MILLINGTON QUARRY, INC.,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SOMERSET COUNTY
Plaintiff,	:	DOCKET No. SOM-L-475-08
v.	:	CIVIL ACTION
TOWNSHIP OF BERNARDS, and TOWNSHIP COMMITTEE of the TOWNSHIP OF BERNARDS,	:	OTSC Return Date: April 14, 2008
Defendants,	:	Before: Honorable Yolanda Ciccone, AJSC

Brief of Defendants Township of Bernards and Township Committee of the Township of Bernards, in Opposition to Plaintiff's Order to Show Cause to Seeking a Temporary Restraining Order and Preliminary Injunction to Enjoin Defendants from Enforcing the Provisions Of Bernards Township Ordinance #2008

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On the Brief

INTRODUCTORY NOTE

Defendants respectfully submit that before reading this Brief, the Court review the Certification of Township Engineer Peter Messina (the "Messina Cert."). Engineer Messina provides the factual and technical background necessary to understand the complexities of this dispute. Engineer Messina has also provided the Court with color photographs of the Quarry Property with notations thereon to assist in understanding what the Quarry Property looks like. Mr. Messina has provided charts and colored sheets from the plans, as well, to conclusively demonstrate that since at least early January 2007, MQI and Tilcon have been surreptitiously hauling in millions of cubic yards ("CY") of fill material into the Quarry Property and commenced implementing - without any Township review or approvals – the January 24, 2008, proposed Rehabilitation Plan prepared by Kevin Page, PE, of Page Engineering Consultants, PC, for MQI and Tilcon. Unfortunately for MQI and Tilcon, Engineer Messina has "caught them red-handed."

PRELIMINARY STATEMENT

PLAINTIFF IS ONCE AGAIN "CAUGHT RED-HANDED"

The Plaintiff has once again been caught "red-handed" engaging in a series of misrepresentations to the Township and to the Court, and conducting unlawful, unauthorized actions and activities.

- Approximately 1,000,000 CY of fill were imported into the Quarry Property without notice to or approval of the Township, from approximately 1994 to 2001. (Messina Cert., ¶ 17)

- MQI and Tilcon have begun implementing the new 2008 Proposed Rehabilitation Plan without any review or approvals by either the Planning Board or Township Committee. (Messina Cert., ¶ 6)

- MQI and Tilcon have been creating lesser "flatter" slopes than were approved; misusing imported fill and ensuring additional fill than originally contemplated or estimated would be required. (Messina Cert., ¶ 7)

- MQI and Tilcon have been placing imported fill on the floor area of the Quarry Property, in direct contradiction of testimony made to the Planning Board that only excess native soil overburden would be used on the floor area. (Messina Cert., ¶ 8)

- Plaintiff has failed to bring to the Court's attention that, even if, arguendo, MQI and Tilcon have a right to bring in 3,726,044 CY of fill because that number was included on the 2006 Revised Draft Rehabilitation Plan submitted to the Township by Kevin Page, PE, after the Stipulation of Dismissal Without Prejudice was entered by the parties, the approximate amount of fill already imported into the Quarry Property is 3,784,000 CY as of March 2008 – more than any amount for which MQI or Tilcon can venture a claim of vested rights. Moreover, that number increases daily, at an average of 100,000 CY of fill imported per month. Of course, the precise and exact amount of fill imported to date is impossible for the Township to determine, as MQI and Tilcon have refused to provide records for fill imported before July, 2006.

- Plaintiff has failed to bring to the Court's attention that the Township approval of a rehabilitation plan for the Quarry Property – upon which approval both MQI and Tilcon rely as the basis to continue to import fill material – expires on July 26, 2008, only three months away. The Quarry Property is located in the M-1 zoning district, and importation of fill is not a permitted use in that zone apart from an approved rehabilitation plan.

- MQI filed with the Township Tax Assessor a Chapter 91 form for triple net leases for the Quarry Property. stating that the annual rent was "$326,100". The lease between MQI and Tilcon in fact indicates a base rent of $326,000 and a fixed annual rent of $1,500,000. (Selman Cert., Ex.A – Lease; McArthur Cert., ¶6, Ex.6)

- Despite the requirements of Ordinance #2001, and a request from Engineer Messina, and contrary to assertions in recent pleadings that the quarry inspection escrow fund account deposit of $150,000 was made, no payment of the additional $135,000 escrow deposit required was received by the Township from MQI or Tilcon. (Messina Cert., ¶8, Ex.19)

A. BERNARDS TOWNSHIP HAS LEGITIMATE CONCERNS ABOUT ENVIRONMENTAL CONTAMINATION OF THE QUARRY PROPERTY

Geoffrey Goll, PE, of Princeton Hydro, LLC, the Township's Hydrogeologist, has been retained to oversee the environmental inspection of any fill imported to the Quarry Property. In conjunction with that responsibility, Princeton Hydro monitors, inspects and takes some random samples of the fill material.

On January 4, 2008, Mr. Goll notified the Township that the test results from a sample of imported fill material taken on November 15, 2007, revealed concentrations in excess of the NJDEP most stringent Soil Cleanup Criteria. After enactment of Ordinance #2001, Mr. Goll and Princeton Hydro increased both inspections and soil sampling for testing: instead of twice per month, Princeton Hydro inspects the quarry operations once per week, with the inspection day increased from four hours to eight

hours (or a full day of operation), and instead of twice per month, soil sampling for testing occurs once a week.

Mr. Goll has advised the Township that, once again, test results showed contaminants over the NJDEP most stringent Soil Cleanup Criteria levels, found in a sample taken on March 18, 2008, from a truck attempting to enter the Quarry Property with a load of fill material. (See Goll Cert., ¶6-8) Now that contamination has been discovered again in a random soil sampling from a truck importing fill material into the Quarry Property, inspections and sampling will increase.

> "In an effort proactively to ensure that contaminated materials are not being imported onto the Quarry Property, if any sample analysis reveals contamination above the NJDEP Residential Direct Contact Soil Cleanup Criteria ("RDCSCC"), then for a period of two months following the discovery of such contamination Princeton Hydro and the Township will increase the frequency of truck inspections to six full days per week, with discrete sampling of fill material increased to one sample per day. If after this two-month period no material is detected that contains contaminants in excess of the RDCSCC, then inspection efforts will be reduced to the normal frequency of inspections of once per week by Princeton Hydro."

(Szabo Cert., Ex. 2 - Ordinance #2001) Bernards has serious concerns and a duty to ensure that fill brought into the Quarry Property is not environmentally contaminated. Kevin Page, PE, and Mr. Maragni of MQI testified, during the Planning Board hearings on the rehabilitation plan submitted by MQI and Tilcon in 2003, that, from approximately 1994 to 2001, close to 1,000,000 CY of fill (covering an area of between 9 to 12 acres,

according to Mr. Page) was trucked into the Quarry Property without notification to authorities, Township approval, or environmental testing. (Florio Cert., Ex. 6, 7; and Messina Cert., ¶ 17)

Marvin Mahan (the father of), Roger Mahan and Gary Mahan, are or have been controlling shareholders in MQI, Transtech Industries, Inc. ("Transtech") and Tang Realty, Inc. ("Tang"). (See McArthur Cert., Ex. 1, pp. 5-6, 10 as to Transtech SEC Filing of November 30, 2000; and Ex. 2, SEC Filing as of April 22, 2004, p. 3) Transtech and Tang have involvement in many of the significant hazardous waste dumps in New Jersey. (McArthur Cert., Ex. 4, Forbes Magazine article, December 12, 1988, pp. 38-40, indicating 10 sites.) Chemsol, Inc., founded by Marvin Mahan, Transtech and Tang, owned or operated the Chemsol Superfund Site in Piscataway, NJ. Id., Ex. 2, p. 3. Transtech owned or operated the infamous Kin-Buc landfill facility in Edison, New Jersey. Id., Ex. 1, p. 11. Gary Mahan and Roger Mahan are the shareholders, control, and are the officers of MQI.

On November 20, 1978, the Tang entity transferred title to the Quarry Property in Bernards to MQI for $1.00. (McArthur Cert., Ex. 3, Tang to MQI Deed) The SEC filing dated April 22, 2004, that outlined the settlement of the Tang-owned superfund Chemsol site indicates that "since November 20, 1978, Tang

Realty, Inc has owned the Property at the [Chemsol Piscataway] site. Mahan is President of Tang Realty." Id., Ex. 2, p.3. See also, McArthur Cert., Ex. 5, USEPA August 19, 1999, reporting $23 million agreement with USEPA and New Jersey indicating Tang as a "[company] deemed responsible for hazardous waste at the Chemsol, Inc. Federal Superfund site in Piscataway [to] pay to complete the cleanup of this inactive solvent recovery and waste processing facility on Fleming Street."

Certainly, this history of Mahan family involvement in environmentally contaminated Superfund sites justifies the concerns the Township has to properly monitor importation of fill material into the Quarry Property.

B. EVOLUTION OF THE 2 TO 1 SLOPE REQUIREMENT FROM PLANNING BOARD HEARINGS IN MARCH, 2003, UNTIL JULY 2005 ADOPTION OF TOWNSHIP COMMITTEE RESOLUTION #050249

Bernards Ordinance § 4-9.5a.1 sets forth the purpose of rehabilitation of the Quarry Property. [See Szabo Cert., ¶1, Ex. 1, Section 4-9 "Quarrying"] Ordinance § 4-9.5a.1 states:

> "Purpose. Rehabilitation may begin while quarrying is conducted in accordance with the most recently approved and still valid rehabilitation plan, and it shall be completed after quarry operations cease. The purpose of rehabilitation is to return the quarry property to conditions, that are permitted by the Township Zoning Ordinance, that do not endanger the health and safety of the public, and that do not endanger natural resources such as groundwater and soil erosion. The purpose of the rehabilitation plan (also known in this section as the "plan") is to

describe these conditions, how and when they will be met, and the costs to meet them." (emphasis supplied)

Ordinance § 4-9.5a.2 specifies that:

> "[i]f the quarry owner and quarry operator are different persons, [MQI and Tilcon here] as defined in this section, then both shall join in the application for the rehabilitation plan, and they shall be jointly responsible for the implementation of the approved plan."

1. Planning Board Review

The Planning Board held public hearings on March 18, May 6, June 23, July 22, September 30, October 21, November 3, November 17 and December 2, 2003, and March 2, May 4, June 22, August 17, November 1 and December 6, 2004, [Florio Cert., ¶2] on the Quarry Property rehabilitation plan. The Planning Board discussed its resolution of findings, conclusions and recommendations at its December 21, 2004, and February 8, 2005, meetings, when the final form of the Resolution was adopted. (Id.) The quarry rehabilitation plan reviewed by the Planning Board was dated January 2, 2003, revised on February 5, 2004, consisting of 6 sheets, prepared by Kevin G. Page, PE, PP, of Page Engineering Consultants, PC, (the "2005 Approved Rehabilitation Plan"). (Messina Cert., ¶10, Ex. 4, Title Block for said plan.) Ordinance § 4-9.5a.2 further provides:

> "In the course of the hearing, the Planning Board may recommend changes in the plan, and the applicant may agree to these and amend the plan accordingly. The Planning Board shall submit a report to the Township

> Committee within 45 days after completion of the hearing on the plan. The report will include its findings and recommendations. These will include but not be limited to deficiencies it may find in the plan and recommendations for changes in the plan. If the Planning Board determines that a final decision on a rehabilitation plan should be postponed, the Planning Board may recommend to the Township Committee that an interim rehabilitation plan be accepted."

The Resolution constituted the Planning Board's "report to the Township Committee." (See Florio Cert., Ex. 1 – Report and Resolution)

Contrary to claims by MQI and Tilcon, rights under an approved or revised rehabilitation plan do not vest in perpetuity. Ordinance § 4-9.5a.4 states:

> "Required Review and Renewal of Rehabilitation Plan. Approval of every rehabilitation plan shall expire on the third anniversary of its approval, and a revised rehabilitation plan shall be submitted not less than six months before the expiration of the rehabilitation plan. The revised rehabilitation plan shall be reviewed by the Planning Board and approved by the Township Committee in the same manner as an initial rehabilitation plan." (emphasis supplied)

The Township Committee adopted Resolution #050249 on July 26, 2005, approving the 2005 Approved Rehabilitation Plan. This approval expires three months from now, on July 26, 2008, and the plan and approval will no longer be valid.

Ordinance § 4-9.5b requires:

> "Minimum Contents of Rehabilitation Plan. Every rehabilitation plan shall include the following at a minimum:
>
> 1.That the quarry property be made reusable for a use or uses permitted by the township Zoning Ordinance.

> 2.That the quarry property shall be brought to a final grade by a layer of earth two feet in thickness or its original depth, whichever is less, capable of supporting vegetation, unless a different depth is approved in the rehabilitation plan. Measures to prevent erosion and earth slides shall be described in detail for both the short and long term.
>
> 3.That all fill be of a suitable material approved by the Township Engineer.
>
> 4.**That after rehabilitation there be no slopes steeper than two feet horizontal to one foot vertical, except where such steeper slopes are consistent with an already approved rehabilitation plan.**" (emphasis supplied)

The 2005 Approved Rehabilitation Plan reviewed by the Planning Board did not contemplate or permit the import of any soil fill. Sheet 5 of that plan indicates 122,000 cubic yards of excess cut over-fill on the site. (Messina Cert., ¶10, Ex. 5)

The Planning Board did not substantively discuss creation of a 2:1 slope along the sheer cliff rock face by the railroad track until its last public hearing on December 6, 2004, and the December 21, 2004 and February 8, 2005, Board meetings. David Soloway, Esq., MQI's attorney, objected to the 2:1 slope requirement at that meeting:

> "I know there's been a lot of discussion relating to the cliff along the railroad. It's our intention, and the plan reflects this, to comply with the 2:1 standard in the ordinance where [MQI is] required to do that by the ordinance. It was never intended by [MQI], or we believe by the Township, that this long existing cliff area [4,500 feet] would be required to be restored to 2:1.

> We believe in the language of the ordinance that this slope shown in that area is consistent with previously approved rehabilitation plans. I know that in these prior plans the surface of the lake when filled was thought to reach almost to the top, as opposed to the 50 foot or so greater drop that we now know will exist, but it simply never was intended that the slope in that area would be any different than it is now.
>
> To achieve 2:1 in that area would be a gargantuan task and it would involve an enormous amount of fill. I assume no one cares a whole lot about the burden that would be put on [MQI] or on Tilcon because of that. I think you do care, through, about converting the quarry use to one that's more harmonious with the rest of the area, and the sooner the better.
>
> There is not fill on site to achieve 2:1 in the cliff area. So it would have to be brought in. This would mean that even after pouring is completed there would be an endless parade of trucks brining in more fill, effectively keeping the quarry open for a number of additional years. I don't think any of you want that and I don't think the people living near the quarry or driving past the quarry ever day want that either."

[Florio Cert., Ex. 2 - December 6, 2004, Planning Board hearing transcript excerpt, pp. 19-21]. Counsel for the Planning Board then indicated "[t]echnically, I think Mr. Soloway just recognized in his closing, the plan does not conform." (Id., p. 26) The 2005 Approved Rehabilitation Plan did not conform to Ordinance requirements since neither the 2:1 slope requirement, nor the estimated cubic yards of fill needed to meet that requirement, were shown.

Not until the end of the December 6, 2004, meeting did the Board discuss what amount of cubic yards ("CY") of fill would be required to create the 2:1 slope requirement. MQI and Tilcon

represented that the Quarry Property would be mined out in three years, by the end of 2007, and only 2,000,000 CY of fill would be required to create the 2:1 slope requirement. [Florio Cert., Ex. 2 - pp. 119-122]

> "Board Member ["BM"] White: Are we in agreement that the slopes that are not in compliance 2:1 that are not along the railroad side, that we felt that they should be addressed?
>
> Board Attorney Drill: That would be made 2:1?
>
> Hydrogeologist Goll: Actually, the applicant has proposed 2:1 on that side. There's an existing slope, but they have 2:1.
>
> Township Engineer Messina: Just the western end they didn't agree, which I think should be. Going back to the issue of alternatives, I have to say that I'm real concerned about additional truck traffic in town, We've been spending a lot of time, remember the truck test port [sic - task force] ten years ago trying to get trucks out of town and minimize truck involvement. A lot of residential complaints about trucks. To bring in two million cubic yards of fill would bring that level back up again of disturbance.
>
> BM Macksoud: We've had a million cubic yards brought in already without anybody – [notice, approval or testing]
>
> Mr. Messina: The quarry that was in operation, so there's trucks going in and out. Here the quarry is done and there's still trucks going up and down Stonehouse Road. I think that would annoy the residents.
>
> BM Macksoud: I agree.
>
> BM Moschello: What was the volume?
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> Mr. Messina: About two million cubic yards.
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> BM Moschello: I'd like to know, practically, what are we talking about, three years?
>
> Mr. Messina: Yeah, basically.

BM Moschello: That's not a bad alternative, even through it's a nuisance, as compared to having four thousand foot cliff in town forever.

Mr. Goll: It's going to be 90 to 110,00 truck what you're talking about, times two. So it would be about 200,000 trucks.

BM Moschello: A lot of trucks.

Board Planner Banisch: Have them come in the off peak hours.

BM Moschello: Maybe you can have the railroad deliver and dump off the side. Now there's thinking outside the box. You're thinking about trucks, I'm thinking about trains.

Mr. Goll: It's been done.

Mayor Chaudry: How much per truck?

BM Dr. Souza: Maybe 15.

BM Moschello: That's one of the benefits of having a railroad. If we had a river, we could use boats. But we don't, we have a railroad so we can use that. We don't have to use trucks.

Mayor Chaudry: If it's 2 million cubic yards and one truck is 15 cubic yards, you'll need 133,333 trucks.

Mr. Messina: Times two, they come in and leave.

Mayor Chaudry: So 267,000 trips. And I don't think that's something that you were going to ask for. If it happened- -

Mr. Messina: Who do I direct the phone calls to?

BM Macksoud: There's been this testimony, how many truck trips do they have a year now?

Mr. Messina: I think, mental exercise, an additional three years of operation. It would seem like three more years of operation to fill this back up." (emphasis supplied)

The Board's discussions concerned the estimate of 2,000,000 CY of fill; it neither discussed nor approved importation of

3,600,000 CY of fill. The Board never approved open-ended soil-grading extending well beyond the projected mining operations for the quarry; MQI and Tilcon said 2:1 would be over in three years.

The Board met two weeks later, on December 21, 2004, to discuss preparing its Resolution and Report to the Township Committee. While the Board did recommend the 2 to 1 slope requirement, it did not approve the method to do so, and expressly did not approve or give carte blanche to MQI and Tilcon to commence unlimited importation of fill material to the Quarry Property. The Board told MQI and Tilcon to devise a solution for 2:1 slopes. (Florio Cert, Ex. 3 - Transcript, at pp. 61-68, 71)

> "Board Attorney Koenig: That's critical. That's a critical element. As I said, this resolution is drafted in terms of the concept of having 2:1 slopes where there is land, but a sheer cliff face over water. That's the way this is drafted.
>
> Board Member Moschello: I'm going to state it now, but I said it last time, as well, and I know I missed a lot of - - I wasn't part of the details, but I was part of the 2:1 issue. I'm not so sure I'm completely comfortable with the notion that the Board should worry about the solution. I think it's the obligation of [MQI and Tilcon] to come up with the solution.
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> BM Spitzer: But it is a recommendation of the Board, and I think a key one, that we as a Board do not believe that approximately two million cubic yards of fill should be brought on the site to solve the problem. And that it is our view - -
>
> Board Planner Banisch: That was definitely the conclusion of the Board. It wasn't so much to say there's no way to

come closer to reconcile this, but technically speaking, that blasting approach to turn something sideways and make it - - there's not a lot of hope that's going to be a long-term solution.

BM Macksoud: This one isn't our conclusion until we voted on it. We've not reached a conclusion here.

BM Moschello: I said it the last time and I say it again, this is a four thousand foot cliff that's 70 feet high [sic – 120 to 170 feet high – Messina Cert., ¶ 16] and it's going to be here forever. And I'm not so quick to want to find that we have exhausted all the possible solutions.

Mr. Banisch: What I tried to say, maybe I wasn't clear, was the Board members as a group consensus concluded that if it meant bringing in these thousands of truckloads of fill in order to create that slope, that that was not a desirable thing for the community.

BM Moschello: Frank, were you at the last meeting?

Mr. Banish: [sic]

BM Moschello: It may sound absurd, but I brought up the simple notion of let's use the railroad. That will eliminate thousands of trucks and probably reduce it to substantially fewer trains. So there are other alternatives other than just trucks on roads. And so that I use that as an example as we have not really seriously researched this to the point where we have concluded there is no practical solution, I'm not convinced of that.

BM White: Perhaps our suggestion there should say specifically we note that trucking in the dirt, the fill itself, was what we had the issue with.

BM Spitzer: The Board believes it would be better not to truck in such volume, but to create a safety zone.

BM Macksoud: We've already had a million cubic yards of dirt trucked in here [without Township knowledge, approval or testing] that we know about. How much additional has come in since we got that testimony, I do not know. There could be several hundred thousand more cubic yards, I have no way to know. As the quarry continues its operation for the next however many years, just in the normal course of

operation they may very well be able to bring in another million or so more cubic yards.

There is a lot of overburden on that site that they use to create residential lots, which could be moved around and pushed around in a different fashion and be used to solve this problem.

I'm not happy with trucks going through town, we already have I don't know how many thousand trucks a year going through town. But if they've been bringing the dirt in and nobody noticed, the next million cubic yards maybe nobody is going to notice that either. They come in empty, they come in full. I don't know that it makes a difference.

BM Moschello: The quarry's been in operation for over a hundred years, there's no rush to say this has to be solved overnight. My opinion, I think the issue is critical enough, it's permanent enough that it really requires - - we talked - - you folks talked greatly about the creation of the lake and aeration and all necessary and important practical things to consider. But the creation of a four thousand foot, 70-foot [sic] cliff that's going to be permanently part of the landscape is a much more significant issue than the algae in the lake, on my part.

I don't know if anyone has been able to come up with a - - a very simple solution, and maybe it's not a simple solution. Particularly I looked at the drawings and I see a lot of fill that's going to go into the creation of the lots. My priority is the creation of a safe area rather than worrying about the creation of the lots. That's a different issue.

So I guess I'm just sharing my view that this issue particularly of the compliance of 2:1 is quite important to me and I suggest that we just leave the problem to the applicant and that they submit a plan that does fully comply with the 2:1 slope.

BM Spitzer: Instead of the several sentences that say about the suggestion of the blasting to create the 2:1 slope is not realistic and the suggestion that two million cubic yards of fill be brought would not be in the best interest and instead create a safety zone in areas where sheer rock face presently exists above water, however, all other areas are require [sic] to maintain, strike that to solution oriented. Substitute the Board, the Township Committee shall require the applicant to devise and present - -

BM Moschello: Develop a plan.

BM Spitzer: - - solutions to address the 2:1 slope issue.

BM Moschello: Right, period.

Mr. Messina: How about saying something to the effect that the Board feels that brining in two million cubic yards of fill after the quarry has ceased operation is not desirable. I think that was what we [sic] alluding to. They were going to stop quarrying and then spend three years bringing trucks in. If they do it, as was mentioned earlier, as part of their round trips over the next eight years, come back full or come back empty…

BM Moschello: What you're talking about is the strategy for how do you implement the plan. If you take a simple-minded view, it happens all at the end, which is not necessarily the case.

Mr. Messina: Say we don't like the fact it starts at the end.

BM Moschello: That's a positive statement. But my thought is there are a lot of things that can happen between now and the time that this is finished that could solve this problem practically. I think you're trying to solve a problem and I don't think that's the job of this Board, frankly. It's the job of the Board to make a recommendation.

BM Spitzer: How about a suggestion. Take out those statements and substitute what I said before, the Township Committee should require the applicant to devise and prepare solutions to address the 2:1 slope issue, having first said that **the present plan does not comply with the requirements of the Ordinance.** That's the first thing.

Require them to develop, devise and prepare these additional solutions and say, however, the Board believes that the suggestion of approximately two million cubic yards of fill to be trucked to the site would not be in the best interest of the Township and leave it at that.

BM Macksoud: Trucked after cessation of the quarry operations.

BM Spitzer: After cessation of quarry operations.

BM Moschello: That's a statement of opinion, which is okay. But that's exclusive of how the problem gets solved.

BM Spitzer: Does the Board feel comfortable with that? Mr. Hadiyan.

BM Hadiyan: How about the solution they have is not approved by the Township Committee? How about putting in there whatever solution they come out to be has to be approved by Township Committee.

BM Spitzer: It has to be.

BM Moschello: It has to be. My view is the problem has been identified and the applicant has to provide a solution. And the solution is to put - - how do they propose to solve the 2:1 slope throughout the site? Period, end of discussion.

***

BM Spitzer: The key point here is the Planning Board is not going to make that determination. The recommendation of the Township Committee, which will have to deal with the applicant after our work is done, is there's a problem that they have and they've got to come up with the solution that's acceptable to the Township Committee."

Finally, at the February 5, 2005, meeting, when the Resolution was adopted, the Board again emphasized it was not approving importation of fill as a method to implement the 2:1 slope requirement, but left MQI and Tilcon to create a solution to do so. [Florio Cert., Ex. 5 - Transcript, pp. 5-7.]

"BM Macksoud: … We were having lengthy discussions about how to solve the problem, and the board finally decided it was not our job to solve the problem.

BM Moschello: That's correct.

BM Macksoud: It was the quarry's job, let them find a way to solve the problem. They blasted the slopes and let them address the issue.

We wanted a fully compliant plan, so if I look at the language, the proposed replacement language, I think its' - - it more accurately reflects what we said.

Submit a fully compliant plan, submit a plan fully compliant, I would say with the two to one slope requirement.

I think that addresses - -

BM Moschello: That's fine.

BM Macksoud: - - that more accurately addresses what we are trying to say here.

There are other places I think - - you know - - may be we are not so totally insistent on full compliance and we don't want to be contradictory, but on the slope we want full compliance.

BM Moschello: That was specifically the point, the slope issue.

Board Attorney Sullivan: Is that just in lieu of that third sentence?

BM Moschello: In lieu of - -

BM Macksoud: In lieu of the third sentence?

BM Moschello: Strike that sentence and replace it with the much more emphatic statement that the applicant is expected to submit a fully compliant plan to the two to one slope.

BM Macksoud: Maybe we should give our counsel what we wanted.

I would say read it. The applicant should be required to submit a plan fully compliant with the two to one slope requirement.

Mr. Sullivan: Got it.

BM Macksoud: I think that - -

BM Spitzer: Is everybody comfortable with that?

I think that's right. That language parallels the language that we just approved in the minutes, which I think captures the essence of the discussion that we had there.

We will leave the solutions for the applicant to propose to the township committee, but from our perspective, the plan has to comply with the two to one slope requirement.

> BM Moschello: I would suggest the change be made, and if it's in agreement with the board, the resolution be passed down to the township." (emphasis supplied)

The Board's discussions above were incorporated into the February, 2005 Report and Resolution to the Township Committee at "Whereas" ¶'s 9, 10, 11, 22, 32, 33, 34 and "Now Therefore Condition" ¶'s 8 and 9. (Florio Cert., Ex. 1)

2. Township Committee Review of Planning Board Report and Resolution.

The Bernards Township Committee reviewed the Planning Board Report and Resolution at public hearings on April 21 and May 24, 2005. No substantive discussion of the 2:1 slope requirement occurred during these three meetings except the May 24, 2005 meeting when the Township Committee discussed that an estimated 2,000,000 CY of fill were required. [Szabo Cert., Ex. 3, Transcript, pp. 59-60, 65-67, 69]

> "Township Engineer Messina: [Reading from the Planning Board Resolution and report] [Condition] Number 8: The issue involving the sheer rock face in the 2 to 1 slope centers on water level and the Applicant's desire to continue quarrying. While the prior plan complied because of the higher water level, the present plan does not comply with the requirements of the Ordinance. The Applicant should be required to submit a plan fully compliant with the 2-to-1 slope requirement. The suggestion that approximately two million cubic yards of fill be trucked to the site after cessation of the quarry operation would not be in the best interests of the Township. ...
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> ***
>
> Mr. Messina: Going back to what has to be done. If this is the quarry bottom, this quarry slope, 2-to-1 has to go down

to there. So all of this is extra material that has to be either brought in or reshaped from inside. So it's a sizable triangle that needs to be filled and the water line would be here. So your water - - your lake will be smaller than 60 acres. You're either bringing in material or shifting it from somewhere else on the site along the entire railroad side wall.

Mayor Kelly: That's what we're requiring?

TC Moschello: Which is some 4,000 feet long.

Mr. Messina: That's the dilemma that everyone is in.

Mayor Kelly: The dilemma is because you have to bring the materials to the site?

Mr. Messina: I think the Planning Board tried in summation, basically in this document that was given to you, putting the challenge to the quarry. Saying you [Township Committee] tell [MQI and Tilcon] this is what we want, you [MQI and Tilcon] tell us how it can be done. Bill Allen's offered one solution about negating a prior approved subdivision. That's more of a legal question than anything else. ...

***

TC Moschello: I think there was another scenario that I threw out, which is that trucks are not the only way to bring material in. They can use the [railroad] tracks that are above the quarry, which was used for years to move the material out. So they can also import it vis-à-vis the train and operate it that way.

No one sat down to do the calculations, but obviously that would be far, far, far less in the way of number of car loads, if you would, than truck loads.

BM Messina: The Planning Board asked [MQI and Tilcon] to explore that and tell us why they can't do that.

***

TC Moschello: The earlier discussion, sort of the fear that the Planning Board had was, gee, it was going to require all these truck loads of material. But I don't think that was really studied in terms of some of the other options in terms of moving material within the quarry, alternative

ways of moving material into the quarry, in addition to maybe complementing or supplementing that with trucks.

You're talking about a long enough period of time that if indeed they have a direction, they will be able to accomplish it. It's not like something that they have to suddenly come along tomorrow and truck in all this material." (emphasis supplied)

Again, the method by which MQI and Tilcon were to accomplish a 2:1 slope from vertical cliff face was not settled. Transcript, p. 74-75

Mr. Messina: Number 27 states: The revised cost estimate prepared by Peter A. Messina, P.E., dated July 19, 2004, in amount of $2,071,200 [utilizing 2,000,000 cubic yards of fill] should be established as the amount of appropriate surety to assure completion of the rehab plan.

This was based on the rehab plan in July of 2004, not as you just discussed it. [The Plan with 122,000 CY of excess fill on the site.]

TC Licata: So you have to go back and retool numbers because of the 2-to-1 issue?

Mr. Messina: Right, the two million number is not going to be accurate.

***

Mr. Messina: This may take a while because I would like to see the quarry come up with some ideas on how they're going to comply with this and then generate a cost estimate on that." (emphasis supplied)

Notably, MQI and Tilcon had not submitted a revised plan with a new calculation of the CY fill amount that would be required, nor did they advise to the Township that they would only comply with the 2:1 slope requirement by trucking in the fill.

On July 26, 2005, the next meeting at which Township Committee review of the rehabilitation plan occurred, during the

final discussions of Resolution #050249, (See Szabo Cert., Ex. 4), only a passing mention of CY of fill was made when Mr. Messina said that Kevin Page, PE (MQI/Tilcon engineer) had handed to him as he walked into the meeting that night a calculation estimating 3,200,000 CY of fill would be required to accomplish the 2:1 slope requirement. This was the first time since March, 2003, when the Planning Board started reviewing the proposed rehabilitation plan, that the Township was provided with any fill number other than the 2,000,000 CY estimate. Even then, the increased number was only supplied by Mr. Page in the context of the revised dollar estimate to determine the security amount. [Szabo Cert., Ex. 4, Transcript Excerpt, p. 5]

> "TC Moschello: Were you able to have any discussions with the quarry during your preparation of this [cost estimate]?
>
> Mr. Messina: I had some discussions.
> They had not prepared a reclamation plan pursuant to the town to the two to one slopes.
> I had to prepare myself over the last few weeks, prepared a grading plan that showed the two to one slopes, and my staff prepared the necessary fill calculations.
> I did receive today a letter from Page Engineering, a letter dated July 26th. It was faxed to me later this afternoon and handed to me when I walked in, and basically they are very close - - my calculations showed a fill in that slope area, the newly created area, of 3.4-million cubic yards of fill, and Mr. Page's report did a similar situation.
> He had a 3.2-million cubic yards. It's within a fairly close estimate of each other." (emphasis supplied)

For all intents and purposes, the tremendous 60% to 70% increase in the estimate of the amount of CY which would be required to accomplish 2:1 slopes came from left field, and managed to fly

in under the radar without exception or remark as to the disparity from all earlier estimates and discussions of 2,000,000 CY of fill. Mr. Page's letter to Mr. Messina dated July 26, 2005 - the very same night Resolution #050249 was adopted, was neither addressed to nor distributed to either the Township Committee for its consideration. (Messina Cert., Ex. 7) The increased CY figure was provided only to establish a cost estimate for the rehabilitation security amount in the Township Committee's Resolution. (See Szabo Cert., Ex. 3 – Resolution #050249)

The Township Committee adopted the Planning Board's recommendation as to 2:1 slopes by affirming in its Resolution #050249, Condition (8):

> "(8) The quarry owner shall be required to submit a plan fully compliant with the 2 to 1 slope requirement in all areas."

The Township Committee also established the security amount to be required in connection with the 2005 Approved Rehabilitation Plan:

> "(27) The revised cost estimate prepared by Peter Messina, PE, dated July 26, 2005, in the amount of $4,012,350 should be established as the base amount to determine the appropriate security to assure completion of the rehabilitation plan."

Resolution #050249 neither granted any express permission to the quarry to import fill, nor did it approve any amount of CY of fill, nor did it approve the method by which the 2:1 slope

requirement would be fulfilled. Neither the Planning Board nor the Township Committee were provided with a revised rehabilitation plan by MQI or Tilcon updating the CY figures and calculations. The Planning Board has never reviewed any rehabilitation plan to date that shows a 2:1 slope requirement requiring the import of 2,000,000 cubic yards of fill, much less 3,400,000 cubic yards of fill. The only rehabilitation plan reviewed by the Planning Board was the 2005 Approved Rehabilitation Plan, last revised February 5, 2004, which shows 122,000 cubic yards of excess fill at the Quarry Property. (Messina Cert., Ex. 5)

As indicated, Tilcon and MQI challenged the 2:1 slope requirement, resulting in the January, 2006, Stipulation of Settlement Without Prejudice. (Szabo Cert., Ex. 6) As required by the Stipulation (¶1), MQI's Engineer Kevin Page revised the 2005 Approved Rehabilitation Plan, consisting of 6 sheets, on January 17, 2006, (the "2006 Revised Draft Rehabilitation Plan"), so as "to comply with Condition Number 8 of Resolution #050249 requiring submittal of a plan fully compliant with the 2:1 slope requirement in all areas." Mr. Page, for the very first time on plans submitted to the Township, showed an increase from the 2,000,000 CY figure, by including a singular notation on Sheet 5 that 3,726,044 CY would be required to meet the 2:1 slope requirement – an incredible 85% increase from the

original number presented to and discussed by the Planning Board and Township Committee. (Messina Cert., Ex. 5) **The 2006 Revised Draft Rehabilitation Plan has never been reviewed by either the Planning Board or Township Committee, and does not constitute an approved rehabilitation plan pursuant to Ordinance § 4-9.5a.4.**

> "4. Required Review and Renewal of Rehabilitation Plan. Approval of every rehabilitation plan shall expire on the third anniversary of its approval, and a revised rehabilitation plan shall be submitted not less than six months before the expiration of the rehabilitation plan. The revised rehabilitation plan shall be reviewed by the Planning Board and approved by the Township Committee in the same manner as an initial rehabilitation plan." (emphasis supplied)

The only rehabilitation plan that has been reviewed and approved by the Planning Board and the Township Committee is the 2005 Approved Rehabilitation Plan that indicates 122,000 CY of excess fill exist on the Quarry Property, requiring no importation of fill.

C. HOW MANY CY OF IMPORTED AND NATIVE FILL ARE AT THE QUARRY PROPERTY SITE?

MQI has advised Township Engineer Peter Messina that during the 20 months between July, 2006, and February, 2008, **1,974,855 CY (July 2006 to Feb 2008)** of fill were imported. The 1,974,855 CY of fill represents an average of almost 100,000 CY of a fill a month for 20 months. (Messina Cert., ¶19). MQI has advised that, during this 20-month period, 131,657 trucks imported the

fill – an average of 6,583 trucks a month just for fill importation. (Messina Cert., ¶19)

Despite requests by Mr. Messina, MQI and Tilcon have refused to supply information concerning imports of fill material which occurred before July, 2006. (Messina Cert., ¶ 19, Ex. 8 - May 5, 2006, and March 14, 2008, letters to Tilcon.)

> "In review of my files on the monthly fill documentation provided by Tilcon, I have found I do not have any records prior to July of 2006. It would be appreciated if you would forward documents from January, 2006, or at the least the monthly summaries, to my office at your earliest convenience."

Both the Stipulation of Settlement and Dismissal Without Prejudice entered in January, 2006, and the Planning Board Rehabilitation Plan Resolution dated February 5, 2005, require MQI and Tilcon to supply the Township Engineer with this information on fill importation.

> "[Condition] 17. The quarry should institute a screening policy in order to prevent unsuitable materials from being imported into the quarry. The policy should require (a) record keeping of original material, (b) testing of the material to make sure it is comparable to native material, (c) locational information on exactly where it is left on site. All such records should be available for inspection and copied to the engineering office."

[Florio Cert., Ex. 1, pp. 9-10]

> "Tilcon shall make available to the Township Engineer, consistent with Condition #17 of Resolution #050249, records regarding the origin and characteristics of the fill material. Such records shall also indicate quantities of fill received and, also consistent with Condition #17 of Resolution #050249, locations in the Quarry where it has been placed."

[Szabo Cert., Ex. 6, Stipulation of Settlement dated January 24, 2006, p.4 ¶5.]

Assuming the 20-month average of 100,000 CY of fill a month which was imported from July, 2006, to February, 2008, another **500,000 CY (Feb 2006 to June 2006)** of fill were imported to the Quarry Property during the five months of February, 2006, to June, 2006.

MQI also imported soil fill for many years to the Quarry Property without either notifying the Township or environmentally testing the fill.

> "25. At the hearing on December 2, 2003 the applicant reported there were two additional areas where fill had been brought to the site over the past 6 years. The **first area covered 6 to 8 acres and consisted of approximately 750,000 cubic yards** of fill, and the **second covered 3 to 4 acres with approximately 200,000 cubic yards** of fill." (emphasis supplied)

[Florio Cert., Ex. 1 - Resolution, p. 6]. This equates to another **950,000 CY (approx. 1994 – 2001)** of fill that could be utilized to comply with the 2:1 slope requirement.

During the November 17, 2003, rehabilitation plan hearing, the Planning Board first discovered that MQI had imported soil fill to the Quarry Property without any Township notice or approvals. No testing of the fill occurred during that period of unauthorized importation of fill by MQI. (See Florio Cert., Ex. 5; Excerpt of Transcript, testimony of MQI employee Robert Maragni, pp. 98-107.) Mr. Maragni estimated this unauthorized

fill began arriving at the Quarry Property in "the very late eighties, or 1990." Id. at p. 100.

At the next rehabilitation plan hearing before the Planning Board on December 3, 2003, MQI's engineer, Kevin Page, clarified when the unauthorized fill was imported.

> "We estimate that between the period of – and again no one has exact dates, and certainly least of all me – but sometime after 1994 and up to 1998, to a lesser degree up to 2001, it looks like the majority in that three to four year period, we estimate that about 700,000 cubic yards of fill were brought in [at that first location]."

[Florio Cert., Ex. 6, pp. 19-30.] This was the first location. Mr. Page further estimated another 150,000 to 200,000 CY of fill were deposited at a second location.

> "We have estimated that material to be about 150 to 200,000 yards, again, at that particular [second] location, so what the quarry has indicated to us, there are two spots on this site that imported material is brought in."

Id. pp. 29-30. This fill has been called the "off-site" fill since a native overburden stockpile of 900,000 CY exists at the Quarry Property.

At the October 21, 2003, hearing before the Planning Board, Mr. Page testified "relating to the amount of overburden that was available for spreading around the site." (Florio Cert., Ex. 7, transcript excerpt, p.7,) Mr. Page explained the overburden was "the native fill at the south end of the quarry." (Id., p. 7) Mr. Page revised his calculation from the May 6, 2003,

Planning Board hearing to indicate that of the 900,000 CY of native fill, 259,600 CY would be moved from the overburden pile to provide the "two-foot fill coverage" to, essentially, cover the area of the Quarry Property that had been either mined or disturbed. (Id., pp. 7-16) A substantial portion of this **259,600 CY (existing excess native fill)** that was to be utilized for the two feet of vegetative cover and the 6 inches of lake cover, can now be utilized for the 2:1 slope requirement since, by Mr. Messina's estimate, Tilcon has been using imported fill for grading the floor of the Quarry Property, an estimated 300,000 CY of fill since at least January of 2008. (Messina Cert., ¶ 8)

SUMMARY

Timeframe of Fill Imported
Cubic Yards of Fill

1. Existing Native Fill On-Site	259,000
2. Approximately 1994 to 2001 (Unauthorized)	950,000
3. February 2006 to June 2006	500,000
4. July 2006 to February 2008	1,985,000
5. March 2008 (estimate based on 20-month average)	100,000
TOTAL FILL ON-SITE	**3,784,000**

(and increasing daily)

Even if, arguendo, the Court were to adopt MQI's and Tilcon's claim of the right to import 3,726,044 CY based upon the January, 2006, Stipulation of Settlement – 3,784,000 CY of

fill to create the 2:1 slope requirement is on site. MQI and Tilcon are over the limit. Of course, since MQI and Tilcon represented to the Planning Board during the course of hearings from March, 2003, to February, 2005, that only 2,000,000 CY of fill were required to create 2:1 slopes. The approximate amount of fill already at the site is in excess by 1,784,000 CY of the 2,000,000 CY figure reviewed by the Board.

LEGAL ARGUMENT

POINT I

MQI IS NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF SINCE IT FAILS TO MEET ANY OF THE CROWE STANDARDS. [MQI Brief, p.10]

As recently set forth in B&S Ltd. v. Elephant & Castle, 388 N.J. Super. 160, 167-168 (Ch.Div. 2006):

> "On the return hearing date of an Order to Show Cause, the court may issue preliminary relief if the movant demonstrates that: (1) an injunction is necessary to prevent imminent and irreparable harm; (2) the movant asserts a settled legal right supporting its claim; (3) the material facts are not controverted; and (4) in balancing the equities or hardships, if injunctive relief is denied then that hardship to the movant outweighs the hardship to the non-movant. Morris County Transfer Station, Inc. v. Frank's Sanitation Serv., Inc., 260 N.J. Super. 570, 574 (App.Div.1992) citing Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). **The movant [MQI and Tilcon] carries the burden to prove its entitlement to injunctive relief by clear and convincing evidence.** Dolan v. DeCapua, 16 N.J. 599, 612-13 (1954). As always, equitable relief by a preliminary injunction should not be entered except when necessary to prevent substantial, immediate, and irreparable harm. Subcarrier Communication, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997)."

The well-known standards known as the Crowe standards, Crowe v. DeGioia, 90 N.J. 126 (1982), govern. A temporary restraining order or preliminary injunction is issued to prevent threatened, irreparable injury or mischief that should be averted until there is an opportunity for a full investigation of the matter by the Court. See Crowe v. DeGioia, 90 N.J. at 132-134; Outdoor Sports Corp. v. American Federation of Labor, Local 23132 , 6 N.J. 217 (1951). The standards applicable to an

application for preliminary injunctive relief are well settled. An injunction is an extraordinary remedy that is to be administered with sound discretion upon considerations of justice, equity and morality in a given case. See Crowe v. DeGioia, supra; New Jersey State Bar Ass'n v. Northern New Jersey Mortgage Ass'n, 22 N.J. 184 (1956); Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303 (E&A 1878).

To prevail on a claim for injunctive relief, a party must show that such relief is necessary to prevent irreparable harm, that the law underlying the party's claim is well-settled and that the material facts of the controversy are uncontroverted. See Crowe, 90 N.J. at 132-33. The final factor has been construed as requiring that the party demonstrate a reasonable probability of ultimate success on the merits. See Id. at 133. Additionally, the Court must consider a balancing of the relative hardships on the parties in granting or denying relief. Id. at 134.

Before injunctive relief can be granted, a plaintiff must demonstrate there is a reasonable probability that he will eventually succeed on the merits in the case. Sony Board of Adjustment v. Service Electric Cable Television, 198 N.J. Super. 370, 378-79 (App. Div. 1985). Stated otherwise, an injunction shall not issue unless the law upon which a plaintiff bases its claims is well settled. Citizens Coach Co., 29 N.J. Eq. at 304.

Second, a plaintiff must have no adequate remedy at law. Green v. Piper, 80 N.J. Eq. 288 (Ch.Div. 1912). Third, a **plaintiff must be threatened with substantial, immediate and irreparable harm if the injunction does not issue**. Citizens Coach Co., supra, 29 N.J. Eq. at 303-04. Finally, a plaintiff must show that the threatened harm to it outweighs any possible harm that might result to the defendant should the injunction issue. Suenram v. The Society of the Valley Hospital, 155 N.J. Super. 593, 597 (Law Div. 1977). Considering these criteria in the context of the present matter, neither MQI nor Tilcon can satisfy any of these requirements.

A. MQI HAS NOT ESTABLISHED ANY SUBSTANTIAL, IMMEDIATE AND IRREPARABLE HARM. [MQI Brief, p.11]

For the sake of simplicity, this brief will address each of the MQI legal arguments made at pp. 10 to 26 of MQI's brief on a point-by-point basis. All such arguments are debunked with ease and fail miserably.

> "The first principle for granting preliminary relief requires that the movant [MQI] show by clear and convincing evidence that an injunction is necessary to prevent imminent and irreparable harm."

B&S Ltd., supra. at 167, citing Crowe at 132. MQI claims that "the moratorium on the importation of fill will result in the immediate loss of customers who provide suitable fill material to the Property and a revenue stream to MQI." (emphasis

supplied) MQI Brief, p. 11. This is a false statement since Thomas Carton of MQI has stated that MQI has no contracts whatsoever to import fill to the Quarry Property – MQI only assists Tilcon in allegedly obtaining those contracts. See Carton Affid., ¶27 ("Tilcon, with the assistance of MQI, entered into various contracts for the importation of significant fill material to the Property.") That MQI has no contracts for fill importation with third parties and will suffer no revenue loss is highlighted by the complete absence of even one such representative contract to the Carton Affidavit. This is not substantial, immediate irreparable harm.

MQI also falsely claims that "the moratorium will guaranty the loss and use of the enjoyment of the Property in accordance with the Rehabilitation Plan." MQI has derived and continues to derive significant compensation from the Quarry Property. In January, 1999, CRH P.L.C. of Dublin, Ireland, ("CRH"), announced that it had acquired the Mahan Family businesses MQI and Dell Contractors, Inc. for One Hundred Twenty-Three Million ($123,000,000) Dollars in cash to the Mahans. [McArthur Cert., Ex. 11 - *New York Times* article dated July 6, 1999] At a zoning trial in 2004, Roger Mahan testified that a substantial portion of the acquisition price with Tilcon was allocated to the MQI operation, perhaps in excess of Eighty Million ($80,000,000.00) Dollars.

The 15-year Lease between MQI and Tilcon also obligates Tilcon to make substantial annual payments to MQI for mineral extraction. (See Carton Affid., dated March 27, 2008, ¶ 2, Ex. A – Lease, Sections 2 and 3.)

SECTION TWO
TERM AND RENT

(a) Lessor demises the above Premises for a term (the "Term") of the shorter of fifteen (15) years from the date of execution hereof, or the date when the reserved for the Minerals have been depleted to the point where the Lessee in its reasonable discretion determines that it no longer wishes to engage in the Quarry Operation on the Land.

(b) Lessee shall pay to Lessor during the term annual base rent **(the "Base Rent")** in the amount of **$326,100 per annum** in equal monthly installments of $27,175, on the first day of each month beginning on July 1, 1999. **The parties agree that the Base Rent stated herein represents only a proportionate share of the total fixed annual rental amount of One Million Five Hundred Thousand Dollars ($1,500,000.00) for a period of ten (10) years, (the "Total Rental Amount")** due Lessor pursuant to the provisions of a transaction described in an Agreement of Purchase and Sale of Assets of even date by and between the parties hereto (the "APA"). Accordingly even if Lessee's operation at the Premises is concluded or terminated, except by reason of a default by Lessor which results in Lessee's inability to use the Premises for the purposes contemplated by this Lease, the Base Rent shall continue to be due and owning [sic] Lessor annually for the duration of the first ten (10) years from the date hereof, or until the Total Rental Amount is completely satisfied from the combination of all sites referred to in the APA, whichever shall be sooner.

SECTION THREE
ADDITIONAL RENT

In addition to the Base Rent set forth in Section Two above, the Lessee shall pay all other costs and expenses associated with Lessee's use of the property

> so that this Lease shall be a "triple net" lease. All such expenses shall be deemed "Additional Rent" and shall be payable beginning at the commencement of this Lease and continuing for its duration. **The Additional Rent payable by the Lessee shall include all real estate taxes, assessments and municipal charges, costs and expenses,** all interest and penalties that may accrue thereon in the event of the failure of Lessee to pay those items as provided herein, and all other sums that may become due by reason of any default of Lessee or failure by Lessee to comply with the terms and conditions of this Lease." (emphasis supplied)

On August 1, 2005, MQI's treasurer wrongly reported to Bernards Township Tax Assessor Marcia Sudano that Tilcon was paying MQI only $326,100 as the annual "lease or rent amount." MQI failed to provide Ms. Sudano with a copy of the Lease that indicates the annual total rent pursuant to Section Two of the Lease is $1,500,000. See August 1, 2005, letter from MQI Treasurer Robert Goldstein to Tax Assessor Sudano. (McArthur Cert., Ex. 6) The failure of MQI to accurately report proper rental income results in a much lower property tax assessment and bill for the Quarry Property, permitting underpayment by MQI of real property taxes, and ultimately resulting in other Township residents unfairly being forced to make up for such underpayment. (McArthur Cert., Ex. 8, Property Tax Assessment Sheets)

In summary, Mr. Carton admits that MQI has no contracts with outside haulers to import fill to the Quarry Project – only Tilcon does. (Carton Affid., ¶27) A nine-month moratorium on fill importation will not deprive MQI of any revenues from fill

importation, nor will it discontinue any of the substantial annual Lease payments made by Tilcon to MQI for mining extraction rights, together with the "triple net" lease costs Tilcon pays on behalf of MQI. Moreover, Tilcon's parent company guaranteed MQI all of these payments. Lease, Section Four, "Guaranty". MQI continues to receive from Tilcon its unabated rent stream, and MQI has not alleged that Ordinance #2008's nine-month moratorium will mitigate this rental stream and the triple net lease payments. Moreover, the Township is not drawing upon or disturbing the security posted by MQI for rehabilitation purposes. This is not substantial, immediate irreparable harm.

Mr. Carton claims "MQI has spent considerable money and time to comply with Rehabilitation Plan and the Stipulation of Settlement." (Carton Affid., ¶24) Mr. Carton provides little detail on this claim, other than to state that "MQI has spent approximately $350,000 on specialty equipment for the Property." This is merely a claim of money damages – not irreparable harm. No documentation is submitted to support his claim. In fact, why MQI would purchase equipment to comply with any rehabilitation plan is puzzling since Mr. Carton at ¶17 states "[a]s lessee of the Property, Tilcon was obligated to MQI to meet the terms of the Rehabilitation Plan." MQI and Tilcon filed with the Somerset County Clerk on July 6, 1999, at Book 2243, page 054, a Memorandum of Lease:

> "In accordance with a certain Lease Agreement (the "Lease") dated July 1, 1999, Lessor has leased to Lessee certain property at Stonehouse Road, in the Township of Bernards, County of Somerset, State of New Jersey, as more particularly described in Schedule A attached hereto and made a part hereof (the "Premises").
>
> The term of the Lease is the shorter of fifteen (15) years from July 1, 1999, or the date when the reserves for the Minerals (as defined in the Lease) have been depleted to the point where Lessee in its reasonable discretion determines that it no longer wishes to engage in the Quarry Operation (as defined in the Lease) on the Land.
>
> The lease requires Lessee to comply with and follow the mining and reclamation plans attached to the Lease so that the final contours and grading of the Premises appear as in the Exhibit attached to the Lease."

(See McArthur Cert., Ex. 7 – Memorandum of Lease)

Although neither Tilcon nor MQI has been fully forthcoming with any profit that Tilcon makes on soil fill importation, Tilcon previously claimed to the Township that the profit is marginal.

> "The Township's calculations of average fees per truckload and annual fees generated through delivery of fill material to the Quarry of allegedly "$15 million" is grossly overestimated. In fact, **the net proceeds (after all costs/expenses accounted for) from the incoming fill is less than $1 million**." [emphasis supplied)

(Belardo Cert., Ex. 1 - January 15, 2008, correspondence from Tilcon Attorney Brian Montag, Esq. to Bernards Township Attorney John Belardo, Esq.) Even if Mr. Montag's assertion is accurate, a nine-month moratorium would deprive Tilcon - not MQI - of an estimated $750,000 in money damages – not irreparable harm.

Tilcon is a business unit of the Dublin-based CRH PLC, NYSE ticker symbol "CRH", **www.crh.ie**. CRH reported on January 3, 2008, pre-tax profits of $2.8 Billion dollars.

> "Irish building materials group CRH [NYSE references omitted] said 2007 pretax profit will be "close" to 1.9 billion euros ($2.8 billion), a "high-teens" percentage rise and its fifteenth consecutive year of profit growth. Analysts polled by Thomson Financial expected earnings of 1.82 billion euros this year, followed by 6% growth next year. It's spent a total of 1.2 billion euros in acquisition during the second half. The phased reduction in dividend cover to a targeted 3.5 times for the 2008 financial year continues, but it will buy back up to 5% of its shares under a new program. Though it forecasts slower economic growth next year, a strong dynamic in Central and Eastern European countries together with moderate progress expected in the broader euro zone will help lift profit in 2008, and it expects a steady comparable performance in U.S. profitability as non-residential and infrastructure businesses offset residential."

(McArthur Cert., Ex. 10, 2007 Sales for CRH were $28,961,000,000.00; Ex. 10, CRH – Tilcon company profile and press release). Tilcon is just one of CRH's 42 wholly-owned United States subsidiaries. (McArthur Cert., Ex. 9) Tilcon's company website (**www.tilconny.com**) provides further financial information concerning its affiliation with the Oldcastle Materials Group and vis-à-vis CRH of Ireland.

> "Tilcon joined the Oldcastle Materials Group in 1996. Each Oldcastle company retains its local identity while leveraging the financial strength, best practices and purchasing power of the larger organization. Oldcastle Materials is the fourth largest aggregates producer in the US and the number one asphalt producer and one of the top 10 ready mix concrete producers."

See Tilcon website. Tilcon also runs 13 operations just in New Jersey (including MQI), and 12 operations in New York. Tilcon just added in 2008 two additional New York facilities. (Id.)

MQI next alleges "the moratorium will also cause a prospective breach of certain contractual arrangement with third parties related to the Rehabilitation Plan." MQI Brief, p. 11. This is an unsubstantiated statement entitled to no credence since MQI has no contracts with any "third parties". Mr. Carton only asserts that there are "contracts entered into by Tilcon with various third parties." (Carton Affidavit, ¶27.). Again, this does not constitute substantial, immediate irreparable harm.

Furthermore, the 2005 Approved Rehabilitation Plan, under which MQI and Tilcon are supposed to be operating, is the plan approved by the Township Committee by Resolution #050249 on July 26, 2005. (Szabo Cert., Ex. 5) Pursuant to Ordinance § 4-9.5a.4., the approved plan expires on July 26, 2008, approximately three months from now: "[a]pproval of every rehabilitation plan shall expire on the third anniversary of its approval." Any contract entered with third parties to bring fill into the Quarry Property should have included provisions indicating the contract would be subject to cessation or termination, based on the known expiration date of the approved rehabilitation plan and that the M-1 Zone does not permit the

import of fill as a use independent of an approved rehabilitation plan. Apart from an approved rehabilitation plan, there exists no independent right of permitted use to import fill to the Quarry Property. The M-1 Mining Zone at Ordinance § 21-10.9a.1. provides as a permitted use: "[t]his zone is designed for stone quarrying. Until such time as all quarrying activity has ceased and the quarry use is abandoned, no other such use shall be permitted in the zone except child care centers." (emphasis supplied) (Szabo Cert., Ex. 7, Ordinance § 21-10.9)

"Finally, [MQI alleges] the moratorium will have a substantial and adverse impact on the logistics of the Property and the operation of the Quarry." MQI Brief, p. 11. MQI provides neither an explanation nor a scintilla of support for this claim. MQI is not presently mining the Quarry Property – Tilcon has a 15-year lease to do so. (McArthur Cert., Ex. 7) The nine-month moratorium does not interfere with any "operation" of the Quarry Property by Tilcon. Tilcon may continue to quarry and extract minerals for sale to its customers. MQI's fourth claim of irreparable harm fails as miserably as its three previous woeful claims.

MQI has not only failed to assert any irreparable harm sufficient to warrant preliminary relief, but MQI has also failed to establish any monetary damage. Pursuant to Crowe, the

Court can end the inquiry here and deny MQI's request for injunctive relief.

B. MQI HAS NOT DEMONSTRATED ANY (MUCH LESS A REASONABLE) LIKELIHOOD OF SUCCESS ON THE MERITS. [MQI Brief, p.12]

In flagrant violation of the Quarry Licensing Ordinance of Bernards Township at Chapter 4-9 (Szabo Cert., Ex.1), MQI and Tilcon have surreptitiously commenced – without Township review or approval – implementation of the 2008 Proposed Rehabilitation Plan filed by Page Engineering that requires – according to Mr. Page – an additional 5,268,141 CY of fill, above and beyond the millions of cubic yards of fill already imported into the Quarry Property through October 31, 2007. (See Messina Cert.,¶'s 10-11.) MQI and Tilcon now want to start the meter anew from November 1, 2007, and bring in another 5,268,141 CY of fill from that date alone. Thomas Carton of MQI has proudly boasted to Mr. Messina that MQI's goal is to bring in as much fill as [MQI] can to increase the amount of residential lots MQI can obtain on the Quarry Property after all mining operations have ceased. (Messina Cert., ¶22) The 2008 Proposed Rehabilitation Plan calls for an increase from 41 homes to 50 homes at the Quarry Property, and a decrease in the size of the lake to 24 acres from 44 acres [2006 Revised Draft Rehabilitation Plan],

decreased from 62 acres [2005 Approved Rehabilitation Plan]. (Messina Cert., ¶21)

MQI and Tilcon have commenced implementation of their 2008 Proposed Rehabilitation Plan without obtaining any Planning Board approval as required by Ordinance § 4-9:5a.4., which provides that a "revised rehabilitation plan shall be reviewed by the Planning Board and approved by the Township Committee in the same manner as an initial rehabilitation plan." (Messina Cert., ¶5) The nine-month moratorium will enable the Planning Board to review the 2008 Proposed Rehabilitation Plan while accomplishing at the same time the salutary effect of halting the unlawful actions of MQI and Tilcon in commencing a regrading of the Quarry Property without Township approval.

Mr. Messina has demonstrated, by comparing the 2008 Proposed Rehabilitation Plan with the 2006 Revised Draft Rehabilitation Plan, that MQI and Tilcon are not creating 2:1 slopes, but much less steep "flatter" slopes of 3:1 and 4:1. (Messina Cert., ¶'s 7-9) Thus, fill imported onto the site has not been utilized to comply with the 2:1 slope requirement; this results in the need for a much more massive amount of fill eventually to create the required slopes along the remainder of the original 4,500-foot long vertical cliff walls along the railroad tracks. Mr. Messina roughly estimates only about 20%, or 800 feet, of the total cliff length has been graded despite

the importation of nearly 3,800,000 CY of fill into the Quarry Property to date. (Recall an exact estimate of fill imported is not possible since, despite requests by Mr. Messina as Township Engineer dating back to May of 2006, neither MQI nor Tilcon has supplied the Township with complete records of fill importation prior to July, 2006. (Messina Cert., ¶'s 15-16.) This refusal also violates the Stipulation of Settlement entered by the parties in January, 2006, which requires at ¶5:

> "Tilcon shall make available to the Township Engineer, consistent with Condition #17 of Resolution #050249, records regarding the origin and characteristics of the fill material. Such records shall also indicate quantities of fill received and, also consistent with Condition #17 of Resolution #050249, locations in the Quarry where it has been placed."

To compound their illegal actions, MQI and Tilcon are now importing and spreading fill on the floor of the Quarry Property although Mr. Page consistently testified during the hearings before the Planning Board that the native overburden stockpile of 259,000 CY of fill on the Quarry Property would be used for the eventual required 2 foot vegetative cover. (See Florio Cert., Ex. 7, excerpt of October 21, 2003, Planning Board Transcript; and Messina Cert., ¶8)

In summary, the nine-month moratorium recommended by the Planning Board on March 4, 2008, and put in place by Ordinance #2008 was a reasonable action enacted by the Township to halt MQI's and Tilcon's unlawful and continuing implementation of the

2008 Proposed Rehabilitation Plan until the Planning Board can conduct public hearings to determine what MQI and Tilcon are "up to" now. Having been caught "red-handed", neither MQI nor Tilcon has any probability of success on the merits. The Court should deny any preliminary restraints and release the temporary restraints.

B.1. ORDINANCE #2008 IS ENTITLED TO A PRESUMPTION OF VALIDITY. [MQI Brief, p.12]

The Township has the general authority to regulate quarries pursuant to the State's grant of police power pursuant to N.J.S.A. 40:48-1 and -2 for the health, safety and welfare of the community as set forth by the New Jersey Supreme Court in Bernardsville Quarry, Inc. v. Borough of Bernardsville, 129 N.J. 221, 228-230 (1992) and N.J.S.A. 40:52-1g. as to the power to license quarries. Bernardsville Borough enacted an ordinance, far more stringent than Ordinance #2008 at issue here, which permanently limited the depth below which property could not be quarried. Id. at 224. Bernardsville had initially "ordered the suspension of all blasting at the quarry," i.e., a moratorium. Id. at 226. The New Jersey Supreme Court upheld Bernardsville's permanent ordinance prohibiting quarrying below a certain depth, id. at 245:

> "We hold that Bernardsville pursuant to its police powers has enacted a valid ordinance to limit quarry operations in the interests of the public health,

> safety, and welfare, and that the ordinance clearly advances a substantial, genuine, and legitimate public purpose. **Further, the interference with the property interest of the quarry owner effected by the regulation is not excessive or unreasonable, nor does it deprive the property of substantial value or prevent its use for other economically viable purposes.** We conclude that the application of the ordinance does not effectuate an unconstitutional taking of property without due process of law." (emphasis supplied)

Similarly, a municipality is empowered to enact reasonable moratoriums such as Ordinance #2008 (Szabo Cert., Ex. 8). In RedebAmusement, Inc. v. Mayor and Committee of the Township of Hillside, 191 N.J.Super. 84, 100-101 (Law Div. 2003), the court upheld the validity of Hillside's 18-month moratorium on the issuance of licenses for mechanical amusement devices.

> "The power of a municipality to pass ordinances is limited by and derived from legislative authorization, and those delegated powers are liberally construed. *(numerous citations omitted)*
>
> The municipality is granted the power to license and regulate "places of public amusements" under N.J.S.A. 40:52-1. This power is granted pursuant to the municipal police power to protect the general health, welfare and safety of its citizens. Trombetta v. Atlantic City, 181 N.J.Super. 203, 226, (Law Div. 1981). The power to pass a moratorium is based on this power to regulate. But, it can only be permitted "subject to constitutional limitations that it not be unreasonable, arbitrary or capricious, and that means selected via such legislation shall have real and substantial relation to the objects sought to be attained. Gabe Collins Realty, Inc. v. Margate, 112 N.J.Super. 341, 346, 347 (App. Div. 1970)." Trombetta, supra, 181 N.J.Super. at 226, 1349.
>
> The validity of a municipal ordinance is presumed, and the burden of proof rests on the challenger [here, MQI and Tilcon] to persuade the court that an ordinance

> [such as Ordinance #2008] is invalid. Hutton Park Gardens v. West Orange, 68 N.J. 543, 564, 565 (1975)."

Redeb v. Hillside further held that "a presumption of validity attaches to this moratorium ordinance as well as to all other municipal ordinance. Id. at 101 citing Hutton Pk. Gardens, 68 N.J. at 543, and "the burden of proof is on plaintiff to prove that the 18-month moratorium period is unreasonable." Id. Redeb held:

> "18 months does not appear to be an unreasonable, arbitrary or capricious amount of time considering the lengths of other moratoriums upheld. See Campana, supra, (31 months). Meadowland Reg. Dev. Agcy v. Hackensack, 119 N.J.Super. 572 (App.Div. 1972) cert. den. 62 N.J. 72 (1972) (26 months)."

In addition, under certain circumstances the Township is permitted to suspend MQI's and Tilcon's quarrying license entirely. The Township has not yet approved the 2007 Quarry License, (Messina Cert., ¶26), and MQI and Tilcon operate on a carryover basis from the 2006 license.

Bernards could – although it has not yet done so – suspend all operations at the Quarry Property, including mining, since MQI and Tilcon are implementing the 2008 Proposed Rehabilitation Plan without either Planning Board or Township Committee approval, unlawfully creating lesser slopes and bringing in more fill than was approved under the current approved plan.

> "**Suspension of Licenses.** The Township Committee may suspend any quarry license for reasons specified in this section or if it finds that the licensee is violating a material term or provision of this section

> or the license, or an applicable statute of the State of New Jersey, in such a fashion as will be substantially detrimental to the health, safety or welfare of any of the inhabitants of the township. **Any action by the quarry owner or operator that significantly and adversely affects the feasibility of implementing the approved and current rehabilitation plan may be cause for suspension of the quarry license. Any such suspension may remain in effect until remedial action is taken or, where appropriate, a revised rehabilitation plan is submitted and approved.** Before suspending a license, the township shall give the licensee 10 days' written notice specifying the grounds upon which the license is proposed to be suspended and an opportunity to be heard. Any suspension of a license shall be stayed for a period of five business days to permit the license holder to make application to the Superior Court of New Jersey for relief." (emphasis supplied)

Ordinance § 4-9.11. (Szabo Cert., Ex.1) Rather than moving forward with a more drastic and punitive action at this time, the Township's adoption of Ordinance #2008 imposing a nine-month moratorium on fill importation (as recommended by the Planning Board on March 4, 2008) represents a less draconian measure and eminently reasonable action to curtail the instant abuse than a complete cessation of all quarry operations.

As previously noted, apart from an approved rehabilitation plan, there exists no independent right of permitted use to import fill to the Quarry Property. The M-1 Mining Zone at Ordinance § 21-10.9a.1. provides as a permitted use: "[t]his zone is designed for stone quarrying. Until such time as all quarrying activity has ceased and the quarry use is abandoned, no other such use shall be permitted in the zone except child

care centers."(emphasis supplied)(Szabo Cert., Ex.7, Ordinance § 21-10.9)

As indicated, the nine-month moratorium of Ordinance #2008 is reasonable and valid since it prevents MQI and Tilcon from continued unlawful implementation of the 2008 Proposed Rehabilitation Plan until such time as the Planning Board has the opportunity to conduct public hearings to review the newly proposed plan. Indeed, if the moratorium is lifted, Bernards Township will suffer irreparable harm in that an average of 100,000 CY of fill every month will continue to be deposited on the Quarry Property to (1) develop a grading without approval; (2) create slopes far in excess of the 2:1 slopes shown on the 2006 Revised Draft Rehabilitation Plan; (3) import fill far in excess of either the 2,000,000 CY fill figure presented by MQI and Tilcon to the Planning Board and Township Committee during the course of March, 2003 to July, 2005; (4) import fill far in excess of even arguendo the 3,726,044 CY figure supplied by Mr. Page on the 2006 Revised Draft Rehabilitation Plan – a plan which was neither subject to either review or public hearing before the Planning Board and Township Committee; (5) prevent MQI and Tilcon from using imported fill to create the two-foot vegetative cover required by Ordinance § 4-9.5b.2 when MQI and Tilcon consistently represented to the Planning Board that the 259,000 CY of native fill from the overburden stockpile on site

would be used for this purposes; and (6) create slopes for lesser "flatter" slopes than 2:1, e.g. 3:1 and 4:1, eventually which would lead to the need for additional fill far in excess of even the 5,258,141 CY fill figure (ADDITIONAL FILL REQUIRED AS OF OCTOBER 31, 2007, NOT EVEN COUNTING ALL THE FILL ALREADY AT THE SITE ON THAT DATE ALONG) which is proposed in the 2008 Proposed Rehabilitation Plan; all to (7) as MQI's Thomas Carton has boasted to Township Engineer Peter Messina, permit MQI to dump as much fill on the Quarry Property as possible to create as many residential lots as it can cram in: this is, of course, accomplished by flatter slopes then 2:1 and markedly more fill than ever imagined or approved by the Township or represented to the Planning Board or Township Committee by MQI and Tilcon.

B.2. ENACTMENT OF ORDINANCE #2008 DOES NOT CONSTITUTE A BREACH OF THE STIPULATION OF SETTLEMENT ENTERED AND FILED WITH THE COURT. [MQI Brief, p.16]

Neither MQI nor Tilcon would enter the Stipulation of Dismissal unless it was "without prejudice," reserving their right to challenge the 2:1 slope requirement during future rehabilitation plan reviews. Now, both erroneously argue this Stipulation was carved in cement. As stated in Malhane v. Borough of Demarest, 174 N.J.Super. 28, 30 (App.Div. 1980) citing Christiansen v. Christiansen, 46 N.J.Super. 101 (App.Div. 1957), certif. den. 25 N.J. 56 (1957):

> "A dismissal without prejudice is comparable to a nonsuit... it adjudicates nothing. Another action may be instituted and the same facts urged, either alone or in company with others as the basis of a claim for relief."

Moreover, even if arguendo, Resolution #050249 adopted by the Township Committee on July 26, 2005, constituted an implied approval of the CY figures proffered by Mr. Page (3,200,000 CY) and estimated by Mr. Messina (3,400,000 CY) solely for the purpose of determining the appropriate cost for implementation and setting a dollar amount for security to be required of MQI and Tilcon, that approval will expire on July 25, 2008, and neither MQI nor Tilcon will have any right by ordinance to import fill after that date. See Ordinance § 4-9.5a.4.

> "Required Review and Renewal of Rehabilitation Plan. Approval of every rehabilitation plan shall expire on the third anniversary of its approval [July 25, 2008], and a revised rehabilitation plan shall be submitted not less than six months before the expiration of the rehabilitation plan. The revised rehabilitation plan shall be reviewed by the Planning Board and approved by the Township Committee in the same manner as an initial rehabilitation plan." (emphasis supplied)

For either MQI or Tilcon to suggest any right to an indefinite approval to import fill to the Quarry Property based upon the January 24, 2006, Stipulation of Settlement Without Prejudice is contrary to the plain language of the Township's Ordinances. While Mr. Page submitted his 2006 Revised Draft Rehabilitation Plan pursuant to the Stipulation, a plan he revised to be "fully compliant with the 2:1 slope requirement in

all areas," (Stipulation ¶1), neither the Township Committee nor the Planning Board ever approved the fill figure of 3,726,004 CY – which figure was a footnote on Sheet 5 of the 2006 Revised Draft Rehabilitation Plan. Mr. Messina merely reviewed those revised plans to ascertain they included a 2:1 slope as required. (Messina Cert., ¶13)

Moreover, the argument by MQI and Tilcon for reliance upon the 2006 Revised Draft Rehabilitation Plan is entirely moot since neither MQI nor Tilcon are implementing that plan; both parties are instead implementing the 2008 Proposed Rehabilitation Plan, as noted and set forth previously.

B.3. BERNARDS TOWNSHIP CAN PREVENT FOR NINE MONTHS IMPORTATION OF FILL THROUGH ORDINANCE #2008. [MQI Brief, p.17]

MQI falsely states in its Brief, p. 17, that is has a:

> "Rehabilitation Plan in place which was approved, and mandated by the Township. It has operated under that plan, expending substantial amounts of time and money to commence reclamation of the Property in accordance with the Rehabilitation Plan."

MQI then relies on this assertion to argue that the Township cannot "rescind approvals or permits previously granted as they constitute vested rights which cannot be revoked." Id. MQI, however, is not spending any monies to implement a rehabilitation plan – Tilcon is obligated under the Lease agreement with MQI to implement the plan. See Carton Affid.,

¶17. ("As the lessee of the Property, Tilcon was obligated to MQI to meet the terms of the Rehabilitation Plan.") See McArthur Cert., Ex. 7 - Memorandum of Lease.

Moreover, the claim as to vested rights fails utterly since Ordinance § 4-9.5a.4. clearly indicates that the July 26, 2005, Township Committee approval expires on July 25, 2008, and after that date, MQI and Tilcon have no rights whatsoever until the Planning Board reviews the 2008 Proposed Rehabilitation Plan and that plan is subsequently reviewed and approved by the Township Committee. Ordinance § 4-9.5a.5.

Additionally, the Planning Board and Township Committee discussed the 2,000,000 CY fill estimate, not the 3,726,000 CY fill figure included by Mr. Page in his 2006 Revised Draft Rehabilitation Plan. Even if, arguendo, the mere submission by MQI and Tilcon of a revised plan in 2006 with an increased figure somehow vested them with approval rights, the amount of fill currently estimated to exist or have been imported into the Quarry Property is 3,784,000 CY – already more than the 2006 Revised Draft Rehabilitation Plan figure relied upon by MQI to claim vested rights to continue unchecked to import an average of 100,000 CY of fill per month into the Quarry Property.

Finally, most condemningly, even if the 2006 Revised Draft Rehabilitation Plan submitted by MQI and Tilcon to the Township is considered an implied approval for 3,725,000 CY of fill, as

the Township has made abundantly evident, MQI and Tilcon are not placing and grading imported fill in accordance with the 2006 Revised Draft Rehabilitation Plan; they are unlawfully implementing the new 2008 Proposed Rehabilitation Plan, and the Township is well within its rights to enact Ordinance #2008 putting in place a nine-month moratorium on continued importation of fill into the Quarry Property. The implementation of a nine-month moratorium is entirely justified to prevent MQI's unlawful attempt to increase the residential lot yield at the Property from 41 to 50 lots prior to obtaining any approvals for the 2008 Proposed Rehabilitation Plan.

B.4. ORDINANCE #2008 DOES NOT CONSTITUTE INVERSE CONDEMNATION AS TO MQI. [MQI Brief, p.18]

MQI has not suffered any money damages by virtue of Ordinance #2008, much less inverse condemnation. In July, 1999, Tilcon paid MQI One Hundred Twenty-Three Million ($123,000,000.00) Dollars; of which –Roger Mahan testified at the 2004 zoning trial- approximately Eighty Million ($80,000,000.00) Dollars was for the mining rights to the Quarry Property. Tilcon pays to MQI the sum of One Million Five Hundred Thousand ($1,500,000.00) Dollars for annual rent, plus Tilcon covers all expenses related to the Quarry Property under a triple net lease. (Carton Affid., Ex. A) These payments continue unabated, and MQI has not alleged otherwise. Mr. Carton admits

MQI has no contracts for importation of fill to the Quarry Property, so no income or loss of revenue stream to MQI has been interrupted. MQI's inverse condemnation claim is "a tale... full of sound and fury; signifying nothing."

The New Jersey Supreme Court upheld as not constituting inverse condemnation the Bernardsville ordinance prohibiting mining below a certain depth level, which ordinance reduced the value of that quarry property from $34,000,000 to only $2,700,000.

> "BQI's expert on real estate valuation testified that **the property was worth over $34,000,000** based on a projection that over 10,000,000 metric tons of basalt could be mined from the property. BQI admits, **however**, that even if the depth restriction is upheld, **the property would still have a value of $2,700,000.** As observed in Goldblatt v. Town of Hempstead, supra, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130, the Supreme Court upheld a ban on sand and gravel excavations below two feet above the maximum groundwater level. It noted that 'there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question.' Id. at 594, 82 S.Ct. at 990, 8 L.Ed.2d at 134. In Gardner, we similarly concluded that a substantial diminution in property value did not constitute a sufficient loss of value or deprivation of property to require the payment of compensation. 125 N.J. at 210-11." (emphasis supplied)

Bernardsville, supra, 129 N.J. at 239-240. For MQI to suggest an inverse condemnation claim here in light of the Bernardsville Quarry, Inc. decision is ludicrous.

B.5. THE TOWNSHIP HAS NOT VIOLATED MQI'S CIVIL RIGHTS UNDER NEW JERSEY LAW. [MQI Brief, p. 21]

The Civil Rights Act claim is simply another "throw in everything including the kitchen sink" count. MQI Brief, p. 21. MQI has cited no legal authority for this cause of action, and it bears no merit.

The New Jersey Civil Rights Act is a 2004 statute in which "there are no reported decisions in New Jersey that interpret or apply the NJCRA." PC Air Rights, LLC v. Mayor and Council of the City of Hackensack, 2006 WL2035669 (Law Div. Bergen Cty. 2006) at p.8, "Imperfections of local legislatures that are routinely corrected through conventional actions in lieu of prerogative writs... are not entitled to any additional remedies under the NJCRA." Id. at p. 9. (PC Air Rights opinion, Ex.2, Belardo Cert.) Plaintiff in PC Air Rights challenged a 2005 zoning amendment that partially rezoned the railroad's property (and plaintiff's inchoate right to use the air and space above the property) into a zoning district that permitted only one and two-family residential dwellings. Plaintiff also sought a reversal of actions by the Zoning Board of Adjustment. The PC court refused plaintiff any relief under the New Jersey Civil Rights Act.

B.6. THE TOWNSHIP IS NOT ESTOPPED FROM ENACTING AND ENFORCING ORDINANCE #2008.

MQI argues estoppel. MQI Brief, p. 21. As discussed supra, estoppel is inappropriate when a party such as MQI is unlawfully implementing its new 2008 Proposed Rehabilitation Plan without any Township approvals or authorization. Equitable estoppel is applied only in very compelling circumstances. Bonaventure International, Inc. v. Borough of Spring Lake, 350 N.J.Super. 420, 436 (App.Div. 2002) "The doctrine is rarely invoked against a governmental entity, particularly when estoppel would interfere with essential governmental functions." Id. at 436

MQI and Tilcon claim lack of notice; however, neither claims Ordinance #2008 was not properly introduced, advertised and adopted at a public hearing. See N.J.S.A. 40:49-2. Township Clerk Szabo noticed and published Ordinance #2008 in accordance with the requirements of the statute. (See Szabo Cert., Ex.9) The court should know that Meryl Gonchar, Esq., attorney for MQI, together with counsel for Tilcon, Brian Montag, Esq. and Allison Saling, Esq., were invited to and attended an "off-the-record" meeting at the law office of Bernards Township Attorney John Belardo, Esq. on Monday, February 25, 2008, at 3:30 p.m. As the meeting was "off-the-record", the substance of the discussions which occurred will not be addressed, however, both MQI and Tilcon were placed on notice that the fill being imported was an issue of grave concern to the Township. Counsel

for MQI and Tilcon were requested and given the opportunity to get back to Township Attorney Belardo with feedback from their clients.

C. RELATIVE HARDSHIP FAVORS DISSOLUTION OF THE TEMPORARY RESTRAINT AGAINST IMPLEMENTATION OF ORDINANCE #2008. [MQI Brief, p.26]

If the court does not permit the nine-month moratorium pursuant to Ordinance #2008, MQI and Tilcon will continue with unlawful implementation of their new 2008 Proposed Rehabilitation Plan by trucking in an average of 100,000 CY of fill a month. Once the fill is illegally deposited, it cannot be removed. The Planning Board needs time to review the 2008 Proposed Rehabilitation Plan before it is implemented. The relative hardship favors Bernards Township.

CONCLUSION

For all of the foregoing reasons, defendants Bernards Township and the Township Committee of the Township of Bernards, request that the Court on the return date of plaintiff's Order to Show Cause, dissolve the temporary restraints previously stipulated to, and impose no preliminary restraints on the defendants' enforcement of the terms of Ordinance # 2008.

Respectfully submitted,

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Dated: April 7, 2008