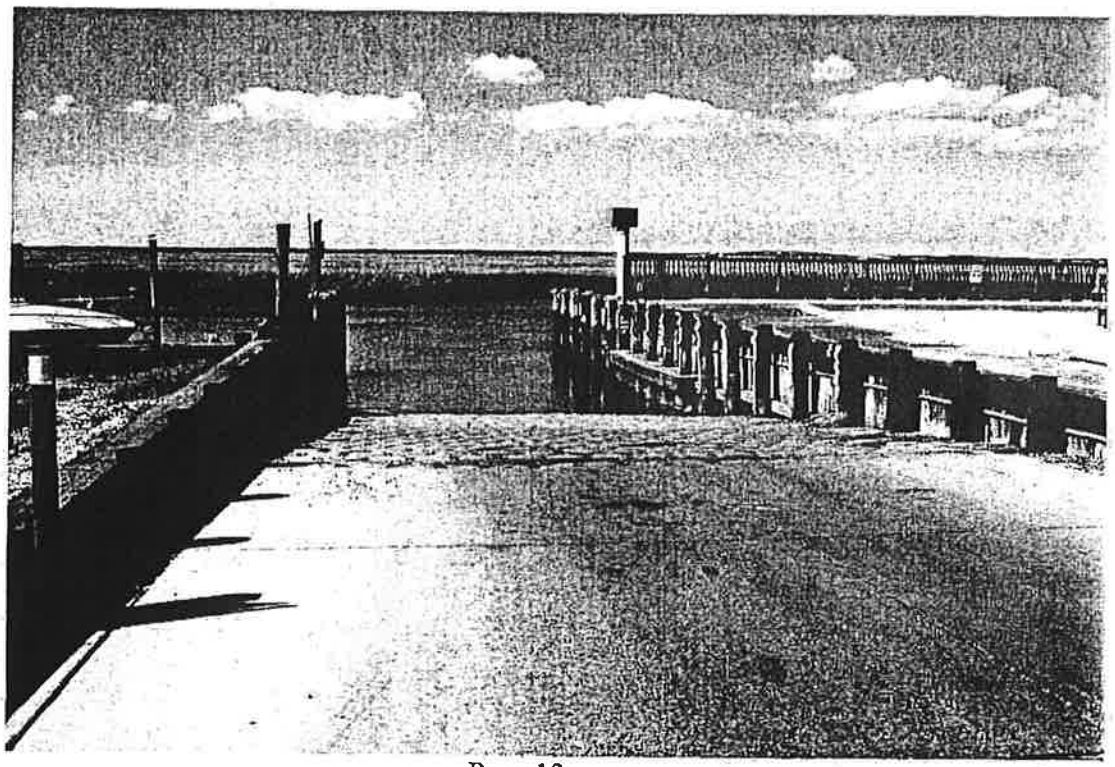
NORTHEAST VIEW OF OCEAN AND SEATING 2ND AND JFK BLVD

All the Beaches, pavilions, marina, bathrooms, and street ends are maintained by the City of North Wildwood Public Works. The North Wildwood Beach Patrol is under the Beach Director. The North Wildwood Police Department is under the authority of the Director of Public Safety and the Public Safety Committee.

City of North The Wildwood has performed a community needs assessment. This assessment is derived from public opinion, governmental meetings, and other governmental information such as tourism boards.

The City of North Wildwood provides unique access to the tidal waterway's of the ocean beaches and bay shoreline for the enjoyment of all its residents and visitors. The utilization of these resources thru special events, fishing tournaments, bird watching, athletic races and numerous other experiences will be continued and expanded. Additional ADA pathways for the Bay and Beachfront would enhance the opportunities for many visitors. A $500,000.00 ADA walkway project to provide greater access to the City's beaches is in the design stages as of 9/25/12. Construction is scheduled to begin in mid to late October, 2012. The City having been fully developed has few options for major projects.

The marine focus would be better access out of the bay waters. The dredging of Beach Creek inlet would open the possibility of an improved business opportunity and allow direct access to the Inter-Coastal Waterway. This would improve the access of all.



III. COMMUNITY NEEDS

The City of North Wildwood has performed a community needs assessment. This assessment is derived from public opinion, governmental meetings, and other governmental information such as tourism boards.

The City of North Wildwood provides unique access to the tidal waterway's of the ocean beaches and bay shoreline for the enjoyment of all its residents and visitors. The utilization of these resources thru special events, fishing tournaments, bird watching, athletic races and numerous other experiences must be continued and expanded. Additional ADA pathways for the Bay and Beachfront would enhance the opportunities for many visitors. The City having been fully developed has few options for major projects.

The marine focus would be better access out of the bay waters. The dredging of Beach Creek inlet would open the possibility of an improved business opportunity and allow direct access to the Inter-Coastal Waterway. This would improve the access of all marina's and fisherman to all local waters.

The safety issue of flooding is a maintenance issue for North Wildwood. The storm sewers, outlet pipes, and flapper valves has mitigated much of the bay side flooding. The improvement of these storm sewers would increase the quality of the all tidal waters.

The North Wildwood Office of Emergency Management and the Police Department coordinate with the County OEM during storms and tidal events. They have demonstrated the understanding of visitors concerns and they have responded quickly to regain access to these resources.

IV. IMPLEMENTATION PLAN

The City of North Wildwood has created an Implementation Plan composed of Priorities, Preservation of Public Access Locations, Signage, Proposed Access Improvements and Facilities, and Municipal tools for Implementation.

The City of North Wildwood has continued to seek ways to maintain and improve the access ways to the ocean and bay tidal waters. The integration of the Dune Protection Plan with the concrete capping of the Seawall Promenade creates a direct connection to JFK Boulevard and the Boardwalk. This has created a unique Ocean Front and Inlet walkway in the State Of New Jersey, with a vision along most of its length. The usage has increased substantially by visitors and residents.

PRESERVATION OF PUBLIC ACCESS LOCATIONS

Current and past cooperation with Amusement Pier owners has resulted in better access to the beach by creating a straight line access path from the Boardwalk to the Beach. Beachfront right of way easements have been maintained in the front and middle sections of all piers. The City and Hereford Inlet Lighthouse committee cooperated to obtain more open spaces to their park with a recent acquisition.

Public transportation is provided along the City's oceanfront Boardwalk by Boardwalk Tram Cars. This service is provided along concrete pathways allowing access the entire length of the North Wildwood and Wildwood Boardwalk. The City of North Wildwood created the template for a Boardwalk maintenance plan that was approved by the Atlantic County Joint Insurance Fund and has been replicated in shore communities throughout New Jersey.

Such cooperation has resulted in the "Wildwoods" receiving notice by Shuman's Travel, a leading publisher rating the Boardwalk in the top 10 in the Country. Time.com placed the "Wildwoods" on the top 50 list of Authentic American Experiences.

The City is pursuing the regaining of Bay street end easements that have been defaulted on in the past.

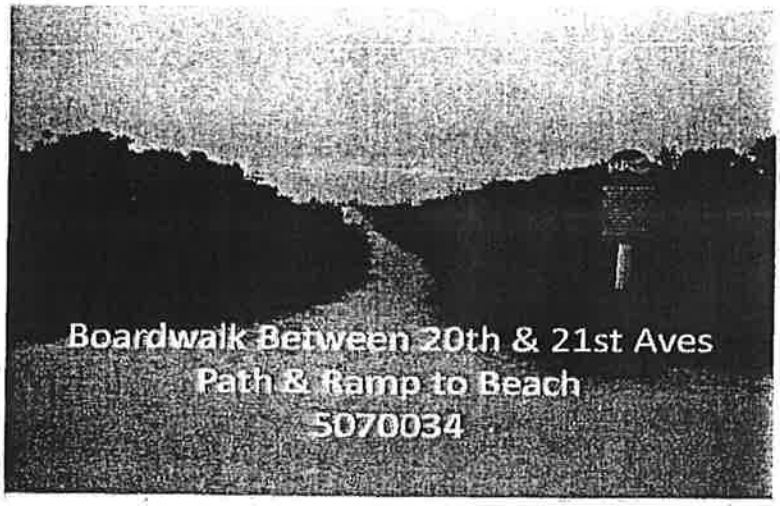
The recent ADA improvements to the bay tidal street end at 15th and Maryland and 18th and Maryland Avenue has improved access to 18th street Canal for visual and fishing. These improvements had costs in excess of $170,000 each.

SIGNAGE

North Wildwood has provided improved signage to most access points. Beach rules and Local ordinance laws are also posted. The City in cooperation with the Greater Wildwood Tourism and Development Committee agreed to standardize the language island wide for the convenience of the visiting tourist. The signage relative to handicapped parking is displayed in all the designated spaces.

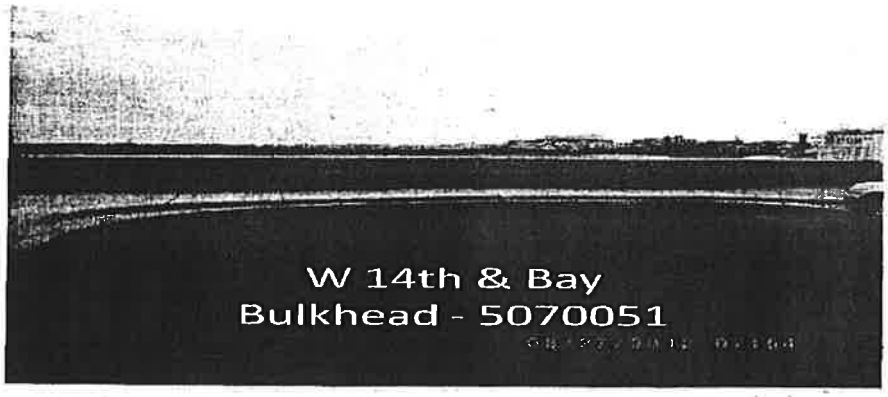
PROPOSED ACCESS IMPROVEMENTS

North Wildwood has proposed the following access improvements. The City is in the process of upgrading access to the beach between 16th and 24th avenues. The completion date is Mid Summer of 2013. These improvements will be ADA upgrades on the pathway to the crossover of the Dunes. Approximately 7 streets will be improved. The estimated cost is $500,000.



In Addition, an ADA upgrade to the Bulkhead at 18th and Maryland (Southwest) will be completed in mid-summer of 2013. The estimated cost will be $175,000. This improvement will enhance access, handicapped parking and fishing opportunities. This improvement will be similar to the following picture of 14th avenue improvement as pictured on the next page.

Although North Wildwood is an established community with a limited available land undeveloped, the City has still established the maximum amount of access to most areas. Future plans are being discussed to create some fishing and seating opportunities on the bay shoreline. A small pier at the bay tidal street ends is one area may have some promise for the future planning.



MUNICIPAL TOOLS FOR IMPLEMENTATION

North Wildwood has the following tools for the maintenance, enhancement, and development of public access. The North Wildwood Public Works Department provides the maintenance program for the City. Independent contractors are hired to perform specialized work. North Wildwood Public Works Department has a formal maintenance plan for the Beach front see attached plan. The Public Works Department also inspects storm sewers, flapper valves, and maintains all municipal grounds. The department utilizes full-time and seasonal workers.

The City of North Wildwood's website is a tool for the public to keep informed about community events and issues. The website combines pertinent government issues, ordinances, various boards and meeting information, agendas and all relative information.

The North Wildwood Public Access Plan provides elements that are consistent with the Land use planning objectives outlined and adopted in the North Wildwood Master Plan of 2010.

The North Wildwood Public Access Plan does not present new or different elements that would change the City's maintenance of public water shoreline access ways, nor does the plan change the City's methods for responding to emergencies or for emergency vehicular access. The plan also has no impact on the Protective Dune plan on the Beach.

MUNICIPAL PUBLIC ACCESS FUND

The City of North Wildwood has not created a Municipal Public Access Fund. If a fund was to be started, the city then would present the NJDEP with the details on the structure and management of the fund.

Lacking the revenue sources like Beach Fees, the city's current method of funding with Grants, Capital Improvement Budgets, Bonding and Taxes will be the continued course of action.

V. RELATIONSHIPS TO OTHER REGIONAL AND STATE PLANS

The North Wildwood Municipal Public Access Plan provides elements that are consistent with the Land Use planning objectives outlined and adopted in the North Wildwood Master Plan (2010) the Cape May County Master Plan.

REFERENCES

Cape May County Master Plan 2002

North Wildwood Master Plan 2010 /Conservation Plan

Subject: Re: North Wildwood Public Access Plan
From: "Randazzo, Cindy" <Cindy.Randazzo@dep.state.nj.us>
Date: Wed, October 3, 2012 5:11 pm
To: "'tsmyth@northwildwood.com'" <tsmyth@northwildwood.com>
Priority: Normal
Options: View Full Header | View Printable Version | Download this as a file

Thank you for your support and prompt submission. Greatly appreciated

----- Original Message -----
From: tsmyth@northwildwood.com [mailto:tsmyth@northwildwood.com]
Sent: Wednesday, October 03, 2012 03:17 PM
To: Randazzo, Cindy
Subject: North Wildwood Public Access Plan

Director Randazzo, On behalf of Mayor Henfey and City Administrator, Lou Belasco, attached are NW Public Access Plan and City Resolution. The original Plan and signed/sealed Resolution are being sent to you via U.S. Mail. Thank you, Tina Smyth, NW Administration

10/5/12

Subject: North Wildwood Public Access Plan
From: tsmyth@northwildwood.com
Date: Wed, October 3, 2012 3:17 pm
To: "Cindy Randazzo" <cindy.randazzo@dep.state.nj.us>
Priority: Normal
Options: View Full Header | View Printable Version | Download this as a file

Director Randazzo, On behalf of Mayor Henfey and City Administrator, Lou Belasco, attached are NW Public Access Plan and City Resolution. The original Plan and signed/sealed Resolution are being sent to you via U.S. Mail. Thank you, Tina Smyth, NW Administration

Attachments:

NWPublicAccessPlan.PDF	999 k	[application/pdf]	Download
NWPublicAccessPlanResolution.PDF	52 k	[application/pdf]	Download

Exhibit 6

THE POINTE
AT MOORE'S INLET
Oceanfront living perfected

November 4, 2016

Delivery via Federal Express

Honorable Judge Julio L. Mendez, AJSC
Atlantic County Civil Courts Building
1201 Bacharach Blvd
Atlantic City, NJ 08401

Ref: Sandra Smith, individually and as Executrix of the Estate of George Bradley Smith and as Guardian Ad Litem for her children, Cole Smith, Brandy Smith, Nicole Gaeta and Kyle Smith
v. City of North Wildwood, State of New Jersey
Docket Number: CPM-L-415-16
Date of Event: July 2, 2012
Our File Number 60289-01

Subject: Importunate for the Beach in North Wildwood to remain open

Honorable Judge Mendez:

The Board of Directors (BOD) of The Pointe @ Moore's Inlet (PMI) have become aware of the referenced docket concerning a pleading to close the beach in North Wildwood from 1st Street to Spruce Avenue. As the BOD we are respectfully imploring your consideration of the items below to support leaving the beach open. The magnitude of pleading to close the beach and timing appears unprecedented and we ask for reasonable considerations below and time to notify the owners of our Condo Association of sixty homeowners on this matter.

1. The Pointe @ Moore's Inlet is a sixty unit ocean front condominum that is situated between Spruce Avenue and Pine Street in North Wildwood. Our property investors are from multiple states primarily in the northest USA. We literally have 1,000's of owners, guests and renters stay at PMI over the summer season with numerous coming to North Wildwood beaches for generations without incident. We also have owners that live at PMI full time or full time in season. Our owners are stakeholders in this matters who have purchased their properties with value derived and personal enjoyment of the access and use of the referenced beach.

2. The BOD has only recently learned of the referenced lawsuit via news articles within the past week. We are a volunteer BOD with fudiciary responsibilities as provided by the NJ Condo Act and By-Laws of the PMI Condominum Association who manage with a modest annual budget that it tightly itemenized to maintenance line items. Should counsel be needed to represent our position as "friend of the court" or however advised, it would require a budget process and appropriate procedure with full knowledge, involvement and approval of our homeowners as provided within our Master Deed and By-Laws.

3. The owners of PMI have significant investments monetarily as well as with personal stewardship and diligence into their properties, the city and activites of North Wildwood. Almost half of our owners use their properties as rental income as full or part time business or for person living and enjoyment. We petition this court and Honorable Judge that we be heard in this matter that greatly effects our owners investments, livelihoods, incomes, families, vacations, rentals, etc. In addition to homeownership; families, renters, and vacationers have invested and enjoyed, boating, water activites, fishing, beach walks, and sunbathing.

4. We ask for the beach to remain open as a reasonalble request on this matter before the court. We assume there is a due process that will provide ample timing to inform all pertinent parties within the city, state, citizens, notices to all homeowners, vacationers that often plan a year in advance, and those with first time or reoccuring rentals.

5. Because the BOD and homeowners at PMI have a vested interest in this matter before the court, we ask to have a presence in the courtroom to observe the procedings.

Thank you for your timely courtesy in reading our concerns, consideration and reply.

Sincerely,
On Behalf of the Board of Directors
The Pointe @ Moore's Inlet

Deborah L. Moore
Vice-President, Unit 109

In concert with:
Joe York, President, Unit 105
Steve Gough, 1st Vice-President, Unit 210

Copy: The Pointe @ Moore's Inlet Condominium Association, Homeowners

Barker, Gelfand & James, Attorneys at Law, Linwood, NJ

Exhibit 7

Del Corp Enters. I, LLC v. Twp. of Ocean

Superior Court of New Jersey, Law Division, Ocean County

October 8, 2014, Argued; October 9, 2014, Decided

DOCKET NO. OCN-L-2452-14

Reporter
2014 N.J. Super. Unpub. LEXIS 2593 *

Del Corp Enterprises I, LLC, Plaintiff, v. Township of Ocean, Defendant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Related proceeding at *Del Corp Enters. I, LLC v. Twp. of Ocean, 2015 N.J. Super. Unpub. LEXIS 1054 (Law Div., May 4, 2015)*

Core Terms

Ordinance, redevelopment plan, administrative remedy, declaratory judgment, Redevelopment, planning board, market rate, purchaser, exhaustion, subject property, Site, third-party, approve, parties, courts, rent

Counsel: **[*1]** Jean L. Cipriani, Esq. appearing on behalf of the plaintiff, Del Corp Enterprises I, LLC (Gilmore & Monahan, P.C.).

Gregory P. McGuckin, Esq. appearing on behalf of the defendant, Township of Ocean (Law Offices of Dasti, Murphy, McGuckin, Ulaky, Koutsouris & Connors).

Judges: Vincent J. Grasso, A.J.S.C.

Opinion by: Vincent J. Grasso

Opinion

Summary

The matter before the court is an action brought by plaintiff Del Corp Enterprise I, LLC, the owner and redeveloper of the property located at Block 131, Lot 4, seeking to declare a portion of the Township of Ocean (Township) Ordinance 2012-01 (Ordinance) invalid. Del Corp demands a declaratory judgment against the Township of Ocean that (1) the Township may not dictate the form of ownership or occupancy of a residential housing unit; (2) the Township may not bar an approved application from development due to the developer's intention to rent the residential units; and (3) the portion of the Ordinance that requires the market rate units to be "for-sale" is invalid.

The Township of Ocean seeks to dismiss the complaint by alleging: (1) Del Corp failed to join an indispensable party, namely the Ocean Township Planning Board; (2) Del Corp failed to establish necessary elements **[*2]** for declaratory relief under *N.J.S.A. 2A:16-56*. Additionally, the Township claims that the Redevelopment Plan at issue is a contract between the Township and Del Corp and cannot be changed unilaterally by Del Corp in order to achieve a greater economic benefit. Finally, the Township submits a counterclaim that the Ocean Township Planning Board had no legal authority to approve Del Corp's Preliminary and Final Major Site Plan. Consequently,

the approvals are void *ab initio* because the Township had not yet adopted the Ordinance authorizing the particular uses at the time of the Planning Board's approval.

Background

Pursuant to the New Jersey Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -73 (LRHL), the Township of Ocean adopted an Economic Redevelopment Plan (ERP) designating a portion of the municipality as "areas in need of redevelopment" and obtained a "Town Center" designation for certain areas, including the property located at Block 131, Lot 4 (the subject property). Pursuant to N.J.S.A. 40A:12A-4(c), the Township Committee of the Township of Ocean designated itself to act as the Redevelopment Agency for the purpose of implementing redevelopment plans within the municipality.

Del Corp is the owner and redeveloper of the subject **[*3]** property. The land is included within the Route 9 Redevelopment Plan as a Town Center-Mixed Unit District pursuant to the ERP and is currently undeveloped and vacant. A previous contract purchaser of the subject property presented to the Redevelopment Committee redevelopment plans known as "Tradewinds at Waretown" (Tradewinds). By letter dated November 15, 2010, the Redevelopment Agency notified Del Corp that they have approved the Tradewinds redevelopment plan to be moved to the Planning Board for approval. The Tradewinds redevelopment plan is comprised of a mixed-use development containing approximately 115 "market rate" residential units and 29 "affordable" residential units.

The Planning Board approved Del Corp's application for Preliminary and Final Major Site Plan for the subject property on April 7, 2011 and memorialized the approval by Resolution 14-11-PB (the Resolution) adopted on May 5, 2011. In relevant part, the Resolution provides,

> 5. The applicant proposes to develop the site for mixed use consisting of 26,600 SF of commercial retail space and 144 multi-family housing units . . . .
>
> 6. The housing units would consist of 29 "affordable" housing units and 115 "*market*" housing **[*4]** units . . . .

The Resolution, nevertheless, conditioned the approval upon a subsequent ordinance to be adopted by the Township Committee authorizing the Redevelopment Plan:

> ALL RELIEF being subject to the following conditions:
>
> . . . .
>
> 6. That the Township adopt an *Ordinance* approving the Redevelopment Plan.

On January 12, 2012, the Township Committee introduced "Ordinance 2012-01, an ordinance amending the Route 9-Phase 1 redevelopment plan for the Tradewinds at Waretown site (Block 131 Lot 4)" (the Ordinance). The Ordinance provides that "[o]f the 144 dwelling units, 115 units are to be *for-sale* condominium units and 29 units are to be affordable rental units." The Ordinance was adopted on February 9, 2012.

On May 2, 2014, Del Corp entered into an agreement with Asher Handler for the purchase of the subject property. According to Del Corp, the purchaser wishes to rent both the affordable and market rate units and will terminate the contract if the Township is permitted to require the market rate units to be for-sale rather than rental. The due diligence period for the Agreement for Sale will expire on September 30, 2014, which is extended to October 15, 2014. Del Corp states that the Township **[*5]** told Del Corp that "development of the subject property shall be in accordance with the Amended Redevelopment Plan, and that the market-rate units may not be leased by the developer, but must be sold as fee-simple units."

Findings

Del Corp claims that it has standing under the Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, because the enforcement of the Ordinance directly affects Del Corp's property rights. According to Del Corp, "if the terms of the ordinance are enforced by the Township and the developer is not permitted to rent out the market rate units, the

contract purchaser will terminate the contract." The Township contends that there is no justiciable controversy as to the Redevelopment Plan adopted by the Ordinance because the parties agreed on the terms of the plan. The Township asserts that Del Corp, by a declaratory judgment, simply asks the court to reform the agreed Redevelopment Plan to make it easier for Del Corp to sell the property to a third-party purchaser. The Township further argues that a declaratory judgment action is inappropriate here because Del Corp fails to avail it of a remedy to seek a judicial review of the Ordinance by way of an action in lieu of prerogative writ **[*6]** within 45 days from the adoption of the Ordinance in accordance with R. 4:69-6(a).

Although New Jersey's Constitution does not expressly confine the exercise of judicial power to actual cases and controversies, it is well settled that courts will not render advisory opinions or function in the abstract. *Compare U.S. Const.* art. III, § 2 *with N.J. Const.* art. VI, § 1; Independent Realty Co. v. Twp. of North Bergen, 376 N.J. Super. 295, 301, 870 A.2d 637 (App. Div. 2005) (citing Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107, 275 A.2d 433 (1971); New Jersey Tpk. Auth. v. Parsons, 3 N.J. 235, 240, 69 A.2d 875 (1949)). New Jersey courts "decide only concrete contested issues *conclusively* affecting adversary parties in interest." Parsons, supra, 3 N.J. at 240 (quoting Borchard, *Declaratory Judgments* at 34-35 (2d ed. 1941)). This policy is solidly embedded in the New Jersey Declaratory Judgment Act (the Act), N.J.S.A. 2A:16-50 to -62. The remedial purpose of the Act is to "afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." N.J.S.A. 2A:16-51. To address such uncertainty, courts shall act "within their respective jurisdiction," which requires an actual controversy. N.J.S.A. 2A:16-52. As such, the threshold question is whether the controversy presented is actual and bona fide. Independent Realty Co., supra, 376 N.J. Super. at 301-02 (citing Parsons, supra, 3 N.J. at 241).

Declaratory judgment is inappropriate to "discern the rights or status of parties upon a state of facts that are future, contingent, and uncertain." Independent Realty Co., supra, 376 N.J. Super. at 302. "[A] declaratory judgment should be withheld when the request is in effect an attempt to have the **[*7]** court adjudicate in advance the validity of a possible [claim or] defense in some expected future law suit." Donadio v. Cunningham, 58 N.J. 309, 325, 277 A.2d 375 (1971).

For the same reason, "the declaratory judgment procedure may not be used to prejudge issues that are committed for initial resolution to an administrative forum, any more than it may be used as a substitute to establish in advance the merits of an appeal from that forum." Independent Realty Co., supra, 376 N.J. Super. at 302 (quoting Pennsylvania Dep't of Gen. Serv. v. Frank Briscoe Co., 502 Pa. 449, 459, 466 A.2d 1336 (1983)). Courts may dispense with the requirement that a plaintiff exhaust administrative remedies only where administrative review will be futile, where there is a need for prompt decision in the public interest, where the issues do not involve administrative expertise or discretion and only a question of law is involved, and where irreparable harm will otherwise result from denial of immediate judicial relief. Brunetti v. New Milford, 68 N.J. 576, 589, 350 A.2d 19 (1975); *see generally*, Pressler, *Current New Jersey Court Rules, Comment* R. 4:69-5, at 748-49 (1975).

Del Corp also alleges that the Township's action infringes upon the constitutionally protected private property interests of Del Corp and may be a violation of equal protection under the Mt Laurel Doctrine in the State of New Jersey. Under the doctrine of "strict necessity," courts generally will adjudicate the **[*8]** constitutionality of legislation only if a constitutional determination is absolutely necessary to resolve the controversy between the parties. Donadio v. Cunningham, 58 N.J. 309, 325-26, 277 A.2d 375 (1971). The issue of "strict necessity" is closely related to the exhaustion requirement. 966 Video, Inc. v. Mayor and Twp. Comm. of Hazlet Twp., 299 N.J. Super. 501, 514, 691 A.2d 435 (Law Div. 1995). When a zoning ordinance is claimed constitutionally invalid as applied to a plaintiff's property, a trial court should ordinarily decline to consider such an attack on the ordinance until the plaintiff has exhausted his administrative remedy as long as the administrative remedy is adequate for the desired relief. *Ibid.*

Here, the court finds that Del Corp fails to present an actual controversy between Del Corp and the Township. Del Corp and the Township negotiated and agreed upon the Redevelopment Plan. Thereafter, the Township adopted the Redevelopment Plan by enacting the Ordinance pursuant to N.J.S.A. 40A:12A-7. The Ordinance indicates:

> The Redevelopment Plan attached . . . for the Tradewinds at Waretown Site is hereby *adopted* and will act as an amendment to Route 9—Phase 1 Redevelopment Plan and supersede the existing zoning requirements for the area as described in the Redevelopment Plan.

The Redevelopment Plan attached in the Ordinance recites:

> The design standards of this **[*9]** Plan provide the framework for the finalization of a redevelopment agreement with the Redevelopment Entity (Ocean Township Committee) and for development approval by the Ocean Township Planning Board.

Moreover, the correspondence attached to Del Corp's moving papers referred to the market rate "for sale" units and indicated no objection from Del Corp during the negotiation. In light of these facts, the court agrees with the Township's argument that the Redevelopment Plan reached with Del Corp is essentially contractual in nature.

Furthermore, the record shows no objection from Del Corp during and after the adoption of the Ordinance. After the adoption of the Ordinance, Del Corp did not seek judicial review by way of an action in lieu of prerogative writ within 45 days in accordance with R. 4:69-6(a). It is after two and a half years of the enactment of the Ordinance that Del Corp now brings up this case because of a sale contract between Del Corp and a third-party purchaser.

As such, there is no controversy arising from the Ordinance which adopted the Redevelopment Plan agreed upon by the Township and Del Corp. By requesting a declaratory judgment to invalidate a portion of the Ordinance, Del Corp **[*10]** is essentially asking the court to reform the agreed-upon Redevelopment Plan in order to satisfy Del Corp's contractual obligation in the sale contract with a third-party purchaser. The court has also considered the fact that the terms of the sale contract between Del Corp and the third-party purchaser are unknown to the court. Conceivably, this contract may fail for other reasons, e.g. title dispute, failure to satisfy a contingency, etc. Therefore, the contract may not consummate due to other provisions which would render this question moot.

Del Corp's brief states "*[i]f* the terms of the ordinance are enforced by the Township and the developer is not permitted to rent out the market rate units, the contract purchaser *will* terminate the contract." Because Del Corp has not demonstrated that it has applied to build apartment units contrary to the Redevelopment Plan and the Township is enforcing the terms of the Ordinance, the court concludes that Del Corp seeks a declaratory judgment here to discern the rights upon facts that are "future, contingent, and uncertain."

Even if the issue in this case is ripe for resolution, a trial court has discretion in requiring a plaintiff to first exhaust **[*11]** its administrative remedies. Independent Realty Co., supra, 376 N.J. Super. at 303. Here, the court finds that the appropriate remedy is an administrative remedy, namely that Del Corp should request the Township to amend the Redevelopment Plan to remove the "for-sale" requirement on the 115 market rate units. Upon the Township's denial, Del Corp may appeal to the court by a prerogative writ challenge under R. 4:69-6 with a record for review. Before the Township's final adverse determination, the issue presented by Del Corp does not conclusively affect its interest and the request for a declaratory judgment is in effect an attempt to have the court adjudicate an issue that more properly should be addressed in an administrative forum. Moreover, under the doctrine of "strict necessity," the court will not adjudicate Del Corp's constitutional claim because the available administrative remedy does not render a constitutional determination absolutely necessary to resolve the controversy between the parties.

Given the fact that Del Corp has not sought the administrative remedy, there is no suggestion that requiring it would be futile. Additionally, Del Corp fails to demonstrate a special circumstance that the interest of justice will require the court **[*12]** to dispense with the exhaustion requirement. The interest involved in this case is that Del Corp seeks to obtain a greater economic benefit from a sale contract with a third-party purchaser. It does not constitute a public interest nor an irreparable harm to warrant that the court dispense with the exhaustion requirement for a prompt decision. On the other hand, the Township has legitimate public interest in requiring Del Corp to exhaust the administrative remedy, which is to work out a Redevelopment Plan to insure a true mixed-use type of development in order to complement its overall Town Center concept. Finally, upon Del Corp's request to amend the Redevelopment Plan, the Township may decide to allow renting. If the Township denies the request, Del Corp may appeal the decision to the court. As such, even if the instant case involves a pure legal issue, the administrative

remedy does not preclude Del Corp from seeking a remedy based on a question of law. Therefore, the court withholds the declaratory judgment and directs Del Corp to pursue administrative remedies.

Finally, the court notes that the Township conceded at trial that the procedure for approval of this Redevelopment Plan **[*13]** had essentially "put the cart before the horse." More specifically, the Planning Board granted Preliminary and Final Major Site Plan approval conditioned upon the adoption of an ordinance by the Township Committee authorizing the Redevelopment Plan. This brings into question the authority of the Planning Board to act without an enabling ordinance. *N.J.S.A. 40A:12A-13* (providing that a planning board shall approve applications for redevelopment in accordance with the requirements set forth by an ordinance); *Jackson Holdings, LLC v. Jackson Tp. Planning Bd., 414 N.J. Super. 342, 998 A.2d 530 (App. Div. 2010)*. The Appellate Division in the Jackson case held that a planning board has no authority to approve a use of land without a valid ordinance to confer the authority. *Jackson Holdings, LLC, supra, 414 N.J. Super. at 351*.

In summary, the court declines to grant declaratory relief and finds that the circumstances of this case require the exhaustion of administrative remedies so that the Township can exercise its delegated discretion with respect to the request that the Redevelopment Plan permit the lease of the market rate units. If Del Corp is aggrieved by any determination of the Township, then Del Corp is entitled to bring a prerogative writ challenge to such action pursuant to *R. 4:69-6*. In light of the court's finding, the court does not need to address the **[*14]** issue of whether Del Corp has failed to join an indispensable party under *R. 4:28-1*. Judgment is entered in favor of defendant the Township, dismissing plaintiff Del Corp's complaint without prejudice as well as a dismissal of defendant the Township's counterclaim. Each party is to bear their own costs and attorney's fees in connection with the within matter. Ms. Cipriani is to prepare the order that comports with the court's ruling.

End of Document

Exhibit 8

Feld v. City of Orange Twp.

Superior Court of New Jersey, Appellate Division

December 10, 2014, Argued; March 26, 2015, Decided

DOCKET NO. A-3911-12T3, A-4880-12T1

Reporter
2015 N.J. Super. Unpub. LEXIS 664 *

, Plaintiff-Appellant, v. THE CITY OF ORANGE TOWNSHIP, WALTER G. ALEXANDER VILLAGE URBAN RENEWAL I, L.L.C., WALTER G. ALEXANDER VILLAGE URBAN RENEWAL II, L.L.C., and THE HOUSING AUTHORITY OF THE CITY OF ORANGE, Defendants-Respondents, and STATE OF NEW JERSEY, OFFICE OF THE STATE COMPTROLLER, NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS, COUNTY OF ESSEX, ORANGE BOARD OF EDUCATION, ORANGE HOUSING DEVELOPMENT CORPORATION, AJD CONSTRUCTION, POWER ELECTRIC CO., INC., F & G MECHANICAL CORP., and MEADOWLANDS FIRE PROTECTION CORP., Defendants.THE FOUR FELDS, INC., d/b/a L. EPSTEIN HARDWARE CO. and REASONABLE LOCK & SAFE, INC., Plaintiffs-Appellants, v. THE CITY OF ORANGE TOWNSHIP and RPM DEVELOPMENT, L.L.C., Defendants-Respondents.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the Superior Court Of New Jersey, Law Division, Essex County, Docket Nos. L-0193-11 and L-2865-11.".

Feld v. City of Orange Twp., 2010 N.J. Super. Unpub. LEXIS 1627 (App.Div., July 19, 2010)

Core Terms

conveyance, municipality, Township, collateral estoppel, tax exemption, trial court, redevelopment, certif, water and sewer, common law, ordinance, prerogative writ, challenging, pay-to-play, entities, resident, grounds, issues, municipal action, urban renewal, amendments, approving, developer, exemption, notice

Counsel: Jeffrey S. Feld argued the cause Pro se and for appellants in A-4880-12.

Aldo J. Russo argued the cause for respondent The City of Orange Township (Lamb Kretzer, L.L.C., attorneys; Robert D. Kretzer, on the brief).

Demetrice R. Miles argued the cause for respondent The Housing Authority of the City of Orange in A-3911-12 (McManimon, Scotland & Baumann, LLC, attorneys; Mr. Miles, on the brief).

Neal M. Ruben argued the cause for respondent RPM Development, L.L.C. in A-4880-12.

Judges: Before Judges Fuentes, Ashrafi, and O'Connor.".

Opinion

PER CURIAM

We address two related appeals in a single opinion. Attorney Jeffrey S. Feld filed these appeals from orders dismissing his own pro se complaint in A-3911-12 for lack of standing, and the complaint he filed in A-4880-12 on behalf of a family-owned corporation on grounds of collateral estoppel. We affirm in part and remand in part the pro se action, and we affirm outright the corporate action.

Feld is a licensed attorney in New Jersey whose practice is essentially limited to serving as "house counsel" for three family businesses, two of which are plaintiffs **[*2]** L. Epstein Hardware Co. and Reasonable Lock & Safe, Inc. These businesses are located in the City of Orange Township (Orange). The two appeals before us are from the sixth and eighth lawsuits out of at least ten that Feld has filed against Orange and other entities challenging municipal actions that he and his family businesses disapprove. Feld describes himself as a "zealous gadfly" and a "radical barrister." He believes he must oversee the actions of government officials in Orange.

As we discussed in a previous opinion, *Feld v. City of Orange Township (Feld II), No. A-2904-10, 2012 N.J. Super. Unpub. LEXIS 502 (App. Div. Mar. 8, 2012)* (slip op. at 2-3), *certif. denied*, *211 N.J. 274, 48 A.3d 355 (2012)*, much of the litigation involves the redevelopment of a blighted business district of Orange with the construction of affordable housing by a private developer, defendant RPM Development, L.L.C. Feld objects to the conveyance of township-owned vacant lots to RPM and also objects to other incentives Orange has given the developer to facilitate the project. *Ibid.*

Some of Feld's lawsuits have been settled, and he has obtained modest judicial remedies in others. In *Feld II*, however, we affirmed dismissal of an action in lieu of prerogative writs by which the Feld plaintiffs **[*3]** sought to invalidate the sale of vacant lots by Orange to RPM. *2012 N.J. Super. Unpub. LEXIS 502 at *1*. The two cases before us now are designated *Feld VI* and *Feld VIII*. *Feld VI* challenges tax exemptions granted for the redevelopment site and *Feld VIII* the conveyance of two additional lots to RPM.

On appeal, Feld has filed lengthy briefs arguing that the trial court's rulings were legally erroneous, and also adding digressive discourses about his purposes and motives in relentlessly pursuing litigation against Orange. The statements of facts and procedural histories in his briefs are disjointed and vastly overstated. They jump from one factual allegation to another without seeming connection or transition, and with minimal citation to the record, in violation of *Rule 2:6-2(a)(3)*, *(4)*. These parts of Feld's briefs resemble detailed notes of an attorney regarding the grievances of his client, or himself in *Feld VI*. They treat all that has apparently happened in these cases as equally relevant to the issues Feld now raises on appeal.

The argument sections of the briefs are sprinkled with references to published and unpublished decisions from which Feld draws unwarranted conclusions of law. Feld's arguments cloud more than illuminate the issues **[*4]** that we must decide. The best we can do is to compare Feld's legal arguments to the grounds for the trial court's dismissals of his complaints and determine whether the court erred in either case.

The complaints were dismissed on defendants' motions under *Rule 4:6-2(e)* for failure to state a claim upon which relief can be granted. Our standard of review is plenary from dismissal of a complaint for lack of standing, *NAACP of Camden Cnty. East v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 444, 24 A.3d 777 (App. Div.)*, *certif. granted*, *209 N.J. 96, 35 A.3d 679 (2011)*, *appeal dismissed*, *213 N.J. 47, 59 A.3d 1083 (2013)*; *State v. Bradley, 420 N.J. Super. 138, 141, 19 A.3d 479 (App. Div. 2011)*, or on grounds of collateral estoppel, *Gannon v. Am. Home Prods., 414 N.J. Super. 507, 523, 999 A.2d 522 (App. Div. 2010)*, *rev'd on other grounds*, *211 N.J. 454, 48 A.3d 1094 (2012)*; *Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 173, 742 A.2d 1007 (App. Div.)*, *certif. denied*, *164 N.J. 188, 752 A.2d 1290 (2000)*.

I.

Feld VI (A-3911-12) — Standing

In *Feld VI*, pro se plaintiff Feld alleges violations of law when the Township Council of Orange adopted ordinances on December 7, 2010, granting tax exemptions to two of the urban renewal entities: Walter G. Alexander Village

Urban Renewal I and II. Feld also alleges violation of law in the Council's approval of a resolution on December 21, 2010, that reduced the outstanding water and sewer charges for the urban renewal site.

In a case management letter dated March 23, 2011, the trial court summarized the issues Feld sought to raise in challenging these municipal actions:

> (A) Whether mandatory statutory terms were omitted from **[*5]** the long term tax abatement agreement ("agreement") approved 12/7/10 for the Walter G. Alexander development site;
>
> (B) Whether a statutorily mandated 5% allotment to the County was omitted from the agreement;
>
> (C) Whether a municipality is permitted to approve an agreement with a developer that owes outstanding water and sewer fees;
>
> (D) Whether a resolution on 12/21/10 compromising outstanding water and sewer fees for the developer (from $700,000 to $200,000) violated the Open Public Meetings Act;
>
> (E) Whether the consideration in (D) is illusory because no time for payment is specified.
>
> (F) Whether (D) violates the "Pay to Play" law.

After many proceedings in the litigation that are not relevant to the present appeal, Orange moved to dismiss the prerogative writs action for lack of Feld's standing to pursue the lawsuit. The trial court granted the motion by written opinion and order dated February 8, 2013. Feld filed a motion for reconsideration and for expansion of the record. The trial court granted Feld's request to expand the record but denied reconsideration of the dismissal. Feld filed a notice of appeal from the court's February 8 and April 5, 2013 orders.

"Standing 'refers to the plaintiff's **[*6]** ability or entitlement to maintain an action before the court.'" *In re Adoption of Baby T., 160 N.J. 332, 340, 734 A.2d 304 (1999)* (quoting *N.J. Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 409, 686 A.2d 1265 (App. Div.)*, *certif. granted*, *152 N.J. 13, 702 A.2d 352 (1997)*, *appeal dismissed*, *152 N.J. 361, 704 A.2d 1297 (1998)*). "Standing is a threshold requirement for justiciability." *Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 421, 591 A.2d 592 (1991)*; *see also Spinnaker Condo. Corp. v. Zoning Bd. of Sea Isle City, 357 N.J. Super. 105, 110, 813 A.2d 1282 (App. Div.)* (whether a party has standing is a threshold inquiry), *certif. denied*, *176 N.J. 280, 822 A.2d 609 (2003)*.

The courts of New Jersey liberally grant a litigant standing to sue. *Jen Elec., Inc. v. Cnty. of Essex, 197 N.J. 627, 645, 964 A.2d 790 (2009)*; *Campus Assocs. L.L.C. v. Zoning Bd. of Adjustment of Hillsborough, 413 N.J. Super. 527, 534, 996 A.2d 1054 (App. Div. 2010)*. At the same time, our courts will not "entertain proceedings by plaintiffs who are 'mere intermeddlers' or are merely interlopers or strangers to the dispute." *Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y., 58 N.J. 98, 107, 275 A.2d 433 (1971)* (citation omitted).

Generally, a litigant has standing under the common law to challenge a governmental action when he has "a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." *In re Camden Cnty., 170 N.J. 439, 449, 790 A.2d 158 (2002)*; *accord Jen Elec., supra, 197 N.J. at 645*; *Baby T., supra, 160 N.J. at 340*.

Feld contends he has standing to pursue his claims even without showing a personal financial stake in the outcome of the case because he seeks to vindicate the public interest in the lawful operation of the municipal government of Orange. "[I]n cases of great public interest, any 'slight additional private interest' will be sufficient to afford standing." *Salorio v. Glaser, 82 N.J. 482, 491, 414 A.2d 943*, *cert. [*7] denied and appeal dismissed*, *449 U.S. 874, 101 S. Ct. 215, 66 L. Ed. 2d 94 (1980)* (quoting *N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n, 82 N.J. 57, 68-69, 411 A.2d 168 (1980)*); *accord People for Open Gov't v. Roberts, 397 N.J. Super. 502, 510-12, 938 A.2d 158 (App. Div. 2008)*. We reject this basis for granting standing to Feld to pursue his claims in *Feld VI*. We cannot say here that the public interest is so exceptional that any slight personal interest of Feld is sufficient to confer standing under the common law.

Our courts have granted "a broad right in taxpayers and citizens of a municipality to seek review of local legislative action without proof of unique financial detriment to them." Kozesnik v. Twp. of Montgomery, 24 N.J. 154, 177, 131 A.2d 1 (1957); *accord* Roberts, supra, 397 N.J. Super. at 514; *cf.* Matlack v. Bd. of Chosen Freeholders of Burlington, 191 N.J. Super. 236, 248, 466 A.2d 83 (Law Div. 1982) (county taxpayer had standing to challenge expenditure by county government), *aff'd*, 194 N.J. Super. 359, 476 A.2d 1262 (App. Div.), *certif. denied*, 99 N.J. 191, 491 A.2d 693 (1984). But the right to challenge government actions as a taxpayer has its limits. *See* Loigman v. Twp. Comm. of Middletown, 297 N.J. Super. 287, 297-99, 687 A.2d 1091 (App. Div. 1999) (a local taxpayer had no standing to enforce a collective negotiation agreement between a public employer and a public employee union); *see also* Borough of Seaside Park v. Comm'r of the N.J. Dep't of Educ., 432 N.J. Super. 167, 210-11, 74 A.3d 80 (App. Div.) (plaintiff had no standing to assert the constitutional rights of others), *certif. denied*, 216 N.J. 367, 80 A.3d 747 (2013).

Feld is neither a resident nor a property or business owner in Orange. He lives and pays property taxes in the same county, Essex, but not in the same municipality. He does not have the standing of a resident or property or business owner of Orange to challenge its municipal actions.

Feld **[*8]** cites Town of Secaucus v. City of Jersey City, 20 N.J. Tax 384 (Tax 2002), in support of his contention that he has common law standing as a county taxpayer because some of his property taxes are paid to the county and will be affected by the tax exemptions granted in Orange. Feld has not cited any binding authority holding that the standing broadly afforded to a resident or taxpayer in the same municipality extends to all taxpayers within the county. Such a rule of standing would subject government bodies and agencies to litigation by outsiders challenging local actions, potentially from all corners of the State. The common law does not treat those whose financial interests are remote as having the same standing to sue as local residents and taxpayers.

The trial court correctly ruled that Feld does not have common law standing simply because he is a resident and taxpayer in the same county as Orange.

We also find no error in denying Feld statutory standing under New Jersey's Long Term Tax Exemption Law (LTTEL), N.J.S.A. 40A:20-1 to -22. Apart from that law, any county taxpayer can challenge a tax *assessment* of another's property in the county pursuant to N.J.S.A. 54:3-21, a statute that is applicable to property tax appeals.[1] In 2002, the Tax Court applied this statute **[*9]** to an appeal by the Town of Secaucus challenging tax *exemptions* Jersey City had granted to properties within Jersey City. Town of Secaucus, supra, 20 N.J. Tax at 423.

In 2003, the Legislature enacted amendments to LTTEL that transferred jurisdiction over challenges to tax *exemptions* under that act from the Tax Court to the Superior Court. The amendments accomplished this change by limiting such a challenge to the procedural requirements of an action in lieu of prerogative writs, which under Rule

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[1] N.J.S.A. 54:3-21(a) provides in relevant part:

> [A] taxpayer . . . feeling discriminated against by the assessed valuation of other property in the county . . . may . . . appeal to the county board of taxation by filing with it a petition of appeal . . . .

[2] N.J.S.A. 40A:20-12 provides in part:

> The rehabilitation or improvements made in the development or redevelopment of a redevelopment area or area appurtenant thereto or for a redevelopment relocation housing project . . . shall be exempt from taxation for a limited period as hereinafter provided. When housing is to be constructed, acquired or rehabilitated by an urban renewal entity, the land upon which that housing **[*10]** is situated shall be exempt from taxation for a limited period as hereinafter provided. The exemption shall be allowed when the clerk of the municipality wherein the property is situated shall certify to the municipal tax assessor that a financial agreement with an urban renewal entity for the development or the redevelopment of the property . . . has been entered into and is in effect . . . .

4:69-1, is cognizable in the Superior Court, Law Division. *See L.* 2003, c. 125, § 11 (codified at N.J.S.A. 40A:20-12).[2]

Feld argues that the 2003 amendments continue to confer standing on county residents to challenge tax exemptions anywhere in the county. Specifically, he points to the provision in the amendments that requires notice of a tax exemption agreement to be published in a newspaper **[*11]** of general circulation within the county.

The 2003 amendments, however, were a legislative reaction to judicial decisions such as *Town of Secaucus, supra, 20 N.J. Tax 384*, that affected the tax exemption provisions of LTTEL. They did not alter the common law standing considerations of the Superior Court in entertaining an action in lieu of prerogative writs. A plaintiff in a prerogative writs action must have a sufficient stake in the matter to challenge the governmental action. *See Al Walker, Inc. v. Borough of Stanhope, 23 N.J. 657, 664-66, 130 A.2d 372 (1957)*; *Campus Assocs., supra, 413 N.J. Super. at 534-35*; *Loigman, supra, 297 N.J. Super. at 299*; *Allen v. Planning Bd. of Evesham Twp., 137 N.J. Super. 359, 363, 349 A.2d 99 (App. Div. 1975)*. Feld has never indicated what his personal stake is in the actions of Orange respecting the redevelopment project.

We also reject Feld's argument that he is a creditor of the municipality and therefore has statutory standing to sue Orange under the United States Bankruptcy Code and the Uniform Fraudulent Transfers Act, N.J.S.A. 25:2-20 to -34. Feld claims he holds a contingent unliquidated claim against Orange because he is entitled to attorney's fees to be paid by Orange in one of the other cases he filed. But Feld cannot show that the tax exemptions or the compromise of water and sewer fees has impaired his ability to collect on his contingent claim against Orange. As the trial court stated: "accepting Feld's argument would mean that every creditor **[*12]** of any New Jersey municipality . . . would have standing to sue whenever the municipality allegedly spent money, or granted tax abatement, unwisely. This is not the law of New Jersey.

Feld argues he has statutory standing under the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 to -21, which applies to one of his claims, the granting of reductions in water and sewer charges. With respect to standing, OPMA provides: "Any person, including a member of the public, may apply to the Superior Court for injunctive orders or other remedies to insure compliance with the provisions of this act . . . ." N.J.S.A. 10:4-16.

In his complaint, Feld claims the Township Council adopted the December 21, 2010 resolution that compromised water and sewer fees without providing notice to the public or an opportunity for the public to be heard on the subject. He contends the Township Council did not include the proposed resolution in the agenda packet available before its meeting. Furthermore, he claims the Council refused to allow him to speak about the resolution at that meeting.

The broad language of N.J.S.A. 10:4-16 confers standing on "[a]ny . . . member of the public" to seek remedies under OPMA. Defendants have not directed us to any **[*13]** case authority that limits standing under OPMA as we have discussed under the common law. Therefore, we agree with Feld that he has statutory standing to challenge compliance of the Township Council with OPMA when it adopted the water and sewer resolution on December 21, 2010.

The trial court's decision states "there appears to be no [OPMA] challenge remaining in this case" because "Orange [agreed] to publicly post all financial arrangements regarding the projects at issue. . . . and not to 'cut [Mr. Feld] off'

. . . .

. . . *The validity of a financial agreement or any exemption granted pursuant thereto may be challenged only by filing an action in lieu of prerogative writ* within 20 days from the publication of a notice of the adoption of an ordinance by the governing body granting the exemption and approving the financial agreement. *Such notice shall be published in a newspaper of general circulation in the municipality and in a newspaper of general circulation in the county if different from the municipal newspaper.*

[(Emphasis added.)]

in violation of the Open Public Meeting Act." Feld has not addressed this part of the court's ruling in his brief on appeal. Instead, he contends the resolution of December 21, 2010, should be voided for failure to comply with OPMA. Because neither the court's February 8, 2013 written decision nor its order of that date indicate that any remedy afforded to Feld actually resolved the OPMA claims of his complaint, we are constrained to remand to the trial court to address more precisely whether an OPMA challenge remained in the case when the court issued its decision and order of dismissal.

If any part of Feld's OPMA claims still remained, we hold that Feld has standing to pursue **[*14]** that single claim, which is designated as item (D) previously quoted from the trial court's listing of issues in its case management letter of March 23, 2011. If in fact no OPMA challenge remained in the case by the time of the court's February 8, 2013 decision, then dismissal of the remainder of his complaint on standing grounds is affirmed.[3] Our decision in this regard does not address the merits of Feld's OPMA challenge or his entitlement to the remedy he seeks but only his standing to pursue the claim.

II.

Feld VIII (A-4880-12) — Collateral Estoppel

Feld VIII is an action brought by a corporate entity that owns businesses located in Orange. Standing is not an issue in *Feld VIII*. The trial court dismissed the complaint on the ground that it alleged essentially the same claims by essentially the same plaintiffs as in *Feld II* and so was collaterally estopped.

In *Feld II*, the plaintiffs were Judith S. Feld, Robert M. Feld, and The Four Felds, Inc., d/b/a L. Epstein Hardware Co. The individually named plaintiffs are the parents of attorney Feld and also **[*15]** owners of the business entities in Orange. They had sought to invalidate the sale of lots by Orange to RPM "for the purpose of building affordable housing and revitalizing commerce in the township." *See* Feld II, supra, (slip op. at 2). We affirmed the trial court's dismissal of the *Feld II* complaint. *Ibid.*

In *Feld VIII*, plaintiff is The Four Felds, Inc., d/b/a L. Epstein Hardware Co. and Reasonable Lock & Safe, Inc. Its claims are essentially the same claims as in *Feld II* but pertaining to two additional lots that Orange conveyed to RPM after the trial court's judgment in *Feld II*.

The doctrine of collateral estoppel prevents re-litigation of issues that have already been presented and decided by a court. Winters v. N. Hudson Reg'l Fire & Rescue, 212 N.J. 67, 85, 50 A.3d 649 (2012). It is based on "finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness." *Ibid.* (quoting Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 522, 897 A.2d 1003 (2006)).

The party seeking to bar a claim on grounds of collateral estoppel must show:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued **[*16]** a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.
>
> [*Ibid.* (quoting Olivieri, supra, 186 N.J. at 521).]

These elements are satisfied here because the issues in *Feld VIII* are the same as in *Feld II*, and the same parties or parties in privity actually litigated them to a final judgment on the merits in *Feld II*.

In *Feld II*, we considered and rejected the following claims:

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[3] Any additional arguments made by Feld with respect to his standing are of insufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

> (1) that conveyance of the land required enactment of an ordinance by the municipal governing body and could not be effected by means of a resolution; (2) that the township council acted arbitrarily, capriciously, and unreasonably in conveying municipal land because there was inadequate consideration for the conveyance and no appraisals were obtained, among other reasons; and (3) that RPM failed to provide a so-called "pay-to-play certificate" before the township entered into the agreement to convey the land.
>
> [*Feld II, supra*, (slip op. at 4).]

We rejected the Feld plaintiffs' primary argument that Orange acted outside its authority by conveying vacant lots it owned to the developer by means of a resolution the **[*17]** Township Council adopted rather than an ordinance. *Id.* at 5. We also rejected a variety of other arguments, including that findings of reasonableness of the consideration exchanged for the lots must be explicitly stated in the authorizing resolution or ordinance, that the conveyance of the land was an unlawful donation of land to a private party, and that Orange needed to include certain documents in the agenda packet before the Council meeting at which the resolution was passed. *2012 N.J. Super. Unpub. LEXIS 502 at *7-9*. In *Feld II*, we also addressed plaintiffs' "pay-to-play" contention. *2012 N.J. Super. Unpub. LEXIS 502 at *12-13*.

Plaintiff's three-count complaint in *Feld VIII* alleged again that the Township Council's action was ultra vires in approving by resolution rather than ordinance the conveyance of the two additional lots. It alleged that certain findings and recitations must be included on the face of an ordinance approving the conveyance (count one), that the Township Council abdicated its legislative duties by failing to follow the appropriate procedures when it approved the conveyances (count two), and that the municipal actions violated pay-to-play statutes (count three). These claims duplicate what was presented and decided in *Feld II*.

Plaintiff argues that **[*18]** collateral estoppel does not apply because of differences in the facts that pertain to these two conveyances, because the law is changing with respect to the presumption of validity of municipal actions, and because of equitable exceptions to collateral estoppel as set forth in *Restatement (Second) of Judgments § 28* (1982).

More specifically, plaintiff contends that: (1) the *Feld II* trial judge warned Orange that the approval procedures for conveyance of its lots must strictly comply with the authorizing statute; (2) a conflict of interest tainted the conveyance of the lots because the outside auditor Orange engaged also provided auditing services for RPM; (3) the pay-to-play issue was not considered and decided by the trial court in *Feld II* and only partially considered by this court on the appeal of that case; and (4) there was spoliation of evidence. We find no merit in any of these arguments.

First, it is not clear what "warning" the *Feld II* trial judge expressed at the conclusion of that case. There is allegedly a "tape glitch" and a "gap" in the transcription of the proceedings that plaintiff references. Assuming that plaintiff is correct that the trial judge warned of deficiencies **[*19]** in the procedures used by Orange when the court issued its decision in *Feld II*, a "warning" is not a holding that affects the legality of the subsequent conveyances of two additional lots. If the trial court intended to impose requirements on the conveyance of future lots, its decision and judgment did not state so. Moreover, in *Feld II*, we held that the pertinent statutes did not require Orange to make "mandatory statutory determinations or findings" in connection with approving a private sale. *Feld II, supra*, (slip op. at 10) (citing *N.J.S.A. 40A:12A-8*).

Second, plaintiffs are not entitled to a new adjudication in *Feld VIII* because of the alleged conflict of interest of a private auditor. Plaintiffs do not explain the role of the outside auditor in the conveyances or how the auditing of financial records creates a disqualifying conflict. They also do not cite any authority in support of their argument that such dual services of an auditor would require nullification of the conveyances.

Third, we considered the pay-to-play issue in the *Feld II* appeal even though plaintiffs had not raised the issue before the trial court until they filed a motion for reconsideration of the final dismissal order. *2012 N.J. Super. Unpub. LEXIS 502 at *12-13*. On the appeal, we noted that **[*20]** the normal remedy for violation of the pay-to-play

laws is a fine and that plaintiffs did not present any authority holding that a violation "would require nullification of a conveyance of land . . . ." *2012 N.J. Super. Unpub. LEXIS 502 at *13*.

Fourth, plaintiff is not entitled to litigate the land conveyances again because of alleged spoliation of evidence. Plaintiff claims that Orange spoliated evidence because certain individuals did not appear for depositions and because counsel directed a witness not to answer a few questions at his deposition. This discovery dispute does not abrogate application of the doctrine of collateral estoppel.

Plaintiff makes a number of other arguments, many of them questioning the good faith of municipal officials who were involved in the redevelopment plan and the conveyances of township property. The additional arguments are without sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.

In sum, the trial court correctly dismissed *Feld VIII* as collaterally estopped by the final judgment in *Feld II*.

Affirmed as to *Feld VIII*, A-4880-12. Affirmed in part and remanded in part as to *Feld VI*, A-3911-12. We do not retain jurisdiction.

End of Document

Exhibit 9

Figa v. Raritan Twp. Planning Bd.

Superior Court of New Jersey, Appellate Division

January 19, 2011, Argued; May 3, 2011, Decided

DOCKET NO. A-5007-09T4

Reporter
2011 N.J. Super. Unpub. LEXIS 1100 *; 2011 WL 1642273

JOHN FIGA and BEVERLY FIGA, Plaintiffs-Appellants, v. RARITAN TOWNSHIP PLANNING BOARD and HI-GEAR DEVELOPERS, INC., Defendants-Respondents.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from Superior Court of New Jersey, Law Division, Hunterdon County, Docket No. L-281-09.

Figa v. Planning Bd. of the Twp. of Raritan, 2010 N.J. Super. Unpub. LEXIS 2303 (Law Div., May 7, 2010)

Core Terms

trial court, variance, plaintiffs', parties, zoning, obligated, lack of standing, prerogative writ, counsel fees, developer, covenant, wireless

Counsel: John E. Lanza argued the cause for appellants (Lanza and Lanza, L.L.P., attorneys; John E. Lanza, of counsel and on the briefs).

John P. Belardo argued the cause for respondent Raritan Township Planning Board (McElroy, Deutsch, Mulvaney & Carpenter, attorneys; Mr. Belardo, of counsel and on the brief).

Jeffrey T. Kampf argued the cause for respondent Hi-Gear Developers, Inc. (Jay and Kampf, L.L.C., attorneys; Mr. Kampf, of counsel and on the brief).

Judges: Before Judges Wefing, Baxter and Koblitz.

Opinion

PER CURIAM

Plaintiffs filed a two-count complaint in lieu of prerogative writs challenging the decision of defendant Raritan Township Planning Board ("Board") denying a subdivision application and seeking indemnification from defendant Hi-Gear Developers, Inc. ("Hi-Gear") for the counsel fees plaintiffs incurred in connection with this prerogative writ action. The trial court denied plaintiffs' request for indemnification and dismissed the challenge to the decision of the Board, concluding that plaintiffs lacked standing to raise the issue. After reviewing the record in light of the contentions advanced on **[*2]** appeal, we affirm.

Plaintiffs owned a six-acre parcel of land that abutted a forty-nine acre parcel owned by Hi-Gear. Both were located in the township's R-3 zone. Plaintiffs knew that Hi-Gear wanted to develop its land, and they approached Hi-Gear with the proposal that it purchase a portion of their land and submit a development proposal to the Board that

encompassed both lots. Hi-Gear agreed and, without the assistance of attorneys, the parties prepared a contract, which they executed on March 20, 2007. Under the contract, Hi-Gear agreed to "pay all expenses required to gain approval and develop a subdivision" and to pay plaintiffs $450,000 for a portion of their land, "to be used for creating lots" for the proposed subdivision. Hi-Gear's obligation to purchase this land was contingent upon it "obtaining approval to create three lots on the land proposed by the Development." Further, Hi-Gear agreed that it would "hold [plaintiffs] harmless in the event that the Subdivision is rejected" and recognized that plaintiffs were "not obligated financially or legally" to the development.

In mid-April 2007, a subdivision application was submitted to the Board spanning the two parcels. The first **[*3]** Board hearing occurred in July 2007; eleven hearings in all were held, concluding in June 2008. During that process, the subdivision plan was modified on a number of occasions in an attempt to meet the objections interposed by surrounding property owners, many of which dealt with issues of drainage and wetlands delineation. In its final form, Hi-Gear proposed to build a total of twenty-four single-family homes. In April 2008, the Board voted to deny the application in light of the fact that Hi-Gear had been unable to produce a letter from New Jersey American Water Co. that it could supply water to the proposed development.

In May 2008, the Board permitted Hi-Gear to re-open its application, and in June Hi-Gear presented to the Board the requested confirmation from the water company. The Board nonetheless again voted to deny the application, citing concerns about the lack of an active recreation area, water runoff problems experienced in the neighborhood, and concerns about the preservation of mature trees. When Hi-Gear elected not to seek judicial relief from this denial, plaintiffs filed the two-count complaint to which we referred at the outset. Neither of the orders that plaintiffs **[*4]** challenge on appeal deal with the substantive merits of their charge that the Board acted arbitrarily, capriciously and unreasonably when it denied this application. We are thus not called upon in this appeal to deal with the legal merits of the Board's ultimate decision to deny this application.

After defendants filed their answers to this complaint, the trial court held a case management conference to structure the litigation. It directed that the initial question to be addressed was the second count of plaintiffs' complaint, which sought to have Hi-Gear held responsible to pay their counsel fees. This, the trial court held, was to be decided on cross-motions for summary judgment.

Plaintiffs argue on appeal both that the trial court's direction that the counsel fee issued be decided first was incorrect and that the trial court's decision on the merits of that issue was also incorrect. We disagree with plaintiffs with respect to both contentions.

There is a facial appeal to plaintiffs' contention that the trial court should have withheld dealing with the issue of counsel fees until it addressed the first count of their complaint. Particularly in the context of this matter, however, we **[*5]** can see no error in the trial court's approach. We note initially that *Rule 4:69-4*, dealing with the management of actions in lieu of prerogative writs, specifically directs the managing judge to establish a briefing schedule. In our judgment, it is in the inherent power of such a managing judge to direct the order in which issues shall be addressed. *Casino Reinvestment Dev. Auth. v. Lustgarten, 332 N.J. Super. 472, 488, 753 A.2d 1190 (App. Div. 2000)* (recognizing that "[t]he right of a trial court to manage the orderly progression of cases before it has been recognized as inherent in its function"). The decision to proceed in this fashion was essentially a discretionary determination, and we can see no abuse of the trial court's discretion in this regard.

Turning to the court's analysis of the underlying merits of the question, we are satisfied that the trial court was correct in that regard as well. We reject plaintiffs' contention that the contractual language obligating Hi-Gear to "pay all expenses required to gain approval and develop" the subdivision also obligated it to incur counsel fees to pursue litigation once the initial application was denied.

Certain basic principles guide our review **[*6]** of this issue on contract interpretation. It is settled that "[w]ords and phrases are not to be isolated but related to the context and the contractual scheme as a whole, and given the meaning that comports with the probable intent and purpose." *Republic Bus. Credit Corp. v. Camhe-Marcille, 381 N.J. Super. 563, 569, 887 A.2d 185 (App. Div. 2005)* (quoting *Newark Publishers' Ass'n v. Newark Typographical Union, 22 N.J. 419, 426, 126 A.2d 348 (1956)*). The contract, moreover, "must be read as a whole, in 'accord with

justice and common sense.'" *Cumberland Cnty. Improvement Auth. v. GSP Recycling Co., 358 N.J. Super. 484, 497, 818 A.2d 431 (App. Div. 2003)* (quoting *Krosnowski v. Krosnowski & Garford Trucking, Inc., 22 N.J. 376, 387, 126 A.2d 182 (1956)*).

> In the quest for the common intention of the parties to a contract the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain. An agreement must be construed in the context of the circumstances under which it was entered into and it must be accorded a rational meaning in keeping with the express general purpose.
>
> [*Tessmar v. Grosner, 23 N.J. 193, 201, 128 A.2d 467 (1957)*.]

Here, viewing this contract as a whole, we agree with the trial court that **[*7]** the parties addressed nothing further than their respective obligations in connection with the initial application to the Board for approval. The contract dealt with the consequences of the Board rejecting the application. It clearly stated that "[i]n the event the Subdivision is rejected by the Township of Raritan, all land currently in ownership of Seller will remain in the ownership of the Sellers and clear of any and all Financial or Municipal obligations." The trial court correctly observed that if the parties had intended that Hi-Gear was obligated to pursue the matter beyond the Board, this provision would have reflected that intent by including, after the reference to the Township of Raritan, a further reference to the exhaustion of the right of appeal. The absence of such language speaks volumes. Further, we agree with the trial court that it was most unlikely that Hi-Gear intended to assume an open-ended obligation to pursue judicial remedies in the absence of a clear statement to that effect. We are satisfied that if we were to construe this contract in such a fashion, we would be giving plaintiffs a better contract than they negotiated for themselves; this we may not do. **[*8]** *Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 192, 814 A.2d 1108 (App. Div. 2002)*.

We turn now to plaintiffs' contention that the trial court erred when it dismissed the first count of their complaint, finding that they did not have sufficient standing to challenge the Board's decision.

Standing refers to a plaintiff's ability to initiate and maintain an action before the court. *Stubaus v. Whitman, 339 N.J. Super. 38, 47, 770 A.2d 1222 (App. Div. 2001)*, *certif. denied*, *171 N.J. 442, 794 A.2d 181 (2002)* (holding that taxpayers and school districts lacked standing to challenge the constitutionality of the Comprehensive Education Improvement and Financing Act, *N.J.S.A. 18A:7F-1 to - 36*). If a plaintiff does not have sufficient legal standing, a court will not entertain the matter. *Ibid.* In general, "standing requires that a litigant have a sufficient stake and real adverseness with respect to the subject matter of the litigation, and a substantial likelihood that some harm will fall upon it in the event of an unfavorable decision." *Neu v. Planning Bd. of Twp. of Union, 352 N.J. Super. 544, 552, 800 A.2d 908 (App. Div. 2002)* (quoting *In re N.J. Bd. of Pub. Utils., 200 N.J. Super. 544, 556, 491 A.2d 1295 (App. Div. 1985)* (recognizing that owners of property in **[*9]** close proximity to a major development had standing to challenge certain aspects of its approval)); *accord Jen-Elec., Inc. v. Cty. of Essex, 197 N.J. 627, 646, 964 A.2d 790 (2009)* (holding that a potential supplier has standing to challenge bid specifications in a public contract). Thus, a plaintiff must have an interest in the outcome of the litigation and while a financial interest is ordinarily sufficient to confer standing, *see Spinnaker Condo. Corp. v. Zoning Bd. of the City of Sea Isle City, 357 N.J. Super. 105, 111, 813 A.2d 1282 (App. Div.)*, *certif. denied*, *176 N.J. 280, 822 A.2d 609 (2003)* (citation omitted), it is not conclusive.

Although New Jersey courts have set a "fairly low threshold" for standing and liberally interpret its requirements, a plaintiff generally "does not have standing to assert the rights of a third party." *Id. at 110-11* (citations omitted); *see also Stubaus, supra, 339 N.J. Super. at 47-48* (citation omitted). Courts "will not render advisory opinions or function in the abstract nor will [they] entertain proceedings by plaintiffs who are 'mere intermeddlers' or are merely interlopers or strangers to the dispute." *Stubaus, supra, 339 N.J. Super. at 48* (quoting *Crescent Pk. Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107, 275 A.2d 433 (1971)*).

Whether **[*10]** a party has standing to pursue a legal remedy is a question of law; accordingly, our review of the trial court's determination is plenary. *Manalapan Realty, L.P. v. Twp. Comm. of the Twp. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230 (1995)*.

The trial court relied upon our decision in Spinnaker, supra, in concluding that plaintiffs lacked standing in this matter. There, the plaintiff, Spinnaker Condominium Corporation ("Spinnaker"), leased roof space to Sprint, a wireless telecommunications company, so that it could install nine antennae and related equipment needed to improve its service in the area. 357 N.J. Super. at 109. To do so, however, Sprint needed a conditional-use variance from the zoning board, and its application was denied. Ibid. Sprint thereafter found a new location for its antennae and decided not to appeal the decision of the zoning board and terminated its lease with the plaintiff. Id. at 108. Spinnaker, nonetheless, filed a prerogative writs action challenging the board's denial. *Ibid.* The trial court determined that Spinnaker lacked standing, and we agreed, since Spinnaker did not suffer a "substantial likelihood of some harm" from the board's denial. Id. at 111. After all, Spinnaker **[*11]** was not a wireless telecommunications provider and had no right on its own to install or operate such equipment on its roof. *Ibid.* Since Sprint decided not to appeal and terminated its lease, Spinnaker had no financial interest in the outcome of the litigation. *Ibid.*

Spinnaker argued, however, that its standing derived from its status as a "developer" under the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1 to -136, which gives it the ability to apply to the board for "development" approvals such as use variances. *Ibid.; see also* N.J.S.A. 40:55D-3. [1] The MLUL defines a "developer" as "the legal or beneficial owner...of any land proposed to be included in a proposed development." N.J.S.A. 40:55D-4. As "legal owner" of the land, Spinnaker claimed, it would benefit if the board were to approve the use variance because the variance would run with the land; it would not have been personal to Sprint as the applicant. Spinnaker, supra, 357 N.J. Super. at 111-12.

We rejected this **[*12]** argument, however, because "an application by a wireless telecommunications provider implicates more than 'property-specific' proofs" - it depends on technological factors that are specific to the applicant and does not, therefore, run with the land. Id. at 112. Such applicants must prove that their requested use is technically necessary in order to fix their "coverage gaps" and provide adequate service to the area. Id. at 112-14. Thus, we concluded that Sprint's application here was specific to Sprint:

> Therefore, contrary to Spinnaker's argument in this case, a conditional-use variance to permit construction of the nine specific antennae proposed by Sprint would not adhere to the land in the traditional zoning sense. This is so because any other wireless telecommunications provider that may lease Spinnaker's facilities will do so because it has its own discrete, coverage gap. Its facility will be designed to be compatible with its own existing network system. The number, size and location of antennae used by the new provider will depend on the nature and extent of the coverage gap in that system and other technical factors relating to its operation. In short, without Sprint, the application **[*13]** denied by the Board lacks technical relevance. Therefore, Spinnaker had no standing to appeal the Board's denial of the application.
>
> [Id. at 114.]

Plaintiffs attempt to distinguish *Spinnaker* on the basis that it involved the installation of wireless communications equipment, the approval of which would not run with the land. They stress that approval of the subdivision application, on the other hand, would run with the land. We do not find this proffered distinction significant. Rather, the principle enunciated in Spinnaker is that a party who did not control the application lacked standing to challenge its denial when the party who did control did not wish to pursue the matter further. That principle is fully applicable here.

Plaintiffs also point to our recent decision in Campus Assocs. L.L.C. v. Zoning Bd. of Adjustment of the Twp. of Hillsborough, 413 N.J. Super. 527, 996 A.2d 1054 (App. Div. 2010), to advance their contention that they have standing in this matter. In that case, the plaintiff signed a contract to sell 13.79 acres to The Richman Group of New Jersey, L.L.C., contingent upon Hillsborough's zoning board granting the necessary use variance to permit construction of affordable housing **[*14]** on the property. Id. at 530. When the board denied the application,

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[1] Under the MLUL, only a "developer" may submit an "application for development" to the board seeking approval of a subdivision, planned development, conditional use, zoning variance, or permit. N.J.S.A. 40:55D-3.

Richman decided not to appeal and terminated the contract. Id. at 531. Campus Associates, however, wanted to pursue the project, either by itself or by contracting again with Richman or some other developer. *Ibid.* Accordingly, Campus Associates filed a prerogative writs action to challenge the board's denial. *Ibid.* The trial court then dismissed the complaint on the basis that Campus Associates lacked standing to appeal because it was not the applicant and was not harmed by the board's denial; Campus Associates could always submit a new application on its own behalf. Id. at 532.

We disagreed with the trial court and held that Campus Associates had standing to appeal the denial of Richman's application, "provided the application depended on property specific proofs and not factors unique to the applicant." Id. at 530. In so holding, we reasoned that this case differed from the situation in *Spinnaker* where factors unique to the applicant caused the variance not to run with the land; here, on the contrary, an ordinary use variance was involved which, if granted, would run with the land and benefit Campus Associates as **[*15]** the landowners. Id. at 534-38.

There is a critical distinction between the situation presented in Campus and the present matter. In *Campus*, the proposed development was to be sited entirely on the 13.79 acres owned by Campus, and Campus wanted to pursue developing its property and asserted it had the capacity to do so. Id. at 531. Here, on the other hand, plaintiffs own only one small portion of the property needed for this development, and there is no indication they have the ability to pursue the development without the cooperation and participation of Hi-Gear, the adjoining majority property owner.

Plaintiffs also contend that the result of the Board's decision to deny this application has been to cost them $450,000, the price Hi-Gear had agreed to pay for the portion of their property to be purchased. Such a loss, they argue, is sufficient to confer standing upon them. This argument, however, is dependent upon plaintiffs' further contention that the denial of the application did not terminate their contract with Hi-Gear. But, as we have indicated earlier in this opinion, we do not share that view of the parties' contract. The respective obligations of plaintiffs and Hi-Gear to each **[*16]** other ended when the Board did not approve this application. Thus plaintiffs' loss of this business opportunity does not give them standing to challenge the Board's action.

Further, we agree with the trial court that it is of no moment that the Board did not raise the question of plaintiff's standing in its answer. "[S]tanding is an element of justiciability that cannot be waived or conferred by consent." In re Adoption of Baby T., 160 N.J. 332, 341, 734 A.2d 304 (1999).

Plaintiffs present one additional argument with respect to their contention that the trial court erred in granting summary judgment to Hi-Gear, that Hi-Gear's failure to pursue an appeal was a breach of the implied covenant of good faith and fair dealing that exists in every contract. Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224, 864 A.2d 387 (2005). We acknowledge that plaintiffs' complaint did not include such an allegation, but we elect to deal with it nonetheless.

Good faith performance of a contract "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Wilson v. Amerada Hess Corp., 168 N.J. 236, 245, 773 A.2d 1121 (2001) (quoting Restatement (Second) of Contracts § 205 comment a **[*17]** (1981)). The implied covenant "calls for parties to a contract to refrain from doing 'anything which will have the effect of destroying or injuring the right of the other party to receive' the benefits of the contract." Brunswick Hills Racquet Club, Inc., supra, 182 N.J. at 224-25 (quoting Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 130, 207 A.2d 522 (1965)).

"Proof of 'bad motive or intention' is vital to an action for breach of the covenant." Id. at 225 (quoting Wilson, supra, 168 N.J. at 251). To prove breach of the covenant, the plaintiff "must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties." *Ibid.* (quoting 23 *Williston on Contracts* § 63:22 (Lord ed. 2002)). Thus, "[a] plaintiff may be entitled to relief under the covenant if its reasonable expectations are destroyed when a defendant acts with ill motives and without any legitimate purpose." Id. at 226 (quoting Wilson, supra, 168 N.J. at 251).

Here, plaintiffs have provided no evidence that Hi-Gear had a "bad motive" for choosing not to appeal; rather, they merely make a bald assertion **[*18]** that Hi-Gear must have wanted to avoid having to purchase their property. Such an allegation, however, entirely lacking in evidential support, is an insufficient basis upon which to deny summary judgment to a party otherwise entitled to that relief.

Finally, plaintiffs have addressed in their brief their substantive contention that the Board's decision to deny this application was erroneous. The trial court did not make a determination on that underlying question, and we decline to address it in the first instance.

The orders under review are affirmed.

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Exhibit 10

Lee v. State

Superior Court of New Jersey, Appellate Division

May 26, 2009, Submitted; June 23, 2009, Decided

DOCKET NO. A-1077-08T2

Reporter
2009 N.J. Super. Unpub. LEXIS 1661 *; 2009 WL 1749640

THERESA LEE AND THERESA LEE AS ADMINISTRATOR AD PROSEQUENDUM OF THE ESTATE OF BENJAMIN LEE, Plaintiffs-Appellants, v. STATE OF NEW JERSEY; DELAWARE AND RARITAN CANAL COMMISSION; DELAWARE AND RARITAN CANAL STATE PARK; and DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY, Defendants-Respondents, and SCUDDERS FALLS and EWING TOWNSHIP, Defendants.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1692-07.

Core Terms

River, immunities, public entity, defendants', unimproved, summary judgment motion, notice, dangerous condition, trial date, days, arbitration, scheduled, drowning, public property, trial court, supervision, summary judgment, injuries, swim, warn

Counsel: Colby H. Grossman, attorney for appellants.

Anne Milgram, Attorney General, attorney for respondents (Melissa H. Raksa, Assistant Attorney General, of counsel; Kathleen M. Bartus, Deputy Attorney General, on the brief).

Judges: Before Judges Carchman and Sabatino.

Opinion

PER CURIAM

Plaintiff Theresa Lee, individually and on behalf of the estate of her deceased husband Benjamin Lee, appeals the Law Division's order granting summary judgment to defendants in this wrongful death litigation. The order dismissed plaintiff's complaint seeking to impose liability upon defendants, various public entities, in connection with the July 2005 drowning of plaintiff's husband in the Delaware River. As a matter of law, the trial court concluded that the public entities are immune from liability under the Tort Claims Act, *N.J.S.A. 59:1-1 to 59:12-3* (the "TCA"). We agree with the trial court's determination of statutory immunity, and affirm.

I.

This case arises out of tragic facts, which are substantially undisputed. We consider those facts, and all reasonable inferences from them, in a light most favorable to plaintiff as **[*2]** the responding party on defendants' summary

judgment motion. *Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 535, 666 A.2d 146 (1995)*; *see also* *R. 4:46-2(c)*.

On July 22, 2005, plaintiff, along with her twenty-two-year-old husband Benjamin, and a friend, Roxanna Jones, visited the Delaware and Raritan Canal State Park (the "Park") located on the eastern bank of the Delaware River. The trio came to the Park that day to picnic, and to "wade and swim" in the river waters off of the shore. At approximately 4:30 p.m. Benjamin attempted to swim to an island located in the river near the Delaware Canal tow path. As he did so, Benjamin was pulled further into deeper water by the river's current. Benjamin failed to make it to the island and, despite plaintiff's efforts to save him, he ultimately drowned.

Various rescue units, including the Ewing Township Police Department, the Yardley-Makefield (Pennsylvania) Fire Department, and the New Jersey State Park Service, all attempted to find Benjamin, without success. Two days later, July 24, two kayakers found his body south of the Scudders Falls bridge that spans the Delaware River near Washington's Crossing.

The seventy-mile Park is owned and operated by **[*3]** the New Jersey Department of Environmental Protection (the "DEP" [1]) and the Delaware and Raritan Canal Commission (the "Commission"), a sub-unit within the DEP. During its hours of operation the Park is regularly patrolled by one to four Park rangers. No lifeguards or other supervisors are stationed within the Park.

Following the death of her husband, and after timely serving the requisite notices under the TCA, *see* *N.J.S.A. 59:8-8*, plaintiff filed a complaint in the Law Division against the Park, the DEP, the Commission, the State of New Jersey, Scudders Falls, [2] and Ewing Township (collectively, "defendants"). [3] In her complaint, plaintiff alleged that defendants failed to take adequate measures to warn or safeguard Park visitors concerning the hazards of the Delaware River, thereby leading to Benjamin's drowning. Defendants, all of which are public entities covered by the TCA, denied liability. Their answers raised various immunities and alternative defenses under the statute.

Following discovery, defendants moved for summary judgment. In the motion papers, defendants relied on a certification from Ernest P. Hahn, Executive Director of the Commission. Hahn certified that the "Commission is a regulatory agency legally 'in the DEP,' but does not own any land." Defendants further relied upon the certification of Jeanne A. Mroczko, Acting Director of the State Park Service within the DEP. Mroczko certified that the State "did not own, control, or have jurisdiction over the Delaware River on July 22, 2005, or at any other time relevant to this matter." Defendants further relied on the deposition testimony of Stephen S. Garcia, a ranger employed by the State Park Service. Among other things, Garcia attested "that the State's jurisdiction ends at the [Delaware River's] waterline."

Apart from these proofs establishing the State defendants' lack of ownership and control of the river, defendants relied in their motion upon explicit immunities codified in the TCA, including *N.J.S.A. 59:4-8* (regarding the condition of unimproved public property, including rivers), and *N.J.S.A. 59:4-9* **[*5]** (regarding the condition of, among other things, the unimproved and unoccupied portions of the beds and navigable rivers owned by the State). Plaintiff argued that these immunity provisions in the TCA are inapplicable because of the alleged awareness of defendants and their employees of the severe dangers of the Delaware River. Plaintiff also emphasized defendants' alleged failure to provide warnings to, or supervision of, bathers in the river, including her husband. Plaintiff further contended that defendants' summary judgment motion was untimely under *Rule 4:46-1* because it was not filed more than thirty days before the scheduled trial date.

After hearing oral argument, the motion judge determined that, as a matter of law under the TCA, defendants were shielded from liability for Benjamin's drowning. The judge applied pertinent case law, including *Fleuhr v. City of*

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[1] The complaint erroneously identified the DEP by its former name, the Department of Environmental Protection and Energy.

[2] Scudders Falls is a location along the Delaware River rather than a legal entity.

[3] We shall **[*4]** refer to the defendants other than Ewing Township and Scudders Falls as "the State defendants."

Cape May, 159 N.J. 532, 732 A.2d 1035 (1999), recognizing that, as the motion judge paraphrased it, "once a bather enters a body of water, such as a river in this case, which is unimproved . . . there can be no liability [under the TCA] for injuries which occur solely due to the conditions encountered in the unimproved body." Additionally, **[*6]** the judge rejected plaintiff's procedural claim that defendants should be deprived of the benefit of the TCA immunities because their dispositive motion was made returnable less than thirty days before the trial date.

Plaintiff now appeals, solely as to the State defendants. [4] As a substantive matter, plaintiff maintains that no statutory immunities under the TCA apply here and, even if such immunities do pertain, defendants forfeited that protection by their failure to warn or protect Benjamin against the river's dangerous condition. Procedurally, plaintiff argues that the trial court should never have entertain the summary judgment motion due to the motion's proximity to the pending trial date.

II.

We begin with a brief discussion of the procedural issue. The pertinent chronology is as follows.

Following discovery, the Civil Case Manager's Office issued the parties a notice on August 15, 2008, scheduling a trial date for October 27, 2008. One week later, on August 22, 2008, the Case Manager's Office issued a second notice. That second notice scheduled an arbitration for October **[*7]** 16, 2008. It is not clear from the record why the arbitration notice was generated after, rather than before, the trial notice. Nor is it clear why the interval administratively provided between the arbitration date and the trial date was only eleven days, a period shorter than the thirty-day interval specified by Rule 4:21A-6(b)(1) to enable a litigant to demand a trial *de novo* following an arbitration.

Thereafter, on September 2, 2008, defendants filed their motion for summary judgment, marked returnable for the regular biweekly motion day of October 10, 2008. Plaintiff filed her opposition to that motion on October 1, 2008. The return date was not adjourned, and oral argument on the motion was conducted, as originally scheduled, on October 10, 2008. The trial court granted defendants' motion and issued a corresponding order that same day.

Plaintiff asserts that the trial court should not have entertained defendants' motion for summary judgment because the motion was returnable only seventeen days before the October 27 trial date, rather than the full thirty days prescribed by Rule 4:46-1. As amended in 2006, that *Rule* states, in relevant part, that a motion for summary judgment "shall **[*8]** be returnable not more than 30 days before the scheduled trial date, unless the court otherwise orders for good cause shown." *Ibid.* The purpose of the thirty-day interval is to accommodate the completion of the summary judgment motion process before the parties have to prepare for trial should the motion prove to be unsuccessful. *See also* Pressler, *Current N.J. Court Rules*, Comment R. 4:46-1, at p. 1633 (Gann 2009) (noting the obvious "desirability of pretrial disposition of dispositive motions").

The motion judge excused defendants for not filing their summary judgment motion with enough lead time to be disposed of within thirty days of the scheduled trial. We agree with the motion judge that there is ample "good cause" present here to justify the relaxation of the thirty-day interval. For one thing, because the trial notice issued from the Civil Division Office inexplicably preceded the arbitration notice, defendants were deprived of the customary predicate event of arbitration before a trial date was fixed. In addition, the October 27 trial date on the computer-generated notice apparently was not a feasible date, in light of the intervening arbitration and the motion judge's other **[*9]** trial commitments.

Moreover, because the thrust of defendants' summary judgment motion was based upon statutory immunities--legal protections that we agree control in this case--the motion judge recognized that "it doesn't make sense to ignore" those immunities in the pretrial phase. We agree with the motion judge that it would not have been sensible to require defendants, after the parties had gone through the expense and effort of preparing for trial, to delay their application for dispositive relief and preserve it in the form of a motion to dismiss on the first trial day.

---

[4] Plaintiff has not appealed the trial court's dismissal of co-defendants Ewing Township and Scudders Falls.

Given the idiosyncratic scheduling of this case and the dispositive nature of defendants' statutory arguments, we concur with the motion judge that it was reasonable for the court to have considered the summary judgment motion on its merits on October 10, notwithstanding the normal thirty-day window called for under revised Rule 4:46-1. There was ample good cause to relax that requirement. *See also* R. 1:1-2. We therefore affirm the motion judge's procedural ruling.

III.

We now turn to the substance of defendants' motion. In doing so, we are mindful that our review on appeal of an order granting summary judgment is **[*10]** de novo, and that we must apply the same standards as the trial court under Rule 4:46. *See* N.J. Div. of Taxation v. Selective Ins. Co., 399 N.J. Super. 315, 322, 944 A.2d 667 (App. Div. 2008) (citing Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167, 704 A.2d 597 (App. Div.), *certif. denied*, 154 N.J. 608, 713 A.2d 499 (1998)).

Generally speaking, and subject to the TCA's specific immunity provisions, a public entity may be liable for injuries caused by a condition on its property if the plaintiff establishes:

> (1) that the property was in dangerous condition at the time of the injury;
>
> (2) that the injury was proximately caused by the dangerous condition;
>
> (3) that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred; and either
>
> (4) a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> (5) a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.
>
> [*See* N.J.S.A. 59:4-2; *see also* Brown v. Brown, 86 N.J. 565, 575, 432 A.2d 493 (1981).]

A plaintiff must **[*11]** also demonstrate under N.J.S.A. 59:4-2 that the public entity's conduct was "palpably unreasonable." *Ibid.; see also* Muhammad v. N.J. Transit, 176 N.J. 185, 195, 821 A.2d 1148 (2003); Kolitch v. Lindedahl, 100 N.J. 485, 493, 497 A.2d 183 (1985).

These liability-imposing principles are qualified in the TCA by specific immunities set forth, among other things, in N.J.S.A. 59:4-8 and N.J.S.A. 59:4-9. Both of these immunities cover "unimproved" public property or waterways. Public property remains "unimproved" unless there has been "substantial physical modification of the property from its natural state, and when the physical change creates hazards that did not previously exist and that require management by the public entity." Troth v. State, 117 N.J. 258, 269-70, 566 A.2d 515 (1989). We agree with defendants that the Delaware River and the contiguous Park satisfy the definition of "unimproved" property.

More specifically, N.J.S.A. 59:4-8 mandates that:

> Neither a public entity nor a public employee is liable for an injury caused by a condition of any *unimproved public property*, including but not limited to *any natural condition of any* lake, stream, bay, *river or beach*.
>
> [(Emphasis added).]

In like manner, N.J.S.A. 59:4-9 provides a **[*12]** related immunity for injuries caused by the condition of unimproved portions of "submerged lands" and the "beds of navigable rivers":

> Neither a public entity nor a public employee is liable for any injury caused by a condition of the *unimproved and unoccupied portions of the* tidelands and *submerged lands, and the beds of navigable rivers*, streams, lakes, bays, estuaries, inlets and straits owned by the State.
>
> [(Emphasis added).]

As the motion judge aptly recognized, these statutory immunities clearly apply to the turbulent conditions of the Delaware River that allegedly caused Benjamin's drowning. As we have already noted, the river is "unimproved" property within the ambit of N.J.S.A. 59:4-8. Additionally, as defendants' supporting certifications establish without contradiction, the State of New Jersey and its governmental sub-units do not own or control the Delaware River itself beyond the waterline on the river bank. The immunity of N.J.S.A. 59:4-8 is therefore clearly on point.

To the extent that Benjamin's drowning might have been produced, in part, by the condition of the river bed below the water itself, N.J.S.A. 59:4-9 separately insulates defendants from liability for such a dangerous **[*13]** condition within "submerged lands." N.J.S.A. 59:4-9 therefore provides an independent basis for immunity that is applicable here.

The motion judge found the Supreme Court's analysis of these TCA immunities in Fleuhr, supra, relevant to the present case, and so do we. In *Fleuhr*, a bodysurfer suffered a broken neck while swimming in the ocean off of the Jersey Shore. 159 N.J. at 534. The plaintiff sued the City of Cape May under the TCA. He obtained an expert, who opined that, due to the presence of Hurricane Emily off of the Eastern Seaboard and the stronger waves that could be created by the storm, it was unreasonable for the City to not have a storm warning system in place. Id. at 536. The trial judge rejected the claim and granted summary judgment under N.J.S.A. 59:4-8. *Ibid.* Both this court and the Supreme Court affirmed that disposition.

The Supreme Court in *Fleuhr* emphasized the legislative commentary applicable to these particular statutory immunities involving natural and unimproved property. In that regard, the Legislature has declared that:

> [I]t is desirable to permit the members of the public to use public property in its natural condition and that the burdens and expenses of **[*14]** putting such property in a safe condition as well as the expense of defending claims for injuries would probably cause many public entities to close such areas to public use. In view of the limited funds available for the acquisition and improvement of property for recreational purposes, it is not unreasonable to expect persons who voluntarily use unimproved public property to assume the risk of injuries arising therefrom as part of the price to be paid for benefits received.
>
> [*See* id. at 540 (quoting Comment on N.J.S.A. 59:4-9).]

The legislative commentary also states:

> The exposure to hazard and risk involved is readily apparent when considering all the recreational and conservation uses made by the public generally of the [approximately 915,000] acreages, both land and water oriented. Thus, in sections 59:4-8 and 59:4-9 a public entity is provided an absolute immunity irrespective of whether a particular condition is a dangerous one.
>
> [*Ibid.* (citing Comment on N.J.S.A. 59:4-8 and N.J.S.A. 59:4-9).]

Plaintiff insists that these long-standing immunities should not apply here because defendants' actions and inactions were "palpably unreasonable." Among other things, plaintiff highlights the **[*15]** testimony of Garcia, the Park ranger, acknowledging that he would typically "find swimmers just about every day" in the river at certain times of the year. Plaintiff also points to statements in the record from Thomas C. Keck, a Regional Superintendent within the State Park Service, conceding that the upper portion of the Delaware River contains "swift currents" and that the location is a "very unsafe place to swim." These assertions are insufficient, however, to overcome the clear

immunities mandated by the TCA. The hazards described by the witnesses are inherent in the Delaware River itself, an unimproved and natural condition. [5]

Plaintiff cites to Aversano v. Palisades Interstate Parkway Comm'n, 180 N.J. 329, 851 A.2d 633 (2004), for the proposition that TCA immunity may be abrogated where a public entity's **[*16]** liability can be asserted under a separate provision in the TCA. In *Aversano*, a young man was sunbathing at the Palisades Interstate Park when he fell backwards off a three-hundred-foot cliff. Id. at 330. Emergency personnel assumed that the man could not have survived the fall. *Ibid.* Rather than beginning a "rescue" operation, they instituted a "recovery" operation. *Ibid.* However, when the emergency crew finally reached the young man, three hours after his fall, he still had a pulse and was moaning. *Ibid.* He died two hours later. Id. at 331.

The trial court concluded in *Aversano* that the defendants involved in the emergency operation were immune from liability under N.J.S.A. 59:4-8. We reversed, holding that the unimproved-property immunity of N.J.S.A. 59:4-8 did not eliminate the defendants' exposure to liability for the reduction in the young man's "chances of survival that might have been caused by defendants' alleged negligence in undertaking a proper rescue." *Ibid.* The Supreme Court adopted our reasoning and affirmed. *Ibid.*

Aversano is clearly distinguishable from the present case. In that case, it was the failure of emergency personnel to properly respond to the decedent's fall, **[*17]** not the condition of the property, that supported plaintiff's theory of liability.

Plaintiff faults defendants for not stationing lifeguards or other supervisory personnel at the Park who hypothetically might have been able to intercede and rescue her husband from the river current. However, N.J.S.A. 59:2-7 plainly states that:

> A public entity is not liable for the failure to provide supervision of public recreational facilities; provided, however, that nothing in this section exonerates a public entity for failure to protect against a dangerous condition as provided in Chapter 4 [of *Title* 59].

Moreover, a companion provision, N.J.S.A. 59:3-11, immunizes public employees from liability for "failure to provide supervision of public recreational facilities," unless such supervision is affirmatively provided in a negligent manner. *Ibid.*

This is not a situation in which supervision of bathers in the river was supplied by defendants but negligently implemented. It is undisputed that no supervision whatsoever was provided. Indeed, the record contains a photograph of a sign posted on a gate entering the Park advising the public that swimming in the Delaware River was prohibited. Sadly, for reasons **[*18]** that may never be known, the decedent did not either perceive or heed those warnings.

For these many reasons, the defendants are immunized from liability in this case. We recognize that the outcome is a harsh one for decedent's family. Even so, it is not our function to second-guess the clear policy choices made by the Legislature within the terms of the TCA. *See* Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 181-83, 793 A.2d 607 (2002) (noting that under the TCA, "immunity is the rule and liability is the exception").

Affirmed.

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[5] Plaintiff's reliance upon an unpublished river drowning case litigated in New York, ***Cohen v. New York, 5 Misc. 3d 1144[A], 841 N.Y.S.2d 819, 2007 NY Slip Op 51135[U] [N.Y. Ct. Cl. 2007]***, in which summary judgment was denied to the public entity defendants, is unavailing. The unpublished decision is not precedential and did not, of course, involve the sovereign immunities legislatively established in New Jersey in the TCA. *See* R. 1:36-3.

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Exhibit 11

Gourley v. Twp. of Monroe

Superior Court of New Jersey, Appellate Division

October 23, 2012, Argued; January 8, 2013, Decided

DOCKET NO. A-1595-11T2

Reporter
2013 N.J. Super. Unpub. LEXIS 34 *; 2013 WL 68715

TODD GOURLEY and MELISSA GOURLEY, his wife; LAURA SABARERIO; DANIEL CONTE and ALICE CONTE, his wife, Plaintiffs-Appellants, v. TOWNSHIP OF MONROE, a Municipal Corporation, Defendant-Respondent, and JEFFREY REITZ, ELIZABETH LATHROP, MARK F. DELANEY and MICHELLE S. REITZ, Third-Party Defendants.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from Superior Court of New Jersey, Chancery Division, Gloucester County, Docket No. C-0060-09.

Core Terms

plaintiffs', dangerous condition, flooding, nuisance, summary judgment, preliminary injunction, public entity, storm water, inverse condemnation, township, upstream, injunction, neighbors, basin, drain, drainage system, public property, third-party, entity

Counsel: Brian P. Stouffer argued the cause for appellants (Walter T. Wolf, LLC, attorneys; Walter T. Wolf, on the briefs).

Robert A. Baxter argued the cause for respondent (Craig, Annin & Baxter, LLP, and Law Offices of Charles A. Fiore, attorneys; Mr. Baxter, of counsel and on the brief; Charles A. Fiore, of counsel).

Judges: Before Judges Fisher, Alvarez and St. John.

Opinion

PER CURIAM

Plaintiffs, Todd and Melissa Gourley, appeal from the September 13, 2010 order denying their request for a preliminary injunction, the June 15, 2011 order granting defendant Township of Monroe's cross motion for summary judgment dismissing all counts except the count alleging inverse condemnation, and the July 13, 2011 order dismissing plaintiffs' inverse condemnation claim. Following our review of the arguments advanced on appeal, in light of the record and applicable law, we affirm.

I.

The following pertinent facts and circumstances emerge from the record. Plaintiffs reside in Monroe on Newton Avenue, which is a paved dead-end street that has no underground drainage system. Topographically, Newton has high points at each end **[*2]** and a low point at the plaintiffs' south east property line.

Plaintiffs purchased their property in November 2000. At that time they were not aware of any flooding or potential for flooding to the property. Soon after moving in, they noticed that after a "good" rainfall, water would start collecting in their side yard. Plaintiffs installed a French drain and sump pump but this did not alleviate the problem.

Flooding on Newton had likely been a long-standing problem, but increasingly affected plaintiffs' property as additional houses were built on the street. In late 2005 or early 2006, third-party defendant, Jeffery Reitz, cleared his upstream lot and installed a pole barn. After this, plaintiffs experienced increased flooding on their property. The flooding became more frequent when Reitz constructed a home on his lot. Thereafter, plaintiffs began complaining to Monroe.

In 2007, plaintiffs dug a five-foot-deep basin in their side yard. The basin collected the runoff rain water but a Township inspector told plaintiffs to fill in the basin because it was a dangerous condition. Plaintiffs subsequently constructed a detention basin. The cost for the basin was $4295, but it did not alleviate **[*3]** the problem. Plaintiffs then began putting sandbags out on the street during rainstorms and took other steps to try to protect their property from the water which would accumulate on Newton. This included having a drain installed under Newton in 2009 to drain water away from their property. However, the drain had to be taken out because approval from Monroe had not been received prior to its installation. Consequently, plaintiffs resorted to continuing to use sandbags. In September 2009, after receiving a complaint from plaintiffs' neighbor, the police informed plaintiffs they could no longer use sandbags on the street to guard against runoff water. However, they were allowed to keep sandbags on their property near the curb.

On November 17, 2009, plaintiffs filed a complaint against Monroe alleging it had created a dangerous condition, an increase in storm water flooding on or around their home. Monroe filed a motion to dismiss plaintiffs' complaint. Plaintiffs responded by filing an amended complaint, adding their adjacent neighbors as additional plaintiffs. Monroe then filed an answer, separate defenses, and third-party complaint naming plaintiffs' upstream neighbors on Newton as **[*4]** third-party defendants.

On September 13, 2010, plaintiffs' request for a preliminary injunction was denied. We denied plaintiffs' motion for leave to file an interlocutory appeal. Plaintiffs then filed an amended complaint, asserting direct claims against the third-party defendants. On June 15, 2011, plaintiffs' motion for partial summary judgment was denied and Monroe's cross motion for summary judgment dismissing all counts against it except the count alleging an inverse condemnation claim was granted. After a hearing, the motion judge granted Monroe's cross motion for summary judgment, dismissing plaintiffs' inverse condemnation claim. On November 15, 2011, plaintiffs dismissed their complaint against third-party defendants without prejudice.

This appeal ensued. On appeal, plaintiffs raise the following issues:

Point I

MONROE IS LIABLE FOR TRESSPASS AND NUISANCE; PLAINTIFFS ARE ENTITLED TO DAMAGES AND INJUNCTIVE RELIEF.

Point II

MONROE IS LIABLE FOR INJURIES CAUSED BY THE DANGEROUS CONDITION OF NEWTON ROAD.

Point III

THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT, IN FAVOR OF MONROE, ON PLAINTIFF'S CLAIM FOR INVERSE CONDEMNATION WAS IMPROPER, BECAUSE THE LAW OF INVERSE CONDEMNATION BY DIRECT **[*5]** PHYSICAL TAKING APPLIES.

II.

We begin with plaintiffs' claim that Judge Rafferty erred when he denied plaintiffs' request for a preliminary injunction.

An appellate court applies an abuse of discretion standard in reviewing a trial court's decision to grant or deny a preliminary injunction. *See* Horizon Health Ctr. v. Felicissimo, 135 N.J. 126, 137, 638 A.2d 1260 (1994); Nat'l Starch & Chem. Corp. v. Parker Chem. Corp., 219 N.J. Super. 158, 162, 530 A.2d 31 (App. Div. 1987). "Judicial abuse of discretion is tantamount to harmful error, i.e., error clearly capable of producing an unjust result." Community Hosp. Group Inc. v. More, 365 N.J. Super. 84, 94, 838 A.2d 472 (App. Div. 2003) (citing Higgins v. Polk, 14 N.J. 490, 493, 103 A.2d 1 (1954); R. 2:10-2), *aff'd in part*, 183 N.J. 36, 869 A.2d 884 (2005).

"The standards for issuing a preliminary injunction were clearly established by the Supreme Court in *Crowe v. De Gioia.*" Paternoster v. Shuster, 296 N.J. Super. 544, 555, 687 A.2d 330 (App. Div. 1997) (citing Crowe v. De Gioia, 90 N.J. 126, 132-34, 447 A.2d 173 (1982)). Accordingly, when a trial court determines whether to grant a preliminary injunction it must consider: (1) whether an injunction is "necessary to prevent irreparable harm"; (2) whether "the legal right underlying [the **[*6]** applicant's] claim is unsettled"; (3) whether the applicant has made "a preliminary showing of a reasonable probability of ultimate success on the merits"; and (4) "the relative hardship to the parties in granting or denying [injunctive] relief." Crowe, supra, 90 N.J. at 132-34.

The motion judge did not abuse his discretion when he denied plaintiffs' preliminary injunction request. The motion judge determined that significant factual questions remained undecided thus making a preliminary injunction an inappropriate form of relief for plaintiffs. Moreover, granting the preliminary injunction would not have been as simple, direct, and practical as plaintiffs assert. It would have required Monroe to improvise expensive measures to drain water that naturally flows from upstream neighbors to plaintiffs' properties during rain storms. Additionally, it was not apparent that this injunction was necessary to prevent irreparable harm to plaintiffs. When plaintiffs requested the injunction in 2010, they had already sustained the flooding of their property for several years and there was no indication that waiting several additional months for disposition of their claims would exacerbate the situation. **[*7]** It was also not apparent that plaintiffs adequately demonstrated a reasonable probability of ultimate success on the merits of their claims.

We next address plaintiffs' claims that Judge McDonnell erred when she granted defendant's motions for summary judgment. Plaintiffs argue that Monroe affirmatively collects storm water on Newton which creates a nuisance. They further allege that this collection of storm water creates a dangerous condition on Newton for which Monroe is liable. We begin by discussing the standard for our review of a grant of summary judgment.

A trial court will grant summary judgment to the moving party "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); *see also* Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523, 666 A.2d 146 (1995). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving **[*8]** party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

An appellate court uses the same standard as the trial court. Estate of Hanges v. Metropolitan Prop & Cas. Ins. Co., 202 N.J. 369, 378, 997 A.2d 954 (2010). It decides first whether there was a genuine issue of fact. If there was not, it then decides whether the trial court's ruling on the law was correct. Gray v. Caldwell Wood Prods., Inc., 425 N.J. Super. 496, 500, 42 A.3d 192 (App. Div. 2012).

Plaintiffs claim Monroe is liable for the storm water runoff because this excess water has resulted in a dangerous condition on Newton which abrogates Monroe's immunity under the Torts Claims Act (TCA). N.J.S.A. 59:1-1 to 12-3. Plaintiffs also maintain that the storm water on Newton creates a nuisance for which they are entitled to relief.

When a plaintiff's negligence claim arises against a government entity, the TCA governs whether liability attaches. N.J.S.A. 59:2-1 states, "[e]xcept as otherwise provided by this act, a public entity is not liable for an injury, whether

such injury arises out of an act or omission of the public entity or a public employee or any other person." The TCA defines public entities to include municipalities. N.J.S.A. 59:1-3.

Public [*9] entities are immune from negligence suits unless such suits are specifically authorized by the TCA. N.J.S.A. 59:1-2. Accordingly, the TCA must be strictly construed to permit lawsuits only where specifically allowed. Gerber ex rel. Gerber v. Springfield Bd. of Educ., 328 N.J. Super. 24, 34, 744 A.2d 670 (App. Div. 2000).

When there is a dangerous condition on public property, the TCA allows for public entity liability if certain requirements are met. N.J.S.A. 59:4-2 states:

> A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> b. a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.
>
> Nothing in this [*10] section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.

A dangerous condition is defined as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." N.J.S.A. 59:4-1(a). "Courts have understood a 'dangerous condition' as defined in N.J.S.A. 59:4-1(a) to refer to the 'physical condition of the property itself and not to activities on the property.'" Levin v. Cnty. of Salem, 133 N.J. 35, 44, 626 A.2d 1091 (1993) (quoting Sharra v. City of Atlantic City, 199 N.J. Super. 535, 540, 489 A.2d 1252 (App. Div. 1985)). However, "a public entity may be liable for a dangerous condition on private property that is proximately caused by the public entity's activities on public property[.]" Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 175, 793 A.2d 607 (2002).

While the TCA does not refer to nuisance liability, our Supreme Court has held that "public entity liability for nuisance is recognized [as a dangerous condition of property] [*11] under the Tort Claims Act." Birchwood Lakes Colony Club, Inc. v. Borough of Medford Lakes, 90 N.J. 582, 593, 449 A.2d 472 (1982). "The essence of a private nuisance is an unreasonable interference with the use and enjoyment of land." Sans v. Ramsey Golf & Country Club, Inc., 29 N.J. 438, 448, 149 A.2d 599 (1959). When considering whether plaintiffs have demonstrated an unreasonable interference with the use and enjoyment of their land, New Jersey courts are guided by the principles established in the *Restatement (Second) of Torts*. See Smith v. Jersey Cent. Power & Light Co., 421 N.J. Super. 374, 389, 24 A.3d 300 (App. Div.), *certif. denied*, 209 N.J. 96, 35 A.3d 679 (2011). The Restatement (Second) of Torts § 822 (1979), states:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

In *Sheppard v. Twp. of Frankford*, we reversed the trial court's denial of plaintiffs' injunction to abate a nuisance [*12] after a jury found that the township created a continuing nuisance and did not have exemption from liability

under the TCA. 261 N.J. Super. 5, 7, 617 A.2d 666 (App. Div. 1992). The jury found a continuing nuisance where the township had a drainage system that discharged storm water into a drainage ditch between plaintiffs' properties and modifications by the township to this drainage system over the years enhanced, concentrated, and sped up the flow of the storm water into the drainage ditch causing flooding of plaintiffs' properties. Id. 8-9.

In *Posey*, a boy died as a result of an alleged dangerous condition caused by a stream and culvert located on public property which drained into and created a pond on private property. Supra, 171 N.J. at 175. Our Supreme Court reversed this court's affirmance of the trial court's grant of summary judgment in favor of the township, holding that a jury could have reasonably found that an integrated drainage system did exist on public property and that this created an unnatural and dangerous condition on private property. *Ibid.*

Here, the motion judge did not err when she determined that the flooding on Newton did not create a nuisance or a dangerous condition which **[*13]** would abrogate Monroe's immunity under the TCA. The motion judge concluded:

> The fact that Plaintiff's property floods during certain rain storms does not mean that it is a dangerous condition. Occasional flooding that occurs on plaintiff's property as a result of upstream development or just its existence as a low point is not a physical defect within the meaning of the Tort Claims Act.

Unlike the townships in *Sheppard* or *Posey*, Monroe does not have an integrated drainage system or conduits compelling storm water onto plaintiffs' property. Supra, 261 N.J. Super. 5; *supra*, 171 N.J. at 175. The water accrues naturally on plaintiffs' property by means of gravity, running from upstream properties to the lower points on Newton. The township is not affirmatively depositing water onto plaintiffs' property and it is not liable for water that naturally flows onto Newton but does not create a dangerous condition. Additionally, plaintiffs have not shown how Monroe has created "an unreasonable interference with the use and enjoyment of [their] land." Sans, supra, 29 N.J. at 448.

In Armstrong v. Francis Corporation, 20 N.J. 320, 327-329, 120 A.2d 4 (1956), our Supreme Court declared that the State would follow **[*14]** the "reasonable use rule" in cases where damages are sought by one landowner against the other as the result of the diversion of and expulsion of water. Under the "reasonable use rule," an owner or possessor of land is held liable for the "casting of surface waters from one's own land upon the land of another, in circumstances where the resultant material harm to the other was foreseen or foreseeable." Id. at 326.

The only affirmative action Monroe took was to grant construction permits to upstream Newton residents. Monroe is therefore not creating a nuisance on the plaintiffs' property.

Finally, we turn to plaintiffs' contention that the judge erred in granting Monroe's motion for summary judgment on plaintiffs' inverse condemnation claim. Inverse condemnation describes a proceeding in which land owners seek compensation for a taking of their property without the compensation required by the Fifth Amendment. Pinkowski v. Twp. of Montclair, 299 N.J. Super. 557, 575, 691 A.2d 837 (App. Div. 1997).

There is a two-part analysis which the court must consider when determining a claim for inverse condemnation. Plaintiffs must first demonstrate that it is more appropriate to deal with their claims using "takings **[*15]** law, as opposed to tort law." Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355 (2003). This tort-takings inquiry "requires consideration of whether the effects the plaintiff[s] experienced were the predictable result of the government's action, and whether the government's actions were sufficiently substantial to justify a takings remedy." *Ibid.* If the court determines that a takings remedy is appropriate, then the plaintiffs must establish that they "possessed a protectable property interest in what [they] allege[] the government has taken." *Ibid.*

There are three forms of government taking that can give rise to a claim for inverse condemnation: "'[1] a permanent physical occupation, [2] a physical invasion short of an occupation, and [3] a regulation that merely restricts the use of property.'" Smith v. Jersey Cent. Power & Light Co., 421 N.J. Super. 374, 386, 24 A.3d 300 (App. Div. 2011) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 430, 102 S. Ct. 3164, 3173, 73 L. Ed. 2d 868, 879 (1982). A direct physical taking may be found where the interference with plaintiffs' use of their property is temporary or intermittent, rather than permanent. Smith, supra, 421 N.J. Super. at 386.

[*16] However, this determination depends upon all the circumstances of the defendant's infringement upon the plaintiffs' use of their property, including the extent and duration of that infringement. *Ibid.*

Here, plaintiffs assert that the motion judge erred because they had a valid claim for inverse condemnation by direct physical taking. Contrary to plaintiffs' contentions, their property had not been taken by Monroe for use as a public storm water basin. Monroe did not perform an overt act on plaintiffs' property that resulted in a physical occupation. Monroe merely granted building permits to upstream neighbors. While the construction of impervious structures by upstream neighbors may have intensified the flooding of plaintiffs' property, Monroe's decision to grant permits is immune from liability. *See* N.J.S.A. 59:2-5; *Pinkowski, supra, 299 N.J. Super. at 575*. Thus, the motion judge did not err when she granted Monroe's motion for summary judgment. Plaintiffs' assertion that they have a cognizable claim for inverse condemnation by direct physical taking is not supported by the facts or the law.

Affirmed.

End of Document

Exhibit 12

Mignano v. Jim Sullivan, Inc.

Superior Court of New Jersey, Appellate Division

March 8, 2016, Argued; May 26, 2016, Decided

DOCKET NO. A-2995-12T2, A-3587-12T2, A-3732-12T2

Reporter
2016 N.J. Super. Unpub. LEXIS 1217 *; 2016 WL 3004855

MARC J. MIGNANO and JENNIFER L. MCGUCKIN-MIGNANO, as parents and Guardians ad Litem of ISAAC J. MIGNANO, a minor, on his behalf and for all others similarly situated, Plaintiffs, v. JIM SULLIVAN, INC., JIM SULLIVAN REAL ESTATE SERVICES, INC., NAVILLUS GROUP, a general partnership, JAMES SULLIVAN, JR., JAMES SULLIVAN, III, DREW A. SULLIVAN, SANDRA SULLIVAN-LYONS, and TERRI CLAY, Defendants-Appellants, and ACCUTHERM, INC., PHILIP J. GIULIANO, KIDDIE KOLLEGE DAYCARE & PRESCHOOL, INC., STEPHEN and BECKY BAUGHMAN, JULIE and MATTHEW LAWLOR, THEODORE MILLER, SGT. JOSEPH OLSEN, ROBERT ERRERA, WILLIAM ATKINSON, JAMES "CHIP" WOODS, and THE COUNTY OF GLOUCESTER, NEW JERSEY, Defendants, and THE TOWNSHIP OF FRANKLIN, NEW JERSEY, Defendant/Third-Party Plaintiff-Respondent, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES, NEW JERSEY DEPARTMENT OF HUMAN SERVICES DIVISION OF CHILDREN AND FAMILIES, and PNC BANK NATIONAL ASSOCIATION, SUCCESSOR TO MIDLANTIC BANK, Third-Party Defendants.WAYNE ADAIR, JR., in his own right and as father and Guardian ad Litem of minor plaintiffs, TAYLOR MINYON, JOEY ADAIR and WAYNE ADAIR, III, and on behalf of all others similarly situated, Plaintiffs, v. JIM SULLIVAN, INC., JIM SULLIVAN REAL ESTATE SERVICES, INC., NAVILLUS GROUP, LLC, JIM SULLIVAN, III, and JIM SULLIVAN, IV, Defendants-Appellants, and PHILIP J. GIULIANO, ACCUTHERM, INC., and COUNTY OF GLOUCESTER, Defendants, and NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Defendant-Respondent, and TOWNSHIP OF FRANKLIN, NEW JERSEY, Defendant/Third-Party Plaintiff-Respondent, v. NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES, NEW JERSEY DEPARTMENT OF HUMAN SERVICES DIVISION OF CHILDREN AND FAMILIES, and PNC BANK NATIONAL ASSOCIATION, SUCCESSOR TO MIDLANTIC BANK, Third-Party Defendants.JAMIE KAHANA, individually and as Guardian ad Litem for HALEY KAHANA and ROBERT KAHANA, III, minors, ANDREW FRANKS, and ROBERT KAHANA, JR., Plaintiffs, v. ACCUTHERM, INC., PHILIP J. GIULIANO, KIDDIE KOLLEGE DAYCARE & PRESCHOOL, INC., STEVEN and BECKY BAUGHM, JULIE and MATTHEW LAWLOR and COUNTY OF GLOUCESTER, Defendants, and JIM SULLIVAN, INC., JIM SULLIVAN REAL ESTATE SERVICES, INC., JAMES SULLIVAN, III, JAMES SULLIVAN, IV, and NAVILLUS GROUP, LLC, Defendants-Appellants, and NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Defendant-Respondent, and TOWNSHIP OF FRANKLIN, NEW JERSEY, Defendant/Third-Party Plaintiff-Respondent, v. NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES, NEW JERSEY DEPARTMENT OF HUMAN SERVICES DIVISION OF CHILDREN AND FAMILIES, and PNC BANK NATIONAL ASSOCIATION SUCCESSOR TO MIDLANTIC BANK, Third-Party Defendants.MARC J. MIGNANO and JENNIFER L. MCGUCKIN-MIGNANO, as parents and Guardians ad Litem of ISAAC J. MIGNANO, a minor, on his behalf and for all others similarly situated, Plaintiffs-Respondents/Cross-Appellants, v. JIM SULLIVAN, INC., JIM SULLIVAN REAL ESTATE SERVICES, INC., NAVILLUS GROUP, a general partnership, JAMES SULLIVAN, JR., JAMES SULLIVAN, III, DREW A. SULLIVAN, SANDRA SULLIVAN-LYONS, TERRI CLAY, ACCUTHERM, INC., PHILIP J. GIULIANO, KIDDIE KOLLEGE DAYCARE & PRESCHOOL, INC., STEPHEN and BECKY BAUGHMAN, JULIE and MATTHEW LAWLOR, THEODORE MILLER, SGT. JOSEPH OLSEN, WILLIAM ATKINSON, JAMES "CHIP" WOODS, and THE COUNTY OF GLOUCESTER, NEW JERSEY, Defendants, and ROBERT ERRERA, Defendant-Appellant/Cross-Respondent, and THE TOWNSHIP OF FRANKLIN, Defendant/Third-Party Plaintiff-Appellant/Cross-Respondent, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES, NEW JERSEY DEPARTMENT OF HUMAN SERVICES DIVISION OF CHILDREN AND FAMILIES, and PNC BANK NATIONAL ASSOCIATION, SUCCESSOR TO MIDLANTIC BANK, Third-Party

Defendants.WAYNE A. ADAIR, JR., in his own right and as father and Guardian ad Litem of minor plaintiffs, TAYLOR MINYON, JOEY ADAIR and WAYNE ADAIR III, and on behalf of all others similarly situated, Plaintiffs-Respondents/Cross-Appellants, v. JIM SULLIVAN, INC., JIM SULLIVAN REAL ESTATE SERVICES, INC., NAVILLUS GROUP, LLC, JIM SULLIVAN III, JIM SULLIVAN IV, PHILIP J. GIULIANO, ACCUTHERM, INC., NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and COUNTY OF GLOUCESTER, Defendants, and TOWNSHIP OF FRANKLIN, STATE OF NEW JERSEY, Defendant/Third-Party Plaintiff-Appellant/Cross-Respondent, v. NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES, NEW JERSEY DEPARTMENT OF HUMAN SERVICES DIVISION OF CHILDREN AND FAMILIES, and PNC BANK NATIONAL ASSOCIATION, SUCCESSOR TO MIDLANTIC BANK, Third-Party Defendants.JAMIE KAHANA, individually and as Guardian ad Litem for HALEY KAHANA and ROBERT KAHANA III, minors, ANDREW FRANKS, and ROBERT KAHANA, JR., Plaintiffs-Respondents/Cross-Appellants, v. ACCUTHERM, INC., PHILIP J. GIULIANO, JIM SULLIVAN, INC., JIM SULLIVAN REAL ESTATE SERVICES, INC., JAMES SULLIVAN, III, JAMES SULLIVAN, IV, NAVILLUS GROUP, LLC, KIDDIE KOLLEGE DAYCARE & PRESCHOOL, INC., STEVEN and BECKY BAUGHM, JULIE and MATTHEW LAWLOR, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and COUNTY OF GLOUCESTER, Defendants, and TOWNSHIP OF FRANKLIN, Defendant/Third-Party Plaintiff-Appellant/Cross-Respondent, v. NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES, NEW JERSEY DEPARTMENT OF HUMAN SERVICES DIVISION OF CHILDREN AND FAMILIES, and PNC BANK NATIONAL ASSOCIATION, SUCCESSOR TO MIDLANTIC BANK, Third-Party Defendants.MARC J. MIGNANO, and JENNIFER L. MCGUCKIN-MIGNANO, as parents and Guardians ad Litem of ISAAC J. MIGNANO, a minor, on his behalf and for all others similarly situated, Plaintiffs-Respondents/Cross-Appellants, v. JIM SULLIVAN, INC., JIM SULLIVAN REAL ESTATE SERVICES, INC., NAVILLUS GROUP, a general partnership, JAMES SULLIVAN, JR., JAMES SULLIVAN, III, DREW A. SULLIVAN, SANDRA SULLIVAN-LYONS, TERRI CLAY, ACCUTHERM, INC., PHILIP J. GIULIANO, KIDDIE KOLLEGE DAYCARE & PRESCHOOL, INC., STEPHEN and BECKY BAUGHMAN, JULIE and MATTHEW LAWLOR, THEODORE MILLER, SGT. JOSPEH OLSEN, ROBERT ERRERA, WILLIAM ATKINSON, JAMES "CHIP" WOODS, and THE COUNTY OF GLOUCESTER, NEW JERSEY, Defendants, and THE TOWNSHIP OF FRANKLIN, NEW JERSEY, Defendant/Third-Party Plaintiff, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES, NEW JERSEY DEPARTMENT OF HUMAN SERVICES DIVISION OF CHILDREN AND FAMILIES, and PNC BANK NATIONAL ASSOCIATION, SUCCESSOR TO MIDLANTIC BANK, Third-Party Defendants.WAYNE A. ADAIR, JR., in his own right and as father and Guardian ad Litem of minor plaintiffs, TAYLOR MINYON, JOEY ADAIR and WAYNE ADAIR III, and on behalf of all others similarly situated, Plaintiffs-Respondents/Cross-Appellants, v. JIM SULLIVAN, INC., JIM SULLIVAN REAL ESTATE SERVICES, INC., NAVILLUS GROUP, LLC, JIM SULLIVAN III, JIM SULLIVAN IV, PHILIP J. GIULIANO, ACCUTHERM, INC., and COUNTY OF GLOUCESTER, Defendants, and NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Defendant-Appellant/Cross-Respondent, and TOWNSHIP OF FRANKLIN, STATE OF NEW JERSEY, Defendant/Third-Party Plaintiff, v. NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES, NEW JERSEY DEPARTMENT OF HUMAN SERVICES DIVISION OF CHILDREN AND FAMILIES, and PNC BANK NATIONAL ASSOCIATION, SUCCESSOR TO MIDLANTIC BANK, Third-Party Defendants.JAMIE KAHANA, individually and as Guardian ad Litem for HALEY KAHANA and ROBERT KAHANA, III, minors, ANDREW FRANKS, and ROBERT KAHANA, JR., Plaintiffs-Respondents/Cross-Appellants, v. ACCUTHERM, INC., PHILIP J. GIULIANO, JIM SULLIVAN, INC., JIM SULLIVAN REAL ESTATE SERVICES, INC., JAMES SULLIVAN III, JAMES SULLIVAN IV, NAVILLUS GROUP, LLC, KIDDIE KOLLEGE DAYCARE & PRESCHOOL, INC., STEVEN and BECKY BAUGHM, JULIE and MATTHEW LAWLOR and COUNTY OF GLOUCESTER, Defendants, and NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Defendant-Appellant/Cross-Respondent, and TOWNSHIP OF FRANKLIN, Defendant/Third-Party Plaintiff, v. NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES, NEW JERSEY DEPARTMENT OF HUMAN SERVICES DIVISION OF CHILDREN AND FAMILIES, and PNC BANK NATIONAL ASSOCIATION, SUCCESSOR TO MIDLANTIC BANK, Third-Party Defendants.

Subsequent History: Certification denied by *Mignano v. Jim Sullivan, Inc., 2016 N.J. LEXIS 912 (N.J., Sept. 7, 2016)*

Certification denied by *Mignano v. Jim Sullivan, Inc., 2016 N.J. LEXIS 929 (N.J., Sept. 7, 2016)*

Certification denied by *Mignano v. Jim Sullivan, Inc., 2016 N.J. LEXIS 942 (N.J., Sept. 7, 2016)*

Prior History: **[*1]** On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Docket Nos. L-1309-06, L-1730-06, and L-1823-06.

Baughman v. United States Liab. Ins. Co., 662 F. Supp. 2d 386, 2009 U.S. Dist. LEXIS 125392 (D.N.J., 2009)
Navillus Group v. Accutherm Inc., 422 N.J. Super. 169, 27 A.3d 973, 2011 N.J. Super. LEXIS 157 (App.Div., 2011)

Core Terms

site, contamination, certificates, tax sale, mercury, daycare center, trial judge, employees, warn, plaintiffs', permits, testing, cross-appeal, remediation, immune, issuing, attorney's, issuance, summary judgment, settlement, impose liability, public entity, foreclosure, license, investigate, occupancy, custom, contaminated site, health department, state-created

Counsel: Alan C. Milstein argued the cause for appellants Jim Sullivan, Inc., Jim Sullivan Real Estate Services, Inc., Navillus Group, L.L.C., James Sullivan, Jr., Drew A. Sullivan, James Sullivan, III, Sandra Sullivan-Lyons, and Terri Clay in A-2995-12 (Sherman, Silverstein, Kohl, Rose & Podolsky, P.A., attorneys; Mr. Milstein, on the brief).

M. James Maley, Jr., argued the cause for respondent Township of Franklin in A-2995-12; appellants/cross-respondents Township of Franklin and Robert Errera and A-3587-12 (Maley & Associates, P.C., attorneys; Mr. Maley, Emily K. Givens, Erin E. Simone, and M. Michael Maley, on the briefs).

Randall B. Weaver, Deputy Attorney General, argued the cause for respondent in A-2995-12 and appellant/cross-respondent in A-3732-13 State of New Jersey, New Jersey Department of Environmental Protection (John J. Hoffman, Acting Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Mr. Weaver, on the briefs).

Thomas T. Booth, Jr., Michael J. DeBenedictis, and Stuart J. Lieberman argued the cause for respondents/cross-appellants **[*2]** in A-3587-12 and A-3732-12 (Locks Law Firm, LLC, DeBenedictis & DeBenedictis, LLC, Law Offices of Thomas T. Booth, Jr., LLC, and Lieberman & Blecher, P.C., attorneys; Mr. Booth, Mr. DeBenedictis, Mr. Lieberman, and Michael G. Sinkevich, Jr., on the briefs).

Judges: Before Judges Yannotti, St. John and Guadagno. The opinion of the court was delivered by YANNOTTI, P.J.A.D.

Opinion by: YANNOTTI

Opinion

The opinion of the court was delivered by

YANNOTTI, P.J.A.D.

These three appeals are calendared back-to-back and consolidated for the purpose of our opinion.

In A-3587-12, the Township of Franklin (Township) and Robert Errera (Errera) appeal from the trial court's judgment finding them liable under the Tort Claims Act (TCA), *N.J.S.A. 59:1-1 to 12-3*, and *42 U.S.C.A. § 1983* (*Section*

1983). The Township and Errera also appeal from the court's order awarding plaintiffs attorney's fees and costs pursuant to *42 U.S.C.A. § 1988*. Plaintiffs cross-appeal from the trial court's application of the collateral source doctrine to certain settlement funds, its denial of counsel fees under the TCA, and its refusal to enforce an alleged settlement agreement with the Township.

In A-3732-12, the State of New Jersey, Department of Environmental Protection (DEP), appeals from the judgment finding it liable to plaintiffs **[*3]** under the TCA. Plaintiffs cross-appeal and raise the same arguments they raise in A-3587-12, to the extent those arguments apply to the DEP.

In A-2995-12, the Sullivan defendants appeal from the trial court's orders granting summary judgment to the Township and the DEP, dismissing their fraud and negligence claims.

We address the three appeals in this opinion. For the reasons that follow, in A-3587-12, we reverse the judgment entered against the Township and Errera and the order awarding plaintiffs attorney's fees; and we affirm in part and dismiss in part on the cross-appeal. In A-3732-12, we reverse the judgment entered against the DEP and dismiss the cross-appeal. In A-2995-12, we affirm the grant of summary judgment to the Township and the DEP.

I.

A. *The Complaint.*

These appeals arise from class actions filed as a result of the operation of a daycare center by Kiddie Kollege Daycare & Preschool, Inc. (Kiddie Kollege) on property that was previously the site of Accutherm, Inc. (Accutherm), a thermometer factory. Plaintiffs are children who attended the daycare center, and adults who worked or visited the center. Plaintiffs alleged they had been exposed to toxic mercury on the site.

In **[*4]** these actions, plaintiffs named as defendants: (1) Accutherm and Philip J. Giuliano, the chief executive officer and sole shareholder of the company; (2) the Sullivan defendants, who were involved in the acquisition and conversion of the property for use as a daycare center; (3) the Township and Township employees Theodore Miller (Miller), Sergeant Joseph Olsen (Olsen), and Errera (collectively, the Township defendants); (4) the County of Gloucester (County) and County employees William Atkinson (Atkinson) and James Woods (Woods) (collectively, the County defendants); (5) the State of New Jersey, Department of Environmental Protection (DEP); (6) Kiddie Kollege; (7) Julie and Matthew Lawlor (the Lawlors), the initial owners of Kiddie Kollege; and (8) Stephen and Becky Baughman (the Baughmans), who later owned Kiddie Kollege.

Plaintiffs asserted various common law claims, as well as claims against the public entity defendants under *Section 1983*. They sought, among other relief, an order establishing a court-administered medical monitoring fund, punitive damages, and attorneys' fees.

The trial judge certified the matters as class actions, and thereafter the actions were consolidated. The judge later **[*5]** conducted a bench trial on plaintiffs' claims.

B. *Evidence Presented at Trial.*

1. *The Accutherm Property.*

In June 1984, Accutherm acquired property in the Township, where it operated a thermometer factory. Environmental contamination of the site first came to light in the late 1980s, at which time, the County health department investigated the property, in coordination with the State's Department of Health (DOH) and the DEP. Woods and Atkinson performed the investigation. The County found tetrachloroethene in the water. Blood testing of Accutherm's employees also revealed elevated levels of mercury. Giuliano told Woods he planned to clean up the property.

Because of the threat to the health of Accutherm's employees, the County filed a complaint with the federal Occupational Safety and Health Administration (OSHA), which thereafter investigated the complaint. In April 1988,

the DEP ordered Accutherm to immediately cease the discharge of industrial pollutants into the septic system on the property, and later directed the company to analyze and obtain a classification of the contents of the septic tank. There is no evidence that Accutherm complied with the DEP's directive.

In August 1989, **[*6]** OSHA issued a citation and notification of penalty to Accutherm, for its failure to provide its employees with a safe workplace due to the presence of mercury vapors. OSHA provided a copy of the citation to the Township. In April 1990, OSHA wrote a letter to the Township's Mayor, advising of the "serious health threat" posed by Accutherm's operations. OSHA noted that Giuliano had indicated he intended to sell the property, and OSHA stated that it was concerned the property would be sold to an unsuspecting buyer, who would be "saddled with the burden of th[e] contaminated building, while the current owner escapes cleaning up the problem he created."

OSHA provided a copy of the letter to the Township's construction official from 1987 to 2003. The Mayor also provided copies of the letter to the Township's Office of Emergency Management (OEM), and the County health department. The Mayor expected the County to handle the matter, in part because the Township had no role in remediating contaminated sites.

Miller did not remember receiving OSHA's letter. However, he recalled that around the time this letter was written, someone from the State or federal government came to his office and advised that **[*7]** the Accutherm building was contaminated with mercury, and was not to be occupied, used, or sold because it was unsafe.

In 1992, Accutherm ceased operations at the factory because it could not afford to clean up the property, and filed a petition for Chapter 11 bankruptcy. While the bankruptcy proceedings were pending, Midlantic National Bank (Midlantic) filed a foreclosure action against Accutherm and retained Environmental Waste Management Associates (EWMA) to undertake an environmental assessment of the property.

EWMA issued a report which stated that ambient air results for mercury vapor in the building exceeded permissible limits at all tested locations. The report also stated that free mercury had been observed at numerous locations within the structure.

EWMA recommended limiting human access to the building until interior mercury levels could be confirmed by long-term testing and laboratory analysis. It said persons entering the site should wear protective gear and should be decontaminated upon exiting. EWMA also recommended further testing, remediation, and notification to the County health department of the results of its assessment.

Due to the environmental contamination of the **[*8]** property, Midlantic elected to charge off Accutherm's loan balance, but nevertheless followed up on some of EWMA's recommendations. In September 1994, Midlantic's counsel wrote to Accutherm's attorney and provided a copy of EWMA's report. Midlantic's counsel asked Accutherm to notify the County's health department and a real estate broker involved in the matter of the contamination. Midlantic's counsel also asked that warning signs be posted on the property.

Accutherm's attorney forwarded the letter to the County. Several months later, Midlantic's counsel sent another letter to Accutherm's attorney. Midlantic's counsel requested the posting of signs on the property, and provided samples that could be used. Accutherm's attorney provided the letter to Giuliano, and forwarded the EWMA report to the County health department. Atkinson spoke with Olsen, one of the Township's police officers, who also worked on the Township's emergency management staff. Olsen provided his entire file on Accutherm to Atkinson, which included a copy of OSHA's letter to the Mayor. Atkinson contacted Accutherm's attorney, the DOH, and the DEP. Atkinson provided the DEP with the information Olsen had given to him. **[*9]**

In November 1994, the DEP informed Accutherm that it was required to comply with the Industrial Site Recovery Act (ISRA), *N.J.S.A. 13:1K-6 to -14*. Accutherm thereafter filed with the DEP a general information notice concerning its ISRA obligation. Accutherm noted that it was in bankruptcy and could not afford to pay the required filing fee.

Josh Gradwohl (Gradwohl) of the DEP understood that Accutherm was not going to comply with its ISRA obligation. He referred the matter to the DEP's compliance and enforcement section, which issued a letter dated April 7, 1995, ordering the company to clean up and remove the hazardous discharges on the property. Gradwohl explained that the DEP was required to exhaust all means for obtaining compliance by the responsible party before seeking assistance from the federal Environmental Protection Agency (EPA).

In July 1995, Midlantic's counsel wrote to Woods at the County's health department, and provided him with copies of prior correspondence with Accutherm's attorney and the reports concerning the mercury contamination at the property. Counsel expressed concern that no signs had been posted at the property, and prospective buyers had toured the building unaware of the **[*10]** potential risks. Counsel noted that the bank did not have possession or control of the property and did not believe it had the right to post signs there. Counsel thought it "prudent" to alert the County of the status of the matter.

Shortly thereafter, Woods sent Accutherm's attorney a letter urging that warning signs be posted on the property immediately and persons be restricted from entering the building pending a clean-up of the site. Copies of the letter were sent to Olsen and Gradwohl. Olsen placed the letter in his file. He did not, however, put signs on the property, nor did the County.

The DEP continued its ongoing ISRA enforcement efforts and placed the property on its Known Contaminated Site List. In August 1995, the DEP sent an investigator to examine the property. The DEP's investigator reported that residential properties were located adjacent to the site, which was un-fenced and did not have posted signs warning of the hazards inside the building. The investigator noted that the windows and doors of the building were locked, but one outer window was broken. The DEP took no steps to secure the property.

The DEP continued its efforts to obtain federal funding for a clean-up. **[*11]** In August 1995, the DEP wrote to the EPA, requesting that the site be considered for removal action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), *42 U.S.C.A. §§ 9601-9675*. In September and October 1995, the EPA performed testing at the property.

In January 1996, the EPA issued a mini-pollution report in which it stated:

> Based on air monitoring results, the potential for exposure to [mercury] vapor outside the building does not exist. Soil sampling data indicates that, though [mercury] is present in two samples, it is well below the Emergency Removal Guidelines. In addition, the material does not appear to be distributed over the entire property.
>
> Air monitoring inside the building did not indicate that any significant levels of [mercury] vapor were present. Wipe sample analytical did result in locating two areas where [mercury] was present in concentrations greater than the [DEP's] proposed contaminant levels. The building, however, appears to be structurally sound and secure, which greatly minimizes the possibility of a direct contact exposure to the material.
>
> Based on air monitoring, soil sample analysis, wipe sample analysis and the condition and security of the building **[*12]** and surrounding property, the site does not present an immediate threat to human health or the environment.

At that point, the DEP's efforts to obtain remediation of the site ended. The property remained contaminated. The DEP assigned the property the status of "awaiting assignment" on the Known Contamination Site List. That status is given to contaminated properties that pose no imminent threat to the public health, and where there is no active clean-up activity.

2. *Acquisition of the Property by Navillus Group.*

In April 1994, Accutherm ceased paying taxes on the property, and in 1994 and 1997, the Township sold tax sale certificates to FUNB of Florida for the unpaid taxes pursuant to the Tax Sale Law, *N.J.S.A. 54:5-19 to -137*. Also in 1994, Sullivan moved his real estate business to offices in a building across the street from the Accutherm site.

Sullivan is licensed as a real estate broker and as a property appraiser. Although Sullivan had lived most of his life in the Township, he denied any knowledge of the nature of Accutherm's business.

In 1999, Navillus Group, a general partnership in which Sullivan was partner, purchased the 1994 and 1997 tax sale certificates from FUNB. The property taxes remained in **[*13]** arrears. In 1999, Navillus purchased another tax sale certificate from the Township. Sullivan did not investigate the property before Navillus purchased the certificates, although he was aware of rumors that the property was contaminated.

Furthermore, the notices issued by the Township for the tax sales included a warning that the property involved may be industrial property subject to environment clean-up responsibilities under state law. The notices did not, however, specifically indicate that the Accutherm property was contaminated or subject to ISRA. Sullivan did not believe the general warning applied to the Accutherm site because he considered it to be commercial rather than industrial property.

Nevertheless, Sullivan investigated the property on his own. He obtained a title search that revealed Accutherm's former ownership of the site. Moreover, in January 2000, after Navillus purchased the December 1999 tax sale certificate, Sullivan discussed with his attorneys rumors that the property was contaminated. Thereafter, Sullivan's attorneys advised him that it would be in his "best interest" to secure an "independent opinion as to the environmental soundness of th[e] property."

Sullivan **[*14]** did not obtain such an opinion, nor did he take any other steps to determine whether the property was contaminated. Instead, Sullivan made inquiries about the property with various Township officials, including Philip Sartorio, who was the Township's director of community development between 1998 and November 2003.

Sartorio recalled speaking with Sullivan about his plans for the property and discussing the site's contamination issues. Later, Olsen was asked to give Sullivan information about the property, and he provided Sullivan with the EPA's mini-pollution report. Sullivan reviewed the report on his own and understood it to mean the property was safe. He also thought that if there was something "wrong" with the property, no one would issue him the necessary permits for its use.

In February 2000, Sullivan wrote to the DEP regarding his intent to "foreclose on the property and refurbish it." He stated that he had reviewed the EPA report, which had concluded that mercury had been found but "nothing was above acceptable levels." He asked whether the DEP had any additional information regarding the property.

The DEP did not respond to Sullivan's letter, and he never followed up with the **[*15]** department. In April 2000, Sullivan's attorneys wrote to Sullivan and confirmed that he intended to proceed with foreclosure on the tax sale certificates. The letter indicated that Sullivan told his attorneys that he had obtained an environmental assessment of the property. However, he had not done so.

In August 2000, Navillus commenced foreclosure proceedings on its tax liens. Final judgment in that action was entered in June 2001, at which time Navillus obtained title to the property.

3. *Permits and Licensing Activity.*

Around that time, the Sullivan defendants began to renovate the property, but they lacked the necessary permits. Miller became aware of the renovations and in July 2001 issued a stop work order and penalty. However, after applications were filed and the penalty paid, the Township issued permits for electrical, roofing, siding and plumbing work.

About a year later, Navillus applied to the County health department for a license to alter the property's septic system, and on July 24, 2002, the County issued the license and provided a copy to Miller. Atkinson testified that the County was not aware of any ongoing contamination at the site. The County thought the DEP and EPA **[*16]** had handled or were handling those issues.

In August 2002, Navillus transferred title to Jim Sullivan, Inc., a corporation formed by Sullivan's father, which employed Sullivan. Sullivan's siblings Drew Sullivan, Terri Clay, and Sandra Sullivan-Lyons also were employed by the company, and they were partners in Navillus.

Thereafter, Sullivan advertised the property for sale or lease, and the Lawlors approached him with the idea of leasing the property for use as a daycare center. Sullivan told the Lawlors they were responsible for obtaining any necessary permits or variances. Sullivan claimed he provided the Lawlors with a copy of the EPA's mini-pollution report.

Sometime in 2003, Julie Lawlor went to the Township's zoning office and inquired as to whether the property could be used as a daycare center. Errera, the Township's zoning and code enforcement officer from February 2002 to May 2010, told her that it could be. However, Errera went to Sartorio, who was his supervisor, and expressed concerns about use of the property as a daycare center, in light of its history and contamination.

Sartorio checked the DEP's website, or a hard copy of the list of known contaminated sites, and noted **[*17]** that the property was not on the list. Errera was still concerned, so Sartorio phoned the DEP and left a message, asking that someone contact Errera. Sartorio also told Errera to call Sullivan and ask for a copy of the EPA mini-pollution report, and to confirm with the DEP that the site had either been cleaned up or remained contaminated.

In September 2003, Errera spoke with Gradwohl at the DEP and stated that there was a plan to use the property as a daycare center. Errera recalled being told that the site was listed as "NFA." Errera did not know what that meant and asked Sartorio, who told him that NFA status means the case had been closed. Therefore, Errera thought there were no current environmental concerns about the property.

Gradwohl testified, however, that he told Errera that an NFA letter had not been issued for the property, the site had not been remediated, and it was still contaminated. According to Gradwohl, Errera was told that it would be inappropriate to put anyone in the building. Gradwohl testified that there was "no way [he] would have said something that would have in any way implied that the site was clean and suitable for occupancy."

Gradwohl posted an electronic **[*18]** note of his conversation with Errera, which supported his recollection. According to the note, Gradwohl told Errera that no NFA approval had been issued, and converting the property to a daycare center was "NOT recommended." Gradwohl did not follow up on this conversation since he did not believe anything else needed to be done.

Around this time, the Lawlors approached Sullivan about purchasing the property and presented him with documentation from a bank indicating that the bank required information from the DEP and an NFA letter. Sullivan sought records from the DEP regarding the site, and the DEP provided a copy of certain records, including the EPA's mini-pollution report. Apparently as an oversight, the DEP's ISRA records were not provided.

Meanwhile, work continued on the property. In November 2003, the Lawlors sought a zoning permit to allow the operation of a daycare center, and Errera asked for written documentation that the environmental contamination had been remediated. Sullivan eventually provided Errera with a copy of the EPA's report, highlighting the statement that the property presented no immediate threat to human health or the environment.

Errera apparently only read **[*19]** the highlighted statement. He brought the matter to Sartorio, who instructed him to issue the permit. In January 2004, the Township's construction officer issued a temporary certificate of occupancy (CO), and in February 2004, a final CO was issued. Thereafter, Kiddie Kollege operated on the property for about two years, through July 2006.

4. *Closure of Kiddie Kollege*.

In late 2005 or early 2006, the DEP placed the Accutherm site on a list of properties to be re-evaluated. Upon inspecting the site, the DEP discovered that it was being used as a child care facility. In April 2006, the DEP contacted Sullivan and ordered that the site be tested. Sullivan retained an environmental firm to perform that work.

The initial test results revealed mercury vapor, as well as mercury in wipe and vacuum samples, both in the basement and on the first floor of the building, with the air sample results registering well above actionable federal standards. On July 28, 2006, the daycare center was closed on an emergent basis, at the direction of the DEP and the DOH.

5. *Expert Testimony.*

The State conducted urine tests of mercury-exposed individuals. Based on those test results, the State believed that health **[*20]** impacts were not expected, due to the level of mercury found in the samples tested. The State's review of individuals' medical records also revealed no symptoms, signs or conditions consistent with mercury exposures.

Plaintiffs presented expert testimony in toxicology from John Norris, Ph.D., and in neuropsychology from David Hartman, Ph.D. Dr. Norris testified that, due to their exposure to mercury at the daycare center, the class members had a continued risk to their central nervous and immune systems, with the child class members at greater risk than the adult members because they had a higher sensitivity to mercury. He recommended neuropsychological and immunological testing, while Dr. Hartman testified that neuropsychological testing was warranted due to mercury's known neurotoxicity.

Defendants presented three rebuttal experts: Bruce J. Shenker, Ph.D., an expert in immunology; Margit Lukk Bleecker, M.D., Ph.D., an expert in neurology and neurotoxicology; and David C. Bellinger, Ph.D., an expert in pediatric neurophsychology, epidemiology, and neurotoxicological psychology. Dr. Shenker opined that the adults and children in the class were not at risk for developing an immunological **[*21]** disease or compromised immune system due to the mercury exposure.

Dr. Bleecker testified that, given their limited exposure and their urine test results, adult members of the class could not develop mercury toxicity, and they were not at greater risk of developing or having a neuropsychological disease or a compromised immune system. According to Bleecker, the adult testing proposed by plaintiffs' experts was unreasonable and unnecessary.

Furthermore, Dr. Bellinger would not expect mercury toxicity in the child class members based on their test results, and he disagreed that the child class members were more vulnerable than the adult class members. He opined that there was no value in the neuropsychological testing proposed by plaintiffs' experts because those tests would not reveal anything tied to mercury specifically, and the proposed tests were not warranted for individuals who were not suffering from any symptoms that required intervention.

C. *The Trial Court's Decision, and Post-Trial Activity.*

On January 11, 2011, the trial judge rendered an oral decision on the record, which assessed liability against the Sullivan defendants (35%), the Township defendants (35%), the County defendants **[*22]** (20%), and the DEP (10%). The judge determined that a $1.5 million medical monitoring fund should be established, but only for the benefit of the children class members and for neuropsychological tests only. Thereafter, the trial judge retired and another judge assumed responsibility for the case. In June 2011, the court entered judgment in accordance with the trial judge's decision.

In August 2011, we reversed the trial court's order in a related matter, which had vacated the tax foreclosure judgment and restored ownership of the property to Accutherm. *Navillus Group v. Accutherm, Inc., 422 N.J. Super. 169, 172, 27 A.3d 973 (App. Div. 2011), certif. denied, 209 N.J. 232, 36 A.3d 1064 (2012)*. We held that the trial court had erroneously determined that a tax foreclosure judgment could be set aside pursuant to a provision of ISRA, which allows for the voiding of a sale or transfer of an industrial establishment in the event the transferor fails to remediate the property and obtain DEP approval. *Id. at 180-83, 27 A.3d 973*.

We observed that, when Navillus and Jim Sullivan, Inc. purchased the tax sale certificates, they had sufficient information to put them on notice of possible environmental contamination of the property, and the Tax Sale Law

places the risk of discovering facts that might affect the value of the property upon the **[*23]** purchasers of the certificates. *Id. at 183, 27 A.3d 973*.

Thereafter, in this case, the trial court denied motions by the Township for relief from the judgment, based upon our decision in *Navillus*. In November 2011, the Sullivan defendants filed a consolidated amended cross-claim against the Township and third-party claim against the DEP, asserting causes of action for negligence and fraud.

In March 2012, the judge entered an order which denied a motion by plaintiffs to enforce a purported settlement between plaintiffs and the Township, and granted the Township's motion to bar disclosure of confidential mediation communications regarding the alleged settlement.

In April 2012, the judge determined that all of the Sullivan/Baughman settlement proceeds would be deemed a collateral source of recovery under *N.J.S.A. 59:9-2(e)*, thereby reducing the damages payable by the Township and the DEP. The judge also ruled that the Township and the DEP were not liable for counsel fees under the TCA.

In October 2012, the judge awarded attorneys' fees to plaintiffs pursuant to *42 U.S.C.A. § 1988(b)*. The fees were awarded only with regard to the *Section 1983* claims, on which only the Township and Errera had been found liable.

In August 2012, the DEP and the Township filed motions **[*24]** for summary judgment on the claims asserted by the Sullivan defendants. The judge entered orders dated February 22, 2013, granting the motions for reasons stated on the record on October 12, 2012, and in a written opinion dated December 10, 2012.

We note that, while the appeals were pending, we affirmed a judgment entered by the Law Division imposing liability upon Navillus, the Navillus general partners, and Jim Sullivan, Inc. for the remediation of the Accutherm site pursuant to the Spill Compensation and Control Act, *N.J.S.A. 58:10-23.11 to -23.11z*. *N.J. Dep't of Envtl. Prot. v. Navillus Grp., No. A-4726-13T3 [slip op. at 29], 2016 N.J. Super. Unpub. LEXIS 77 (App. Div. Jan. 14, 2016)*. We held, however, that there was insufficient evidence on the record to pierce the corporate veil of Jim Sullivan, Inc. or impose liability on the basis of unjust enrichment, and remanded for further proceedings on these issues. *Ibid.* On April 29, 2016, the Supreme Court denied certification in that case. *___ N.J. ___, 2016 N.J. LEXIS 471 (2016)*.

II.

We turn first to the Township and Errera's appeal, and plaintiffs' cross-appeal. The Township and Errera argue that the trial judge erred by finding them liable under the TCA. They further argue that the judge erred by finding them liable under *Section 1983* and by awarding **[*25]** plaintiffs attorneys' fees pursuant to *42 U.S.C.A. § 1988(b)*.

We note initially that the findings of fact of a trial judge will not be disturbed on appeal when supported by competent, relevant, and reasonably credible evidence in the record. *Zaman v. Felton, 219 N.J. 199, 215, 98 A.3d 503 (2014)*; *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484, 323 A.2d 495 (1974)*. However, the trial judge's legal determinations are subject to de novo review. *Zaman, supra, 219 N.J. at 216, 98 A.3d 503*.

A. *The Township's Liability Under the TCA.*

1. *Negligence.*

Here, the trial judge found that the Township was liable under the TCA because its employees knew that the Accutherm site was contaminated with mercury, and had the authority to warn the public and stop development of the site as a daycare center by refusing to issue the necessary permits, but failed to do so.

The judge observed that the record was "replete with evidence" that the "municipal officials had knowledge concerning the contamination of the Accutherm site before it was approved to become a daycare center, and even after it was established as a daycare center." The judge stated that "everyone" had pointed "fingers everywhere else" but "unbelievably, the approvals were granted and the Kiddie Kollege was opened."

The judge determined that the Township was liable for the negligence of its employees, and that such negligence **[*26]** justified imposition of liability under the TCA, specifically N.J.S.A. 59:2-2(a). The judge rejected the Township's claim that it was immune from liability in this matter.

On appeal, the Township and Errera argue that the judge erred by failing to recognize the immunities afforded to them under the TCA and the common law. We agree.

As noted, in finding the Township liable, the trial judge relied upon N.J.S.A. 59:2-2(a), which states, "A public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances." However, this liability provision is subject to the immunities enumerated in the TCA. N.J.S.A. 59:2-1(b); *Tice v. Cramer, 133 N.J. 347, 355-56, 627 A.2d 1090 (1993)*; *Turner v. Twp. of Irvington, 430 N.J. Super. 274, 283, 63 A.3d 1233 (App. Div. 2013)*.

Here, the trial judge found that the Township was liable due to the negligent issuance of construction, occupancy and zoning permits that allowed the operation of the daycare center on the contaminated property. Such actions are immune from liability under N.J.S.A. 59:2-5, which provides that:

> [a] public entity is not liable for an injury caused by the issuance . . . of . . . any permit, license, certificate, approval, order, or similar authorization where the public entity or public employee **[*27]** is authorized by law to determine whether or not such authorization should be issued . . . .

Interpreting this immunity provision, our Supreme Court has stated:

> Licensing activity is a vital exercise of governmental authority. In this State there are literally millions of licenses, certificates, permits and the like applied for, issued, renewed or denied. It is inevitable that with such a staggering volume of activity, mistakes, both judgmental and ministerial, will be made. The purpose of the immunity is to protect the licensing function and permit it to operate free from possible harassment and the threat of tort liability.
>
> [*Malloy v. State, 76 N.J. 515, 521, 388 A.2d 622 (1978)*.]

Thus, the immunity granted to a public entity's permit activity "is pervasive and applies to all phases of the licensing function, whether the governmental acts be classified as discretionary or ministerial." *Id. at 520, 388 A.2d 622*. N.J.S.A. 59:2-5 therefore precludes the trial court's finding of liability based upon the Township's issuance of construction, occupancy and zoning permits.

The trial judge also found that the Township was liable due to its failure to "properly expose and act upon knowledge" of contamination at the Accutherm site. We recognize that the Township and its officials could **[*28]** have taken actions to warn the public with regard to the contamination of the Accutherm property. However, any decision to take or not take such actions was discretionary, not ministerial as found by the trial judge. The failure to take such actions is immune from liability under the TCA.

A public entity cannot be held liable for the exercise of discretion in carrying out governmental functions. *See* N.J.S.A. 59:2-3(a), (c), (d); *S.P. v. Newark Police Dep't, 428 N.J. Super. 210, 230, 52 A.3d 178 (App. Div. 2012)* (noting that discretionary acts call for exercise of deliberation and judgment, examining facts, reaching reasoned conclusions, and acting on conclusions in a way not specifically directed).

In addition, the Township and its employees have immunity under the TCA for the failure to adopt or enforce a law. *See* N.J.S.A. 59:2-4. The Township and its employees also have common law immunity for nonfeasance. *See* N.J.S.A. 59:1-2 ("government should not have the duty to do everything that might be done"); *Lentini v. Montclair, 122 N.J.L. 355, 356, 5 A.2d 692 (Sup. Ct. 1939)* (holding that a public entity is not liable for the nonfeasance of its employees and agents unless such liability is established by "positive statutory law").

Plaintiffs argue, however, that the Township had a duty to act with regard to the contamination of the site because it involved "a situation of an emergent and high **[*29]** risk nature," compelling an urgent response to warn the public. In support of this argument, plaintiffs rely upon Bergen v. Koppenal, 52 N.J. 478, 246 A.2d 442 (1968).

In *Koppenal*, the Court held that a police officer may have a duty to act if the officer "learns of an emergent road condition which is likely not to be observed by a motorist and which holds an unusual risk of injury." Id. at 480, 246 A.2d 442. The Court held that in determining whether a municipality could be liable in such circumstances, the finder of fact should consider whether, at the time of the emergency, the police force had competing demands and whether the failure to deploy the police was palpably unreasonable. *Ibid.*

Plaintiffs also rely upon Wuethrich v. Delia, 134 N.J. Super. 400, 341 A.2d 365 (Law Div. 1975), *aff'd*, 155 N.J. Super. 324, 382 A.2d 929 (App. Div.), *certif. denied*, 77 N.J. 486, 391 A.2d 500 (1978). In that case, the plaintiff claimed that the police department had been notified that an individual was menacing members of the public with a firearm a short distance from police headquarters. Id. at 405, 341 A.2d 365. The police did not respond to this information. *Ibid.*

A short time later, the individual shot a person in the head with a gun, killing him instantly. *Ibid.* The court held that, under the circumstances, the police had a non-discretionary duty to investigate the warning, and a jury could find the municipality liable for failing **[*30]** to do so. Id. at 411, 414, 341 A.2d 365. The court indicated that the jury should consider any competing demands that police may have had at the time, and determine whether the decision not to investigate was "palpably unreasonable." Id. at 414, 341 A.2d 365.

We are convinced that plaintiffs' reliance upon Koppenal and Wuethrich is misplaced. As the record shows, this matter involves private property located in the Township, which was discovered to be contaminated in the late 1980s, and which remained contaminated for more than a decade after it was abandoned and unoccupied.

The property did not present an immediate threat about which the Township had a duty to warn the public. Indeed, neither the DEP nor the EPA viewed the property as requiring immediate action to clean up the mercury contamination. We conclude that, under these circumstances, the Township did not have a non-discretionary duty to warn the public of the contamination.

Plaintiffs also cite Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 625 A.2d 1110 (1993), in support of their contention that the Township had a duty to warn the public of the contamination. In *Hopkins*, the Court held that real estate broker had a duty to conduct a reasonable inspection and warn prospective buyers and visitors who tour an open house. Id. at 448, 625 A.2d 1110. The Court explained **[*31]** that the duty to inspect and warn arises from the professional services undertaken by a broker attempting to sell the house on behalf of the owner, when the broker has an adequate opportunity to undertake the inspection. *Ibid.* The duty is limited to defects reasonably discoverable through ordinary inspection. *Ibid.*

Hopkins does not, however, support the imposition of liability upon the Township in this matter. Here, the Township neither owned nor possessed the property, nor did it ever invite citizens onto the property. We therefore reject plaintiffs' contention that the Township had a duty to warn the public of dangers posed by contamination of the Accutherm site.

2. *Public Nuisance.*

The Township further argues that the trial judge erred by finding it liable for creating a public nuisance. Again, we agree.

A public nuisance is defined by the Restatement (Second) of Torts, § 821B (1979), as follows:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public **[*32]** peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Claims against a public entity for creating a public nuisance are subject to the TCA. *Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 181, 793 A.2d 607 (2002)* (citing *N.J.S.A. 59:2-1(a)*); *Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 97-98, 675 A.2d 1077 (1986)*; *Birchwood Lakes Colony Club, Inc. v. Borough of Medford Lakes, 90 N.J. 582, 587, 593-96, 449 A.2d 472 (1982)*. "[A] public entity may be liable for creating a nuisance under the TCA," by maintaining a dangerous condition on public property, *N.J.S.A. 59:4-2*, or "for creating a hazardous condition on the property of another." *Posey, supra, 171 N.J. at 185, 793 A.2d 607*.

For purposes of the TCA, public property is property that is owned or controlled by the public entity. *N.J.S.A. 59:4-1(c)*. Here, the property is private property that was owned by Accutherm and thereafter by Navillus and Jim Sullivan, Inc. Moreover, there is no evidence that the Township created the dangerous condition of the property. Indeed, the Township played no role in the contamination of the site.

Plaintiffs argue that the Township may be held liable for creating a nuisance because it granted the permits which allowed the property to be used as a daycare center. **[*33]** We disagree. If the property was dangerous, it was because it was contaminated. The issuance of the zoning or occupancy permit did not create that condition. In any event, as we stated previously, the Township is immune under the TCA for its permitting activities.

B. *Section 1983 Liability of The Township and Errera.*

The Township and Errera argue that the judge erred by finding them liable under *Section 1983*, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .
>
> [*42 U.S.C.A. § 1983*.]

Section 1983 "does not, by its own terms, create substantive rights." *Kaucher v. Cnty. of Bucks, 455 F.3d 418, 423 (3d Cir. 2006)*. Rather, it is "a means of vindicating rights guaranteed in the United States Constitution and federal statutes." *Gormley v. Wood-El, 218 N.J. 72, 97, 93 A.3d 344 (2014)*; *Gonzales v. City of Camden, 357 N.J. Super. 339, 345, 815 A.2d 489 (App. Div. 2003)*. To determine whether a plaintiff has validly stated a claim under *Section 1983*, the court must first identify the constitutional right violated. *Kaucher, supra, 455 F.3d at 423*.

1. *Errera.*

The judge found Errera liable under **[*34]** *Section 1983* based on his issuance of the zoning permit. The judge held that, by issuing the permit, Errera violated plaintiff's right to protection from harm resulting from a state-created danger, a right protected by the substantive due process guarantee of the *Fourteenth Amendment to the United States Constitution*. *See Kaucher, supra, 455 F.3d at 431*; *Gormley, supra, 218 N.J. at 98-101, 93 A.3d 344*.

In *Gormley*, the Court adopted the four-factor test for *Section 1983* claims based upon a state-created danger. *Id. at 101, 112, 93 A.3d 344* (citing *Bright v. Westmoreland Cnty, 443 F.3d. 276, 281 (3d Cir. 2006)*, *cert. denied*, *549 U.S. 1264, 127 S. Ct. 1483, 167 L. Ed. 2d 228 (2007)*). Under this test, the plaintiff must establish that (1) the harm

ultimately caused was "foreseeable and fairly direct"; (2) the public employee who created the danger acted with a degree of culpability that shocks the conscience; (3) the plaintiff and the state had a relationship from which it could be concluded that the plaintiff was foreseeable victim of the state's actions, rather than merely a member of the general public; and (4) the state actor affirmatively used his or her authority, which created a danger to the plaintiff or made the plaintiff more vulnerable to danger than if the state had not acted at all. *Id. at 101, 93 A.3d 344* (citing *Bright, supra, 443 F.3d at 281*).

Here, the evidence does not support the trial judge's legal conclusion that Errera's action in issuing the zoning permit meets the test for a state-created danger under *Gormley*. Clearly, **[*35]** Errera was negligent in doing so, as the trial judge found. However, we cannot conclude that his actions were so egregious as to shock the conscience. We note that Errera had no education or experience in environmental matters. His primary role as zoning official was to determine whether use of the property as a daycare center was permitted by the Township's zoning ordinance.

The permit merely indicated that the proposed use was allowed. It was not a representation that the property was environmentally safe for use as a daycare center. We recognize that Gradwohl told Errera the property had not been cleaned up. He also recommended against its use as a daycare center. Even so, Errera misunderstood the meaning of NFA status and may have reasonably believed there were no current concerns about the property.

2. *The Township.*

a. *State-created Danger.*

The trial judge found the Township liable under *Section 1983* on the theory that it was responsible for a state-created danger. The judge based this finding upon the Township's issuance of the tax sale certificates and its participation in the tax sale foreclosure process, which allowed Navillus and later Jim Sullivan, Inc. to obtain title to the property. **[*36]** We conclude, however, that the trial judge erred as a matter of law in finding that plaintiffs met the four-factor test under *Gormley* for imposing liability upon the Township on this basis.

Here, the Township sold the tax certificates pursuant to the Tax Sale Law. When doing so, the Township informed purchasers of the certificates that industrial property might be subject to environmental cleanup responsibilities. As noted previously, purchasers of the tax sale certificates are responsible for discovering any facts, such as environmental contamination, that might have an impact upon the value of the property. *Navillus, supra, 422 N.J. Super. at 183, 27 A.3d 973*.

Therefore, the Township's actions in issuing the tax sale certificates and participating in the tax foreclosure were not a direct and foreseeable cause of any harm to plaintiffs, and these actions do not shock the conscience. Furthermore, plaintiffs were not foreseeable victims of the Township's actions because at the time the tax sale certificates were sold and Navillus acquired the property in the foreclosure process, the Township could not have anticipated that a daycare center would operate on the site.

The trial judge also imposed liability upon the Township pursuant to *Section 1983* based **[*37]** on the issuance of construction permits for the property. We conclude that the judge erred as a matter of law in doing so because evidence regarding the issuance of these permits also fails to meet the four-part test for a state-created danger under *Gormley*.

Plaintiffs did not establish that issuance of the construction permits was the direct or foreseeable cause of any harm suffered by the children exposed to mercury at the daycare center. The record shows that at the time the permits were issued, there was no plan to operate a daycare center on the property. Even if the officials were negligent in issuing the permits, their actions were not egregious and do not shock the conscience.

In addition, the judge imposed liability upon the Township based upon the issuance of the zoning and occupancy permits. However, as we stated previously, the judge erred as a matter of law by holding Errera personally liable for issuing the zoning permit. That conclusion also precludes the imposition of liability upon the Township on that basis.

Furthermore, the issuance of the occupancy permits may have been negligent, but, like the Township's other permitting actions, the actions were not shocking to **[*38]** the conscience.

b. *Failure to Train Employees.*

The trial judge found that the Township was liable under *Section 1983* on the basis of its failure to train its employees in certain respects. The judge determined that the Township was aware that its employees were involved in the sale of tax sale certificates for property within the municipality, and they might face situations in which tax sale certificates were being sold for contaminated property.

The judge found that the Township knew that the dangers from selling tax sale certificates could be lessened if the employees were trained or instructed to consult the files of its OEM, which included information on contaminated sites. The judge determined that the Township's failure to train its employees in this respect was, at a minimum, reckless indifference, if not willful blindness.

To impose liability under *Section 1983* on this basis, plaintiffs were required to establish that the Township's failure to train its employees in a particular manner constituted deliberate indifference to the constitutional rights of persons affected thereby, such that the failure could be considered an actionable policy or custom; and the failure to train was the proximate cause of **[*39]** the injuries sustained. *City of Canton, Ohio v. Harris, 489 U.S. 378, 388-92, 109 S. Ct. 1197, 1204-06, 103 L. Ed. 2d 412, 426-29 (1989)*; *Thomas v. Cumberland Cnty., 749 F.3d 217, 222 (3d Cir. 2014)*. Deliberate indifference is a very high standard to satisfy, and it usually requires proof of "[a] pattern of similar constitutional violations by untrained employees." *Connick v. Thompson, 563 U.S. 51, 62 131 S. Ct. 1350, 1360, 179 L. Ed. 2d 417, 427 (2011)*; *Thomas, supra, 749 F.3d at 223*.

We are convinced that the evidence does not support the legal conclusion that the Township acted with deliberate indifference to the possibility that a tax sale certificate could be issued for a contaminated site and create an unconstitutional state-created danger. As we noted previously, when the tax sale certificates were issued for the Accutherm property, the Township notified the potential purchasers that industrial sites may have environmental cleanup responsibilities.

Moreover, under the Tax Sale Law, the burden is on the purchaser to familiarize itself with potential environmental hazards that could affect the value of the property. *Navillus, supra, 422 N.J. Super. at 183, 27 A.3d 973*. In addition, there was no evidence that any prior sale of a tax sale certificate in the Township resulted in the use or occupancy of a contaminated site.

Thus, the evidence does not support the trial judge's legal conclusion that the Township acted with deliberate indifference to any potential constitutional violation arising from a failure to train its **[*40]** employees to consult the OEM files for evidence of contamination before issuing a tax sale certificate.

c. *Unlawful Policy or Custom.*

The trial judge determined that the Township was liable under *Section 1983* for maintaining an unlawful policy or custom with regard to the sale of tax sale certificates on contaminated sites. The judge found that the Township maintained a policy or custom of failing to check its OEM files to determine if a site was contaminated before issuing tax sale certificates relating to that property.

The judge also determined that the Township maintained a policy or custom of issuing general tax sale notices that merely mentioned that industrial property might be contaminated. We are convinced the judge erred as a matter of law by imposing liability on the Township for these reasons.

A municipality may not be held vicariously liable under *Section 1983* for the unconstitutional acts of its employees, unless the acts are the result of a municipal policy or custom. *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690-91, 98 S. Ct. 2018, 2035-36, 56 L. Ed. 2d 611, 635-36 (1978)*; *Loigman v. Twp. Comm. of Middletown, 185 N.J. 566, 590, 889 A.2d 426 (2006)*. A municipal employee's unconstitutional act will be considered an act of official

government policy if the employee had final policy-making authority, or if the employee's unconstitutional act was ratified by an employee with **[*41]** final policy-making authority. *Id. at 590-91, 889 A.2d 426*; *Plemmons v. Blue Chip Ins. Servs., Inc., 387 N.J. Super. 551, 571, 904 A.2d 825 (App. Div. 2006)*.

However, a plaintiff may establish a custom "by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law." *Watson v. Abington Twp., 478 F.3d 144, 155-56 (3d Cir. 2007)* (citations omitted). Thus, "custom may be established by proving knowledge of, and acquiescence to, a practice." *Id. at 156*.

Plaintiffs have not shown that the Township's issuance of the tax sale certificates with regard to the Accutherm site were unconstitutional acts. These acts did not constitute a state-created danger, and they were not the result of an actionable failure-to-train.

We accordingly conclude that the trial judge erred by finding the Township and Errera liable under the TCA and *Section 1983*. We therefore reverse the judgment entered against these parties and the order awarding plaintiffs attorney's fees pursuant to *42 U.S.C.A. § 1988*.

We note that, in their appeal, the Township and Errera also argue that the trial court erred by relying upon its prior decision in the *Navillus* case, and by misapplying the legal standard for establishing a medical monitoring fund. Because the judgment against the Township and Errera is reversed, we need not address these issues.

C. *Plaintiff's **[*42]** Cross-Appeal.*

In their cross-appeal, plaintiffs argue that the trial court erred by denying their motion to enforce a settlement with the Township. Plaintiffs' arguments on this issue are without sufficient merit to warrant extended discussion. *R. 2:11-3(e)(1)(E)*. We affirm the denial of plaintiffs' motion to enforce the purported settlement substantially for the reasons stated by the motion judge on the record on March 14, 2012.

We note that the motion judge had ordered the parties to participate in post-trial mediation. *R. 1:40-4*. Communications in a mediation session are not subject to discovery unless permitted by the New Jersey Uniform Mediation Act, *N.J.S.A. 2A:23C-1 to -13*. *See R. 1:40-4(c)*. Here, there was no settlement agreement signed by the parties in mediation, and no waiver of the privilege applicable to mediation communications. We are therefore convinced the motion judge correctly determined that plaintiffs' motion to enforce the purported agreement should be denied.

Plaintiffs further argue that the motion judge erred by applying the collateral source doctrine to the Sullivan/Baughman settlement monies, and by refusing to award them attorney's fees pursuant to the TCA. In view of our decision setting aside the judgment entered **[*43]** against the Township under the TCA, these issues are moot.

Accordingly, on the appeal, we reverse the judgment entered against the Township and Errera and the order awarding plaintiffs attorneys' fees pursuant to *42 U.S.C.A. § 1988(b)*. On the cross-appeal, we affirm the denial of plaintiffs' motion to enforce the purported settlement with the Township, and dismiss the remainder of the cross-appeal.

III.

We turn to the DEP's appeal from the final judgment holding it liable under the TCA for its actions or omissions with regard to the Accutherm property, and to plaintiffs' cross-appeal.

The trial judge found the DEP liable for: (1) changing the classification of the subject property from one of an immediate environmental concern to one awaiting assignment; (2) failing to place warning signs restricting access to the property until the site was cleaned up; and (3) failing to notify the DOH of the contamination so that a license would not be issued for use of the property as a daycare center.

The judge held the DEP liable under N.J.S.A. 59:2-2(a), concluding that the acts of its employees were ministerial and that no immunities applied. The judge stated that the DEP "failed to properly expose and act upon knowledge that [it] had **[*44]** regarding the contamination of the Kiddie Kollege site prior to and after its opening as a daycare center."

On appeal, the DEP argues that the trial court erred as a matter of law because it is immune from liability under the TCA with regard to its actions or omissions regarding the Accutherm site. We agree. We are convinced that, even if the DEP's actions were negligent, and those actions were a proximate cause of any harm to plaintiffs, the DEP is immune from liability in this matter.

As we have explained, the DEP took various actions to address the environmental contamination at the Accutherm site. It inspected the property to determine if any security measures were necessary, but determined that none were required at that time because the property was not occupied and the building was locked. The DEP also sought remediation by the property owner and assistance with remediation from the EPA.

In addition, the DEP placed the property on the Known Contaminated Site List pending the availability of funds necessary for remediation, although it later removed the property from the list. The DEP ranked the property against other contaminated properties in the State to prioritize the expenditure **[*45]** of public funds. The DEP also provided accurate information about the property to the Sullivans and to Errera in response to their inquiries.

Under the TCA, a public entity may be liable for injuries proximately caused by the negligence of its employees acting within the scope of their employment. N.J.S.A. 59:2-2(a). However, as noted previously, any such liability is subject to the immunities set forth in the TCA. N.J.S.A. 59:2-1(b). Tice, supra, 133 N.J. at 355-56, 627 A.2d 1090; Turner, supra, 430 N.J. Super. at 283, 63 A.3d 1233. Here, the DEP is immune from liability for actions that constitute nonfeasance, N.J.S.A. 59:1-2; any failure to enforce the law, N.J.S.A. 59:2-4 and 59:3-5; any failure to inspect or negligent inspection, N.J.S.A. 59:2-6; and for discretionary activities, N.J.S.A. 59:2-3.

The trial judge concluded that the DEP voluntarily assumed responsibility for remediation of the Accutherm site, thereby creating a duty of care as to how the department handled the property pending remediation. However, under the Spill Act, the duty to clean up the site rested at all times with those responsible for the contamination and its remediation. Navillus, supra, No. A-4726-13T3 [slip op. at 29], 2016 N.J. Super. Unpub. LEXIS 77. The DEP also took regulatory actions regarding the property, as permitted by law, but such actions did not impose upon the DEP a duty of care for the property pending its remediation.

We also reject plaintiffs' **[*46]** contention that the DEP can be held liable for maintaining or creating a dangerous condition on the Accutherm property. The property at issue was never owned or controlled by the DEP. Posey, supra, 171 N.J. at 183-84, 793 A.2d 607. There also is no evidence that the DEP created the danger presented by the contamination of the property. We therefore conclude that the judgment entered against the DEP must be reversed.

In their cross-appeal, plaintiffs argue that the trial judge erred by applying the collateral source doctrine to the Sullivan/Baughman settlement funds. In view of our determination that the judgment against the DEP must be reversed, that issue is moot.

Accordingly, we reverse the judgment against the DEP and dismiss plaintiffs' cross-appeal.

IV.

We next consider the appeal by the Sullivan defendants from the trial court's order dismissing their fraud and negligence claims against the Township and the DEP.

The following facts and procedural history inform our decision on this appeal. Plaintiffs' class action complaints were filed in October and November 2006 and detailed information and documentation in the Township's and DEP's possession regarding the Accutherm site, dating back to the 1980s. With their answers, the Sullivan **[*47]**

defendants filed cross-claims against their co-defendants, including the Township and DEP, but only for contribution and indemnification.

Meanwhile, in October 2006, the Sullivans filed their action, to vacate the tax sale foreclosure judgment. The named defendants in that litigation were Accutherm, Giuliano, the DEP, and the Township. In their complaint, the Sullivans detailed information in the possession of the Township and the DEP, dating back to the 1980s, regarding contamination at the Accutherm site. That litigation proceeded through discovery and a bench trial on February 18, 2009, with the trial court's opinion being issued on April 28, 2009. *See* Navillus, supra, 422 N.J. Super. at 175-76, 27 A.3d 973.

In September 2009, the Sullivan defendants filed a motion in this litigation, for leave to file cross-claims against the Township, and third-party claims against the DEP, for monetary damages for negligence and fraud. By written opinion dated April 19, 2010, and order dated May 5, 2010, the judge granted that motion and also ruled that the Sullivans' proposed negligence and fraud claims would be severed and litigated after plaintiffs' class action claims.

In so doing, the judge rejected defendants' argument that the proposed claims **[*48]** should have been filed in the *Navillus* tax foreclosure litigation, and therefore should be deemed barred under the entire controversy doctrine. The judge also rejected defendants' argument that the claims were barred for failure to comply with the notice provisions of the TCA. However, the denial of defendants' motion was "without prejudice."

The Sullivans did not participate at trial because they settled the class action claims on October 19, 2010. They indicated they intended to pursue their affirmative claims against the Township and DEP after trial. The Sullivans did not, however, file their proposed cross-claims and third-party claims until after trial.

At a post-trial hearing on October 26, 2011, the motion judge permitted the cross-claims and third-party claims "to be reinstated." The judge indicated that, "once served," these claims could be subjected to motions to dismiss, or for summary judgment.

On November 29, 2011, the Sullivan defendants filed their negligence and fraud claims against the Township and the DEP. The basis of their claims was the Township's and DEP's alleged failure to warn them that the property was contaminated, and provide documentation regarding the contamination, **[*49]** thereby inducing them to unwittingly acquire the property and transform it into a daycare center.

The judge denied the Township's and DEP's motions to dismiss but granted their motions for summary judgment. In her written opinion, the judge ruled that the claims were time-barred. The judge alternatively found that the negligence and fraud claims failed as a matter of law.

On appeal, the Sullivans argue that the judge erred by granting summary judgment to the Township and the DEP because discovery on its claims was not complete. We disagree. As a general matter, summary judgment should not be granted before the completion of discovery. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193, 536 A.2d 237 (1988). However, a party opposing summary judgment on the ground of incomplete discovery "must show, with some specificity, the nature of the discovery sought" and that the missing discovery would provide necessary information relating to a missing element of the case. Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498, 38 A.3d 669 (App. Div. 2012).

As we have explained, the asserted basis for the Sullivans' negligence and fraud claims is that the Township and the DEP did not provide them with all documents and information in their possession relating to the Accutherm property. However, the record reflects that at the time the Township and **[*50]** the DEP moved for summary judgment, the Sullivans had obtained all relevant documents and information from the Township and the DEP, through discovery in this and other litigations. Therefore, the judge did not rule prematurely on the motions for summary judgment.

The Sullivans further argue that the judge erred by ruling that their negligence and fraud claims were barred by the two-year statute of limitations in the TCA. Again, we disagree. We affirm the trial court's determination that the

claims were time-barred substantially for the reasons stated by the motion judge in her written opinion of December 10, 2012.

As the judge determined, the two-year statute of limitations applied to the Sullivans' claims, and the Sullivans failed to assert those claims within two years of their accrual, as required by the TCA. The judge also correctly rejected the Sullivans' assertion that their claims related back to the answers they filed in the class action litigation in January 2007, in which they asserted cross-claims for contribution and indemnification.

The Sullivans' cross-claims for contribution and indemnification were substantially different from the claims of negligence and fraud asserted **[*51]** in November 2011. The contribution and indemnification claims were based upon co-defendants' alleged liability to plaintiffs, whereas the negligence and fraud claims were premised upon the Township's and the DEP's alleged liability to the Sullivans. New claims will not be deemed to relate back where, as here, they are otherwise time-barred. *Molnar v. Hedden, 138 N.J. 96, 104, 649 A.2d 71 (1994)*.

In any event, by the time the Sullivans filed their fraud and negligence claims in November 2011, the contribution and indemnification claims had been settled. Accordingly, there were no existing claims to which the new claims could relate back. *Id. at 104-05, 649 A.2d 71* (amended pleading cannot relate back to earlier filing once case has been settled).

Since we have determined that the motion judge correctly found that the Sullivans' claims against the Township and the DEP were time-barred, we need not consider whether the Township and the DEP were entitled to summary judgment on other grounds.

We have considered the other arguments raised by the Sullivan defendants in their appeal. We conclude that they are without sufficient merit to warrant discussion. *R. 2:11-3(e)(1)(E)*.

Accordingly, we affirm the orders granting judgment to the Township and the DEP on the Sullivans' claims for negligence **[*52]** and fraud.

In A-3587-12, reversed on the appeal; affirmed in part and dismissed in part on the cross-appeal. In A-3732-12, reversed on the appeal; the cross-appeal is dismissed. In A-2995-12, affirmed. The matter is remanded to the trial court for entry of an order consistent with this opinion. We do not retain jurisdiction.

End of Document

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SANDRA SMITH, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF GEORGE BRADLEY SMITH, AND AS GUARDIAN AD LITEM FOR HER CHILDREN KOLE SMITH AND BRANDY SMITH, NICOLE GAETA, KYLE SMITH, Plaintiff, v. CITY OF NORTH WILDWOOD, STATE OF NEW JERSEY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY DOCKET NO. CPM-L-415-16 Civil Action **ORDER**

THIS MATTER having come before this Court upon the application of A. Michael Barker, Esquire, of the Law Offices of Barker, Gelfand & James, Attorneys for Defendant The City of North Wildwood, and, the Court having reviewed the moving papers and any opposition filed thereto; and, for good cause having been shown:

IT IS on this _____ day of _____2017 **ORDERED** and **ADJUDGED** that the Motion to Dismiss Plaintiff's Complaint pursuant to R. 4:6-2 filed by Defendant the City of North Wildwood, is hereby granted.

IT IS FURTHER ORDERED and **ADJUDGED** that a copy of this Order shall be served upon all counsel within ten (10) days of receipt thereof.

_____

JSC

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SANDRA SMITH, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF GEORGE BRADLEY SMITH, AND AS GUARDIAN AD LITEM FOR HER CHILDREN KOLE SMITH AND BRANDY SMITH, NICOLE GAETA, KYLE SMITH, Plaintiff, v. CITY OF NORTH WILDWOOD, STATE OF NEW JERSEY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY DOCKET NO. CPM-L-415-16 Civil Action **CERTIFICATION OF SERVICE**

I, A. Michael Barker, Esquire, being of full age, hereby certify as follows:

1. I am an attorney-at-law licensed to practice in the State of New Jersey, and I am the Senior Partner with the Law Offices of Barker, Gelfand & James. I am the attorney entrusted with the handling of this matter on behalf of the Defendant, the City of North Wildwood, and I am familiar with the facts set forth herein.

2. On the 30th day of December, 2016, the original of the within Notice of Motion to Dismiss, Brief, Certification of Counsel with Exhibits, and proposed form of Order on behalf of the Defendant, the City of North Wildwood was sent via First-Class Mail to the Superior Court of New Jersey, County of Cape May, 9 North Main Street, Cape May Court House, New Jersey 08210, for filing.

3. On the 30th day of December, 2016, a true and correct copy of the aforesaid documents was sent via first-class mail to:

Paul R. D'Amato, Esquire
D'AMATO LAW FIRM
2900 Fire Road ~ Suite 200
Counsel for Plaintiff

And

Kristina Miles, Esquire
Office of the Attorney General
Hughes Justice Complex
25 Market Street
7th Floor West, P.O. Box 093
Trenton, New Jersey 08525
Counsel for Defendant
State of New Jersey

4. 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.

Dated: December 30, 2016

A. Michael Barker, Esquire