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January 3, 2017

VIA Hand-Delivery

Attn: Deputy Clerk  
Atlantic County Civil Division  
Superior Court of New Jersey  
1201 Bacharach Boulevard, 3<sup>rd</sup> Floor  
Atlantic City, NJ 08401

Re: Sandra Smith, et al v. City of North Wildwood, et  
al  
Docket No.: CPM-L-415-16

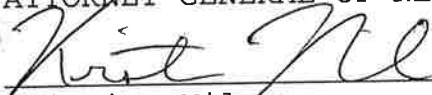
Dear Deputy Clerk:

Enclosed for filing please find the original and two copies of the Defendant State of New Jersey's Motion to Dismiss, Notice of Motion, and supporting Certification of Kristina Miles, along with a Certification of Service

Please have one copy stamped "Filed" and return it to me via our messenger. Please contact me with any questions. Thank you.

Sincerely yours,

CHRISTOPHER S. PORRINO  
ATTORNEY GENERAL OF NEW JERSEY

By:   
Kristina Miles  
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Enclosures

c: Honorable Julio Mendez, J.S.C. (via Hand Delivery)  
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SUPERIOR COURT OF NEW JERSEY  
CAPE MAY COUNTY - LAW DIVISION

DOCKET NO.: CPM-L-415-16

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SANDRA SMITH, INDIVIDUALLY AND, )  
AS EXECUTRIX OF THE ESTATE OF )  
GEORGE BRADLEY SMITH, AND AS )  
GUARDIAN AD LITEM FOR HER ) Civil Action  
CHILDREN KOLE SMITH AND )  
BRANDY SMITH, NICOLE GAETA, )  
KYLE SMITH )  
  
Plaintiffs, )  
  
v. )  
  
CITY OF NORTH WILDWOOD, and )  
STATE OF NEW JERSEY, )  
  
Defendants. )

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DEFENDANT STATE OF NEW JERSEY'S MOTION TO DISMISS

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### PRELIMINARY STATEMENT

Plaintiffs, the surviving family members of a man who drowned in the Hereford Inlet on July 27, 2012, improperly seek to force the State and the City of North Wildwood ("City") to close an entire beach area in the City via a permanent injunction. Plaintiffs' claims cannot be sustained against the State as to a municipally owned and operated beach.

Plaintiffs have failed to state a claim against the State upon which relief can be granted. R. 4:6-2(e). Plaintiffs' sole legal claim is that the waters off the unprotected Hereford Inlet beach in the City constitute a public nuisance. However, under the Tort Claims Act, the State is immune from any liability associated with an unimproved public property such as the municipal beach and the Hereford Inlet. N.J.S.A. 59:4-8. Moreover, the Legislature specifically determined that no public entity is liable for injuries caused by the unimproved or unoccupied portions of tidelands and submerged lands. N.J.S.A. 59:4-9. Thus, Plaintiffs' action fails.

Further, Plaintiffs neither have standing nor can demonstrate any so-called "conduct" perpetuated by the State to sustain the alleged public nuisance claim for which damages may be sought. Additionally, the State does not control the municipally owned and operated beaches pursuant to the 2008 Borough of Avalon v. Department of Environmental Protection

Appellate Division case.

Additionally, Plaintiffs inappropriately seek an impermissible mandamus against the State and have failed to exhaust the administrative remedies open to them.

For all of these reasons, Plaintiffs' complaint must be dismissed as against the State.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On July 27, 2012, the accident that gave rise to this action and two additional lawsuits occurred along the Hereford Inlet in the City of North Wildwood. George Bradley (Brad) Smith was wading with his daughter, Brandy Smith, and his friend, Scott Sunderland, and Scott's daughter, along the Hereford Inlet shoreline where the water meets the beach. Complaint Exhibit A, Sunderland Tr. 22:4-15. According to Mr. Sunderland's testimony, the four people were walking in calf-deep water. Id. at 35:5-35:10; 113:18-22. The group began their walk near the Surf Avenue and First Avenue lifeguarded beach area and walked northwest beyond the guarded area along the Hereford Inlet beach until they reached a point approximately 100-200 feet away from the rock wall, then turned around and walked back southeast. Id. at 23:11-24:3.

While wading in the water, on their return, Mr. Sunderland testified that they suddenly lost their footing, as though there was nothing beneath their feet. 36:16-37:11. According to Mr.



Sunderland, the accident occurred southeast of Central Avenue and southeast of the parking lot area. Sunderland Dep., Exhibit 10; Sunderland Tr. 13:7-15:24. All four people were swept into the Inlet's waters and although Mr. Sunderland managed to swim back to the beach with his daughter on his back, Mr. Smith and Brandy were both pulled further into the Inlet. Sunderland Tr. 37:10-18, 38:11-19, 39:9-42:12. Brandy was saved by someone on a jet ski. Id. at 46:12-20. Unfortunately, Mr. Smith drowned and his body was found three days later.

The City of North Wildwood owns and manages an extensive set of municipal beaches. The City owns and operates beaches on the Atlantic Ocean side of the City as well as along the Hereford Inlet. The area below the mean high water line is tidally flowed. The State understands that the City provides lifeguards for many, but not all of its beaches. Complaint, Exhibit J, Rosenello Tr. at 69:12-70:4. However, the City does not provide lifeguards for the beach along the Hereford Inlet northwest of Surf Avenue because it is a large area that includes endangered species habitat limitations and an area that is popular with fishermen. Id. at 70:13-75:12; see also Complaint, Exhibit C, Cavalier Depo Tr. at 141:17-24. The City's mayor also unequivocally testified in discovery that it is unsafe for people to be in the water offshore of an unguarded beach due to the natural conditions of an ocean and inlet. Id.

at 84:4-85:17.

On July 23, 2014, Sandra Smith filed a wrongful death suit against the City of North Wildwood, Cape May County, and the State of New Jersey individually and also as Mr. Smith's executrix. Sandra Smith v. City of North Wildwood, et al., Docket No. CPM-L-331-14. That action also included a count which sought to close the unguarded portion of the Hereford Inlet beach in North Wildwood.

After extensive discovery in the wrongful death action, the parties agreed that Mrs. Smith's beach closure claim should be the subject of a separate action. Thus, on October 4, 2016, Plaintiff filed her complaint in this action to close the beach.

#### LEGAL ARGUMENT

I. A MOTION TO DISMISS SHOULD BE GRANTED WHERE THE ALLEGATIONS OF THE COMPLAINT FAIL TO STATE A VIABLE LEGAL CLAIM UPON WHICH REMEDY CAN BE GRANTED.

Pursuant to New Jersey Rule of Court 4:6-2(e), litigants may move to dismiss an opponent's complaint for "failure to state a claim upon which relief can be granted" prior to filing a responsive pleading. R. 4:6-2(e). Such a motion is decided by "examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989).

The reviewing court examines the complaint "in depth and

with liberality" to determine whether a possible cause of action "may be gleaned even from an obscure statement of claim." Ibid. (quotations omitted). During such review, plaintiffs receive "every reasonable inference of fact" alleged in the Complaint. Ibid. However, if the plaintiff has failed to articulate "a legal basis entitling it to relief," the matter must be dismissed. Camden County Energy Recovery Associates, L.P. v. N.J. Dep't of Env'tl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999).

**A) PLAINTIFFS NEITHER HAVE STANDING NOR HAVE ARTICULATED A VIABLE PUBLIC NUISANCE CLAIM BECAUSE THE STATE IS IMMUNE FROM LIABILITY PURSUANT TO THE TORT CLAIMS ACT, N.J.S.A. 59:4-8 AND 59:4-9.**

Plaintiffs seek a permanent injunction, claiming that Hereford Inlet and its accompanying beach constitute a public nuisance. This claim fails for a number of reasons.

**1) The State is Immune from Tort Liability On Any Unimproved Property Pursuant to the Tort Claims Act**

The liability of public employees and public entities, including the State and its agencies, is controlled by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. Generally, the Tort Claims Act reflects the considered legislative response to the judicial abrogation of the traditional doctrine of sovereign immunity in Willis v. Department of Construction and Economic Development, 55 N.J. 534 (1970). The legislative declaration of

public policy set forth in the Tort Claims Act specifically states:

[I]t is hereby declared to be the public policy of this state that public entities shall only be liable for their negligence within the limitations of this Act and in accordance with the fair and uniform principles established herein. All the provisions of this Act should be construed with a view to carry out the above legislative declaration. [N.J.S.A. 59:1-2].

The Tort Claims Act states that a public entity is not liable for an injury caused by an act or omission except as otherwise provided by the Tort Claims Act. N.J.S.A. 59:2-1a. Thus, under the Tort Claims Act, immunity is the rule and liability is the exception. Indeed, when determining claims under the Tort Claims Act, courts "should [determine] whether an immunity applies and if not, should liability attach." Troth v. State, 117 N.J. 258, 265-66 (1989) (emphasis in original). Therefore, if an immunity applies, the State is not liable and Plaintiffs cannot succeed on the merits of their claim.

Here, the State's tort immunity is embodied in both N.J.S.A. 59:4-8 and N.J.S.A. 59:4-9, the latter of which states "[n]either 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."

The comment to this provision explains that this section:

reflect[s] 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. ... The exposure to hazard and risk involved is readily apparent when considering all the recreational and conservation uses made by the public generally of [publically-owned] 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.** Comment to 59:4-9 (emphasis added).

The comment further explains that the term "unimproved public property" is to be liberally construed. Id.

Public property "is no longer 'unimproved' when 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, supra at 269-270 (emphasis added). Here, the beach and the water remain wholly unimproved.

Upon occasion public properties may be partially improved and partially unimproved, whereupon courts examine the specific area where an injury occurred. Kowalsky v. Long Beach Township, 72 F.3d 385, 389 (3d Cir. 1995) (following Troth).

Thus, where the injury is caused by an alleged dangerous condition that is a natural element of the unimproved land, the public entity is immune from liability. Aversano v. Palisades Interstate Parkway Comm'n, 363 N.J. Super. 266, 270 (App. Div. 2003); see also Fleuhr v. City of Cape May, 159 N.J. 541, 545 (1999) (finding a surfer's injuries were caused only by ocean waves, which were a natural condition); Kowalsky v. Long Beach Township, 72 F.3d, supra at 390 (finding that injuries to swimmers were caused by ocean waves, which were "acts of nature"). Yet, even if the property had been partially improved, the public entity is not liable absent a "causal connection" between the alleged injury and the improvement. Troth v. State, 117 N.J., supra at 270.

Here, the unimproved property immunity applies because the area where Mr. Smith's accident occurred is publicly owned and is unimproved. There is no dispute that the beach and Inlet are publicly, rather than privately, owned. Complaint ¶ 1. Regardless of how the location is characterized, tort immunity applies to the upland beach under N.J.S.A. 59:4-8 or to the tidally flowed area under N.J.S.A. 59:4-9.

A searching review of Plaintiffs' own complaint and their own accompanying exhibits demonstrates that there are no allegations that either the beach or the Inlet itself are improved. According to the complaint, Mr. Smith and his

companions were wading in the Inlet water along the Inlet coast, rather than walking along the dry beach sand. Complaint at ¶9 (quoting Scott Sunderland testimony at 35:8-10, 130:4-131:15, 114:21-115:6, 129:23-130:3). Importantly, the complaint does not allege that there are any improvements in the waterline between the dry sand and the deeper Inlet waters, and the exhibits attached to the Plaintiffs' complaint depict a beach in its natural condition. Indeed, the complaint itself admits that the alleged dangerous condition is caused by an entirely natural phenomenon:

“...the life threatening hazard presented by the dangerous conditions created by a drop off that was often two feet from the shoreline at the Unprotected Inlet Beach, coupled with strong currents in the Hereford Inlet and a vortex and/or whirlpool in the Hereford Inlet.”  
Complaint, Count One, ¶ 6. (See also Complaint, Count One, ¶ 8, which notes that beachgoers “may be suddenly dropped in the ocean over their heads, and be pulled by the current and/or vortex and/or the whirlpool out to sea...”)

Further, the witness testimony quoted throughout the complaint repeatedly describes the condition as being entirely natural. See Exhibit C, Cavalier Dep. at 42:16-42:19 (noting the inlet changes all the time), 44:1-5 (whirlpool effect caused by bay and ocean currents), and 112:1-7 (the changes are caused by the Inlet currents); Exhibit E, Lindsay Dep. at 29:15-20 (the water is “treacherous” due to the currents); Exhibit G, Belasco Dep. at 15:5-15 (inlet is inherently dangerous due to the currents); Exhibit H, Delinski Dep. at 15:3-16:3 (beach changes due to the

tides); Exhibit J, Rosenello Dep. at 82:20 (describing the ocean as "a wilderness"). Thus, the area where the incident occurred, which is the relevant area to consider pursuant to Troth, is clearly unimproved.

Even if one considers the broader physical area in the vicinity of the accident, the area remains unimproved and the statutory immunity applies. For instance, although the City of North Wildwood may conduct beach maintenance and raking in some areas within its municipal jurisdiction, Mayor Rosenello confirmed during his deposition that the City complies with permitting restrictions and does not conduct raking or maintenance in the unguarded beach area. Rosenello, 62:12-63:13, Exhibit J to the Complaint. Similarly, although the presence of an upland stone revetment is noted to be parallel to the Hereford Inlet, there are no allegations in the complaint that the revetment, which lies further inland, affected either the dry beach or the water area where the accident occurred.

**2) Since the State is Immune Under the Tort Claims Act, Plaintiffs Do Not Have Standing To Bring and Cannot Meet the Elements of a Public Nuisance Claim**

Due to the State's immunity, as discussed supra, Plaintiffs fail to meet the elements of a public nuisance here, even with an in-depth and liberal reading of their complaint.

New Jersey has adopted the Restatement (Second) of Torts iteration of public nuisance, which defines a public nuisance



as:

(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 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 produce a permanent or long-lasting effect and, as the actors knows, or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821B(1979) see also In re Lead Paint Litigation, 191 N.J. 405, 424-25 (2007).

In New Jersey, a public nuisance "is related to conduct, performed in a location within the actor's control, which has an adverse effect on a common right." In re Lead Paint Litigation, 191 N.J. 405, 429 (2007).

It is also well-settled that public nuisance claims may only be sustained by private parties in limited circumstances. The Restatement explains:

(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.

(2) In order to maintain a proceeding to enjoin a public nuisance, one must (a) have the right to recover damages, as indicated in Subsection (1), or (b) have authority as a public official or public agency to represent the state or a political subdivision in the latter, or (c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.

Restatement (Second) of Torts, § 821C

In other words, for a private party to sustain an action to enjoin an alleged public nuisance, that party must have suffered a special injury entitling them to seek damages under a public nuisance claim. In re Lead Paint Litigation, 191 N.J., supra at 429.

Plaintiffs have neither met the required standing nor the definitional elements of showing a public nuisance for the same reason: the State is immune under these circumstances pursuant to the Tort Claims Act. When determining claims under the Tort Claims Act, courts "should [determine] whether an immunity applies and if not, should liability attach." Troth v. State, 117 N.J. 258, 265-66 (1989) (emphasis in original). Therefore, if an immunity applies, the State is not liable and Plaintiffs cannot succeed on the merits of their claim.

Because the State is immune from liability pursuant to the unimproved property provisions of the Tort Claims Act, N.J.S.A. 59:4-8 and 59:4-9, Plaintiffs cannot sustain an action in damages against the State. Therefore, pursuant to the Restatement and In re Lead Paint Litigation, Plaintiffs cannot sustain an action seeking an injunction against the State. Restatement (Second) Torts, Section 821B.

Likewise, Plaintiffs' primary claim of public nuisance fails because there has been no conduct by the State that gave rise to the accident. Contra Restatement (Second) Torts,

821B(2) (explaining each circumstance that could sustain a public nuisance claim requires an inquiry of the "conduct" involved). Simply put, the accident, tragic though it was, occurred as a result of the natural conditions of the currents in the Hereford Inlet. See Complaint, Count 1, ¶¶ 6 and 8, Count 2, ¶¶ 6 and 8; see also the multiple depositions in which deponents recognized the potential danger arising from the Inlet's nature, as summarized supra. Similar to the accidents that occurred due to natural circumstances in both Kowalsky and Fleuhr, Plaintiffs' claim here is equally unviable.

Thus, Plaintiffs have failed to state a claim upon which relief may be granted and their complaint must be dismissed as against the State.

**B) PLAINTIFFS' CLAIM TO CLOSE THE BEACH CAN ONLY BE ENFORCED AGAINST THE MUNICIPALITY THAT OWNS AND OPERATES THE BEACH**

Plaintiffs' complaint against the State must be dismissed because the relief Plaintiffs seek, the closure of part of a municipally-owned and operated beach, cannot be sustained against the State pursuant to well-established law, despite the State's regulation of land use within the coastal area. Avalon v. Department of Environmental Protection, 403 N.J. Super. 590 (App. Div. 2008).

The Department of Environmental Protection ("State" or "DEP") is authorized by the Legislature to regulate via

permitting development when such development may have an impact on a natural resource of interest to the State. DEP oversees development pursuant to the Coastal Area Facilities Review Act, or CAFRA. N.J.S.A. 13:19-1, et seq. CAFRA defines "development" to include "the grading, excavation or filling on beaches or dunes" in addition to the layperson's understanding of building construction. N.J.S.A. 13:19-3.

One of the substantive elements DEP considers when any entity submits an application for a permit to "develop" a beach or dune area is whether the proposed development will have any impact on the public's access to the waterfront. N.J.S.A. 13:19-10(h). The DEP's consideration includes the long-standing Public Trust Doctrine, wherein land flowed by tidal waters is owned by the State for the public's use for "navigation, fishing and recreational uses, including bathing, swimming and other shore activities." Matthews v. Bay Head, 95 N.J. 306, 312 (1984).

However, the DEP recognizes that public access may be tempered so access does not create conditions that may reasonably be expected to endanger public health or safety. N.J.A.C. 7:7-16.9(b)(4). Indeed, the Public Trust doctrine itself has always been balanced by consideration of public safety. See Neptune City v. Avon-By-The-Sea, 61 N.J. 296, 311 (1972) (noting coastal municipalities may "very properly

regulate and limit . . . the number of persons allowed on the beach at any one time in the interest of safety." ). Therefore, the DEP permits public access restrictions on a seasonal, hourly, activity or other scope as necessary due to conditions on the ground. N.J.A.C. 7:7-16.9(b)(4).

A limitation to the DEP's specific public access oversight arises when municipalities submit applications for beach maintenance permits. Since raking and grading beaches and/or dunes are considered "development" pursuant to CAFRA, any coastal municipality that wishes to maintain their beach must apply for a beach maintenance general permit. N.J.A.C. 7:7-6.2.

Yet it is settled that the State cannot require a municipality to keep a municipally-owned beach open if the municipality decides, pursuant to its own police power, that the beach should be closed. Borough of Avalon v. Department of Environmental Protection, 403 N.J. Super. 590 (App. Div. 2008). As Judge Skillman stated, coastal municipalities hold "exclusive control over municipally-owned beaches" because:

[i]t is the municipality, not the DEP, that owns and operates and therefore bears responsibility for the management of its beaches. The municipality must provide such police services as may be required to maintain public safety during the hours a beach is open to the public. In addition, the municipality must provide whatever emergency services may be required if a swimmer or other person using the beach suffers a personal injury. Id. at 599-600 (citing N.J.S.A. 40:61-22.20 and Fleuhr v. City of Cape May, 159 N.J., supra).

The relevant statutory provision upon which the Appellate Division relied further mandates:

The governing body of any municipality bordering on the Atlantic Ocean...which owns...lands bordering on the ocean, tidal water bays or rivers...for a place of resort for public health and recreation...shall have the exclusive control, government and care thereof...and may, by ordinance, make and enforce rules and regulations for the government and policing of such lands..

N.J.S.A. 40:61-22.20

Given this unambiguous limitation upon the DEP's authority, the agency works with coastal municipalities during permit applications to identify and maintain existing public access areas while balancing other concerns. Thus, if a municipality such as the City of North Wildwood sought to close a portion of its waterway or beach area upon showing that an unreasonable risk to public safety exists, the DEP would not object to the municipality's decision. Indeed, the DEP's own public access regulations specifically acknowledge that municipally-owned beaches can be closed by the municipality due to public safety concerns. N.J.A.C. 7:7-16.9(b)(4). Therefore, an injunction against the State to close the City of North Wildwood's beach in whole or in part would be both inappropriate and ineffective, as the City is the public entity with the authority to make that determination.

## POINT II

### PLAINTIFFS' REQUEST FOR A PERMANENT INJUNCTION INAPPROPRIATELY SEEKS AN ORDER OF MANDAMUS AGAINST THE STATE FOR DISCRETIONARY ACTION

Plaintiffs mistakenly seek an order of mandamus to close the unguarded beach along Hereford Inlet, but such relief is unavailable when the government, as here, is entitled to exercise its discretion. I.H.R.A.C. v. Diamond Shamrock Chem., 216 N.J. Super. 166, 175-176 (App. Div. 1987).

The common law remedy of mandamus is only available to require the State to exercise non-discretionary, mandatory functions, "where the right to performance of a ministerial duty is clear and certain." In re Commissioner's Failure to Adopt 861 CPT Codes, 358 N.J. Super. 135, 149 (App. Div. 2003). A ministerial duty is one that is absolutely certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment and discretion. In re Failure by the Dept. of Bank. and Ins. to Transmit a Proposed Dental Fee, 336 N.J. Super. 253, 262 (App. Div. 2003).

Mandamus will not lie "if the duty to act is a discretionary one and the discretion has been exercised." U.S. Trust Co. of New York v. State, 69 N.J. 253, 259 (1976), rev'd on other grounds, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92

(1977). The key question to determine whether an action for mandamus may proceed is whether the agency has acted, not whether Plaintiff believes the discretionary action by the agency is the correct one. See Loigman v. Township of Middletown, 297 N.J. Super. 287, 299 (App. Div. 1997) (mandamus a proper remedy only to compel a specific action when the duty is ministerial and wholly free from doubt, and to compel the exercise of discretion, but not in a specific manner); Bordentown Township Board of Health v. Interstate Waste, 191 N.J. Super. 128, 141 (Law Div. (1983). Mandamus cannot be used "to interfere with or control the mode and manner of its exercise or to influence or direct a particular result." Switz v. Middletown Twp., 23 N.J. 580, 587 (1957).

Here, Plaintiffs ask this court to compel the DEP and the City of North Wildwood to close the unguarded beach along Hereford Inlet. This would be a wholly discretionary decision. The DEP's consideration of public access pursuant to its CAFRA permitting actions incorporates a fact-sensitive balancing of considerations, including the type of development proposed, whether the access can be on or off-site, and whether the access would run afoul of other public policy considerations. N.J.S.A. 13:19-10. All of these elements require discretion. The Department exercises its discretion in working with coastal municipalities on public access issues along the shore and



weighs public safety and public resource concerns. This case directly illustrates the latter conflict, as a full beach closure could require significant public resources to implement and enforce. See Complaint Exhibit E, Lindsay Depo. Tr. 46:1-14, 51:25-52:10 (noting resources needed to keep beach closed).

In sum, Plaintiffs improperly ask the court to intervene and substitute its judgment for that of the DEP's and the City's, the latter of which owns, operates and maintains the beach. Given settled law, Plaintiffs' request must be denied.

### POINT III

#### **PLAINTIFFS HAVE FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES**

Plaintiffs seek a mandamus order to close the beach before having applied to either the City of North Wildwood or the State with their request. The City incorporates public access in its Master Plan and the State expects the City to provide public access to the beaches, where appropriate and according to the rules and standing law per Borough of Avalon, as part of the City's beach maintenance CAFRA general permit. N.J.S.A. 13:19-10; see also Miles Cert., Exhibit A.<sup>1</sup>

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<sup>1</sup> The Department respectfully submits that its Motion to Dismiss can be granted on either or both of its points raised in Points I and II of this brief, thereby not requiring this court to reach this third point. However, to the extent this motion must be determined on Point III, the Department also respectfully requests that the submission of documents not included with the complaint convert consideration of only Point III to the motion

Plaintiffs should have asked the City to modify its Master Plan or the State to modify the permit, either of which would have afforded the governmental body the ability to consider public safety and public access. However, since no request has been made, there is no administrative record for a court to appropriately review to determine whether either governmental entity has acted inappropriately in keeping the beach open. In other words, Plaintiffs have simply failed to exhaust their administrative remedies.

It is well-settled that "[e]xhaustion of administrative remedies before resort to the courts is a firmly embedded judicial principle." Garrow v. Elizabeth General Hospital & Dispensary, 79 N.J. 549, 558-59 (1979). The purpose of this rule is "to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts." Brunetti v. New Milford, 68 N.J. 576, 588 (1975). As explained by the In re Stoeco decision:

In any case amenable to administrative review, the court should consider whether exhaustion of remedies will serve the interests of justice. The exhaustion doctrine seeks to vindicate several essential public policies. The first is to 'ensure that claims will be heard by a body possessing expertise in the area.' Administrative exhaustion also 'allows the parties to create a factual record necessary for meaningful appellate review.' A third interest is discouragement of 'piecemeal litigation.' Another policy furthered by the doctrine is eliminating resort to the

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for summary judgment standard. R. 4:6-2; see also Pressler, Current N.J. Court Rules, comment 4.1.2 on R. 4:6-2 (2017).

courts where the agency decision might satisfy the parties and thus moot the factual or legal issue raised. It is incumbent upon the court to weigh these interests carefully to 'find the proper balance.'

In re Stoeco Development, Ltd., 262 N.J. Super. 326, 335 (App. Div. 1993).

In weighing the Stoeco factors here, it becomes clear that Plaintiffs' failure to even approach the City or the State with their closure request - never mind exhaustion of their administrative remedies - causes the types of problems that the exhaustion doctrine is meant to avoid.

The City's CAFRA permit on its face prohibits the City from limiting vertical or horizontal public access to the beach. Id. at point 4. However, CAFRA also requires the DEP to weigh a number of factors in considering the issuance of a permit, including both public access and public safety. N.J.S.A. 13:19-10(f) (ensuring the proposed development will not "endanger human life or property nor otherwise impair the public health, safety, and welfare") and N.J.S.A. 13:19-10(h) (consideration of the development's impact on public access to the waterfront).

Here, Plaintiffs could have contacted the DEP directly and asked the DEP to reconsider the existing permit first issued in 2005. N.J.A.C. 7:7-27.7(a)(8) (permitting the Department, acting on its own accord, to suspend a permit "to protect public health, safety, and welfare or the environment."). Alternately, Plaintiffs could have asked the City to limit public access to

the unguarded beach, and to apply for a permit modification.  
N.J.A.C. 7:7-27.25(e).

Regardless of the administrative avenue chosen, Plaintiffs' failure to approach either the City or the State has several results which impact this case. First and foremost, the scope of Plaintiffs' request has not been made concrete. Had Plaintiffs approached the City or the State with their request first, they would have needed to outline the scope of the beach closure, whether they sought to close the beach to all or only some uses, whether there were any times or seasons when the beach should be closed, and whether any ancillary actions to close the beach - such as fence installation or seawall stair removal - would be requested. However, since Plaintiffs failed to approach the City or the State, the remedy Plaintiffs seek is still ambiguous. This is particularly problematic in a case like this, as some remedies might include improvements to the area, which could actually induce future liability to the City and/or the State.<sup>2</sup>

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<sup>2</sup> For instance, stairs on the seawall upland of the beach allow the public to safely cross over the seawall to reach the beach. If Plaintiffs sought to close the beach by closing the seawall stairs, it would likely have the unintended consequence of causing some members of the public to try to reach the beach and water regardless by climbing down the seawall's rocks. Since the public would not be using the safer staircase, the likelihood of a potential injury from someone falling off of the seawall will increase - and with it, the potential liability for the City and/or the State would increase as well.

Similarly, there has been no opportunity for the DEP, which is the State agency possessing expertise in the area of public access, to weigh the various interests at issue here and make a decision. See In re Stoeco, supra at 335. Indeed, had Plaintiffs initially approached the DEP, the instant litigation may have been mooted depending on the determination. Id.

Finally, there is no factual record for any kind of meaningful appellate review.<sup>3</sup> All of these problems would likely have been addressed had Plaintiffs followed the appropriate administrative procedure.

As Plaintiffs failed to exhaust their administrative remedies and the Stoeco elements do not demonstrate that this is a case where the court should be flexible about such failure, Plaintiffs' demand for a mandamus order should be dismissed.

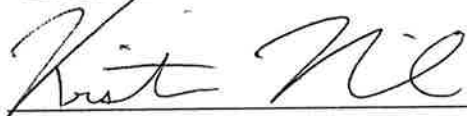
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<sup>3</sup> Pursuant to R. 2:2-3(a)(2), the Appellate Division holds exclusive jurisdiction regarding alleged State agency actions. This extends to allegations of State agency inactions. Mutschler v. Dept. of Environmental Protection, 337 N.J. Super. 1, 9 (App. Div.), certif. denied, 168 N.J. 292 (2001); Pascucci v. Vagott, 71 N.J. 40, 51-54 (1976); and Hospital Center at Orange v. Guhl, 331 N.J. Super. 322, 330 (App. Div. 2000). To the extent that Plaintiffs allege that the DEP was aware of the Hereford Inlet conditions and did nothing when, instead, the beach should have been closed, the DEP therefore respectfully reserves the right to challenge the jurisdiction of this court over such claims.

CONCLUSION

For the reasons set forth herein, Plaintiffs' complaint must be dismissed.

CHRISTOPHER PORRINO  
ATTORNEY GENERAL OF NEW JERSEY

By:   
Kristina Miles  
Deputy Attorney General

Dated: January 3, 2017

CHRISTOPHER S. PORRINO  
ATTORNEY GENERAL OF NEW JERSEY  
Richard J. Hughes Justice Complex  
25 Market Street  
Trenton, New Jersey 08625  
Attorney for Defendant  
State of New Jersey

By: Kristina Miles  
Deputy Attorney General  
(609) 292-4059  
Kristina.Miles@dol.lps.state.nj.us  
Attorney No. 3282011

---

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

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TO: Deputy Clerk  
Atlantic County Civil Division  
Superior Court of New Jersey  
1201 Bacharach Boulevard, 3<sup>rd</sup> Floor  
Atlantic City, New Jersey 08401

Honorable Julio Mendez, J.S.C.  
Atlantic County Superior Court  
1201 Bacharach Boulevard, 3<sup>rd</sup> Floor  
Atlantic City, New Jersey 08401

Paul D'Amato, Esq.  
D'Amato Law Firm  
2900 Fire Road, Suite 200  
Egg Harbor Township, New Jersey 08234  
Attorney for Plaintiffs

Joseph C. Grassi, Esq.  
Barry, Corrado & Grassi, P.C.  
2700 Pacific Avenue  
Wildwood, New Jersey 08260  
Attorney for Plaintiffs

A. Michael Barker, Esq.  
Barker, Gelfand & James  
210 New Road - Suite 12  
Linwood Greene  
Linwood, NJ 08221  
Attorney for Defendant City of North Wildwood

**PLEASE TAKE NOTICE** that the undersigned, Christopher S. Porrino, Attorney General of New Jersey, attorney for the State of New Jersey, will move on February 10, 2017 at 9:30am before the Superior Court of New Jersey, Cape May County, Law Division for an Order granting Defendant's Motion to Dismiss the Complaint.

**PLEASE TAKE FURTHER NOTICE** that the State of New Jersey relies upon the attached brief and the Certification of Kristina Miles, Deputy Attorney General, in Support of the State's Motion to Dismiss.

A proposed form of order is attached.

CHRISTOPHER S. PORRINO  
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: \_\_\_\_\_  
Kristina Miles  
Deputy Attorney General

DATED: January 3, 2017



CHRISTOPHER S. PORRINO  
ATTORNEY GENERAL OF NEW JERSEY  
Attorney for Defendant New Jersey  
Department of Environmental Protection  
Hughes Justice Complex  
25 Market Street  
P.O. Box 093  
Trenton, New Jersey 08625

By: Kristina Miles  
Deputy Attorney General  
(609) 633-2038  
Attorney No. 003282011

---

SANDRA SMITH, INDIVIDUALLY AND AS	:	SUPERIOR COURT OF NEW JERSEY
EXECUTRIX OF THE ESTATE OF GEORGE	:	CAPE MAY COUNTY - LAW DIVISION
BRADLEY SMITH, AND AS GUARDIAN AD	:	
LITEM FOR HER CHILDREN KOLE SMITH	:	DOCKET NO. CPM-L-415-16
AND BRANDY SMITH, NICOLE GAETA,	:	
KYLE SMITH,	:	<u>Civil Action</u>
	:	
Plaintiffs,	:	
	:	
v.	:	Certification of
	:	Kristina Miles,
CITY OF NORTH WILDWOOD, and	:	Deputy Attorney General
STATE OF NEW JERSEY,	:	
	:	
Defendants.	:	

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1. I am a Deputy Attorney General within the New Jersey Division of Law, Office of the New Jersey Attorney General in the State of New Jersey. I have personal knowledge of the facts stated herein.

2. I have served as a Deputy Attorney General for the Environmental Permitting and Counseling section for over three and a half years.

3. I make this Certification in Support of Defendant State of New Jersey's Motion to Dismiss submitted on January 3, 2017.

4. Attached hereto as Exhibit A is a true and accurate copy of the City of North Wildwood's Coastal Area Facilities Review Act ("CAFRA") beach maintenance general permit first issued by the State on July 13, 2005.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements is willfully false, I am subject to punishment.

A handwritten signature in cursive script, appearing to read "Kristina Miles", written over a horizontal line.

Kristina Miles,  
Deputy Attorney General

January 3, 2017

# **EXHIBIT A**



State of New Jersey

Department of Environmental Protection

LAND USE REGULATION PROGRAM

PO BOX 439

TRENTON, NJ 08625-0439

(609) 292-8115 (Fax)

www.state.nj.us/dep/landuse

Richard J. Codey  
Acting Governor

Bradley M. Campbell  
Commissioner

mailed  
8.2.05

JUL 13 2005

Steven C. Morey  
Lomax Morey Consulting  
P.O. Box 9  
Cape May Court House, N.J. 08210

RE: Authorization for Coastal General Permit  
LURP File No.: # 0507-03-0009.1 CAF 030001  
CITY OF NORTH WILDWOOD  
Block(s): N/A; Lot(s): N/A  
North Wildwood, Cape May County

Dear Mr. Morey:

The Land Use Regulation Program has reviewed the referenced application for a General Permit authorization pursuant to the requirements of the Coastal Permit Program Rules at N.J.A.C. 7:7-7 and in accordance with the Coastal Area Facility Review Act (N.J.S.A. 13:19 et seq.) and/or the Waterfront Development Law (N.J.S.A. 12:5-3).

This permit authorizes beach and dune maintenance activities conducted in accordance with Best Management Practices as found in the Rules on Coastal Zone Management at N.J.A.C. 7:7E-3A. The names, title, address and telephone number of the person(s) responsible for supervising the proposed activities to ensure compliance with N.J.A.C. 7:7E-3A.1, 3A.2 and 3A.3 are:

City of North Wildwood  
Department of Public Works  
P.O. Box 499  
901 Atlantic Ave.  
North Wildwood, NJ 08260  
Tim O'Leary, Superintendent  
(609) 522-4646 Phone  
(609) 522-1141 FAX

Van Note-Harvey Associates  
211 North Main Street, Suite 203  
Cape May Court House, NJ 083210  
Ralph Petrella, Jr., P.E. & L.S.

(609) 465-2600 Phone  
(609) 465-8028 FAX

This permit authorizes beach and dune maintenance activities only, and does **NOT** authorize the replacement of any street-end bulkheads.

The approved maintenance area is within the outlined areas, **specifically identified as the Recreation Beach Area**, as shown on three sheets, entitled "Map to Accompany Application for: General Permit For Beach & Dune Maintenance Activities, City of North Wildwood, Cape May County, N.J.", dated April 15, 2005, last revised July 7, 2005, and prepared by Van Note-Harvey Associates, N.J.P.E. License No. 23226.

By this permit, the State of New Jersey does not relinquish tidelands ownership or claim to any portion of the subject property or adjacent properties.

#### **Project Specific Conditions**

In addition to the conditions noted at N.J.A.C. 7:7-1.5, the activities allowed by this authorization shall comply with the following conditions. Failure to comply with these conditions shall constitute a violation of the Coastal Area Facility Review Act (N.J.S.A. 13:19-1 et seq.) and/or the Waterfront Development Law (N.J.S.A. 12:5-3).

1. This permit does not authorize the repair or reconstruction of street end seawalls and/ or bulkheads.
2. The City of North Wildwood must continue to maintain metered public parking along the streets adjacent to the beach.
3. The City of North Wildwood must continue to provide handicapped accessible public access to the beach from all street-ends. If, at some future date, any or all of the street-ends are vacated by the City, they must include in the vacation documents, provisions for the maintenance of public access to the beach. Copies of the vacation documents must be provided to the Program for review and approval prior to enactment.
4. The City cannot limit vertical or horizontal public access to the dry sand area nor interfere with the public's right to free use of the dry sand for intermittent recreational purposes connected with the ocean and wet sand. However the City may charge a fee to those member of the public who remain upon and use its beach for an extended period providing it cleans the beach, picks up trash regularly, and permits use of its shower facilities, if provided. The City must also provide customary lifeguard services for members of the public who use the ocean areas up to the high water mark regardless of whether they are just passing through or remaining on the beach area.
5. Raking of the beach may only occur within 100 yards of **manned** lifeguard station.

6. No raking may occur within vegetated areas of the beach.
7. In areas documented by the Department as habitat for threatened or endangered beach nesting shorebirds, no raking of the beach may occur between April 1 and August 15.
8. The proposed activities **MUST** be conducted in accordance with Best Management Practices as defined by the Department in the Rules on Coastal Zone Management, N.J.A.C. 7:7E-3A (copy enclosed). Activities other than those outlined in this Subchapter (3A) shall require additional authorization from the Program. Failure to receive such additional authorization prior to activities may warrant enforcement action by the Bureau of Coastal and Land Use Enforcement.
9. Sand transfers to or from wetland areas that may exist on a beach are **NOT** authorized by this permit.
10. Records of all sand transfer activities shall be maintained by the township, and shall be available for inspection by the Department, upon request. These records shall include, but not be limited to, dates of transfer, borrow area limits, fill area limits, estimates of amount of sand transferred, the name of the person supervising the transfer activities, and the engineering certification required ( if appropriate) for all sand transfer activities.
11. Bulldozing, excavation, grading, vegetation removal or clearing and relocation of existing dunes whether existing or constructed in conjunction with this permit are **NOT** authorized under this general permit.

#### Standard Permit Conditions

The following standard conditions shall apply to all General Coastal Permits:

1. This permit is NOT VALID until the permit acceptance form has been signed by the applicant, accepting and agreeing to adhere to all permit conditions, and returned to the appropriate regional office within the Land Use Regulation Program.
2. This permit, including all conditions listed herein, shall be recorded in the office of the County Clerk (the Registrar of Deeds and Mortgages if applicable) in the county or counties wherein the lands included in the permit are located within ten (10) days after receipt of the permit by the applicant. A copy of the recorded permit shall be forwarded to the Land Use Regulation Program immediately thereafter.
3. The permittee shall notify, in writing, the NJDEP, Bureau of Coastal and Land Use Enforcement at 1510 Hooper Avenue, Toms River, NJ 08753, three working days prior to the commencement of construction on the site or site preparation.

4. The issuance of this permit shall in no way expose the Department to liability for the sufficiency or correctness of the design of any construction or structures. Neither the State nor the Department shall be liable for any loss of life or property which may occur by virtue of the activity or development resulting from any permit.
5. The permittee shall allow the authorized representatives of the Department free access to the site at all time when construction activity is taking place, and at other times upon notice to the permittee.
6. The activities shown by plans and/or other engineering data, which are this day approved, shall be constructed and/or executed in conformity with such plans and/or engineering data and conditions herein. No change in plans or specifications upon which this permit is issued shall be made except with the prior written permission of the Department, in accordance with N.J.A.C. 7:7-4.10.
7. A copy of this permit and approved plans shall be kept at the construction site and shall be exhibited upon request to any person.
8. The permittee shall immediately inform the Department of any unanticipated adverse effects on the environment not described in the application or in the conditions of this permit. The Department may, upon discovery of such anticipated adverse effects, and upon the failure of the permittee to submit a report thereon, notify the permittee of its intent to suspend the permit, pursuant to N.J.A.C. 7:7-4.11.
9. This permit does not waive the obtaining of any local, State or Federal permits which may be required. This permit is not valid and no work shall be undertaken until such time as all other required approvals and permits have been obtained.
10. All fill and other earth work on the lands encompassed within this permit authorization shall be stabilized in accordance with "Standards for Soil Erosion and Sediment Control in New Jersey," (obtainable from local Soil Conservation District Offices) promulgated by the New Jersey State Soil Conservation Committee, pursuant to the soil Erosion and Sediment Control Act of 1975, N.J.S.A. 4:24-42 et. seq. and N.J.A.C. 2:90-1.3 through 1.14. These standards are hereby incorporated by reference.

#### Duration of Authorization/Notification of Work

This authorization for a General Permit is valid for a term not to exceed five years from the date of receipt from the Department. If the term of this authorization exceeds the expiration date of the general permit issued by rule, and the permit upon which the authorization is based is modified by rule to include more stringent standards or conditions, the permittee must comply with the requirements of the new regulations by applying for a new General Permit authorization unless construction is already underway. If this General permit is not reissued, the permittee must apply for an individual CAFRA permit unless construction pursuant to the prior General Permit is underway. The expiration date of the General Permits issued by rule is October 16, 2005.

In order to promote inter-governmental cooperation in management of our natural resources, a copy of this decision shall be shared with appropriate local and federal agencies.

If you have any questions regarding this General Permit authorization, please contact Gail J. Moore of our staff at (609) 292-8262. Please reference the permit number in any future communication concerning this action.

Sincerely,



Christopher M. Dolphin  
Supervisor, Coastal Region  
Land Use Regulation Program

- c. NJDEP, Bureau of Coastal and Land Use Enforcement, Toms River  
US Army Corps of Engineers, Philadelphia District



CHRISTOPHER S. PORRINO  
ATTORNEY GENERAL OF NEW JERSEY  
Richard J. Hughes Justice Complex  
25 Market Street  
Trenton, New Jersey 08625  
Attorney for Defendant  
State of New Jersey

By: Kristina Miles  
Deputy Attorney General  
(609) 633-2038  
Kristina.Miles@dol.lps.state.nj.us  
Attorney No. 3282011

---

SANDRA SMITH, INDIVIDUALLY AND	:	SUPERIOR COURT OF NEW JERSEY
AS EXECUTRIX OF THE ESTATE OF	:	CAPE MAY COUNTY - LAW DIVISION
GEORGE BRADLEY SMITH, AND AS	:	
GUARDIAN AD LITEM FOR HER	:	DOCKET NO. CPM-L-415-16
CHILDREN KOLE SMITH AND BRANDY	:	
SMITH, NICOLE GAETA, KYLE SMITH,	:	<u>Civil Action</u>
	:	
Plaintiffs,	:	
	:	
v.	:	ORDER GRANTING DEFENDANT STATE
	:	OF NEW JERSEY'S MOTION TO
CITY OF NORTH WILDWOOD, and	:	DISMISS
STATE OF NEW JERSEY,	:	
	:	
Defendants.	:	

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This matter having been opened to the Court by Christopher Porrino, Attorney General of New Jersey, by Kristina Miles, Deputy Attorney General appearing, attorney for Defendant State of New Jersey ("State"), and the Court having considered the papers submitted in support of and in opposition thereto, and for good cause shown;

IT IS on this \_\_\_\_\_ day of \_\_\_\_\_, 2017

ORDERED that the Defendant's Motion to Dismiss is granted.

IT IS FURTHER ORDERED that within \_\_\_\_\_ days of this date, Defendant State's attorney shall serve Plaintiffs' attorneys and co-Defendant's attorney with a true and correct copy of this Order.

---

Hon. Julio Mendez, J.S.C.

In accordance with R. 1:6-2(a), this motion was

\_\_\_\_\_ opposed \_\_\_\_\_ unopposed

CHRISTOPHER S. PORRINO  
ATTORNEY GENERAL OF NEW JERSEY  
Attorney for Defendant New Jersey  
Department of Environmental Protection  
Hughes Justice Complex  
25 Market Street  
P.O. Box 093  
Trenton, New Jersey 08625

By: Kristina Miles  
Deputy Attorney General  
(609) 633-2038  
Attorney No. 003282011

---

SANDRA SMITH, INDIVIDUALLY AND AS	:	SUPERIOR COURT OF NEW JERSEY
EXECUTRIX OF THE ESTATE OF GEORGE	:	CAPE MAY COUNTY - LAW DIVISION
BRADLEY SMITH, AND AS GUARDIAN AD	:	
LITEM FOR HER CHILDREN KOLE SMITH	:	DOCKET NO. CPM-L-415-16
AND BRANDY SMITH, NICOLE GAETA,	:	
KYLE SMITH,	:	<u>Civil Action</u>
	:	
Plaintiffs,	:	
	:	
v.	:	Certification of Service
	:	
CITY OF NORTH WILDWOOD, STATE OF	:	
NEW JERSEY,	:	
	:	
Defendants.	:	

---

MAUREEN M. POPP, pursuant to R. 1:4-4(b) certifies:

1. I am a legal secretary in the Division of Law, Department of Law and Public Safety, State of New Jersey.

2. On January 3, 2017, at the direction of Kristina Miles, Deputy Attorney General, I caused to be forwarded by hand delivery, an original and two copies of Defendant State of New Jersey's Motion to Dismiss along with Notice of Motion and Certification of

Kristina Miles, along with a Certification of Service to the Deputy Clerk of the Atlantic County Civil Division.

Attn: Deputy Clerk  
Atlantic County Civil Division  
Superior Court of New Jersey  
1201 Bacharach Boulevard, 3<sup>rd</sup> Floor  
Atlantic City, New Jersey 08401

Honorable Julio Mendez, J.S.C.  
Atlantic County Superior Court  
1201 Bacharach Boulevard, 3<sup>rd</sup> Floor  
Atlantic City, New Jersey 08401


I also forwarded a copy of same by UPS Overnight Delivery to:

Paul D'Amato, Esq.  
D'Amato Law Firm  
2900 Fire Road, Suite 200  
Egg Harbor Township, NJ 08234

Joseph C. Grassi, Esq.  
Barry, Corrado & Grassi, P.C.  
2700 Pacific Avenue  
Wildwood, NJ 08260

A. Michael Barker, Esq.  
Barker, Gelfand & James  
210 New Road - Suite 12  
Linwood Greene  
Linwood, NJ 08221

3. 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.

  
Maureen M. Popp  
Legal Secretary

Dated: January 3, 2017