MEMORANDUM

TO: Chairman Breslin and Members of
the Zoning Board of Adjustment of Bernards Township

FROM: Steven K. Warner, Esq., Board Attorney

DATE: May 14, 2019

RE: Millington Quarry, Inc.
135 Stonehouse Road
Block 6001, Lot 6
Application No. ZB18-026

1. Background

Millington Quarry, Inc. (“MQI” or the “Applicant”) proposes to subdivide property located in the M-1 Mining Zone and designated as Block 6001, Lot 6, on the Township Tax Map, more commonly known as 135 Stonehouse Road (the “Property” or the “Site”).

The Property consists of 179.769 acres, which the Applicant proposes to divide into two lots, Proposed Lot 6.01 and Proposed Lot 6.02, in order to confine an environmentally restricted portion of the Property to a separate lot. Proposed Lot 6.01 is proposed to consist of 50.285 acres and will contain the environmentally restricted area. Proposed Lot 6.02 is proposed to consist of 129.484 acres and will contain the balance of the Property, which includes an existing office building approved by the Planning Board of the Township of Bernards (the “Planning Board”) in 1983. The Applicant is not proposing any land disturbance or physical improvements.

The Property is a former active quarry presently being rehabilitated, i.e. made reusable for a use permitted by the Zoning Ordinance. The rehabilitation plan (the “Rehabilitation Plan”) was approved by the Township Committee, as set forth in a Settlement Agreement and Release

1 Proposed Lot 6.01 will also be referred to herein as the “Environmentally Restricted Lot,” and Proposed Lot 6.02 will also be referred to herein as the “Remainder/Office Lot.”
between the Township and the Applicant, dated April 29, 2014 (the “2014 Settlement Agreement”). The Rehabilitation Plan calls for the majority of the Site to be occupied by an approximately 95 acre meadow and an approximately 50 acre lake.

A portion of the Property, including a portion of the future lake, is subject to a Memorandum of Agreement (“MOA”) between the Applicant and the New Jersey Department of Environmental Protection (“NJDEP”), whereby the NJDEP has provided oversight of an environmentally restricted portion of the Property. A Deed Notice/Restriction in a form approved by the NJDEP was recorded with the Somerset County Clerk on July 25, 2018.

Prior to filing the instant application with the Board of Adjustment of the Township of Bernards (the “Zoning Board”), the Applicant filed an application with the Planning Board seeking the same minor subdivision approval relief. The Applicant’s existing/proposed office use on Proposed Lot 6.02 was initially determined by the Township Planner to constitute a pre-existing nonconforming use and, therefore, MQI’s request to reduce the size of the property on which it was located by subdividing it was deemed to constitute an expansion of this pre-existing nonconforming use, thus requiring relief pursuant to N.J.S.A. 40:55D-70(d)(2). In light of MQI’s acknowledged need for “d” variance relief, the Applicant withdrew the prior application before it was heard by the Planning Board and, as such, the Planning Board took no formal action. MQI now seeks minor subdivision approval and d(2) (and other requisite bulk) variance relief from the Zoning Board (the “MQI Application”).

By letter dated March 6, 2019, John Belardo, Esq., the attorney for the Township of Bernards (the “Township”), advised the undersigned and Michael Lavigne, Esq., MQI’s attorney, that the Bernards Township Committee (the “Township Committee), by Resolution #2019-0162 adopted on March 5, 2019, authorized him, the Township Planner and the Township Engineer to
appear before the Zoning Board on the MQI Application and, *inter alia*, oppose same on jurisdictional grounds. By email dated March 6, 2019, Mr. Lavigne confirmed receipt of same and advised that he would appear at the March 6 public hearing before the Zoning Board for the limited purpose of entering an appearance and having notice of the hearing carried to a future date, so as to afford the Zoning Board an opportunity to research and consider the jurisdictional challenge.

At the March 6th hearing, the Zoning Board scheduled briefing of the jurisdictional dispute, so that both MQI and the Township had a full and fair opportunity to present their arguments on behalf of their respective positions, in writing, with the expectation that the Zoning Board would render its determination on the jurisdictional dispute at the May 16th public hearing.

This Memorandum constitutes my legal opinion, and supportive analysis, on the following three (3) predicate issues:

- Does the Township have standing as an “interested party” to challenge the jurisdiction of the Zoning Board and object to MQI’s Application on the merits if jurisdiction is exercised by the Zoning Board?

- Does the Zoning Board have jurisdiction to hear and decide the merits of the MQI Application and, if so, is the Zoning Board’s exercise of that jurisdiction mandatory?

- Is MQI required to notice for, and obtain, a d(1) use variance for Proposed Lot 6.01 (the Environmentally Restricted Lot), as part of the MQI Application?

**2. Does the Township Have Standing as an “Interested Party” to Challenge the Jurisdiction of the Zoning Board and to Object to MQI’s Application on the Merits if Jurisdiction is Exercised by the Zoning Board?**

While at the outset it appears that MQI does not contest the standing of the Township to appear as an “interested party” and to challenge the jurisdiction of the Zoning Board to hear the MQI Application, I nevertheless thought it prudent to provide the Zoning Board with my legal
opinion on the issue of the Township’s standing to so appear in these proceedings, since same is a predicate issue to the Township’s ability to challenge the Zoning Board’s jurisdiction. For the reasons set forth below, it is my legal opinion that the Township has such standing.

A. The Statutory Allocation of Functions Between the Municipal Governing Body and its Administrative Land Use Agencies.

Very broadly, the authority delegated to municipalities under the Municipal Land Use Law (“MLUL”) is exercised by three municipal agencies: the governing body (here, the Township Committee), the Planning Board and the Zoning Board. The Planning Board adopts a master plan with a land use element. The Township Committee works from that master plan to enact zoning ordinances. Once the municipal regulations are effective, the Planning Board and the Zoning Board review individual land development applications to determine whether they conform to the master plan and the applicable ordinances or whether, consistent with the purpose of that master plan and those ordinances, an exception should be made and variance relief should be granted to the Applicant.

Once functioning, the Zoning Board, exercising its variance power, is not merely an agency of the municipality that created it, but rather it is an independent statutory body authorized and empowered to act in ways which are quasi-judicial, rather than simply ministerial. See, Centennial Land & Dev. Co. v. Tp. of Medford, 165 N.J. Super. 220, 225 (Law Div. 1979). While land use boards are not courts, nevertheless, in the process of hearing and deciding matters which properly come before them, land use boards must take testimony and admit into evidence exhibits, and they must make findings of fact, and draw legal conclusions from those facts, in accordance with the testimony and documentary evidence presented at the hearing on the application, in much the same way that a court would do the same.

**B. The Broad View of Standing to Participate in Hearings on Land Development Applications.**

The concept of standing relates to which parties can appear before a land use board, such as this Zoning Board. Land use boards are instructed, like courts, to take a generous view of standing. The MLUL provides that “interested parties” and “parties immediately concerned” have standing to participate in hearings on land use development applications.

An “interested party,” as applied to a proceeding before a land use board such as this Zoning Board, is defined under the MLUL, at N.J.S.A. 40:55D-4, as:

any person, whether residing within or without the municipality, whose rights to use, acquire, or enjoy property is or may be affected by any action taken under this Act, or whose rights to use, acquire or enjoy property under this Act, or under any other law of this State or of the United States have been denied, violated or infringed by an action or a failure to act under this Act.

The language is particularly broad. Plainly, the term includes the applicant, all interested parties other than the applicant who want to participate in support of the application, and all interested parties who want to participate in opposition thereto (i.e., objectors).

The list of who may qualify as an “interested party” with standing to appear before a local land use board on a development application has been characterized as being long. See, Harz v. Borough of Spring Lake, 234 N.J. 317, 321, 333 (2018) and Paruszewski v. Township of

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2 The term “party immediately concerned” in N.J.S.A. 40:55D-6 “means for purposes of notice any applicant for development, the owners of the subject property and all owners of property and government agencies entitled to notice under [N.J.S.A. 40:55D-12].” This provision has been relied on to provide standing for municipalities adjoining (within 200 feet) of the property that is the subject of a land development application that is before another municipality’s land use board. Although not an “interested party,” an adjoining municipality qualifies for notice and the right to appear as a statutorily defined “party immediately concerned.” This is not the situation in this case because the Township is not an adjoining municipality, but rather it is the municipality within which the property that is the subject of the land development application is located.
Elsinboro, 154 N.J. 45, 53 (1998), both underscoring the breadth of the definition of this term. Because public hearings before land use boards are the primary venue for developing a factual record regarding a land development application, land use boards are instructed to exercise great caution before denying anyone an opportunity to be heard, and excluding someone who wishes to testify should be a very rare exception. Much like the broad grant of standing to interested parties in superior court hearings, local land use boards should be careful to give interested parties an opportunity to make a record and thereby preserve their right to appeal any board determination.

C. It is My Legal Opinion that the Township Has Standing to Participate as an Interested Party in the MQI Application and to Challenge the Jurisdiction of the Zoning Board to Hear and Render a Decision on the Merits of Same.

The Supreme Court, in Paruszewski v. Township of Elsinboro, 154 N.J. 45, 55 (1998), has concluded that a governing body, in the person of the municipal attorney, has standing to appear before the board of adjustment “where there is a substantial public interest in protecting the integrity of the master plan or zoning scheme.”

The Paruszewski Court recognized that the governing body of a municipality is vested with broad power by the State Constitution and statutes, including the authority to regulate land use. The Supreme Court was quick to point out that, by giving exclusive authority over certain land development applications to a zoning board, the Legislature in the MLUL evidenced its intent that the governing body should not interfere with, or influence, a zoning board’s decision with respect to those applications. Nevertheless, the Paruszewski Court recognized that the MLUL authorizes a municipality to appear before a zoning board in certain limited situations, including (1) when the application involves development of municipal property, and (2) when
the municipality owns property within 200 feet of the property that is the subject of the land development application before a zoning board.

Here, it is my understanding that the Township owns property, in fact, five (5) open space lots, within 200 feet of the Site. This fact alone, in my legal opinion, provides the Township with standing to appear to object to the MQI Application. Moreover, the Supreme Court in Paruszewski, recognized that case law dealing with a closely related issue - the issue of when a governing body has standing to challenge land use board decisions in court - provides examples of other instances in which it would be appropriate for the governing body to intervene in a matter before a zoning board.

Relying on the appellate court decisions in Township of Dover v. Board of Adj. of Township of Dover, 158 N.J. Super. 401, 408-409 (App. Div. 1978) and Zoning Bd. of Adj. of Green Brook v. Datchko, 142 N.J. Super. 501 (App. Div. 1976), the Supreme Court in Paruszewski held that, although it would ordinarily be an impermissible interference with board functions for the governing body to seek judicial review of a particular land use board decision, the municipality could seek such review in a case where the governing body’s own authority had been directly infringed upon. By analogy, the Paruszewski Court held that, in instances where a zoning board may be arrogating the governing body’s authority, the governing body could

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3 The Supreme Court in Stafford v. Stafford Zoning Bd., 154 N.J. 62 (1998), held that, in “those rare circumstances where a zoning board exceeds the scope of its authority, thereby arrogating the governing body’s authority, and such action threatens either the public interest or enforcement of the MLUL,” the governing body had standing to sue. Id. at 81. Implicit in this ruling is that any action which exceeds a board's authority is an arrogation of governing body authority, albeit an indirect one. The Court in Stafford, 154 N.J. at 79, emphasized that the governing body was not being afforded standing to sue the land use board every time the latter made a “wrong” decision; as long as that decision was within the scope of the authority granted by the MLUL, it could not be challenged by the governing body. See, North Brunswick Twp. v. North Brunswick Bd. of Adj., 378 N.J. Super. 485 (App. Div.), certif. den. 185 N.J. 266 (2005), where the court reversed a grant of a variance that would have substantially altered the zone plan, finding that such a grant would have amounted to an arrogation of authority.
appear before the zoning board during the hearings on the land development application, rather
than have to wait to appeal after the decision is rendered. *Id.* at 61.

The *Paruszewski* Court pointed to multiple instances where our courts have found it
appropriate for the governing body to appear before a zoning board to form an adequate public
record in matters of substantial public importance, and to guard against an arrogation of its
municipal authority. In such cases, the Supreme Court found that the appearance of the
municipal attorney, on behalf of the municipality’s interest, provided a means by which the
public’s interest is represented.

In the case *sub judice*, the Township, through the Township Attorney herein, contends
that if it is granted, MQI’s application, relating to a contamination remediated site larger than 50
acres, which itself is part of a larger tract with a total lot area of approximately 180 acres and
located in the center of the Township, and which has been the subject of much public discourse
and fifteen (15) years of litigation, would permit MQI to circumvent its obligation to file a
revised Rehabilitation Plan and otherwise violate Section 4-9, Quarrying, of the Township of
Bernards Quarrying Ordinance (the “Quarrying Ordinance”). A copy of the Quarrying Ordinance
is attached as hereto as “*Exhibit A*.” Moreover, the Township, through its attorney, contends that
MQI’s Application seeks to have the Zoning Board usurp, and arrogate to itself, the powers of
the Planning Board and the Township Committee, pursuant to the Quarrying Ordinance, to
review and approve the requisite revised Rehabilitation Plan. Further, the Township, through its
attorney, contends that the Zoning Board lacks jurisdiction because MQI’s Application
effectively requires d(1) use variance relief for Proposed Lot 6.01, for which MQI has failed to
notice.
Based upon the foregoing, it is my legal opinion that, in addition to the Township’s standing as a “200 foot” property owner, the Zoning Board would be well within its discretion to find that the MQI Application constitutes a matter of substantial public importance, and that, therefore, the Township also has standing under Paruszewski as an “interested party” to challenge the Zoning Board’s jurisdiction and to otherwise appear in the Zoning Board proceedings to ensure a proper public record is made and to guard against the alleged arrogation of the Township Committee and Planning Board’s authority.

3. Does the Zoning Board Have Jurisdiction to Hear and Decide the Merits of the MQI Application and, if so, is the Zoning Board’s Exercise of that Jurisdiction Mandatory?

A. The Parties’ Respective Positions:

(1) MQI contends that the Zoning Board has exclusive jurisdiction to hear and decide the MQI Application and it is the Township Committee that is seeking to arrogate the exclusive authority of the Zoning Board rather than the contrary as alleged by the Township.

MQI, by letter brief dated March 27, 2019, contends that the Zoning Board has exclusive jurisdiction to hear and decide MQI’s request for d(2) variance relief and minor subdivision approval, and that it is the Township Committee that seeks to arrogate the express authority of the Zoning Board, rather than the contrary as alleged by the Township.

First, MQI concedes that the existing office use is a nonconforming use and, given the reduction in the size of the lot devoted to that use (Proposed Lot 6.02), requires MQI, at the least, to seek variance relief pursuant to N.J.S.A. 40:55D-70(d)(2); citing Razberry’s, Inc. v. Kingwood Twp., 250 N.J. Super. 324 (App. Div. 1991). MQI contends that, pursuant to N.J.S.A. 40:55D-
70, the Zoning Board is the only agency with the authority to grant such relief and, pursuant to N.J.S.A. 40:55D-20, the exclusive authority of the Zoning Board cannot be exercised by the Township Committee or the Planning Board. MQI argues that the Zoning Board does not have the option to voluntarily cede its jurisdiction to another municipal body in an effort to show comity, deference or otherwise; relying on TWC Realty v. Zoning Bd. of Adjust., 315 N.J. Super. 205 (Law Div. 1998), aff’d o.b. 321 N.J. Super. 216 (App. Div. 1999).

Second, MQI contends that a governing body does not have the power to restrict a zoning board from exercising its authority to grant variances, and neither body may arrogate to itself the power expressly reserved by statute to the other; relying on Paks Fast Service, Inc. v. Zoning Bd. of Adjustment of the Twp. of Mahwah, 2011 WL 3667635 (App. Div. August 23, 2011). MQI concedes that the Township has the authority to regulate businesses within its boundaries pursuant to N.J.S.A. 40:52-1, and that such authority extends to the licensing and regulation of quarries. However, MQI argues that this authority does not enable the Township to arrogate the express authority of the Zoning Board to hear (d) variance cases, and that the “regulation of land uses under the MLUL and the licensing and regulation of businesses under N.J.S.A. 40:52-1 constitute two separate spheres of municipal regulation;” citing Nouhan v. Bd. of Adjustment of the City of Clifton, 392 N.J. Super. 283, 291 (App. Div. 2007).

Third, MQI relies on Section 4-9.10 of the Quarrying Ordinance, which provides, in pertinent part, that, “[a]n approval or renewal of a quarry license by the Township Committee shall not constitute approval of any item or matter that may require separate approval of the Board of Adjustment, Planning Board or any other municipal, county, state or federal body or agency,” as further support for its contention that the Zoning Board has exclusive jurisdiction
over MQI’s Application and the Zoning Board cannot decline to hear and resolve the merits of the MQI Application.

(2) The Township contends that the Zoning Board lacks jurisdiction to hear and decide MQI’s request for d(2) variance relief and minor subdivision approval.

The Township, by letter brief dated April 17, 2019, contends that the Zoning Board lacks the jurisdiction to hear and decide the MQI Application, for multiple reasons.

First, the Township contends that the development of the Property is controlled by the 2014 Settlement Agreement and the Rehabilitation Plan, neither of which the Zoning Board has the jurisdiction to interpret. Second, the Township argues that MQI has failed to submit a revised Rehabilitation Plan to the Planning Board, as required by Section 1 of the Settlement Agreement, and that granting the MQI Application would effectively prevent the Planning Board and the Township Committee from exercising their respective authority to review, and approve, same. Third, the Township contends that MQI’s proposal to retain the existing office building contravenes the Rehabilitation Plan, in which MQI agreed to demolish the building.

Fourth, the Township contends that any approval of Proposed Lot 6.01 (the Environmentally Restricted Lot) would require a d(1) non-permitted use variance and MQI’s failure to apply, and notice, for d(1) use variance relief precludes Zoning Board jurisdiction. In this regard, the Township contends, now that MQI no longer has a quarry license and all quarrying activity has ceased, that Section 21-10.9 (Mining Zone) of the Zoning Ordinance allows only uses permitted in the R-3 Zone and public parks, roads, and other public purposes. The R-3 Zone is designed primarily for low density residential use, though the R-3 Zone also permits golf courses, farming, family day care homes, exempt home offices, and various conditional uses as set forth in Section 21-10.4.a of the Ordinance. Office uses (with various
exceptions not applicable to MQI’s Application) are not permitted in the R-3 Zone, requiring a variance pursuant to N.J.S.A. 40:55D-70(d). The Township concludes, in this regard, that, since Proposed Lot 6.01 is restricted, by deed and institutionalized controls, to non-residential uses, there are no permitted uses under the Zoning Ordinance which MQI can ascribe to Proposed Lot 6.01.

Fifth, the Township explains that Section 4-9.5.b of the Quarrying Ordinance affords the Township Committee and the Planning Board, in the context of its review of the initial Rehabilitation Plan and all subsequent amendments thereto, the right to ensure the “quarry property be made useable for a use or uses permitted by the Township Zoning Ordinance . . . .” and that “the plan suggests appropriate final uses for the quarry property. . . . ” As such, the Township contends that, not only must MQI obtain d(1) use variance relief from the Zoning Board for Proposed Lot 6.01, but further that the Planning Board and the Township Committee’s authority to review and approve the requisite revised Rehabilitation Plan would be arrogated if the Township were denied the opportunity to ensure that the use(s) pursued by MQI were “permitted” and “appropriate final uses.”

(3) MQI contends, on reply, that all disputes between MQI and the Township regarding the 2014 Settlement Agreement should properly be brought before the Superior Court, which already is considering certain of such matters, and MQI need not obtain d(1) use variance relief to maintain Proposed Lot 6.01 in its current vacant state.

First, MQI contends that any dispute between the Township and MQI regarding the 2014 Settlement Agreement should be adjudicated in the Superior Court, where certain of such disputes already are pending, and not before the Zoning Board. Second, and relatedly, MQI contends that it is not within the Zoning Board’s jurisdiction to interpret, and resolve disputes regarding, the 2014 Settlement Agreement, the Rehabilitation Plan, or the Quarrying Ordinance,
the last of which is not a land development ordinance, but rather a general ordinance enacted pursuant to the Township’s police powers.

Third, MQI disputes the Township’s characterization of its d(2) variance request as intended to authorize the continued use of the existing office building on Proposed Lot 6.02 (the Remainder/Office Lot). Instead, MQI contends that same is merely recognizing the need for such relief, pursuant to the Razberry’s case, in order to obtain subdivision approval before demolishing the structure. In fact, MQI acknowledges its obligation under the Rehabilitation Plan to demolish the structure and explains that it has posted a bond with the Township to guarantee same.

Fourth, and finally, MQI disputes the Township’s claim that MQI must obtain d(1) use variance relief to keep Proposed Lot 6.01 (the Environmentally Restricted Lot) in its current, vacant state, contending that it is not obligated at the time of subdivision approval request to propose an affirmative use for same, let alone one that it is permitted in the R-3 Zone.

B. A Land Use Board May Not Refuse to Exercise Its Jurisdiction to Hear and Decide a Complete Land Development Application That is Properly Presented to the Board.


The TWC Court drew a distinction between (1) purely legal jurisdictional determinations by a board of adjustment, which are proper, and (2) an attempt by a board of adjustment to

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5 The TWC Court recognized that a board can resolve its own jurisdiction regarding purely legal matters, for example, a planning board could determine that it lacked jurisdiction to hear a development application which seeks “d” variance relief pursuant to N.J.S.A. 40:55D-70(d). The appellate court
decline jurisdiction on the theory that a grant of a variance would amount to an “arrogation of authority.” The TWC court made it clear that the latter determination, which is the same determination that the Township asks the Zoning Board to make herein, should only be made by an appellate court in reviewing a land use board's variance grant. Id., at 212-218.

In TWC, the applicant, TWC, challenged the Edison Zoning Board's refusal to review the merits of its use variance application to construct a multi-unit congregate care housing facility for the elderly on a 23+ acre parcel in the 2200+ acre Light-Industrial Zone. The Edison Board had determined that it lacked jurisdiction to adjudicate the merits of the land development application, because of the breadth of the application, its size and intensity, and the extent to which it deviated from the standards of the light industrial zone. The Edison Board dismissed the application, citing the lack of jurisdiction as the basis for its decision. In so deciding, the Edison Board reasoned that, because the request for relief was so expansive, it was tantamount to a request for a rezoning of the parcel, which, under the enabling legislation, was a power vested exclusively in the governing body. See, N.J.S.A. 40:55D-26 and -62.

The Court in TWC severely criticized the Edison Board’s determination that it lacked jurisdiction to hear the application, holding that a zoning board was not authorized to refuse to consider the merits of a variance application that has been deemed complete. The TWC Court recognized that a board of adjustment is an independent administrative agency whose authority is derived from the Legislature via the MLUL, the enabling authority which authorizes and defines the limits of a municipality's procedural and substantive power to regulate land development within its borders. Within this regulatory framework, the board of adjustment is vested with the primary authority, under N.J.S.A. 40:55D-70d, to determine whether variances should be recognized that jurisdictional determinations such as these, which are purely legal in nature, and do not require a plenary or evidentiary hearing, are inherently proper. TWC, 321 N.J. Super., at 217, n. 10.
granted, and the ancillary powers to grant site plan and subdivision approvals in conjunction therewith. See, N.J.S.A. 40:55D-76b. The TWC Court recognized that these delegated powers may not be exercised by any other body. See, e.g., Cronin v. Township Committee, 239 N.J. Super. 611 (App.Div.1990) (holding that the governing body's determination regarding existence of nonconforming use was deemed ultra vires since authority to adjudicate this issue is vested exclusively with the zoning board); see also N.J.S.A. 40:55D-20.

The TWC Court observed that, once created, a zoning board shall exercise the power delegated to it in Article 9 of the MLUL, (N.J.S.A. 40:55D-69 to -76). The zoning board’s original jurisdiction requires it, in the first instance, to assess the “completeness” of a proposed development application. See, N.J.S.A. 40:55D-10.3. Once the application has been deemed complete, the board “shall grant or deny approval of the application (emphasis added)” within 120 days. N.J.S.A. 40:55D-76c. 6

The TWC Court recognized that the statute does not speak in permissive terms, but rather mandates either an approval or a denial of the application. Id.; see also Manalapan Holding Co. v. Hamilton Tp. Planning Bd., 92 N.J. 466, 482 (1994) (“[W]e do not countenance a permissive interpretation or application” of the statute, and no “waiver or relaxation of its terms” may be implied). Indeed, the board's failure to act within the time period prescribed, “shall constitute approval of the application.” N.J.S.A. 40:55D-76c (emphasis added); see also, Manalapan Holding Co., supra, 92 N.J. at 482. The TWC Court concluded that the MLUL does not explicitly authorize the board to skirt its jurisdictional mandate to hear and decide a “complete” development application.

6 As defined in N.J.S.A. 40:55D-3, the definitional portion of the MLUL, the term shall “indicates a mandatory requirement” while the term may “indicates a permissive action.”
The Edison Zoning Board in the TWC Case had relied primarily on Township of Dover v. Board of Adj. of Township of Dover, 158 N.J. Super. 401, 408-409 (App. Div. 1978), which the TWC Court materially distinguished.7 In Dover, the appellate court confronted the issue of whether a municipal governing body had standing to challenge a zoning board’s grant of a variance on the ground that the relief granted was so expansive in nature and impact as to have infringed upon the governing body's exclusive power to zone. See, Id. at 405 (emphasis added).

In holding that the governing body had standing to challenge the zoning board's alleged arrogation of its authority, the Dover Court reversed and remanded the matter for trial, identifying the factors to be considered by the trial court in adjudicating the contentions of the governing body.

The TWC Court recognized that, contrary to the assertions of the Edison Board, Dover never contemplated the zoning board reserving unto itself the authority to dismiss an application without deciding the merits. The court in TWC stated:

Indeed, the specific issue raised in that case can arise only if the board grants the requested relief. Absent an approval by the Edison Board, there would be nothing against which to apply the Dover factors: by its own terms, there could be no “jurisdictional” encroachment and no need for standing to be conferred upon the governing body.

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7 The TWC Court explained that the entire thrust of the Dover decision is that “the board of adjustment is an independent administrative agency whose powers stem directly from the Legislature and hence are not subject to abridgment, circumscription, extension or other modification by” and therefore is ordinarily “immune” from, direct or indirect interference by the governing body. 158 N.J. Super. at 408-09, 386. As instructed by the appellate division there, if, on remand, the trial court determined that the board had not “transcended” its variance authority, the township would be foreclosed from attacking the grant on its merits since such an attack would constitute “an impermissible encroachment … upon the autonomy of the board of adjustment.” Dover, supra, 158 N.J. Super. at 414. The TWC Court reasoned that this rationale was plainly at odds with the Edison Board’s interpretation of Dover in the TWC case. The TWC Court held that, by refusing to decide the merits of the pending development application, the Edison Board not only foreclosed the possibility that an approval would have been sustainable, but at the same time, it precluded the trial court from addressing the merits as well.
In sum, governing statutory and common law authority, including the TWC decision, precludes land use boards from refusing to exercise their mandatory jurisdiction to hear and decide complete applications properly presented to them, on the basis that deciding same would constitute an arrogation of the governing body’s authority, and, instead, such contentions must be addressed by a court, usually in the context of a prerogative writ appeal of the land use board’s decision.

C. The Zoning Board is Mandated by Governing Statutory and Common Law to Exercise its Exclusive Jurisdiction to Hear and Decide the MQI Application, but the Township May Present Evidence During the Proceedings in Support of Its Contention that a Grant of the MQI Application Would Constitute an Arrogation of the Township Committee and Planning Board’s Authority and Same May be Material to the Zoning Board’s Determination on the Merits of the MQI Application.

As MQI contends, it is well established that zoning boards have the exclusive authority to grant (d) variance relief under Section 70 of the MLUL, as reinforced by MLUL Section 20, which provides that a power expressly authorized to be exercised by the zoning board or planning board shall not be exercised by any other body. Moreover, it is equally well established, in the TWC case and its progeny, that the exercise of this authority by land use boards, like this Zoning Board, is mandatory, and land use boards do not have the option to voluntarily cede their jurisdiction to another municipal body in an effort to show deference or otherwise.

Further, as MQI contends, it is well recognized that the licensing and other general/police powers exercised by a municipality are a “separate sphere of municipal regulation” from the regulation of land uses under the MLUL, and the issuance (or declination) of a municipal license does not equate with, or mandate, a grant (or denial) of permission to exercise a particular land use. See, Nouhan v. Bd. of Adjustment of the City of Clifton, 392 N.J. Super. 283, 291 (App. Div. 2007) (holding that the Township’s issuance of an entertainment license to a restaurant did
not authorize the owner to use the property as a discothèque or as a nightclub, since same were not permitted under the local zoning ordinance).

The Township, through its counsel, does not appear to dispute these established general principles when applied to the typical case. However, the Township contends, through its counsel, that the exercise of such generally exclusive and mandatory authority by the Zoning Board in this particular case would result in permitting MQI to circumvent certain of its obligations under the 2014 Settlement Agreement, the Rehabilitation Plan and the Quarrying Ordinance.

It is my understanding that the Township and MQI’s respective cross-motions asserting breach of the 2014 Settlement Agreement by the other party were very recently adjudicated in the Superior Court by Somerset County Presiding Civil Division Judge Thomas C. Miller, P.J.Cv., in the matter entitled, MQI v. Township of Bernards, et al., Docket No. SOM-L-475-08, (the “May 6th Opinion”). It is my further understanding that Judge Miller found that neither party breached the Settlement Agreement, and that MQI is required to submit a revised Rehabilitation Plan, albeit the deadline for such submission was not apparent from the May 6th Opinion, or the Orders entered in accordance therewith. The May 6th Opinion and Orders are attached as “Exhibit B.” As such, the issue of MQI’s obligation to submit the revised Rehabilitation Plan has been addressed by the appropriate authority, the Superior Court, the jurisdiction to which both parties voluntarily submitted. The resolution of these issues should remain with the Superior Court and are outside the jurisdiction of the Zoning Board.

Based upon the foregoing, it is my legal opinion that, in the case sub judice, as in the TWC case, while the Township can pursue its claim of arrogation of authority in the Superior Court, either by way of seeking injunctive relief if it concludes that the claims are ripe and
warrant such emergent relief at this time, or, alternatively, by way of a prerogative writ appeal at
the conclusion of the hearing on the MQI Application after the Zoning Board has rendered its
decision on the merits and adopted a resolution memorializing same, the Zoning Board is
mandated by governing statutory and common law to exercise its exclusive jurisdiction to hear
and decide the merits of the MQI Application. While the Dover opinion, like the Paruszewski
decision, supports the standing of the Township as an “interested party” to participate in these
Zoning Board proceedings and make a record for a potential appeal should the Township
conclude that the result of the proceedings constitute an arrogation of the Township Committee
and Planning Board’s authority, these decisions do not, in my legal opinion, permit the Zoning
Board to cede its exclusive authority, and mandatory obligation, to hear and decide the MQI
Application on its merits.

While it is my legal opinion that the Zoning Board is compelled to exercise its
jurisdiction to hear and decide the merits of the MQI Application rather than cede its mandatory
obligation to exercise its exclusive jurisdiction, it is my further legal opinion that the Township
may present all relevant evidence in opposition to the MQI Application, including all testimonial
and documentary evidence supporting the Township’s contention that granting the MQI
Application would constitute an arrogation of the Township Committee and Planning Board’s
authority.

The Township herein contends that the granting of the MQI Application would constitute
approving a revised Rehabilitation Plan, something that is subject to the reviewing authority of
the Planning Board, and the approval authority of the Township Committee, in the same manner
as the initial Rehabilitation Plan. See, the Quarrying Ordinance, at Section 4-9.5(a)(3) through
(5). Indeed, Section 4-9.5(a)(3) of the Quarrying Ordinance appears to require MQI to submit a
revised Rehabilitation Plan within 60 days of application submittal if MQI’s land use
development application “would, if approved, result in a change or revision to the last approved
and still valid rehabilitation plan.” Moreover, Judge Miller, in the May 6th Opinion (at pages 32-34),
appears to have found in favor of the Township’s contention that a revised Rehabilitation
Plan is required and warranted under the circumstances as being in the public interest. Judge
Miller appears to have specifically determined that “MQI’s application if approved ‘results in a
change or revision to the last approved and still valid’ Rehabilitation Plan (at page 33), and the
Judge determined that same was one of “several good reasons why the revised Rehabilitation
Plan continues to be reasonably necessary.” Accordingly, it appears that Judge Miller has
determined that granting the MQI Application would, in fact, result in a change or revision to the
last approved and still valid Rehabilitation Plan, the review, and approval, authority over which
the Township contends is the exclusive province of the Planning Board, and the Township
Committee, respectively.

The arrogation of the Township Committee and Planning Board’s authority, as contended
by the Township, could occur only if the Zoning Board grants the MQI Application, and does so
unconditionally. However, if the Zoning Board ultimately renders a decision denying the MQI
Application, the Township’s argument, that a grant of same would constitute an arrogation of the
Planning Board and the Township Committee’s authority, would be rendered moot. Alternatively, if the Board ultimately renders a decision granting the MQI Application, it may
decide to do so with multiple conditions of approval, including a condition that MQI (or any
successor) shall obtain the approval of the Township Committee, after review by the Planning
Board, of the requisite revised Rehabilitation Plan, prior to MQI perfecting the subdivision by
recordation of the subdivision deed.
Yet, if the Zoning Board declines to exercise its exclusive jurisdiction to hear the MQI Application, then the parties will be denied an opportunity to make a record for a court to review on any appeal, exactly what the TWC Court severely criticized the Edison Zoning Board for doing in that case. As such, it is my legal opinion that the Township’s arrogation of authority claim, at least at this time, does not permit the Zoning Board to decline to exercise its exclusive jurisdiction to hear the merits of the MQI Application, which jurisdiction is the mandatory obligation of the Zoning Board to exercise, pursuant to governing statutory and common law, now that the MQI Application has been deemed complete.

In sum, that the Zoning Board is constrained, in my legal opinion, to exercise its jurisdiction to hear the MQI Application, does not preclude the Township from pursuing during the hearings before the Zoning Board its contention that a grant of the MQI Application would constitute an arrogation of the Township Committee and Planning Board authority over the revised Rehabilitation Plan. Moreover, it may be that evidence of such potential arrogation is not only relevant, but actually material, to the Zoning Board’s analysis and determination of the MQI Application. I do not opine on this last aspect because it must be left to the Zoning Board members themselves to determine the weight of the evidence, and the credibility of the witnesses who testify before them, as the Zoning Board hears the merits of the MQI Application, inclusive of all relevant evidence introduced in support thereof, and in opposition thereto.

4. Is MQI Required to Notice for, and Obtain, a d(1) Use Variance for Proposed Lot 6.01 (the Environmentally Restricted Lot), as Part of the MQI Application?

   A. A d(1) Use Variance is Required for Any New Use or Principal Structure that is Not Permitted in the Zone District and Such Relief Requires an Enhanced Standard of Proof.

      If an applicant proposes a use or principal structure that is not permitted in the zoning district, then the proposal will require a d(1) use variance pursuant to N.J.S.A. 40:55D-70(d)(1).
In order to obtain a d(1) use variance, an applicant must demonstrate “special reasons” (the positive criteria), and must prove the entitlement to such relief (both the positive and negative criteria) with an enhanced quality of proof.

New Jersey courts recognize three circumstances in which the “special reasons” required for such a d(1) use variance may be found: (1) where the proposed use inherently serves the public good, such as a school, hospital or public housing facility; (2) where the property owner would suffer “undue hardship” if compelled to use the property in conformity with the permitted uses in the zone; and (3) where the particular use promotes one or more of the purposes of zoning listed at N.J.S.A. 40:55D-2 and it can be shown that “the proposed site is particularly suitable for the proposed use.” See, Saddle Brook Realty, LLC v. Twp. of Saddle Brook Zoning Bd. of Adj., 388 N.J. Super. 67, 76 (App. Div. 2006).

The enhanced quality of proof required for establishing an entitlement to a d(1) use variance is one of the primary differences between d(1) and d(2) variance relief. In Medici v. BPR Co., 107 N.J. 1, 21-22 (1987), the Supreme Court required that an applicant for d(1) use variance relief must show:

in addition to proof of special reasons, an enhanced quality of proof and clear and specific findings by the board of adjustment that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance. The applicant’s proofs and the board’s findings must reconcile the proposed use variance with the zoning ordinance’s omission of the use from those permitted in the zoning district

B. A d(2) Use Variance is Required When a Pre-Existing Non-Conforming Use is Expanded or Intensified, and the Standard of Proof is Lower Than the Standard of Proof Required for a d(1) Use Variance.

When a municipality adopts a zoning ordinance or when an existing zoning ordinance is changed, inevitably there will be uses that are newly prohibited and structures that do not
conform with the new bulk conditions - these are known as pre-existing nonconforming uses and structures. At times, there may even be nonconforming structures housing nonconforming uses. Bonaventure Int’l v. Spring Lake, 350 N.J. Super. 420, 431(App. Div. 2002). The rules and procedures for dealing with pre-existing nonconforming uses and structures derive from the principle that it is inequitable to strip away a person’s lawfully asserted property rights retroactively. In recognition of this principle, the MLUL contains provisions designed to protect landowners from losing property rights that pre-date land use regulation. See, e.g., N.J.S.A. 40:55D-68.

The foregoing concerns notwithstanding, it is universally acknowledged that municipalities have the right to regulate land use through legislation and local ordinances. There is also a judicial tendency to strictly limit the scope of the nonconforming use and to reduce it “to conformity as quickly as is compatible with justice.” Belleville v. Parrillo’s, Inc., 83 N.J. 309, 315 (1980). Moreover, land use regulation is widely viewed as an important factor in preserving health, safety, beauty, natural resources and overall quality of life in communities. Thus, a readily apparent conflict exists between the desire to treat property owners equitably and the laudable goals of land use control. The result is, as it should be, a compromise.

In short, the MLUL permits qualifying pre-existing nonconforming uses and structures to co-exist with the ordinance that, on its face, prohibits them. However, the existence of nonconforming uses and structures is expressly disfavored, precarious, and subject to review at various times. In dealing with nonconforming uses and structures, the New Jersey Legislature and municipal land use boards must continually balance the important goal of bringing such uses and structures into conformity, with the equally compelling interest in protecting property rights from being unfairly restricted.
Although the owner of a lawfully created pre-existing nonconforming use is allowed to continue it and to do necessary maintenance, the owner may not enlarge or modify the use without (d) variance relief. 


The expansion or intensification of a lawfully created pre-existing nonconforming use, which also includes the expansion of a building in which a lawfully created pre-existing nonconforming use is to be carried on, requires a variance pursuant to 40:55D-70d(2). Burbridge v. Mine Hill Tp., 117 N.J. 376, 384-385 (1990); Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268 (1967). By contrast, to the extent the proposal is to change a lawfully created pre-existing nonconforming use to an entirely new, non-permitted use, then a d(1) variance is required. See, Saadala v. E. Brunswick Zoning Bd., 412 N.J. Super. 541 (App. Div. 2010).

Where a nonconforming use exists on a tract of land and an application is made to divide the tract into two or more parcels, a d(2) variance for the expansion or intensification of the pre-existing nonconforming use is required, even if neither the use, nor the structure within which the use is carried out, is otherwise enlarged or expanded. In Razberry’s, Inc. v. Kingwood Tp., 250 N.J. Super. 324 (App. Div. 1991), the appellate court held that a d(2) use variance was required where the owner of an 8.17 acre tract in a commercial zone, occupied by a single family residence (the nonconforming use), proposed to subdivide so as to convey 5.17 acres. The appellate court pointed out that N.J.S.A. 40:55D-68, protecting nonconforming uses, specifies that they may be continued on "the lot...so occupied" and that a subdivision results in two or more lots so that a prerequisite for lawful continuation of the use, that it occupy the same lot, can
no longer be satisfied. The Razberry’s Court concluded that the subdivision would result in an expansion of the nonconformity:

> a reduction in the size of the property occupied by a nonconforming use, with a resulting decrease in the buffers between conforming and nonconforming uses, is just as likely to increase the conflict between a nonconforming use and surrounding conforming uses as an expansion of the facility containing the nonconforming use or an intensification of that use. Therefore, a reduction in the size of the property occupied by a nonconforming use may result in a substantial increase in the nonconformity.

250 N.J. Super. at 327 (emphasis added). \(^8\)

As such, assuming the use of the office building was a pre-existing nonconforming use (as initially understood by the Township Planner), the Township Planner would have been correct in his initial determination that a d(2) use variance was required by MQI for Proposed Lot 6.02, because the lot on which it is located is proposed to be reduced in size. However, as set forth below, it is my legal opinion that MQI’s continued use of the office building requires a d(1) use variance for an entirely new, non-permitted use, and not simply a d(2) variance for a pre-existing nonconforming use.

C. It is my Legal Opinion that MQI is Required to Notice for, and Obtain, a d(1) Use Variance to Create Proposed Lot 6.01 (The Environmentally Restricted Lot), and Further that MQI is Required to Notice for, and Obtain, d(1) Use Variance Relief to Use the Existing Building on Proposed Lot 6.02 (the Remainder/Office Lot) as Commercial Office Space, or for any Use Other Than Those Uses Expressly Permitted in the R-3 Zone.

The Township argues that MQI must notice for, and obtain, d(1) use variance relief, in order to keep Proposed Lot 6.01 (the Environmentally Restricted Lot) in its current, vacant state, because MQI is not proposing an affirmative use that is expressly permitted in the R-3 Zone or a

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\(^8\) The proofs for establishing a right to a d(2) variance are less stringent than those required for d(1) use variance relief. A d(2) variance applicant need not meet the Medici enhanced quality of proofs, and need only satisfy the positive and negative variance criteria for the expansion of the nonconformity, rather than showing that it would have been entitled to a variance for the initial nonconformity. See, Financial Services v. Little Ferry Zoning Bd of Adj., 326 N.J. Super. 265, 275-76 (App. Div. 1999).
public purpose. The Township further contends that, indeed, there is no permitted use that could be ascribed to Proposed Lot 6.01, since it is restricted by deed and institutional controls to non-residential uses that are **not** permitted by Section 21-10.9 (Mining Zone) of the Zoning Ordinance.

MQI responds by contending that (1) it can seek approval to subdivide (one distinct category of “development” as defined by Section 21-3.1 of the Zoning Ordinance) without also including an application for a change in use (a separate and distinct category of “development” as defined therein), and (2) the MLUL definition of “subdivision” at Section 7 of the MLUL expressly contemplates that an applicant may seek subdivision approval solely to permit the sale of the subdivided parcel, without more.

It is my legal opinion that MQI cannot seek to subdivide the Property and create Proposed Lot 6.01 without identifying the proposed use of said lot, particularly given that the creation of resultant Proposed Lot 6.01 requires multiple bulk variances, notably a minimum improvable lot area variance. It is my understanding that minimum improvable lot area requirements were adopted in 2006 with the purpose of ensuring that adequate area suitable for development (i.e., free of environmental or other constraints) is provided within the building envelope on each lot. A minimum improvable lot area of 22,000 square feet is required in the R-3 Zone. The entire building envelope on Proposed Lot 6.01 is subject to an NJDEP Deed Notice/Restriction, resulting in no improvable lot area.

It is axiomatic that the Zoning Board cannot be asked to analyze, and determine, an entitlement to a variance relating to the adequacy of an area as being suitable for development, without the Applicant advising the Zoning Board of the proposed current, or even future, use and development of the lot. Moreover, assuming MQI, as it states it intends to do, sells Proposed Lot
6.01 to a third party, can that purchaser now claim an entitlement to a d(1) use variance for some heretofore proposed non-permitted use, on the basis of “undue hardship,” arguing that to deny same would zone Proposed Lot 6.01 into “economic inutility”?9

MQI’s contention, even if correct, that applicants can obtain subdivision approval for “sale” purposes alone, does not preclude the need for such an applicant to advise the Zoning Board of the proposed (or continued) use of the resultant lots, and said uses must either be permitted uses or pre-existing nonconforming uses, or else the applicant must also obtain the requisite use variance relief from the land use board.

Moreover, it is my legal opinion that MQI is required to obtain d(1) use variance relief for Proposed Lot 6.02 (the Remainder/Office Lot), as well. In the MQI Application, it is my understanding that the Township Planner, based on the information available to him at the time, determined that the existing/proposed office use at the building on Proposed Lot 6.02 constituted a pre-existing nonconforming use that MQI had the “grandfathered” right to maintain, and, given the proposed reduction in the size of the lot on which the use is located, MQI required only d(2) variance relief to maintain the use in accordance with the Razberry’s decision. However, an examination of the 1983 Planning Board Resolution by which MQI originally obtained preliminary and final site plan approval to construct the office building (a copy of which is attached hereto as “Exhibit C”), reveals that the specific use for the office building was “for the quarry business”, and a review of subsequent approvals reveals no change in said use.

The expiration (as I understand it) of MQI’s licensing to conduct mining operations, and the cessation (as I understand it) of all mining activities by MQI at the Site, together with Section

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9 Proof that the property is not reasonably adapted to a conforming use can satisfy the requirement of special reasons for d(1) use variance relief if it "results in economic inutility." Medici v. BPR Co., 107 N.J. 1, 17 n.9 (1987). Brandon v. Montclair, 124 N.J.L. 135, 149 (Sup. Ct. 1940), aff'd 125 N.J.L. 367 (E. & A. 1940).
4-9.1-5 of the Quarrying Ordinance and Section 21-10.9 (M-1 Mining Zone) of the Zoning Ordinance limiting the permitted uses for the Site, leads me to opine that the office building cannot be used as accessory to the quarry mining business and, therefore, any use of the office building must constitute a change in use. Moreover, even assuming, arguendo, that the office use was otherwise permitted, the mining use has been abandoned under any reasonable interpretation of applicable zoning law\(^{10}\), both by MQI’s overt acts of allowing its mining licensure to expire and the cessation of quarrying and mining activities at the Site, and MQI’s demonstrative intention to no longer conduct such activities at the Site. As such, the use of the building on Proposed Lot 6.02 for any use not expressly permitted by Section 21-10.9 (M-1 Mining Zone) of the Zoning Ordinance – which limits permitted uses to residential development at a density of one (1) unit per two (2) acres, farming, golf courses, family daycare homes, exempt home offices, various conditional uses (not applicable to MQI’s case) and public parks, roads, and other public purposes – requires, in my legal opinion, MQI to notice for, and obtain, d(1) use variance relief.

The appellate court’s published decision in Saadala v. E. Brunswick Zoning Bd. of Adjustment, 412 N.J. Super. 541, 543 (App. Div. 2010), is particularly instructive on this issue and supportive of this legal conclusion. In Saadala, the appellate court considered whether an application for a use variance for the establishment of a combined convenience store and retail gasoline station, to replace two separate nonconforming uses for a convenience store and

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\(^{10}\) Nonconforming use status may be terminated as a result of abandonment; however, mere non-use of a nonconforming right does not constitute abandonment. The courts in New Jersey have espoused the traditional view that abandonment of a nonconforming use or structure requires the concurrence of two factors: (1) some overt act or some failure to act which carries a sufficient implication that the owner neither claims nor retains any interest in the subject matter of the abandonment, and (2) an intention to abandon. Berkeley Square v. Trenton Zoning Board of Adjustment, 410 N.J. Super. 255, 268-269 (App. Div. 2009), certif. den. 202 N.J. 347 (2010); S & S v. Zoning Bd. for Stratford, 373 N.J. Super. 603, 613-614 (App. Div. 2004). Clearly, same exists here and the quarry business has been abandoned by MQI at the Site.
gasoline station, constituted an expansion of a nonconforming use, which is subject to the more liberal standards of proof for a d(2) variance, rather than the more restrictive standards of proof applicable to a d(1) use variance for the creation of a new use set forth in Medici v. BPR Co., 107 N.J. 1, 526 (1987). The Saadala Court concluded that such a development plan constituted the creation of a new use, which required a d(1) use variance and was subject to the enhanced Medici standards of proof, and that those standards were not satisfied in that case.

In Saadala, the applicant, 7-Eleven, filed an application with the zoning board requesting use variances for both the “[e]xisting convenience store” and the “[p]roposed gasoline service station,” bulk variances, exceptions from certain design standards, and site plan approval. 7-Eleven presented its request as an application for “an expansion of the existing nonconforming use” within the intent of N.J.S.A. 40:55D-70(d)(2).

Since the zoning board granted 7-Eleven's application on the theory that its development plan involved an expansion of a nonconforming use or uses, and the trial court affirmed the board on this same basis, the appellate court in Saadala first considered the law governing the continuation of nonconforming uses. The statutory authorization for such continuation is provided by N.J.S.A. 40:55D-68, which states:

Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof.

The Saadala Court recognized that, in construing N.J.S.A. 40:55D-68, New Jersey courts have held that “[b]ecause nonconforming uses are inconsistent with the objectives of uniform zoning, . . . they should be reduced to conformity as quickly as is compatible with justice.” Town of Belleville v. Parrillo’s, Inc., 83 N.J. at 315. The appellate court went on to recognize that, “under that restrictive view our courts have held that an existing nonconforming use will be permitted to
continue only if it is a continuance of substantially the same kind of use as that to which the premises were devoted at the time of the passage of the zoning ordinance."  

The Saadala Court determined that 7-Eleven's proposed development of the site did not constitute a continuation of those pre-existing uses, but rather a new use, which required 7-Eleven to satisfy the enhanced Medici standards of proof for the grant of a d(1) use variance. The appellate court in Saadala found further support for its holding in Burbridge, wherein the Supreme Court stated:

> When the application before a board is to expand a nonconforming use, the competing considerations are clear: if the variance is denied, the hope is that the nonconforming use will wither and die; on the other hand, as long as the nonconforming use exists and is thriving, the Board obviously would want to make it conform as best it could with the current use-designation in the zone.

[117 N.J. at 388]

The Saadala Court concluded that, when a landowner proposes to make a substantial change in a nonconforming use, such as the change of use from a restaurant to a discotheque, as in the Parrillo's case, then the application to authorize this change often will be made because the existing use is no longer physically or economically viable, and thus is not “thriving.” In such circumstances, there is a greater likelihood that “the nonconforming use will wither and die” if the application is denied, than where an applicant only seeks authorization for the expansion of an existing use. Consequently, there are substantial policy reasons, which the Supreme Court appears to have implicitly recognized in Parrillo’s and Burbridge, for not applying the liberalized standards of proof required for a d(2) variance when reviewing an application seeking authorization for a substantial change in use.

Here, MQI, as I understand it, seeks to use the existing office building for office uses that cannot be associated with its formally ceased and abandoned quarry mining activities. Further,
the office building can only be used as permitted under Section 21-10.9 of the Zoning Ordinance, specifically, for low density residential development or other uses permitted in the R-3 Zone, or for public purposes. Indeed, as in the appellate court’s decision in Saadala, if the combination of the two pre-existing, nonconforming uses of a gasoline station and a convenience store into a singular use of a combined gasoline station and convenience store constitutes a new, non-permitted, use requiring d(1) use variance relief, then MQI’s use of the building on Proposed Lot 6.02 as commercial office space (associated with mining operations or not) must require d(1) use variance relief.

Based on the foregoing, it is my legal opinion that MQI requires d(1) use variance relief both for the use it must propose for Proposed Lot 6.01 (the Environmentally Restricted Lot) and to continue to use the office building on Proposed Lot 6.02. As such, MQI must properly notice for such d(1) use variance relief for both proposed lots and MQI is subject to the enhanced Medici standard of proof for such d(1) variance relief.

5. Conclusion

In sum, it is my legal opinion that:

1. The Township has legal standing to participate as an “interested party” in the MQI Application and to challenge the jurisdiction of the Zoning Board to hear and render a decision on the merits of same;

2. The Zoning Board is mandated by governing statutory and case law to exercise its exclusive jurisdiction to hear and decide the MQI Application, but the Township may present evidence during the proceedings in support of its contention that a grant of the MQI Application would constitute an arrogation of the Township Committee and Planning Board’s authority, and same may be material to the Zoning Board’s determination on the merits of the MQI Application; and

3. MQI is required to notice for, and obtain, a d(1) use variance for Proposed Lot 6.01 (the Environmentally Restricted Lot), and also a d(1) use variance, rather than a d(2) variance, to continue to use the existing building on Proposed Lot 6.02 (the Remainder/Office Lot) as commercial office space, or to use it for any use other than those uses expressly permitted in the R-3 Zone.
EXHIBIT A
§ 4-8.3 GENERAL LICENSING

§ 4-8.3. Rates of Fees. [Ord. 18-21-30, § 7; Ord. #276, § 1, 12-9-1997, amended]

If at any time, in the opinion of the Township Committee, it becomes advisable, the Committee may adopt a schedule of rates which may be charged by the owners or drivers of taxicabs as in its judgment may seem fair and reasonable.

§ 4-8.9. Additional Requirements for Limousines. [Ord. #1949, 6-24-2007, added]

Where applicable, any person who owns a limousine service as defined in § 4-8.2 is required by the Township to comply with the provisions found within N.J.S.A. 48:16-22.1 (entitled "Limousine Licensing"), 48:16-22.2 (entitled "Examination of limousine by operator; check list"), 48:22.3a (entitled "Limousine service to require certain applicant information") and 48:22.3b (entitled "Limousine service to require drug testing of applicants"). Failure to do so may result in a denial or revocation of a license.

SECTION 4-9

Quarrying

§ 4-9.1. Purpose. [Ord. #517, § 1; Ord. #660, § 1; Ord. #1515, 12-27-2001, § 1, amended; Ord. #1638, 5-27-2003, amended]

It is the intent of this section to license and regulate quarries for the protection of persons and property; for the preservation of the public health, safety and welfare of the Township of Bernards and its inhabitants; and to insure that quarrying operations shall be conducted in such a manner as to create a minimum of annoyance from noise, blasting and dust to nearby owners or occupants of property; to provide for the safety of persons, particularly children; to insure that quarried areas shall be suitably and reasonably rehabilitated after quarrying operations have been completed or otherwise terminated; to protect the environment by minimizing air pollution, prevent surface and subsurface water pollution; and further to alleviate to the extent practicable the adverse effects of truck traffic.

§ 4-9.2. Definitions. [Ord. #517, § 2; Ord. #741, § 1; Ord. #796, § 1; Ord. #860, § 1; Ord. #1515, 12-27-2001, § 1, amended Ord. #1638, 5-27-2003, amended]

As used in this section:

LICENSEE — Shall mean the holder of a quarry license issued pursuant to this section.

MAINTENANCE — Shall mean the repair or reconstruction of equipment on the quarry property. "Maintenance" shall include the operation of equipment which has been repaired or reconstructed where such operation is solely for testing and is accomplished without the introduction of stone or other quarry material into the equipment and without the processing of any quarry product.

PERSON — Shall mean and include any natural person, firm, partnership, association, corporation, company or organization of any kind.
§ 4-9.2 BERNARDS CODE § 4-9.4

QUARRY — Shall mean and include a place where stone, slate, or other natural mineral resources are blasted, excavated, crushed, washed or graded, for use on or off of such place. "Quarry" shall also mean to perform the act of quarrying.

QUARRY OPERATOR — Shall mean the person that conducts the quarrying operations.

QUARRY OWNER — Shall mean the person who owns the quarry property on which quarrying operations are conducted.

QUARRY PROPERTY — Shall mean and include all real property upon which a quarry is located, as well as all real property contiguous thereto in the same ownership.

QUARRYING — Shall mean any of the following:
A. The operation of a quarry; or
B. The business of conducting a quarry; or
C. The sale or shipping of excavated material from a quarry located in the township; or
D. The operation, including warm-up, of equipment used in the operation of a quarry.

§ 4-9.3. License Required. [Ord. #617, § 3; Ord. #790, § 2; Ord. #660, § 1; Ord. #1638, 5-27-2003, amended]

It shall be unlawful for any person to conduct the business of quarrying within the township without first having obtained a license in accordance with the requirements of this section. A property owner may excavate stone or slate from his property without a license where such excavation or removal is an isolated or casual incident if the property owner receives advance permission from the Township Engineer.

§ 4-9.4. Application for License. [Ord. #617, § 4; Ord. #741, § 1; Ord. #660, § 1; Ord. #1615, 12-37-2001, § 1, amended; Ord. #1638, 5-27-2003, amended]

Applications and accompanying documents for licenses required by this section shall be submitted in paper form, and in digital form which is suitable for entry into township CAD and GIS systems. The application shall be signed and verified by the applicant, and shall set forth or be accompanied by the following information:
a. The name, business address and residence address of the applicant, if an individual; the name, residence and business address of each partner, if a partnership; the corporate name, date and state of incorporation, and name, business address and residence address of each officer and stockholder, if a corporation; and the name, business address and residence address of each plant officer, plant manager and plant engineer. If a corporation is not incorporated in the State of New Jersey, the applicant shall state whether the corporation is authorized to do business in the State of New Jersey. If a corporation has any stockholder which is a partnership, the applicant shall state the name, business address and residence address of each partner of each stockholder. If a
§ 4-9.4

GENERAL LICENSING

§ 4-9.4

corporation has any stockholder which is a corporation, the applicant shall state the name, residence address and business address of each officer of each stockholder.

b. The name, business address and residence address of each owner of the quarry property. If the applicant is not the sole owner, written consent of each owner must be furnished.

c. Three prints and one reverse sepia of a plot plan encompassing the requirements set forth in Paragraph d below and a detailed narrative as required by Paragraph e below. Plot plans will also be submitted in digital form, suitable for entry into township CAD and GIS systems.

d. A plot plan of the quarry property, prepared by an engineer or land surveyor licensed in the State of New Jersey, showing the entire tract and including the following:

1. The submission shall be at a scale of one inch equals 100 feet, except that if a larger scale is required to show specific areas and details, supplemental maps shall be included at the larger scale. If one sheet is not sufficient to contain the entire property and surrounding area as required by this paragraph, the map shall be divided into sections shown on separate sheets of equal size, with reference on each sheet to the adjoining sheets.

2. A key map showing the quarry property and its relation to the surrounding areas at the scale of one inch equals not less than 2,000 feet.

3. Title block showing:

(a) Name of quarry, municipality and county.

(b) Name and address of operation.

(c) Scale.

(d) Date of preparation.

(e) Name, address, signature and license number of the preparer.

4. Graphic scale.

5. Revision box.

6. All boundary lines with lengths of courses to 100th of a foot and bearing to one half minutes, the error of closure not to exceed one to 10,000. The boundary lines shall be in the New Jersey Coordinate System.

7. Any municipal boundaries within 200 feet of the quarry property and the names of adjoining municipalities.

8. Zone boundaries.

9. Existing block and lot number(s) of the quarry property as they appear on the Municipal Tax Map.
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10. Block and lot numbers and names and addresses of the owners of record of all properties within 200 feet of the quarry property as shown on the most recent tax list prepared by the Tax Assessor.

11. Acreage of the quarry property to the nearest tenth of an acre.

12. The names, locations and widths of all existing or recorded streets, watercourses and drainage rights-of-way intersecting the quarry property or within 500 feet of the quarry property as shall be shown on the Municipal Tax Map.

13. All streets, existing or proposed, within 500 feet of the quarry property, as shown on the Official Map, the Master Plan or the Municipal Tax Map.

14. The location of all buildings, railroads, railroad rights-of-way, bridges, culverts, drainage, utility poles, high tension towers, and watercourses within 500 feet of the quarry property.

15. All easements or rights-of-way, whether public or private, within 500 feet of the quarry property. The purpose of the easements or rights-of-way shall be stated.

16. All public property within 500 feet of the quarry property. The uses of the public property shall be stated.

17. For the quarry property itself, the information required in Subparagraphs 14 and 15 above.

18. A copy of each restrictive covenant of every nature, existing by deed or otherwise, affecting the quarry property.

19. The location of wooded areas within the quarry property and within 500 feet of the perimeter of the quarry property.

20. Existing contours, at two-foot intervals for slope of less than 30% and at ten-foot interval for slopes of greater than 30% for the quarry property and the area within 500 feet of the perimeter of the quarry property. All elevations shall be based upon UBC & GS data.

21. Location of all existing structures and their uses.

22. Location of all internal roadways.

23. Location of all parking areas showing parking bays, aisles, etc.

24. Location of all noise suppression devices.

25. Location of all loading areas showing size and access.

26. Location and size of all signs.

27. Location of all existing fencing, fencing to be constructed during the twelve-month license period and future fencing.

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28. Location, direction of illumination, power, and type of exterior lighting, including when the lighting will be used.

29. Existing and proposed buffer areas, including detailed screening and landscaping plans.

30. All means of vehicular ingress and egress to and from the quarry property onto public streets, showing the design and location of driveways and curb cuts, including any necessary devices to prevent a hazardous traffic situation.

31. Plans and computations for handling stormwater discharge from the quarry property based upon a twenty-five-year design storm and the method(s) to be used to prevent additional runoff from occurring.

32. A soil sedimentation and erosion control plan for the quarry property.

33. The anticipated ultimate limits of the quarry operation.

34. The contours to be created by the quarry operation during the twelve-month license period and during the next three-year period.

35. Confirmation of any prior estimate of the remaining life of quarrying operations, or a new estimate with supporting data and analysis.

36. Designation of any vegetation, including trees, to be altered or removed from the quarry during the twelve-month license period and in the future. Areas of vegetation, rather than individual trees or other forms of vegetation, may be designated as long as the vegetation contained in the areas are reasonably described.

37. The area of public roads adjacent to the exits which must be kept free of accumulations of dust from the quarry pursuant to Subsection 4-9.9.

38. The application shall include a statement confirming that the most recently approved rehabilitation plan is still valid, and that operations during the license year will be compatible with it.

39. The quarry operator shall continue to seek and implement ways for reducing any detrimental impacts that quarrying may have on the public. It shall report on its progress in each license application.

40. The application shall include a detailed plan and report setting forth methods to prevent, control and ensure that contaminated or environmentally unsound fill material is not imported into and onto the quarry property. [Ord. #2001, § 1, 2-26-2001, added]

An environmental impact statement shall be submitted covering in detail the following areas:

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5. Editor's Note: This ordinance also provided that its provisions shall apply retroactively to 1-5-2008, including the increase in acreage fines and quarry license requirements for 2008.
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1. Description of the operation broken down by activity, the hours of operation of each activity and personnel and equipment required for each operation, including, but not limited to:

(a) Blasting;
(b) Crushing;
(c) Operation of quarry owned or operated vehicles on-site;
(d) Loading of trucks;
(e) Loading of railroad cars;
(f) Maintenance operations;
(g) Administrative operations.

2. Materials to be quarried, anticipated sales (by unit) and previous year's sales (by unit).

3. Total traffic generated by the quarry, including, but not limited to, passenger vehicle arrivals and departures, truck arrivals and departures, and rail arrivals and departures, all by the time of day and points in ingress and egress.

4. An expert report that the noise limits set forth in this section are not exceeded, including a complete detailed report of all efforts being taken to reduce both the noise and vibration created by blasting.

5. Documentary confirmation that state water quality requirements are met and a description of efforts being undertaken to provide that water quality will not be decreased and that the quantity of stormwater runoff will not be increased.

6. Methods (including plans) to insure that erosion will not occur and that sediment will not be transported by stormwater runoff.

7. Summary of all complaints, verbal or written, received during the preceding 12 months and the actions taken concerning each complaint.

8. A written report describing the location of all noise suppression devices, detailing the devices and the anticipated effect.

9. Documentary confirmation that state air emissions requirements are met and a description of efforts being undertaken to provide that dust emissions to adjacent properties are controlled, including a complete detailed report of all sources of dust from quarrying, and a plan to control dust consistent with applicable state requirements, which includes a description of how dust emanating from stockpiles, roads, equipment, operation of vehicles, blasting and other sources of dust will be controlled. The plan must demonstrate that the quarry has made all reasonable efforts to prevent or minimize the escape of fugitive dust particles from the property by complying with the aforementioned plan to control dust.
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10. Documentary confirmation that quarrying operations are consistent with NIDEP regulations concerning water quality and quantity, and a description of efforts being taken to provide that water quality will not be polluted or degraded and that the quantity of any stormwater runoff off-tract will not be increased and stormwater quality will not be degraded.

11. A report from a qualified hydrogeologist that quarrying operations are consistent with NIDEP regulations concerning water quality of streams, watercourses and wetlands on the quarry property and adjacent to the quarry property and a description of efforts being taken to provide that all streams, watercourses and wetlands on the property and adjacent to the quarry are protected from pollution, silting, and environmentally unacceptable runoff.

12. A report from a licensed professional engineer that quarrying operations are consistent with NIDEP regulations concerning air emissions and a description of efforts being taken to provide that air pollution from quarry operations will be minimized and that no adverse environmental impacts to the quarry property or adjacent property will occur.

13. A full description of on-site changes anticipated during the next 12 months on a site plan with a description in narrative form describing quarrying and reclamation activities.

14. Section 4-9.11 herein shall govern any violations of this section.

§ 4-9.5  Rehabilitation of the Quarry Property.  [Ord. #617, § 3; Ord. #741, § 2; Ord. #866, § 1; Ord. #1117; Ord. #1515, 12-37-2001, § 2, amended; Ord. #1638, 5-27-2003, amended]

a. Rehabilitation Plan.

1. 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.

2. Initial Rehabilitation Plan. Prior to approval of an initial license application, a plan for rehabilitation of the quarry property, including the data required under Subsection 4-9.4, shall be submitted as part of the application and referred to the Planning Board for review and making a report to the Township Committee. If the quarry owner and quarry operator are different persons, 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. The Planning Board shall schedule a public hearing on the plan for rehabilitation no more than 60 days after receipt of the plan. The applicant shall give notice as provided in...
Subsection 21-6.6.6 of the Revised Land Use Ordinances of the Township of Bernards. The Planning Board shall review the rehabilitation plan to ensure consistency with each and every provision of Subsections 4-9.4 and 4-9.5, including environmental, health, safety and other factors affecting the public welfare. The Planning Board shall conduct the hearing and follow regular practices used for development applications. These shall include testimony under oath and the opportunity for members of the public to question witnesses and submit testimony. Members of the Township Committee who are also members of the Planning Board may participate in this hearing as members of the Planning Board. The Planning Board shall pay particular attention to the evidence and testimony supporting the feasibility of the plan. 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. Any interim plan shall include the posting of security for rehabilitation in accordance with Subsection 4-9.6.

3. Alternative or Revised Rehabilitation Plan. The applicant shall submit an alternative or revised rehabilitation plan within 60 days of application submitted, if the quarry or property owner has submitted a land use development application that would, if approved, result in a change or revision to the last approved and still valid rehabilitation plan. An alternative or 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.

The Planning Board and Township Committee may retain a qualified hydrogeologist or other licensed professional with experience and expertise in quarry rehabilitation to assist in review of the rehabilitation plan. The fee for such experts shall be charged to the quarry license holder pursuant to the escrow standards in Subsection 4-9.7.

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.

5. The Township Committee shall review the report from the Planning Board. It may then approve the rehabilitation plan, it may approve it with changes with the agreement of the applicant, or it may reject the plan and state its reasons. If it
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approves the plan, it will at the same time establish the security that will be required and the form it will take.

b. 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.


5. That the quarry owners provide adequate security for the completion of the rehabilitation, as required by Subsection 4-9.5.

6. A calculation shall be prepared by a licensed professional engineer to determine the existing availability of fill material to provide the cover required in Subparagraph b2 above.

7. A cost estimate shall be prepared by a licensed professional engineer to establish the costs associated with the proposed rehabilitation plan.

8. The plan shall contain an estimate for the date on which quarry operations will cease and the basis for this estimate.

9. Rehabilitation steps may begin during the time when quarrying is being done. The balance of the plan that remains when quarry operations cease may be carried out in a single stage, or this may be done in multiple stages to accommodate changing conditions, such as water accumulating in the pit. If so, the plan shall describe each stage. Each step in each stage of the plan shall be described in such precise detail that the feasibility of each step, and the cost for implementing each step, may be determined. The plan shall set forth the cost estimate for each step and the basis for the estimate.

10. The plan shall describe each projected source and sink of water and estimate the annual volume of flow into or out of the pit for each source and sink. These sources and sinks shall include but not be limited to precipitation, groundwater, including groundwater through cracks or pores in rock walls, and evaporation. The plan shall include a model, including topographic maps, that projects the filling of the pit over five-year intervals until a stable level is reached, and shall identify projected water level at each five-year interval and at the stable level.
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11. The plan will identify and assess potential impact on water quality resulting from completed quarrying operations.

12. The plan shall describe the projected quality of the water in the pit for each five-year interval and at the projected final level.

13. The plan shall identify the potential risks to health and safety, to humans and to the natural environment, that may obtain at each projected five-year interval and at the projected final level of water in the pit, and shall describe the measures that will be taken to manage and reduce any such risks. The plan shall also identify potential risks to human health and safety that may be associated with step outs in the quarry walls and/or cliff edges on the quarry walls, and shall describe the measures that will be taken to manage and reduce any such risks.

14. The plan shall evaluate risks from falling rock and shall, where appropriate, describe efforts that will be taken to reduce such risks.

15. The plan shall suggest appropriate final uses for the quarry property, based on conditions projected to obtain at each five-year interval and at the stable level of water in the pit.

16. All the above estimates and projections shall be supported by reports and testimony of expert witnesses.

17. The rehabilitation plan shall contain an environmental impact statement (EIS). A copy of the submitted rehabilitation plan and EIS shall be forwarded to the Environmental Commission for its review and comment. The Commission shall submit a report on its findings and recommendations to the Planning Board prior to the hearing on the plan, and members may testify at the hearing and cross examine witnesses.

18. The rehabilitation plan will identify any anticipated environmental remediation which may be required, and the cost estimate identified in Subparagraph 7 above will include the cost of any such remediation.

19. All plot plans, topographic maps will also be submitted in digital form, suitable for entry into township CAD and GIS systems.

c. Schedule for Rehabilitation. The approved rehabilitation plan shall contain an estimated time line for doing the work, starting with the date of termination of quarry operations. A single stage rehabilitation plan, or the first stage of a multistage plan, must be commenced during the first year following the expiration of the last operating license.

d. Remedy for Delay in Rehabilitation. If the responsible person(s) do not implement the rehabilitation plan in accordance with the schedule in the approved plan, and there is a delay of more than 12 months, then the township may undertake the rehabilitation using the security provided under Subsection 4-9.6. The Township Committee may permit extensions of the rehabilitation plan where proven reasonable and appropriate.

6. Editor's Note: Former Subsection 4-9.6(a), Temporary measures, added 3-25-2008 by Ord. 02008, § 1, which immediately followed this paragraph, was repealed 7-15-2008 by Ord. 06008, § 1.
§ 4-9.6 Security for Rehabilitation. [Ord. #617, § 6; Ord. #741, ¶ 1; Ord. #860, ¶ 1; Ord. #1117; Ord. #1515, 12-27-2001, ¶ 1, amended; Ord. #1638, 5-27-2003, amended]

a. Estimate of Costs. The Township Engineer or other expert retained by the Township shall estimate the costs for implementing the rehabilitation plan through all its stages, or he shall review and confirm the estimates provided by the applicant.

b. Required Security. Prior to the approval of any new or renewal license application, the applicant shall agree in writing to rehabilitate the quarry property and shall provide security sufficient to adequately assure the ability to comply with the rehabilitation plan, all in accordance with the provisions of this chapter. This security shall be adequate to implement the rehabilitation plan at any time during the period, which starts with the date of plan approval and ends with the date that quarry operations are expected to cease. Except for the mandatory cash escrow deposit, the applicant may select one or more of the forms of security enumerated in Subparagraphs b1 through b4 below. The Township Committee must approve the form of security selected by the applicant.

1. A Cash Escrow Deposit with the Township. The security for rehabilitation of a quarry shall always include a minimum of $50,000 cash. Every such cash escrow account shall be deposited in the name of the township in an approved township depository; be deposited in interest-bearing investments, the interest to accrue to and be a part of the escrow account; be deposited in an account separate from any other funds; and be designated "[name of quarry] Rehabilitation Plan Escrow" or some substantially similar phrase. The township shall consult with the quarry regarding the type and location of escrow account investments prior to establishing or changing an account, but the township shall not be obligated to accept the quarry's recommendations.

2. A Performance Bond with Adequate Surety. The form and amount of the performance bond shall be approved by the Township Committee. The surety shall be authorized to do business in the State of New Jersey and approved by the Township Committee.

3. A performance bond secured by a mortgage, if acceptable to the Township Committee. The form and amount of the performance bond and mortgage shall be approved by the Township Committee.

4. A performance bond secured by pledge of the applicant's assets, if acceptable to the Township Committee. The form and amount of the performance bond and the form, type and extent of the pledge of assets shall be approved by the Township Committee.

c. Review of Security. The adequacy of the security shall be reviewed by the Township Committee every 12 months. After its review, the Township Committee may permit the security to remain unchanged, may require an increase in security, or may permit a partial release or refund in security.

d. Exchange of Partial Release or Refund of Security. The Township Committee may, at any time, permit the exchange of one form of security for another, or a partial release or refund of security, if the Township Committee is satisfied that after the exchange, partial
release or refund the security will exceed the amount needed to adequately assure the ability to comply with the rehabilitation plan.

§ 4-9.7. Fees. [Ord. #517, § 6; Ord. #741, § 1; Ord. #860, § 1; Ord. #1515, 12-27-2001, § 1, amended; Ord. #1638, 5-27-2003, amended]

a. On January 15 of each year, an annual fee of $5,000 shall be paid by the licensee to the Township to be applied toward expenses of administrative, Planning Board Review, and Board of Health review of the license application. This fee shall not be prorated and may be adjusted from time to time to approximate the reasonable cost of administration of the various provisions of this chapter. Any unexpended portion of the license fee shall be credited to the following year’s annual license fee. An annual statement of account shall be provided to the applicant or license holder.

b. A separate annual escrow fee in the amount of $150,000 is established to cover the monthly inspections, including the inspections of the importation of fill material, monthly reports, investigations of violations by the Township Engineer, special expert review of dust, blasting, noise, samplings of importation of fill material, and other areas of special expert advice deemed necessary by the Township Committee or the Township Engineer, and attorneys’ fees incurred by the Township for review of the license application. The license holder shall deposit the annual escrow fee by January 2 of each year, and shall replenish the escrow account as necessary within 15 days of a written replenishment request made by the Township. Any unexpended portion of the annual escrow fee shall be credited to the following year’s annual escrow fee. The annual escrow fee shall be administered in accordance with the applicable provisions of N.J.S.A. 40:45D-53.2. A statement of account shall be provided to the license holder in advance of any request by the Township for the replenishment of the escrow, or any subsequent annual deposit to be made by the license holder. [Ord. #2601, § 1, 2-26-2008, amended]

§ 4-9.8. Quarry Inspection. [Ord. 517, § 8; Ord. #741, § 1; Ord. #860, § 1; Ord. #1515, 12-27-2001, § 1, amended; Ord. #1638, 5-27-2003, amended; Ord. #2601, § 2-26-2008, amended]

The Township Engineer or his authorized representative is hereby designated as quarry inspector. The quarry inspector shall conduct inspections of the quarry property and quarry in order to determine whether operations are being conducted in accordance with the quarry license and the terms and provisions of this chapter. The Township Committee may retain environmental expert consultants to ensure that inspections and sampling of the importation of fill material into and onto the quarry property is performed so as to ensure the fill material is not environmentally contaminated. Inspections shall be conducted at least one time per month or as frequently as the quarry inspector determines is necessary. The quarry inspector shall submit written reports of all quarry inspections to the Township Committee.

7. Editor’s Note: This ordinance also provided that its provisions shall apply retroactively to 1-1-2001, including the increase in escrow fees and quarry license requirements for 2001.

8. Editor’s Note: This ordinance also provided that its provisions shall apply retroactively to 1-1-2001, including the increase in escrow fees and quarry license requirements for 2001.
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§ 4-9.9. Regulation of Operation. (Ord. #517, § 9; Ord. #741, § 1; Ord. #668, § 1; Ord. #1915, 12-27-2001, § 1; added; Ord. #1915, 12-27-2001, amended; Ord. #1638, 5-27-2008, amended)

a. Quarrying, and the sale or trucking of quarry materials, may be conducted only from Monday through Saturday between the hours of 7:00 a.m. and 5:00 p.m., prevailing time, except that office administration and maintenance of equipment, including motor vehicles, may be conducted at any time. Equipment warm-up may, during the months of April through October, begin at 5:45 a.m. Monday through Saturday, and may, during the months of November through March, begin at 6:30 a.m. Monday through Saturday. No quarrying shall be conducted on Christmas, New Year's Day, Easter, Memorial Day, July 4, Labor Day or Thanksgiving.

b. All drilling must be done by the wet drilling method or by any other method of equivalent effectiveness for dust control.

c. All roads or traveled rights-of-way within a quarry must be regularly treated with calcium chloride, or other dust arresting agent, as necessary to substantially reduce the excessive accumulation and dissemination of dust beyond the boundaries of the quarry property.

d. After the effective date of this section, no quarrying shall be permitted within 50 feet of the quarry property line if it results in damage to lateral support of abutting property, except that quarrying shall continue to be permitted within 50 feet of the quarry property line in those locations where such quarrying has already been undertaken and is identified in any already approved quarry license plan of the quarry property. landscaped berms, satisfactory to the Township Engineer, shall be provided along the perimeter of the quarry property except along any railroad right-of-way. No quarrying shall be permitted which will endanger the lateral support of abutting properties.

e. In no case shall any quarry products, equipment or other materials, except berm and landscaped screening material, be erected or stored within a distance of 100 feet of the quarry property line except along a railroad right-of-way. Storage may be made along a railroad right-of-way if the storage is screened with solid fence material, such as redwood slat chain link.

f. A chain link fence with a minimum height of six feet shall be erected around the perimeter of the quarry property, and all means of ingress and egress shall be controlled by substantial gates of a similar height. The Township Committee may, upon reviewing a license application, reduce the area to be fenced and may allow the fence construction to take place over a period of more than one year, but less than five years. A performance bond equal to the construction cost for the fencing to be constructed during the license term shall be provided. The surety shall be authorized to do business in the State of New Jersey and approved by the Township Committee.

g. On each occasion when blasting is to be conducted, written or verbal notice shall be given to the office of the Township Engineer. Notice shall be given at least two hours prior to the proposed detonation unless prevailing conditions make it impossible, but in no case less than 1/2 hour. Additionally, all residents within 500 feet of any quarry property line who have in writing requested notice shall be notified verbally at least 1/2


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hour prior to the proposed detonation. Blasting shall be conducted only between 10:00 a.m. and 4:00 p.m. prevailing time. Blasting shall be conducted according to the requirements and regulations of the State of New Jersey.

1. The applicant shall file with the Township Clerk written claims of damage due to blasting within 10 days of receipt and the results of the inspections of those claims within 30 days of the date of the claim.

2. The applicant or the state shall monitor each blast with seismographic equipment.

h. Signs shall be maintained at all entrances and exits of the quarry indicating the name and address of the licensee along with the telephone numbers where the licensee can be contacted at any time of the business day. Additionally, the township police shall be provided with a twenty-four-hour number for use in case of emergency.

i. Where conveyors discharge material of less than one inch in diameter onto stock piles of such material, spray bar sprinklers shall be used as needed to control dust emissions.

j. Wherever the quarry property abuts a public street or road or abuts any residential property, a solid continuous landscape screen shall be planted and maintained unless an alternative has been approved or required by the Township Committee. The landscape screen shall consist of massed evergreens and deciduous trees and shrubs of such species and density as will provide a substantial screen throughout the full course of the year.

k. The maximum amount of noise emanating from any quarry audible along the perimeter of the quarry property shall not exceed the noise standards as set forth in Subparagraph I below. The regulations of this section shall not be construed to exempt a quarry from state or local noise limits at any time. The regulations of this section shall not be construed to regulate noise which is required by safety equipment mandated by the state or federal government.

l. From 7:00 a.m. to 5:00 p.m. Monday through Saturday, the daytime noise limits as set forth by the State of New Jersey shall apply. During all other times, the nighttime noise limits of the State of New Jersey shall apply.

m. No vegetation, including trees, shall be cut down or removed from the quarry unless the vegetation has been designated for removal on the license application.

n. The public streets within 200 feet of each exit from a quarry, measured from the projected center line of the exit, shall be kept free from accumulations of dust by the licensee. If a licensee fails to remove dust from such public streets within one day's notice to any individual apparently in charge of the quarry operations during hours of operation, the licensee shall be guilty of a violation of this section and the township may remove such dust at any reasonable means and bill the cost of such removal to the licensee. Failure to pay the cost of removal within 30 days of billing shall be a further violation of this section and shall be a cause for suspension of a license pursuant to Subsection 4-9.11.

o. Activities not explicitly permitted in this section are not permitted.
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1. Fill material sources providing a volume of greater than 5,000 cubic yards of fill material to the quarry property must provide certified testing reports to the license holder to ensure that the fill material is free of environmental contamination. If an importer of fill material has multiple sources that in aggregate total greater than 5,000 cubic yards, then the fill material must be tested for each site. All sampling must be certified with a letter from a New Jersey licensed professional engineer, licensed geologist, or certified hazardous materials handler (CHHM). The testing must include the following analyses:

NDEP Soil Cleanup Criteria (SCC) List
SCC Volatiles 8260B
SCC Base Neutral/Acid Extractables 8270C
PCB 8082
TCL Pesticides 8081A
PP Metals + Ba & V 7800 Series / 6020
Hexavalent Chromium 3500-Cr D / 7196A
Trivalent Chromium Calculation
Total Cyanide 9014
Corrosivity (as pH) / pH (S.U.) 150.1 / 9046B / 9045C
Phenols 9066

Geotechnical Index Testing
Grain Size with Hydrometer ASTM C422
USCS Description w/Munsell Soil Description ASTM D2488 (+ Munsell)
Moisture Content ASTM D2216
Organic Content ASTM D2974

2. The license must have all laboratory analyses performed by a New Jersey licensed analytical laboratory in good standing. Tests must be conducted at a minimum of once per 5,000 cubic yards, and for each soil type. Tests must be conducted for every 5,000 cubic yards of fill material rounded up to the nearest 5,000 cubic yards. The test results of the samples must be submitted to the Township Engineer and the license for review and written approval before the fill material may be delivered to the quarry property. Owners with multiple sites with an aggregate of soil greater than 5,000 cubic yards must have each site sampled for every 5,000 cubic yards rounded up to the nearest 5,000 cubic yards.

Editor's Note: This ordinance also provides that its provisions shall apply retroactively to 1-1-2008, including the license to secure new fill and quarry license requirements for 2008.
§ 4-9.10  BERNARDS CODE  § 4-9.11

§ 4-9.10. Submission, Review and Issuance of Licenses. [Ord. #1516, § 10; Ord. #1515, § 1; Ord. #1505, 12-27-2001, § 1, amended; Ord. #1513, 5-27-2003, amended] All license applications shall be submitted to and reviewed by the Township Engineer. The Township Engineer shall then forward a report to the Township Committee with any recommendations the Township Engineer may make. The Township Committee shall determine whether the application is in compliance with this section and, if so, shall schedule a public hearing on the license application. The public hearing on the license application shall be advertised and conducted in a manner similar to that for the adoption of ordinances. Members of the public will be permitted to ask questions and submit statements. After the close of the public hearing, the Township Committee may approve the license application and the issuance of a license, or it may disapprove the application. It shall state the reasons for its decision. The application to renew a quarry license shall be filed with the township by January 15 of each year. Each application shall be acted upon by the Township Committee within 60 days from the date of the filing of the application; but if not acted upon within that time, any existing license shall continue in full force and effect until the renewal application is acted upon by the Township Committee. A new quarry license shall be effective upon approval by the Township Committee. A renewal quarry license shall be effective on March 15 of the year of filing. Quarry licenses shall expire on March 15 of each year. An approval or renewal of a quarry license by the Township Committee shall not constitute approval of any farm or matter that may require separate approval of the Board of Adjustment, Planning Board or any other municipal, county, state or federal body or agency. No application for a license shall be reviewed by the Township Committee if there is no approved and currently valid rehabilitation plan, unless a rehabilitation plan has been submitted and is under review. All persons to whom a license is proposed to be transferred must confirm that the licensing provisions of Section 4-9.1 herein have been complied with before a license may issue to such license transfe

§ 4-9.11. Suspension of Licenses. [Ord. #1517, § 11; Ord. #1505, § 1; Ord. #1515, 12-27-2001, § 1, amended; Ord. #1513, 5-27-2003, amended] 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 licensee holder to make application to the Superior Court of New Jersey for relief.
§ 4-9.12 GENERAL LICENSING

§ 4-9.12. Enforcement and Penalties. [Ord. #517, § 12; Ord. #741, § 1; Ord. #860, § 1; Ord. #869, 5-27-2003, amended]

a. This section shall be enforced on behalf of the township by the quarry inspector, who shall investigate any violation of this section which he knows of or which comes to his attention by complaint of any person. If a violation is found to exist, or have existed, the quarry inspector shall have the authority to prosecute a complaint in Municipal Court.

b. Any person who violates any provision of this section or who fails to comply with any of the requirements of this section shall be subject to a fine or other enforcement action to the penalty stated in Chapter III, Section 3-1 et seq. The maximum penalty for any violation or offense under this section shall be $100.

c. As an additional remedy, the violation of any provision of this section which causes discomfort or annoyance to reasonable persons of normal sensitivities or which endangers the comfort, health, safety or peace of residents in the area is subject to abatement summary by a restraining order or injunction issued by a court of competent jurisdiction.

d. Nothing in this subsection shall be construed to abridge, limit or otherwise impair the right of any person to damages or other relief on account of injuries to persons or property and to maintain any action or other appropriate proceeding therefor.

§ 4-9.13. Applicability of Other Ordinances. [Ord. #517, § 14; Ord. #741, § 1; Ord. #860, § 1; Ord. #869, 5-27-2003, amended]

Nothing in this section shall be construed as repealing any provision of any other township ordinance which, by its terms, regulates or controls quarrying or its incidental activities either directly or indirectly, or which furthers the general purposes of this section in any way. If any regulation in this section differs from the same or similar regulation of any other township ordinance, the more restrictive provision shall be deemed to control.


Notwithstanding any other requirements of Section 4-9, as of July 21, 2008, at 12:00 a.m., the importation of fill material onto quarry property within the Township is expressly prohibited. Neither a quarry owner, nor a quarry operator, nor any other person or entity shall permit the importation of fill material onto quarry property within the Township. The Township Committee reserves the right to rescind or modify the prohibition against importation of fill for reasons within its general police powers, including the right to adopt a resolution temporarily lifting the prohibition in order to permit limited fill importation in conjunction with quarry rehabilitation activities specifically approved by the Planning Board and Township Committee.
EXHIBIT B
DAY PITNEY LLP

MILLINGTON QUARRY, INC.

v.

TOWNSHIP OF BERNARDS, TOWNSHIP COMMITTEE OF TOWNSHIP OF BERNARDS, and PLANNING BOARD OF THE TOWNSHIP OF BERNARDS,

Defendants.

THIS MATTER, having been brought before the Court on the motion of Day Pitney LLP, attorneys for Plaintiff Millington Quarry, Inc. ("Plaintiff"), on notice to counsel for Defendants Township of Bernards (the "Township"), Township Committee of Township of Bernards, and Planning Board of the Township of Bernards, for the entry of an Order enforcing the April 29, 2014 settlement agreement entered into by the parties (the "Motion"); and the Court having considered any opposition; and the Court having heard the arguments of counsel, if any; and for good cause having been shown;

IT IS on this 6th day of May, 2019,
ORDERED that Plaintiff's Motion is hereby GRANTED IN PART and DENIED IN PART as outlined in the Court's opinion attached hereto and made a part hereof; and it is further

ORDERED that the Township is hereby directed to form the Oversight Subcommittee in the manner prescribed in the April 29, 2014 Settlement Agreement; and it is further

ORDERED that the Oversight Subcommittee established pursuant to the April 29, 2014 Settlement Agreement is the only advisory subcommittee permitted to address any issues concerning the implementation of the Last Approved Plan; and it is further

ORDERED that Township Resolution 2019-0082, insofar as it established a Quarry Advisory Task Force ("QATF") that does not comply with the April 29, 2014 Settlement Agreement, is hereby deemed invalid; and

ORDERED that the QATF is prohibited from addressing any issues concerning the implementation of the Last Approved Plan; and it is further

ORDERED that a copy of this Order shall be served on all counsel of record within 5 days of receipt of this Order.

/S/ THOMAS C. MILLER, P.J.Cv.
HON. THOMAS C. MILLER, P.J. Cv.

XXX Opposed

SEE ATTACHED STATEMENT OF REASONS
MILLINGTON QUARRY, INC.

Plaintiff,

v.

TOWNSHIP OF BERNARDS, TOWNSHIP COMMITTEE OF TOWNSHIP OF BERNARDS, and PLANNING BOARD OF THE TOWNSHIP OF BERNARDS,

Defendants.

SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SOMERSET COUNTY DOCKET NO. SOM-L-475-08

CIVIL ACTION

ORDER GRANTING DEFENDANTS' CROSS-MOTION TO ENFORCE SETTLEMENT AGREEMENT AND TO ORDER MQI TO COMPLY WITH TOWNSHIP ORDINANCE TO SUBMIT TO THE PLANNING BOARD BY APRIL 30, 2019, AN AMENDED REHABILITATION PLAN APPLICATION

THIS MATTER having been opened to the Court upon the motion to enforce settlement brought on behalf of Millington Quarry, Inc. ("plaintiff") against the Township of Bernards ("Township") and Township Committee of Township of Bernards ("Township Committee"), (collectively "defendants"), and a cross-motion to enforce a settlement agreement and township
ordinances on behalf of Township and Township Committee, and the Court having reviewed and considered the moving and opposing papers, having heard argument of counsel, and finding good cause existing for the within order;

IT IS on the 6th day of May, 2019,

ORDERED that the motion to enforce settlement brought on behalf of Plaintiff, against Defendants is GRANTED IN PART and DENIED IN PART; and be it further

ORDERED that the cross-motion is hereby DENIED WITHOUT PREJUDICE in its entirety; and be it further

ORDERED that:

1. MQI submit to the Planning Board by April 30, 2019, a revised rehabilitation plan application so as to comply with the April 29, 2014, Settlement Agreement MQI entered into with Bernards Township, Section 1, which states:

"The 2011 Rehabilitation Plan shall be effective upon the date of this Settlement Agreement and, shall expire on January 31, 2017 ("the "Expiration Date") and, in accordance with Section 4-9.5a 4, a revised rehabilitation plan shall be submitted not less than three (not six) months [October 31, 2016] before the expiration of said rehabilitation plan." (emphasis added)

2. MQI comply with Township Committee Resolution No. 2019-0162 including Schedule A which now includes Systems 4-5 and 7-21 in the amount of $3,435,608 of the 2011 Rehabilitation Plan are incomplete since 2011, including late maintenance; by directing that MQI submit a revised rehabilitation application to the Planning Board by April 30, 2019; and as further required by Township Ordinance Section 4-9.5a.3 as triggered by submission of a revised rehabilitation plan application by MQI’s October 25, 2018, land use development application to the Zoning Board of Adjustment.

/S/ THOMAS C. MILLER, P.J.Cv.
HON. THOMAS C. MILLER, P.J. Cv.

SEE ATTACHED STATEMENT OF REASONS
Millington Quarry, Inc. v. Township of Bernards, et al.
Docket No. SOM-L-475-08
Plaintiff's Motion to Enforce Settlement
OPPOSED
Defendant's Cross Motion to Enforce Settlement Agreement and Township Ordinance
OPPOSED
Returnable: April 29, 2019

I. PARTIES AND RELIEF SOUGHT

Plaintiff Millington Quarry, Inc. ("Plaintiff" or "MQI") moves for the entry of an Order enforcing the settlement agreement entered into by the parties on April 29, 2014 (the "Settlement Agreement"). MQI is represented by Mark Salah Morgan, Esq. of Day Pitney, LLP. Plaintiff has submitted a reply brief dated April 8, 2019 which has been considered by the Court. Plaintiff also opposes Defendants' Cross Motion.

Defendants, Township of Bernards and Township Committee of Township of Bernards, by and through their counsel, John P. Belardo, Esq. of McElroy Deutsch Mulvany & Carpenter, LLP, Cross Moves to Enforce MQI Settlement Agreement and to order MQI to comply with the Township Ordinance. Defendants also oppose the Plaintiff's Motion.

II. SUMMARY OF PLAINTIFF'S MOTION

Five years ago, Plaintiff and the Township of Bernards (the "Township") reached an agreement to resolve a contentious and heavily litigated dispute that lived on the Court's docket for more than six (6) years and involved four (4) judges and one (1) retired judge. The Settlement Agreement resolved disputes regarding the rehabilitation of Plaintiff's property in the Township - the Millington Quarry (the "Quarry"). According to Plaintiff, the key component of the Settlement Agreement involved the establishment of a Quarry Oversight Subcommittee, comprised of three specific Township officials, to address any issues relating to the implementation of rehabilitation at the Quarry. Plaintiff asserts that in violation of the Settlement Agreement, the Township failed to establish the Oversight Subcommittee, and instead has recently formed a different committee that includes non-officials, for the identical purpose. Plaintiff therefore brings this motion to enforce the Settlement Agreement, and compel the Township to honor its commitment as set forth in the Settlement Agreement.
III. FACTUAL BACKGROUND PROVIDED BY MQI

(A) The Quarry

MQI is the record owner of the Millington Quarry, which consists of approximately 190 acres and is identified on the tax map as Block 6001, Lot 6, located at Stonehouse Road in Bernards Township (the “Property”). See Certification of Mark S. Morgan, Esq. (“Morgan Cert.”), Ex. A, ¶ 7. The Property was operated as a quarry beginning in 1895. Id. at ¶ 8. MQI conducted quarrying operations at the Property from 1978 until October 31, 2016, when quarrying operations ceased. Id.

The Quarry has been the subject of multiple lawsuits filed in the Superior Court of New Jersey, Somerset County, including: 1) Tilcon New York, Inc. et al. v. Township of Bernards, Consolidated Docket Nos. SOM-L-279-02, SOM-L-218-02, SOM-L-1277-05, SOM-L-1284-05 (collectively, the “2005 Litigation”); and 2) Millington Quarry, Inc. v. Bernards Township et al., Docket No. SOM-L-475-08 (“2008 Litigation”). A separate lawsuit involving MQI’s lessee was also filed in this Court and captioned as Millington Quarry, Inc. et al. v. Tilcon New York, Inc. et al., Docket No. SOM-L-261-12, which was the subject of a separate settlement. These matters combined have taken up at least fifteen (15) years of the Court’s time and resources and millions of dollars in legal fees.

(B) The 2005 Litigation

In 2003, MQI and its former lessee of the Property, Tilcon New York, Inc. (“Tilcon”), submitted a revised Rehabilitation Plan a/k/a Reclamation Plan to the Township Committee, which outlined MQI’s strategy for the restoration of the Property at the conclusion of quarrying operations and the costs that would be incurred to complete the rehabilitation (the “2003 Rehabilitation Plan”). Id. at ¶ 17. The Township imposed two conditions on the 2003 Rehabilitation Plan. Id. at ¶¶ 20 – 22. Tilcon, which was, at that time, responsible for the rehabilitation of the Property, objected to these two conditions and, in September 2005, filed suit against the Township, the Township Committee, and MQ!, contesting the conditions. Id. at ¶ 27.

After several months of litigation, a settlement was reached and a Stipulation of Settlement and Dismissal Without Prejudice was entered (the “2005 Settlement”). Id. at ¶ 27 – 29. As a result of the 2005 Settlement, MQI and Tilcon revised the 2003 Rehabilitation Plan to include the conditions imposed by the Township. Id. at ¶ 30. After the 2003 Rehabilitation Plan was revised, MQI and Tilcon began the process of rehabilitating the Property. Id. at ¶¶ 31 – 32.

(C) The 2008 Litigation

On January 28, 2008, MQI and Tilcon submitted a revised rehabilitation plan to the Township, as required by its ordinances (the “2008 Rehabilitation Plan”). Id. at ¶ 45. Thereafter, in February and March of 2008, the Township adopted two ordinances: Ordinance #2001 amending the quarrying license to require an increased level of environmental sampling and testing of incoming fill material transported to the Property; and Ordinance #2008 effectuating a 9-month
moratorium on the importation of fill material onto the Property, pending the Township’s review of the 2008 Rehabilitation Plan. Id. at ¶¶ 49 – 52.

On March 27, 2008, MQI filed this action, seeking a temporary restraining order and preliminary injunction with respect to the enforcement of Ordinance #2008. Id. at ¶ 53. The Law Division (Hon. Yolanda Ciccone, A.J.S.C.) entered an Amended Order on April 22, 2008, in which the Court, inter alia, imposed temporary and preliminary restraints upon the Township with respect to enforcement of Ordinance #2008 and established a strict timeline for the Planning Board’s and the Township’s review of the 2008 Rehabilitation Plan. Id.

Immediately after entry of the Court’s Order, on April 23, 2008, the Township introduced and passed Ordinance #2011 on first reading, which circumvented the 2005 Settlement by modifying the grading requirements agreed to therein by the parties. Id. at ¶ 54. MQI objected to the adoption of Ordinance #2011, and advised the Township’s attorney and the Planning Board’s attorney that Ordinance #2011 would constitute a breach of the 2003 Settlement and would leave MQI and Tilcon without a reasonable time period in which to design a new plan that incorporated any such changes before expiration of the 2003 Rehabilitation Plan. Id. at ¶ 56. On May 13, 2008, the Township Committee ratified Ordinance #2011 on second reading, over MQI’s objections. Id. at ¶ 57.

The Planning Board did not provide MQI or Tilcon with any review letters with respect to the 2008 Rehabilitation Plan until May 20, 2008 – nearly four months after MQI’s submission of the 2008 Rehabilitation Plan, and after four hearings had already been concluded. Id. at ¶ 61. The review letters did not provide MQI with any clear guidance as to how to rectify purported deficiencies or concerns with respect to the 2008 Rehabilitation Plan, and the Planning Board rejected MQI’s several requests to meet to discuss the purported deficiencies and concerns in order to reach a resolution with respect to same. Id. at ¶ 62.

On June 11, 2008, the Planning Board adopted a resolution in which it, inter alia, recommended to the Township Committee that the Township Committee reject the 2008 Rehabilitation Plan and require MQI to submit a new rehabilitation plan which would satisfy an additional forty-three (43) enumerated conditions, including the recommendation that no further fill be brought to the Property. Id. at ¶63. On July 15, 2008, the Township Committee adopted Resolution #080308, over MQI’s objections, which disapproved of the 2008 Rehabilitation Plan and imposed the additional forty-three (43) conditions identified by the Planning Board. Id. at ¶65. On July 2, 2008, the Township adopted Ordinance #2025, which expressly prohibited the importation of fill material to the Property. Id. at ¶67.

MQI ultimately amended its original Verified Complaint in Lieu of Prerogative Writs in the 2008 Litigation to challenge the above ordinances and other action on the part of the Township as arbitrary, capricious, unreasonable, and otherwise improper, and as constituting a breach of the Township’s contracts with MQI. Id. at Ex. A. The 2008 Litigation was contentious, politically-driven, and heavily litigated over the years that followed.
(D) The Settlement Agreement

On April 29, 2014, MQI and the Township finally entered into a Settlement Agreement and Release (the "Settlement Agreement") by which the parties settled all claims raised in the 2008 litigation and established a comprehensive plan for the rehabilitation of the Property (the "Last Approved Plan"). Id. at Ex. B. The Settlement Agreement was adopted pursuant to Resolution No. 2014-0186. Section 7 of the Settlement Agreement provides as follows:

SECTION 7: Oversight Subcommittee.

A. An advisory Oversight Subcommittee shall be established by the Township Committee to address any issues that may arise during the course of implementing the Rehabilitation Plan.

B. The advisory Oversight Subcommittee shall consist of the following Bernards Township officials or their successors: (1) Mayor John Carpenter or this Mayor's designee; (2) Township Engineer, Tom Timko, P.E.; and (3) Police Chief, Brian Bobowicz. Id. at p. 5 (emphasis supplied). After MQI and the Township entered into the Settlement Agreement, MQI began the process of rehabilitating the Property pursuant to the Last Approved Plan.

(E) Regarding MQI's claim that the Township has Breached the Settlement Agreement

On October 31, 2016, MQI submitted to the Township an "as-built" plan establishing MQI's compliance with the Settlement Agreement and the Last Approved Plan. Id. at Ex. C. Since the time MQI and the Township entered into the Settlement Agreement, the Township and its consultants, including Princeton Hydro, LLC ("PH"), have conducted reviews of the progress of the rehabilitation of the Property every month, at a minimum, and have consistently confirmed that MQI is in compliance with the Last Approved Plan. See Certification of Tom Carton ("Carton Cert."), ¶ 1 - 6, Ex. A - C. PH has noted that "the majority" of the grading process required for reclamation has been complete since December 2016. Id., Ex. B, p. 6.¹

Because MQI substantially completed the Last Approved Plan set forth in the Settlement Agreement, on April 10, 2018, the Township adopted Resolution #2018-0214, in which it released to MQI $5,000,000 of its approximately $8,400,000 performance bond. Id. at Ex. D. As of the

¹ Similarly, the New Jersey Department of Environmental Protection has issued to Plaintiff a Soil Remedial Action Permit ("SRAP"), which required designation of a Licensed Site Remediation Professional ("LSRP"), to ensure the Property's compliance with all applicable remediation standards. See Carton Cert., ¶ 7, Ex. D. Plaintiff's LSRP, Joseph Sorge, confirmed in a December 13, 2018 letter that it is his professional opinion that the remediation of the Property has been completed in compliance with all applicable remediation standards in a manner that is protective of the public health, safety, and environment. Id., ¶ 8, Ex. E.
date of filing, the rehabilitation of the Property has been substantially completed in accordance with the Last Approved Plan.

Despite Plaintiff’s compliance with the Last Approved Plan, and the issuance of favorable reports by PH, the DEP, and the LSRP, certain residents of the Township have been extremely vocal and involved in the process, mostly speaking out against and directly opposing MQI’s proposals for the rehabilitation of the Property. See Carton Cert., ¶ 9.

On January 29, 2019, the Township adopted Resolution #2019-0082. Id. at Ex. B. Through Resolution #2019-0082, the Township resolved that:

[T]he “Quarry Advisory Task Force” is established and shall (1) review and report back to the Township Committee with their findings, any concerns, and recommendations, regarding MQI’s compliance with implementing the Last Approved Plan; and (2) further review the Property’s environmental condition, documentation, and status, and make appropriate recommendations to the Township Committee in one or more reports on or before October 1, 2019, and the Township Committee may pursue outside professionals for technical input; and (3) advise on remediation status in accordance with the MOA, RIQP, RAWP, the RAO, and all other DEP filings in this matter, the governing statutes, regulations, and ordinances....

Id. (emphasis supplied). Resolution #2019-0082 further provided that:

[T]he Quarry Advisory Task Force shall consist of the following, appointed for a one year term expiring 12/31/19:

1. Mayor/Mayor’s Designee
2. Up to three (3) resident members
3. Township Engineer.

Id. MQI indicates that it was not notified that the Township would be establishing a Quarry Advisory Task Force separate and apart from the advisory Oversight Subcommittee required pursuant to the Settlement Agreement. To date, the Township has not established the Oversight Subcommittee as required by the Settlement Agreement.

The Township’s stated reason for establishing the Quarry Advisory Task Force was because “there is a substantial public interest in ensuring that the site is properly remediated.” Id. MQI asserts that no evidence was presented or exists that establishes any violation by MQI of the Settlement Agreement or the Last Approved Plan. The function of the Quarry Advisory Task Force established by Resolution #2019-0082 is the same as the function of the Oversight Subcommittee established by the Settlement Agreement, i.e., to address any issues that may arise in connection with the implementation of the Last Approved Plan. The appointed members of the Quarry Advisory Task Force do not comply with the requirements of the Settlement Agreement insofar as
(i) the Police Chief is excluded; and (ii) two “resident members” – who are not Township officials – are included. Id.

On February 22, 2019, the Quarry Advisory Task Force adopted a First Report to the Bernards Township Committee by the Quarry Advisory Task Force (the “Task Force Report”). Id. at Ex. F. MQI was not provided with a copy of the Task Force Report at the time of its submission. In the Task Force Report, the Quarry Advisory Task Force made a number of findings and recommendations to the Township relating to MQI’s rehabilitation of the Property and its implementation of the Last Approved Plan. Id. The Task Force Report set forth several items that it believes require immediate action by the Township based on the Task Force’s contention that MQI is not in compliance with the Last Approved Plan, and indicated that there are several other aspects of MQI’s implementation of the Last Approved Plan that it intends to review and report on in the future. Id.

IV. TOWNSHIP’S CROSS MOTION

The Township has Cross Moved for an Order granting the following relief:

1. Directing MQI to submit to the Planning Board by April 30, 2019, a revised rehabilitation plan application so as to comply with the April 29, 2014, Settlement Agreement MQI entered into with Bernards Township, Section 1, which mandates:

“The 2011 Rehabilitation Plan shall be effective upon the date of this Settlement Agreement and shall expire on January 31, 2017 (“the “Expiration Date”) and, in accordance with Section 4-9.5a 4, a revised rehabilitation plan shall be submitted not less than three (not six) months [October 31, 2016] before the expiration of said rehabilitation plan.” (emphasis added.)

2. Directing MQI to comply with Township Committee Resolution No. 2019-0162 including Schedule A (which shows that that Items 4-5 and 7-21 in the amount of $3,435,608 of the 2011 Rehabilitation Plan are incomplete since 2011, including lake maintenance), by directing that (i) MQI submit a revised rehabilitation application to the Planning Board by April 30, 2019, and (ii) as further required by Township Ordinance Section 4-9.5a.3, submission of a revised rehabilitation plan application as triggered by MQI’s October 25, 2018, land use development application to the Zoning Board of Adjustment.

V. PLAINTIFF’S RELEVANT STATEMENT OF FACTS IN SUPPORT OF ITS MOTION AND IN OPPOSITION TO THE TOWNSHIP’S CROSS MOTION

Plaintiff relies on and incorporates herein the Reply Certification of Thomas C. Carton in Further Support of Plaintiff’s Motion to Enforce the Settlement Agreement and in Opposition to the Township’s Cross-Motion to Enforce the Settlement Agreement (“Carton Reply Cert.”). In
addition, the timeline below summarizes certain key developments that are reflected in the motion record, which have been compiled here for the Court's ease of reference. A larger version of the timeline below was attached to Plaintiff's brief as Appendix A.

**Millington Quarry, Inc. - Key Dates**

|------|------|------|------|------|------|

**MONTHLY INSPECTIONS OF PROPERTY BY TOWNSHIP**

- April 29, 2014: Twp. informed Plaintiff that the property was not in compliance with the terms of the Settlement Agreement.
- October 31, 2014: Township requested a hearing to discuss bond reduction.
- November 9, 2014: Township acknowledged the majority of the rehabilitation work was complete.
- December 9, 2014: Township acknowledged the majority of the rehabilitation work was complete.
- February 17, 2015: Township adopted Resolution No. 2015-015, reducing bond by $50,000.
- July 10, 2015: Township meeting to discuss board reduction.
- October 20, 2015: Township meeting to discuss bond reduction.
- February 15, 2016: Township meeting to discuss bond reduction.
- April 1, 2016: Township meeting to discuss bond reduction.
- December 13, 2016: Township meeting to discuss bond reduction.
- January 29, 2017: Township meeting to discuss bond reduction.
- March 4, 2017: Township meeting to discuss bond reduction.
- March 5, 2017: Township meeting to discuss bond reduction.
- Four summonses issued for alleged conduct in Nov. 2016.
- CATF formed.
- Twp. demands revised Rehab. Plan and authorizes Township Attorney to contest MOJ's ZBA Application.

Plaintiff, MQI, on the other hand, also asserts that it is "in compliance" with the Settlement Agreement. Plaintiff points out that the Settlement Agreement required Plaintiff to rehabilitate the Property in accordance with the rehabilitation plan submitted by Plaintiff in October 2011 (the "2011 Rehabilitation Plan"). See Carton Reply Cert., ¶ 3. The Township adopted the 2011 Rehabilitation Plan as a part of the Settlement Agreement on April 29, 2014 in accordance with Resolution #2014-0186, which stated:

> the Township Committee has reviewed the Planning Board Report and approves the 2011 Rehabilitation Plan subject to the modifications, terms, and conditions with the consensual agreement of MQI as set forth in the Settlement Agreement.

See Certification of Deputy Municipal Clerk Rhonda Pisano in Support of Defendants' Cross-Motion ("Pisano Cert."), at Exhibit G. Adoption of the 2011 Rehabilitation Plan set forth in the Settlement Agreement was the culmination of six (6) years of litigation, hundreds of thousands of dollars spent by both the Township and Plaintiff, and at least seventeen (17) hearings before the Planning Board and Township Committee that began on July 17, 2011 and ended on April 29, 2014. Carton Reply Cert., ¶ 5. The Settlement Agreement was also the culmination of countless mediation sessions before the Honorable Jack L. Lintner, P.J.A.D. (Ret.). Id.
Since execution of the Settlement Agreement by the Parties, Plaintiff has adhered to the 2011 Rehabilitation Plan and substantially completed its performance and implementation of the 2011 Rehabilitation Plan. Id., ¶ 6. Indeed, after spending more than $10 million to implement the 2011 Rehabilitation Plan, the Property has undergone a remarkable transformation and currently consists of a large meadow and a filling lake. Id. Documentation of Plaintiff's substantial completion of the 2011 Rehabilitation Plan is set forth in the March 13, 2019 Certification of Thomas C. Carton, which included:

(a) reports from the Township's consultant, Princeton Hydro, LLC, documenting Plaintiff's compliance with the 2011 Rehabilitation Plan following regular inspections of the Property;

(b) inspection reports from the New Jersey Department of Environmental Protection ("DEP"), confirming that the Property is in compliance with applicable DEP regulations; and

(c) a report from the Licensed Site Remediation Professional ("LSRP"), Joseph Sorge of JM Sorge, Inc., confirming that the remediation of the Property has been completed in compliance with all applicable remediation standards in a manner that is protective of the public health, safety, and environment.

See Certification of Thomas C. Carton in Support of Plaintiff's Motion to Enforce Settlement Agreement ("Carton Cert."); Exhibits B – E. Further documentation of Plaintiff's substantial completion of the 2011 Rehabilitation Plan is contained in the October 28, 2016 report of Dynamic Earth, LLC, which concludes that "site reclamation has been substantially completed." Carton Reply Cert., ¶ 8, Exhibit B.

Based upon Plaintiff's substantial completion of the 2011 Rehabilitation Plan, Plaintiff has not, subsequent to the Settlement Agreement, submitted any revised rehabilitation plan to the Township. Id., ¶ 9. While Section 1 of the Settlement Agreement provided for the submission of a revised rehabilitation plan by October 31, 2016, because Plaintiff was not proposing any revisions to the 2011 Rehabilitation Plan, Plaintiff addressed its Section 1 obligation by re-submitting to the Township, on October 31, 2016, the approved 2011 Rehabilitation Plan along with documentation demonstrating its substantial completion of that Plan. Carton Reply Cert., ¶ 10, Exhibit C. The cover letter to Plaintiff's October 31, 2016 submission specifically requested a hearing, stating:

We request that this matter be set for a hearing by the Township Committee and we look forward to answering any questions you may have.
Carton Reply Cert., Exhibit C (emphasis supplied). Eight days later, on November 8, 2016, Plaintiff confirmed to the Township that its October 31, 2016 submission constituted documentation of its compliance with the 2011 Rehabilitation Plan, and was not a “revised rehabilitation plan.” In its November 8, 2016 letter, Plaintiff specifically stated:

We welcome the opportunity to further discuss this matter and to address any questions the Township Committee may have.

See Certification of Mark Salah Morgan, Esq. in Support of Plaintiff’s Motion to Enforce Settlement Agreement (“Morgan Cert.”), Exhibit C. Despite requesting a hearing and making explicitly clear that Plaintiff was not proposing any revisions to the 2011 Rehabilitation Plan, the Township never scheduled a hearing on Plaintiff’s October 31, 2016 submission nor did it ever allege that Plaintiff was not in compliance with the Settlement Agreement. Indeed, the Township’s cross-motion is the first time the Township ever alleged Plaintiff was in breach of the Settlement Agreement. Yet, remarkably, the Township offers zero evidence on its cross-motion to rebut the contemporaneous evidence from its own Engineer and technical consultants that unequivocally support Plaintiff’s compliance with the Settlement Agreement.

Plaintiff contends that the Township’s position ignores the reports of its own consultants which Plaintiff submits contradict the proposition that the Plaintiff has breached the Settlement Agreement. Instead, the Township directs the Court to a subdivision plan and proposed Deed Notice filed by the Plaintiff nearly six months ago with the Bernards Zoning Board of Adjustment (“ZBA Application”). The ZBA Application (filed on October 25, 2018) is not before the Court and, even if it were, the mere filing of such an application by the Plaintiff does not violate the Settlement Agreement or any governing law. The Township completely fails to explain how the ZBA Application offends the Settlement Agreement or any law governing the Property. Indeed, it cites to absolutely no authority or provision in law that would preclude the filing of the ZBA Application.

The issue of whether the Settlement Agreement precludes the ZBA Application is not an issue that was addressed in the Agreement itself. MQI asserts that the ZBA Application, if approved, will not result in a change or revision to the 2011 Rehabilitation Plan, although that issue, including whether the Application or the grant of the Application will trigger a requirement for a revised Rehabilitation Plan are beyond the scope of this opinion.
In fact, MQI accuses the Township of seeking to manufacture a dispute to achieve a political agenda. The best evidence of the Township's efforts to manufacture a dispute can be seen through the Township's recent adoption of Resolution 2019-0162, which directs Plaintiff to submit a revised rehabilitation plan by April 30, 2019. Carton Reply Cert., ¶ 21. The stated reasons for the Township's adoption of Resolution 2019-162 are:

a. Plaintiff submitted an application for preliminary and final minor subdivision to the Township Zoning Board of Adjustment on October 25, 2018 (the "ZBA Application");

b. the Settlement Agreement requires the submission of a revised rehabilitation plan by October 31, 2016; and

c. "the Township Engineer has determined" that several "items" associated with the rehabilitation of the Property "are still either not completed or are in the process of ongoing completion."

See Pisano Cert., Exhibit D.

According to the Plaintiff, the stated reasons for the Township's adoption of Resolution 2019-162 are inconsistent with the following:

a. Plaintiff is entitled to pursue a subdivision of the Property in the ordinary course. Nothing precludes such an application, especially since the ZBA Application, if approved, would not result in a change or revision to the 2011 Rehabilitation Plan. The requirements of the 2011 Rehabilitation Plan run with the Property whether it remains as one parcel or as two separate parcels. See Carton Reply Cert., ¶ 23.

b. Plaintiff complied with the Settlement Agreement by notifying the Township, on October 31, 2016, that it was completing (and had in fact substantially completed) the 2011 Rehabilitation Plan. On November 8, 2016, Plaintiff specifically informed the Township that it was not submitting a revised rehabilitation plan. In the intervening three years, the Township has not expressed any objections or concerns regarding Plaintiff's performance under the Settlement Agreement nor did it ever schedule a hearing as requested. Id.

c. The Township Engineer's determination that certain "items" are not yet completed, or are "in the process of ongoing completion," establishes only that Plaintiff's performance of the 2011 Rehabilitation Plan is ongoing, and does not give rise to an obligation on the part of Plaintiff to submit a revised rehabilitation plan. Id.

The Township Engineer's determinations regarding outstanding rehabilitation items are particularly confounding to Plaintiff because several of the identified items are in fact substantially complete. For example, the Township Engineer identifies Item No. 4 (On-Site Earthwork), and
Item No. 5 (Overburden Import/spread), but Dynamic Earth, LLC found that both of these items were “95 percent complete” as of October 28, 2016. Id., ¶ 24, Exhibit B. This finding was consistent with the findings of the Township’s consultant, Princeton Hydro, LLC, which concluded on December 9, 2016 (42 days after Dynamic Earth’s findings), that “the majority of the grading process required for reclamation is now complete.” See Morgan Cert., Exhibit B. The 2011 Rehabilitation Plan does not contain a schedule by which any of the outstanding items identified by the Township Engineer must be completed. Therefore, the allegation that certain items are outstanding, even if correct, does not mean that Plaintiff has failed to adhere to the 2011 Rehabilitation Plan.

In any event, several of the items identified by the Township Engineer as outstanding relate to lake maintenance issues, which are ongoing because the lake is still in the process of reaching its expected surface area of 40 – 50 acres (which is dependent on rainfall to achieve its natural surface area). See Carton Reply Cert., ¶ 26. Throughout 2018, a partial lake characterization survey was performed by Kleinfelder, Inc., which showed that the lake on the Property has developed as anticipated in Plaintiff’s January 2012 Lake Management Plan. Id. To date, the lake has filled up more than half of its expected surface area and is continuing to fill. Id., ¶ 27. In its January 23, 2019 report, Kleinfelder concluded that “the lake forming in Millington Quarry will be an outstanding water resource: beautiful, clean, and capable of supporting a healthy aquatic ecosystem.” Id., Exhibit G. MQI therefore submits that the Township cannot lay claim to a breach of the Settlement Agreement in view of these uncontradicted facts.

VI. COURT’S DECISION

A. Regarding MQI’s Request to Declare the Township to be in Violation of the Settlement Agreement

1) In General

The issue before the Court involves a request for a determination of whether the settlement entered into by the parties has been violated. Some background on the law regarding settlements is warranted.

Div. 1985)). "An agreement to settle a lawsuit is a contract, which like all contracts, may be freely entered into and which a court, absent a demonstration of 'fraud or other compelling circumstances,' should honor and enforce as it does other contracts." Brundage, 195 N.J. at 601 (quoting Pascarella v. Bruck, 190 N.J. Super. 118, 124-25 (App. Div.), certif. denied, 94 N.J. 600 (1983)).

"On a disputed motion to enforce a settlement, as on a motion for summary judgment, a hearing is to be held to establish the facts unless the available competent evidence, considered in a light most favorable to the non-moving party, is insufficient to permit the judge, as a rational factfinder, to resolve the disputed factual issues in favor of the non-moving party." Amatuzzo v. Kozmiuk, 305 N.J. Super. 469, 474-75 (App. Div. 1997)

Here, it is uncontradicted that in order to conclude and fully resolve a costly and contentious period of litigation, Plaintiff and the Township entered into the Settlement Agreement, which established a comprehensive plan for the rehabilitation of the Property. See Morgan Cert., Ex. B. One component of that plan, and an express term of the Settlement Agreement, was that the Township Committee would establish an Oversight Subcommittee, charged with addressing "any issues that may arise" during the rehabilitation of the Property. Id. at p. 5. Plaintiff asserts that the Oversight Subcommittee was to be comprised of three individuals: (1) the Mayor or the Mayor's designee; (2) the Township Engineer; and (3) the Police Chief. Id.

2) MQI's Position

MQI argues that in deviation from this express term of the Settlement Agreement, the Township Committee has failed to form an Oversight Subcommittee. MQI avers that instead, through adoption of Resolution #2019-0082 on January 29, 2019, the Township Committee formed the Quarry Advisory Task Force, which does not include the Police Chief, and which includes two "resident members," who are not Township officials. Id., at Ex. E. MQI offers that apparently the Township Committee formed the Quarry Advisory Task Force without any consultation with or even notice to Plaintiff. Moreover, MQI submits that the Quarry Advisory Task Force has now issued the Task Force Report, which evinces a clear intention on the part of the Township to disregard other material terms of the Settlement Agreement, and to revisit issues relating to the rehabilitation of the Property as if the Settlement Agreement does not exist. Id., at Ex. F.
Plaintiff argues that implied in the Township’s agreement to form the Oversight Subcommittee was an agreement to refrain from forming a different committee, with a committee membership composition that is inconsistent with the agreed upon composition of the Oversight Subcommittee, to perform the exact same function. See Troy v. Rutgers, 168 N.J. 354, 365-66 (2001) (explaining that implied contractual terms are “as binding” as express contractual terms). MQI therefore postulates that the Township has therefore violated the Settlement Agreement not only by failing to form the Oversight Subcommittee, but also by forming the Quarry Advisory Task Force, which entirely usurps the intended role and purpose of the Oversight Subcommittee.

MQI therefore proposes that to enforce the Settlement Agreement, and afford meaning to the commitments of all parties, the Court should enter the form of Order enclosed with its Motion papers which grants Plaintiff’s motion to enforce the settlement.

As a result, MQI effectively requests that the Court enter an Order granting the following relief: (1) directing the Township to form the Oversight Subcommittee in the manner prescribed in the Settlement Agreement; (2) directing that the Oversight Subcommittee established pursuant to the Settlement Agreement is the only advisory subcommittee permitted to address any issues concerning the implementation of the Last Approved Plan; (3) deeming Resolution 2019-0082, insofar as it established a Quarry Advisory Task Force that does not comply with the Settlement Agreement, invalid; and (4) directing that the Quarry Advisory Task Force is prohibited from addressing any issues concerning the implementation of the Last Approved Plan.

In its Reply, MQI counters that the Township’s offering takes a “tortured” reading of the Settlement Agreement that is not supported by any rational reading of the Settlement Agreement.

MQI offers that while the Township claims that the Oversight Subcommittee was formed by virtue of the Township’s approval of the Settlement Agreement, it provides nothing to the Court demonstrating that the Oversight Subcommittee exists other than in name only. There is no evidence whatsoever that, since its purported formation in April 2014, it has done anything such as meeting to discuss the rehabilitation of the Property, no less addressing any alleged issues during the course of implementing the 2011 Rehabilitation Plan. According to MQI, this lack of evidence is telling and leads (in their view) to one of two conclusions, either: (i) that the Oversight Subcommittee does not exist; or (ii) that the Oversight Subcommittee has found no issues with Plaintiff’s implementation of the 2011 Rehabilitation Plan that require its input. If the latter point
is the case, then Plaintiff, contrary to the Township’s claim in its cross-motion, is in compliance with the 2011 Rehabilitation Plan and has not breached the Settlement Agreement.

MQI advocates that the Township’s claim that it can create any advisory council “it sees fit” pursuant to N.J.S.A. 40A:63-7(d) and case law should be rejected in light of the existence of the express terms of the Settlement Agreement. The Settlement Agreement was intended to resolve all issues between the Township and Plaintiff concerning the rehabilitation of the Property and to establish a comprehensive plan for the rehabilitation. See Morgan Cert., Ex. B. The Township, however, now seeks to undo seminal terms in order to further its own agenda and to attempt to explain away its noncompliance. Neither Dock Watch Hollow Quarry Pit, Inc. v. Township of Warren, 142 N.J. Super. 103 (App. Div. 1976), nor Bernardsville Quarry, Inc. v. Borough of Bernardsville, 129 N.J. 221 (1992), support the Township’s position. In Dock Watch Hollow, the Appellate Division upheld municipal regulations imposed on quarrying operations. 142 N.J. Super. at -118-29. Those regulations pertained to the actual quarrying operation (i.e., hours and days of operation, grade and buffer restrictions, equipment storage, blasting regulations, and landscape screening) and a general provision requiring the reclamation of the quarry during and after termination of quarrying operations and posting of a performance bond. Id. The municipal regulations at issue in those cases did not pertain to the specific manner by which the quarry property would be rehabilitated and were not otherwise governed by a written contract between the municipality and the quarry. See id.

In Bernardsville Quarry, the quarry owner challenged a municipal ordinance that imposed licensing requirements on the quarrying operations and a limitation on the depth to which the property could be quarried. 129 N.J. at 224-27. As the Appellate Division did in Dock Watch Hollow, the New Jersey Supreme Court held that the municipality was permitted to regulate the quarrying operations. Id. at 230, 245. The municipal regulations did not relate to the manner in which the quarry would be rehabilitated, and the Court did not address the situation present here, i.e., which MQI frames as the extent to which a municipality may enact legislation that contradicts a written agreement pertaining to the rehabilitation of a quarry. Indeed, the law is clear that a municipality cannot breach an otherwise lawful agreement (here, the Settlement Agreement) under the guise of compliance with a municipal regulation. See Ballantyne House Assocs. v. City of Newark, 269 N.J. Super. 322, 333-34 (App. Div. 1993).
MQI advocates that a settlement agreement is a contract that must be enforced pursuant to its terms. Brundage v. Estate of Carambio, 195 N.J. 575, 600-01 (2008). Absent a demonstration of fraud or other compelling circumstances, which the Township does not allege exist here. MQI offers that the Court should honor and enforce the terms of a settlement agreement as it would any other contract. Id. Contract terms must be given their plain and ordinary meaning and be enforced as written. Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997); Watson v. City of E. Orange, 175 N.J. 442, 447 (2003) (Long, J. dissenting). “A court normally will not make a better agreement than the parties made themselves, no matter how wise it believes it to be or how balanced it may or may not appear.” Savarese v. Corcoran, 311 N.J. Super. 240, 249 (Ch. Div. 1997), aff'd, 311 N.J. Super. 182 (App. Div. 1998).

[W]here the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written. The court has no right ‘to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently.’ Nor may the courts remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other.


MQI advances that settlement agreements entered into with a municipality or municipal land use board are enforceable to the same extent as settlement agreements entered into between private parties. See, e.g., Friends of Peapack-Gladstone v. Borough of Peapack-Gladstone Land Use Bd., 407 N.J. Super. 404 (App. Div. 2009) (upholding settlement between municipality, land use board, and developer permitting development of property as agreed upon in agreement); Whispering Woods at Bamm Hollow, Inc. v. Middletown Twp. Planning Bd., 220 N.J. Super. 161, 173 (App. Div. 1987) (holding that land use board has the power to settle pending litigation by agreeing to amended development plan subject to public presentation, hearing, and vote); Gandolfi v. Town of Hammonton, 367 N.J. Super. 527, 548-59 (App. Div. 2004) (upholding settlement of land use litigation because (i) terms were not illegal or void against public policy, (ii) settlement of litigation was favored, and (iii) the public’s interest in being heard and participating in public hearings was respected).

The express language of the Settlement Agreement strictly defines the membership of the Oversight Subcommittee. Section 7 of the Settlement Agreement states:
A. An advisory Oversight Subcommittee shall be established by the Township Committee to address any issues that may arise during the course of implementing the Rehabilitation Plan.

B. The advisory Oversight Subcommittee shall consist of the following Bernards Township officials or their successors: (1) Mayor John Carpenter or the Mayor's designee; (2) Township Engineer, Tom Timko, P.E.; and (3) Police Chief, Brian Bobowicz.

Morgan Cert., Exhibit B, Sec. 7.

According to MQI, the establishment of an Oversight Subcommittee consisting of the three identified Township officials was a key provision that caused Plaintiff to enter into the Settlement Agreement. Nowhere in the Settlement Agreement does it state that additional unidentified and non-Township officials may be appointed to the Oversight Subcommittee. Therefore, according to MQI, the actions taken by the Township in establishing the Quarry Advisory Task Force and granting Township residents the authority to address alleged issues with respect to the rehabilitation of the Property are directly contrary to what the parties agreed to when they designated specific officials as having the authority to address issues concerning the rehabilitation. Plaintiffs aver that they specifically negotiated the Settlement Agreement with the goal of removing the animus and emotion of the residents from the very technical and complex rehabilitation process. Thus, MQI asserts that by establishing the Quarry Advisory Task Force, the Township completely gutted Section 7 of the Settlement Agreement.

MQI therefore urges that the Township's argument that the Oversight Subcommittee can include additional individuals, including non-official residents, must fail. Section 7 of the Settlement Agreement governing the membership of the Oversight Subcommittee is not discretionary. It provides that the Oversight Subcommittee “shall consist of the following Bernards Township officials or their successors.” Morgan Cert., Exhibit B, Sec. 7 (emphasis added). Only three individuals are identified. Id. The Settlement Agreement does not indicate that other members are permitted. Id. The word “only” does not have to appear for the Settlement Agreement to be read as Plaintiff indicates. The word “shall” is mandatory according to ordinary usage. E.g., Nw. Bergen Cty. Utils. Auth. v. Borough of Midland Park, 254 N.J. Super. 729, 737 (Law Div. 1992) (citing Greate Bay Hotel & Casino v. Guido, 249 N.J. Super. 301, 303 (App. Div. 1991) and Cooper v. Kensing, 31 N.J. Super. 87, 92 (Ch. Div. 1954), aff'd, 33 N.J. Super. 410 (App. Div. 1954)). The claim that additional members may be appointed to the Oversight Subcommittee is
belied by the plain language of the Settlement Agreement, which provides that the Oversight Subcommittee "shall" consist of three specifically identified Township officials. As a practical matter, the parties agreed to identifying those specific individuals in the Settlement Agreement because they represent the executive, technical, and enforcement arms of the municipality.

Further, MQI submits that the Township also provides no support for its apparent claim that the Police Chief does not have to be a part of the rehabilitation because Plaintiff imported less fill to the Property than the maximum it could have imported. The fact that Plaintiff chose to import less fill than authorized by the Settlement Agreement has no relevance to this Motion. Nothing indicates that the sole purpose of the Police Chief's membership on the Oversight Subcommittee was for the limited purpose of regulating the importation of fill.

Also, MQI contends that contrary to the Township's allegations, the missions of the Oversight Subcommittee and the Quarry Advisory Task Force do not differ. Nor is the purpose of the Oversight Subcommittee more narrowly drawn than that of the Quarry Advisory Task Force. Nowhere in the Settlement Agreement is the Oversight Subcommittee limited to resolving "disputes." Its purpose is to address "any issue" that may arise during the rehabilitation. The Township's attempt to read additional terms and definitions into the Settlement Agreement that are not present must be rejected.

The purpose of the Oversight Subcommittee is "to address any issues that may arise during the course of implementing the Rehabilitation Plan." Morgan Cert., Exhibit B, Sec. 7.A. The Oversight Subcommittee thus has authority over all aspects of implementing the 2011 Rehabilitation Plan. The Settlement Agreement included provisions governing the environmental remediation of the Property, authority over which is within the purview of the Oversight Subcommittee. See Morgan Cert., Exhibit B, §3 ("To the extent the results of any random sample demonstrates an exceedance of the Residential Direct Contact Soil Remediation Standards set forth at N.J.A.C., 7:26D, Joseph Sorge, as the LSRP for the Property, shall take any and all remediation steps that are required by the New Jersey Department of Environmental Protection ("NJDEP")). The purpose of the Quarry Advisory Task Force was and is to (i) address issues in connection with the implementation of the 2011 Rehabilitation Plan, (ii) review the Property's environmental condition and make recommendations, and (iii) advise on remediation status. Id., Exhibit E. According to MQI, the Quarry Advisory Task Force's purported jurisdiction over the 2011
Rehabilitation Plan, in general, and the remediation of the Property, more specifically, is the same as that of the Oversight Subcommittee.

Finally, the Township inexplicably complains that Plaintiff is harassing the Township by submitting a request for documents under the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 ("OPRA"), despite that Plaintiff or any other member of the public is legally permitted to do so. As recently confirmed by the New Jersey Supreme Court in In re N.J. Firemen's Ass'n Obligation to Provide Relief Applications Under Open Public Records Act, 230 N.J. 258, 276 (2017)²:

OPRA was “designed to promote transparency in the operation of government.” Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 541 (2012). Its purpose is “to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.” Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Asbury Park Press v. Ocean Cty. Prosecutor’s Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). Such “broad public access to information” allows the public to police “wasteful government spending and guard[] against corruption and misconduct.” Burnett v. County of Bergen, 198 N.J. 408, 414 (2009). Although OPRA is “not intended to be a research tool [that] litigants may use to force government officials to identify and siphon useful information,” MAG Entmt., LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), it makes all government records presumptively accessible to the public unless an exemption applies, N.J.S.A. 47:1A-1; see also Mason, 196 N.J. at 57. OPRA’s twenty-one exemptions are to be “construed in favor of the public’s right of access[,]” N.J.S.A. 47:1A-1.

3) The Township’s Opposition

The Township opposes the MQI Motion by describing it as a position that “exalts from over substance and because the formation of the QATF falls exclusively within the statutory and policy powers of the Township.

The Township acknowledges that Section 7 of the Settlement Agreement provides:

SECTION 7: Oversight Subcommittee.

A. An advisory Oversight Subcommittee shall be established by the Township Committee to address any issues that may arise during the course of implementing the Rehabilitation Plan.

B. The advisory Oversight Subcommittee shall consist of the following Bernards Township officials or their successors:

² The Township is under a clear obligation pursuant to statute and the longstanding policy of this State to respond to legitimate OPRA requests, including those of Plaintiff, without complaining to the Court. Any reference to any OPRA request that is properly made will be disregarded by the Court as part of this decision as it is not in issue in this Motion.
(1) Mayor John Carpenter or the Mayor’s designee; (2) Township Engineer, Tom Timko, P.E.; and (3) Police Chief, Brian Bobowicz. (emphasis added)

Resolution #2014-0186 adopted by the Township Committee on April 29, 2014, approved the Settlement Agreement and, as a matter of axiomatic law, all of its terms, including Section 7: creation of the Oversight Committee. (See Pisano Cert. ¶6, Exhibit G.) The Quarry Oversight Committee (“QOC”) has existed since April 29, 2014, and presently consists of (1) Mayor Carol Bianchi, (2) Township Engineer Thomas Timko, P.E., and (3) Police Chief Michael Shimsky, Police Chief Brian Bobowicz retired in 2018. As such, the Township posits that MQI’s argument that the QOC was never formed is fatally inaccurate and thus must fail.

The Township has also acknowledged that it created an Advisory Committee regarding certain quarry related issues. The Township posits that, as a general proposition, Township Committees are empowered by law to “create such advisory councils to the municipality as they may choose.” N.J.S.A. 40A:63-7d. Our courts have long recognized that municipalities possess broad police powers in the interest of public health, safety and welfare, to regulate quarries such as MQI and the rehabilitation of quarry property after quarrying has ceased. Bernardsville Quarry, Inc. v. Borough of Bernardsville, 129 N.J. 221, 230-231 (1992); Dock Watch Hollow Quarry Pit, Inc. v. Township of Warren, 142 N.J. Super 103, 115-116 (App. Div. 1976) affirmed 74 N.J. 312 (1977) Dock Watch provides municipalities broad powers to regulate the rehabilitation and reclamation of quarries and “that owners and operators of quarries in the future take specific steps during and following termination of quarrying operations.” 142 N.J. Super. at 121. (“The obvious purpose of the [performance bond] is to insure that on termination of the operations and abandonment of the quarry the land will be left in a safe, attractive and useful condition. This is clearly in the interest of public safety and general welfare.”)

4) Court’s Finding Concerning Whether QOC Presently Exists

The Court finds that notwithstanding MQI’s claims that the QOC was never formed and does not exist, the QOC apparently does exist. In fact, the Township has represented that the Committee does, in fact, exist. Since the QOC presently exists — and has existed continuously since Resolution No. 2014-0186 was adopted, giving Resolution 2014-0186 a liberal reading, that Resolution memorialized the Township’s acceptance of the Settlement Agreement. The Resolution also generally takes actions necessary to comply with the terms of the Settlement Agreement which include the formation of the QOC as required by Section 7.
As such, MQI's Request 1 for an Order directing the Township Committee to form the QOC will be denied, as it is apparent that it already exists. Although the actions of the QOC may not be as formal or as frequent as might be expected, the certified facts provided by the Township Engineer Thomas Timko, P.E. dated April 18, 2019 confirm that the QOC presently exists.

5) Court's Finding Regarding Other Aspects of MQI's Requested Relief

As part of its Motion, MQI also requests the following relief:

2. Directing that the Oversight Subcommittee established pursuant to the April 29, 2014 settlement agreement is the only advisory subcommittee permitted to address any issues concerning the implementation of the Last Approved Plan;

3. Deeming Township Resolution 2019-0082, insofar as it established a Quarry Advisory Task Force ("QATF") that does not comply with the April 29, 2014 settlement agreement, invalid; and

4. Directing that the QATF is prohibited from addressing any issues concerning the implementation of the Last Approved Plan."

Of course, as noted above, the Township has opposed MQI’s Motion and urges that the Court Order that MQI’s requests 2, 3 and 4 should also be denied as well.

Section 7 of the Settlement Agreement provides for a specific limited membership of the QOC. While the Court agrees that technically there is no membership exclusivity language in Section 7 of the Settlement Agreement, the contractual terms in the Settlement Agreement limits the powers of the Township Committee under N.J.S.A. 40:63-7(d) from creating additional advisory committees such as the Quarry Advisory Task Force ("QATF"). In the Court’s view, with regards to its dealings with the Plaintiff concerning this property, the Township is contractually bound to act through the “Oversight Committee” that was referred to in Section 7 of the Settlement Agreement. Although the Township goes through great pains to distinguish between the “Oversight Committee” and the QATF, when the contentions and arguments are distilled to their

3 MQI had notice of the Township Committee’s adoption of Resolution 2019-0082 as the resolution was adopted in accordance with the Open Public Meetings Act as listed and linked to the Committee’s public agenda posted for the January 29, 2019, Township Committee agenda. Mayor Carol Bianchi also announced the formation of the QATF at the Township Committee’s January 3, 2019, reorganization meeting and in her Mayor’s newsletter of January 9. Moreover, formation of the QATF was extensively covered by the Bernardsville News, Tapinto and the Patch. No law requires that the Township Committee provide MQI with private notice of a resolution adoption creating under N.J.S.A. 40A:63-7d. an advisory council.
essence, it appears that the Township's action is simply designed to circumvent the provision of the Settlement Agreement that it agreed to.

It is true that the QATF may include as members township officials and residents to provide input and advice on quarry issues. However, the Township agreed to oversee the Plaintiff's quarry and closure activities through a committee that consisted of a different member mix. In fact, it specifically agreed to that arrangement. It would be improper for this Court to allow the Township to rewrite or circumvent the terms of the Agreement to suit its evolving interests.

It is uncontradicted that Section 7 was specifically negotiated and crafted by the parties. It easily could have been drafted in a manner that could have allowed for more flexibility of membership, or in a manner that could have permitted other committees to be formed in order to interface between the parties; but it was not so drafted. MQI rightfully believes that the provision was an integral term in the Agreement because unlike a private closely held company which "maintains consistency of its management," political entities by their nature change constantly due to the nature of local politics. If the Court were to permit the Township to effectively avoid certain portions of its Agreement as a result of political changes, it would undermine the consistency, certainty and comfort that parties who contract with political entities need in order to facilitate a businesslike environment.

Although the Court recognizes that the Township cites to other cases where the courts have recognized the broad authority given to municipalities to reregulate quarry and quarry closures, in that same regard, the Court finds that the Court decisions in the Bernardsville Quarry, Inc. and Dock Watch Hollow Quarry Pit, Inc. cases are distinguishable from the circumstances here where the parties specifically bound themselves contractually concerning the issues.

Also, the Township points to the fact that the Township Engineer Thomas Timko is presently on both the QOC and the Quarry Advisory Task Force ("QATF"). That one "common member" however does not then render the new QATF to be conforming or substantively conforming with the terms of Section 7. There is no good reason that has been provided to explain why the Township cannot act through the QOC which it contractually agreed to do (in trying to justify why the Chief of Police is no longer needed on the Committee).

The Township also offers that the Police Chief was originally included as a member of the QOC to address truck traffic concerns as MQI sought, pursuant to the Settlement Agreement, the ability to import up to 350,000 cubic yards of fill. (See Section 2: Soil Importation and Section 4:
The Township notes that as it turns out, MQI only imported 22,450 cubic yards of fill from two properties. *(See Timko Cert. ¶5, Exhibit C.)*

While the Township suggests that traffic to the site is no longer an issue, ironically the Township has issued numerous traffic-related summonses to MQI in recent months which seemingly belie that proposition. Regardless, the Township agreed to maintain the Chief of Police as a member of the Committee and it should be bound by that term.

The Township also points out that Section 7 further permits Mayor Carol Bianchi to appoint to the QOC a “Mayor’s designee.” The Township notes that if Mayor Bianchi were to appoint as her “designee” existing QATF member and Bernards Township Sewerage Authority Chairman Kevin Orr, Esq. to the QOC, both Mr. Timko and Mr. Orr would still be on the QOC. While that may be the case, at least the Township would be acting in accordance with the contractual agreement that it bound itself to follow. Since Section 7 allowing Mayor Bianchi to appoint a designee to the QOC, that avenue is within her discretion under the Settlement Agreement. That anomaly does not provide a basis for the Township to avoid its contractual agreement however by establishing a completely different Committee that effectively replaces the QOC.

Also, the Township asserts that Section 7 B. of the Settlement Agreement also does not read as MQI narrowly construes the clause: “The advisory Oversight Committee shall consist [only] of the following Bernards Township officials or their successors…” “Only” is absent from Section 7B. Section 7B does, however, establish the three members who, **at a minimum**, must be on the QOC. Thus, the Township offers that as long as the three designated individuals are on the QOC, the Township Committee may appoint **additional members to** the QOC.

However, the Court does not read the Settlement Agreement as expansively as the Township. The Township agreed to the membership of the Committee as part of the arrangement. It cannot now avoid the agreement that it made by “changing” and/or “packing the members of Committee” in order to directly avoid the terms that it agreed to.

Lastly, the Township argues that the missions of the QOC and QATF also differ. The Township submits that the purpose of the QOC is singularly “to address any issues that may arise during the course of implementing the Rehabilitation Plan.” See Section 7A. On the other hand, the Township offers that the QATF purposes pursuant to Resolution No. 2019-0082 are far more encompassing:
"The Quarry Advisory Task Force is established and shall (1) review and report back to the Township Committee with their findings, any concerns, and recommendations, regarding MQI’s compliance with implementing the Last Approved Plan; and (2) further review the Property’s environmental condition, documentation, and status, and make appropriate recommendations to the Township Committee in one or more reports on or before October 1, 2019, and the Township Committee may pursue outside professionals for technical input; and (3) advise on remediation status in accordance with the MOA, RIWP, RAWP, the RAO, and all other DEP filings in this matter, the governing statutes, regulations, and ordinances."

Mission (1) envisions the QOC as a body meant to resolve “disputes” should “issues...arise during the course of implementing the [2011] Rehabilitation Plan.” Mission (1) of the QATF is “advisory” in nature: to make recommendations to the Township Committee regarding “compliance” with the 2011 Rehabilitation Plan. Missions (2) and (3) of the QATF are outside the scope of the QOC under Section 7A and B of the Settlement Agreement.

The Township acknowledges that while MQI may object or quarrel with the Township Committee’s decision to charge the QATF with missions (2) and (3), the Township argues that its broad police powers to create an advisory council pursuant to N.J.S.A. 40A:63-7d and Bernardsville Quarry, Inc. and Dock Watch Hollow Quarry Pit, Inc. provide the Township with the authority to take the actions that it did. Also, the Township suggests that its discretionary authority should be respected by the Court.

Notwithstanding the Township’s offering, it is evident that there is substantial infringement and overlap between the purposes of the two entities so that the Court can say with a degree of certainty that the QATF infringes upon the purposes that the QOC was formed in conjunction with the Settlement Agreement. To allow both entities to exist would effectively be allowing the Township to re-write and avoid Section 7 of the Settlement Agreement.

For those reasons, the Court finds that under the facts and circumstances presented to the Court, the Township will have violated the settlement agreement between the parties if it continues to maintain the QATF.

Thus, in summary, first, as noted in Point “A” above, the Court finds that the QOC presently exists and has continuously existed since Resolution No. 2014-0186 was adopted.

The Court will direct that the Oversight Subcommittee established pursuant to the settlement agreement is the only subcommittee permitted to address issues concerning the implementation of the Last Approved Plan. Further, Section 7 B. of the Settlement Agreement is read as MQI construes the clause: “The advisory Oversight Committee shall consist [only] of the
following Bernards Township officials or their successors...” Also, the Township Committee may not appoint additional members to the QOC, except for those designated in the terms of the Settlement Agreement.

For those reasons, the Court will GRANT MQI’s Motion to Enforce the Settlement Agreement and will order the other relief requested in its Motion, including:

1. Directing the Township to continue to operate through the Oversight Subcommittee which it has found in the manner prescribed in the April 29, 2014 settlement agreement;

2. Directing that the Oversight Subcommittee established pursuant to the April 29, 2014 settlement agreement is the only advisory subcommittee permitted to address any issues concerning the implementation of the Last Approved Plan;

3. Deeming Township Resolution 2019-0082 insofar as it established a Quarry Advisory Task Force (“QATF”) that does not comply with the April 29, 2014 settlement agreement, invalid; and

4. Directing that the QATF is prohibited from addressing any issues concerning the implementation of the Last Approved plan.

B. Regarding the Township’s Motion Requests

1) The Township’s Position Summarized

In support of the relief requested in its Motion, the Township indicates that the 2011 MQI Rehabilitation Plan expired on January 31, 2017. MQI failed to submit a revised rehabilitation plan to the Township on or before October 31, 2016. As a result, the Township posits that MQI has therefore breached Section 1 of the Settlement Agreement.

MQI in a November 8, 2016, letter to the Township Committee which the Township describes as an attempt to circumvent the Settlement Agreement by claiming MQI’s 2011 Rehabilitation Plan had achieved “substantial completion.”

“This office represents Millington Quarry, Inc. (“MQI”). Be advised that MQI’s October 31, 2016 submission is not a revised rehabilitation plan. Rather, MQI’s submission merely establishes its compliance with the April 29, 2014, Settlement Agreement and Release (“Settlement Agreement”) and the substantial completion of the Reclamation Plan approved by the Settlement Agreement, which was memorialized in Resolution No. 2014-0186. MQI does not intend to submit a revised reclamation plan for consideration by the Township. It is for this reason, we do not believe a hearing before the Planning Board is necessary as the work already approved is substantially complete.” (emphasis added.)

(See Certification of Mark Salah Morgan, Esq. dated March 13, 2019, Exhibit C, letter dated November 8, 2016, to Bernards Township Committee.) The Township offers, however, that
"Substantial completion" pursuant to the Settlement Agreement, is not an exception that eliminated MQI’s requirement to submit a revised rehabilitation plan to the Planning Board as required by the Settlement Agreement. As such, it is the Township’s position that MQI has thereafter been in continuous breach of the Settlement Agreement since October 31, 2016. The Township urges that the Court should order MQI to submit a revised rehabilitation plan to the Planning Board by April 30, 2019, as further mandated by Resolution No. 2019-0162 adopted March 5, 2019. (See Certification dated March 20, 2019, of Deputy Municipal Clerk Rhonda Pisano ["Pisano Cert."], ¶3, Exhibit D.)

The Township posits that even if “substantial completion” under the Settlement Agreement did obviate MQI’s requirement to submit a revised rehabilitation plan, in its view, MQI’s efforts fail to come close to meeting that “requirement.” The Township points out that some eight years after submission of the 2011 Rehabilitation Plan to the Planning Board, MQI has still failed to complete $3,435,608 of bonded rehabilitation items or forty-one (41%) percent of the original $8,435,608 of secured work required at the quarry. (See Schedule A to Township Committee Resolution #2019-0162 attached as Exhibit D to Pisano Cert.)

Schedule A to Resolution 2019 – 0162 states:

"[A]t a minimum the Township Engineer has determined that Items 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21, are still either not completed or are in the process of ongoing completion including lake maintenance.” (emphasis added.)

Of the 21 bonded rehabilitation items, the Township complains that MQI has only fully completed four items: 1, 2, 3. The Township asserts that MQI has not completed the following items:

<table>
<thead>
<tr>
<th>Item No.</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>On-Site Earthwork</td>
</tr>
<tr>
<td>5</td>
<td>Overburden Import/spread</td>
</tr>
<tr>
<td>7</td>
<td>Rip rap forebays and swale</td>
</tr>
<tr>
<td>8</td>
<td>Lake Monitoring</td>
</tr>
<tr>
<td>9</td>
<td>Water Quality Forebays</td>
</tr>
<tr>
<td>10</td>
<td>Lake Maintenance (until filled)</td>
</tr>
<tr>
<td>11</td>
<td>Riparian buffer planting</td>
</tr>
<tr>
<td>12</td>
<td>Thorny plantings and fence</td>
</tr>
<tr>
<td>13</td>
<td>Slope Stabilization planting</td>
</tr>
<tr>
<td>14</td>
<td>Disturbed area hydro-seeding</td>
</tr>
<tr>
<td>15</td>
<td>Silt fence</td>
</tr>
<tr>
<td>16</td>
<td>Rock fall catchment swale</td>
</tr>
</tbody>
</table>
The Township questions why MQI refuses to submit a revised rehabilitation plan. The Township posits that certainly, MQI doing so would allow both the public and Planning Board to review a revised snapshot of MQI’s rehabilitation efforts to date and its remaining timeline for addressing the 17 rehabilitation Items presently outstanding. The Township urges that the Court should order MQI to submit a revised rehabilitation plan compliant with Section 4-9, Quarrying, or before April 30, 2019, as required by Resolution #2019-0162 and pursuant to the March 8, 2019, demand letter from the Township Engineer to MQI. (See Certification of Thomas Timko, P.E. [“Timko Cert.”] ¶2, Exhibit A).

The Township also notes that on October 25, 2018, MQI submitted to the Township Zoning Board of Adjustment (“ZBA”) a request for the following minor subdivision approval and variance relief:

APPLICANT’S STATEMENT

Millington Quarry, Inc. (Inc. (the “Applicant”) is the owner of property commonly known as 125 Stonehouse Road and designated as Block 6001, Lot 6 on the official tax map of Bernards Township, Somerset County, New Jersey (the “Property”). The Property is located in the M-1 Mining zoning district and is the site of the Millington Quarry.

The Applicant is seeking minor subdivision approval from the Zoning Board of Adjustment in order to subdivide the Property into two lots – proposed Lot 6.01 containing 50.285 acres and proposed Lot 6.02 containing 129.484 acres. The Applicant is not proposing any land disturbance or the construction of any improvements in connection with the subject application. The Applicant will seek a variance from Section 21-10.9.a.1 and Table 501 of the Bernards Township Land Development Ordinance (the “Ordinance”) with respect to proposed Lot 6.01 to permit a lot width of 207.1 feet measured 100 feet back from the front lot line whereas 2500 feet is required. In addition, because the property currently contains an existing nonconforming office building and is proposed to be subdivided, the Applicant is also seeking a d(2) variance from the Zoning Board of Adjustment.

[N.B. here by the Township. The (d)(2) variance MQI seeks is required because MQI’s existing quarry office building is not permitted in a residential R-3 zone since quarrying has ceased. If a proposed development involves the reduction in size of a property on which a lawfully created nonconforming use exists, the reduction in the size of the property constitutes an intensification of the pre-existing nonconformity, thereby requiring a (d)(2) variance. Razberry’s, Inc. v. Kingwood Twp., 250 N.J. Super. 324, 327, 329 n.1 (App. Div. 1991).]
The Applicant is seeking minor subdivision approval as well as variance relief pursuant to N.J.S.A. 40:55D-70c and N.J.S.A. 40:55D-70d2 of the New Jersey Municipal Land Use Law. Proposed Lot 6.01 contains a portion of the Property that has been the subject of environmental remediation. In addition to an existing engineering control consisting of a previously installed physical cap, proposed Lot 6.01 will be subject to an NJDEP-approved form of deed restriction. In furtherance of its efforts to close-out the remediation in an orderly and efficient manner, the Applicant is seeking to confine the capped and deed restricted portion of the Property to a single lot within the overall tract.

(See Certification of Township and Zoning Board of Adjustment Planner David Schley, AICP, PP dated March 20, 2019, ¶2, Exhibit A, pertinent portion of MQI's application, ZBA 18-2016)

MQI's proposed Lot 6.01 containing 50.285 acres is the area subject to the deed restriction MQI filed with the Somerset County Clerk that prohibits any residential use of this area. It is Lot 6.01 where MQI imported thousands of truckloads of (what the Township describes as contaminated fill) resulting in the environmental remediation effort undertaken by MQI's Licensed Site Remediation Professional, Joseph Sorge. (See Timko Cert., ¶4, Exhibit B, MQI Deed Restriction filed with the Somerset County Clerk on July 25, 2018; see also detailing the environmental contamination and remediation, the Certification of Thomas C. Carton dated March 13, 2019, Exhibits C, D and E.)

The Township contends that as a direct result of MQI's "environmental contamination" of its quarry property, MQI has lost the ability to develop 12 of the 50 lots shown on the January 24, 2008, concept plan of its engineer Kevin Page, P.E. (See Timko Cert. ¶6, Exhibit D). MQI's minor subdivision plan would result in 19.4 acres of the 33.6 acres of the lake on "Restricted Area" proposed lot 6.01, and 14.5 acres of the lake on the "Outside Restricted Area" proposed lot 6.02.4

(See Timko Cert., ¶7, Exhibit E, MCB Engineering Associates, LLC, Sheet 2 of 2, Patrick McClellan, P.E. License No. 28571 Preliminary and Major Subdivision, Block 6001, Lot 6, dated September 28, 2018, last revised to add supplemental environmental constraints dated January 7, 2019, filed as part of ZBA Application No. 18-0261.)

The Township indicates that Section 4-9.5a.3. of the Township Quarry Ordinance required MQI to file by December 25, 2018, a revised rehabilitation plan as a result of MQI's submission to the Zoning Board of Application 18-026 on October 25, 2018. But, MQI has failed to do so.

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4 MCB's plans now show a lake of 33.6 acres. Previously, MQI's expert, Omni Environmental in a January 17, 2013, report to the Planning Board stated "quarry reclamation...will result in the formation of a 50-acre lake." See Timko Cert. ¶7, Exhibit F.
"3. Alternative or Revised Rehabilitation Plan. The applicant shall submit an alternative or revised rehabilitation plan within 60 days of application submittal, if the quarry or property owner has submitted a land use development application that would, if approved, result in a change or revision to the last approved and still valid rehabilitation plan. An alternative or 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."

(See Section 4-9, Quarrying Ordinance, Pisano Cert., ¶1, Exhibit A) MQI's application if approved "results in a change or revision to the last approved and still valid" 2011 Rehabilitation Plan. MQI has for over 40 years proposed rehabilitation of the 180 acre quarry property as a single lot. As previously noted, MQI now proposes what the Township believes is a significant change, two new lots:

<table>
<thead>
<tr>
<th>Proposed Lot 6.01</th>
<th>Proposed Lot 6.02</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lot size</td>
<td>50.285 acres</td>
</tr>
<tr>
<td>Lake size</td>
<td>19.4 acres</td>
</tr>
</tbody>
</table>

The Township offers that a myriad of issues, including the responsibility for ongoing lake maintenance and monitoring by possibly two different lot owners raise serious concerns to the Township. Moreover, the Township notes that MQI must explain to the Planning Board the change in the sizing of the lake when which the Township indicates is now projected at 33.6 acres by MCB, while six years ago Omni Environmental forecast a lake of 50 acres. Furthermore, they question how will two different lot owners address responsibility for the $3,435,608 still outstanding in the rehabilitation items MQI has not completed: the 17 Items on Schedule A to Resolution #2019-0162-4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21?

Section 4-9.5b states that "[e]very 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... and 15. The plan shall suggest appropriate final uses for the quarry property, based on conditions projected to obtain at each five-year interval and at the stable

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5 “DEVELOPMENT PLAN – Shall mean the application form and all accompanying documents required by this chapter for consideration by the Board for approval. A development plan includes a minor subdivision, major subdivision, site plan, planned development, conditional use, request for variance relief, issuance of a permit or any development as defined as above, or any combination of these terms.” See Section 21-3, Land Development Ordinance, and see also N.J.S.A. 40:5D 3 and 4 defining “Application for Development” and “Development.” (emphasis added).
level of water in the pit.” (emphasis added) (See Pisano Cert., ¶2, Section 4-9 Quarrying Ordinance, Exhibit A.) The Township states that now that MQI no longer has a quarry license and all quarrying activity has ceased, the permitted uses at the quarry property pursuant to Section 21-10.9 M-1 Mining Zone of the Township’s Land Development Ordinances are:

a. Uses.

1. Permitted Use. This zone is designed for stone quarrying. Until such time as all quarrying activity has ceased and the quarry use is abandoned, no other use shall be permitted in the zone except child-care centers. At such time as all quarrying activity has ceased and the quarry use is abandoned, the following uses shall be permitted:

(a). Any uses permitted in the R-3 Zone and constructed in accordance with the requirements for that zone.

(b). Public parks, roads and other public purpose uses.

2. Accessory Uses. Accessory uses customarily incidental to the above permitted uses. (emphasis added.)

The Residential R-3 Zone and Table 401 permit single family residential homes with a minimum lot area of two acres. (See Pisano Cert. at ¶2, Exhibits B and C.)

If proposed Lot 6.01 is restricted by deed and institutional controls to non-residential uses, the Township queries what “permitted” use pursuant to section 21-10.9 and as required by Section 4-9.5b. will MQI propose for the contaminated 50.285 acres? The Township offers that MQI must submit a revised rehabilitation plan to address this issue. The Township indicates that there are no “permitted” uses under the Township’s M-1 Mining and R-3 ordinances for MQI’s “self-inflicted contaminated quarry” property proposed Lot 6.01. While the M-1 Mining Zone permits single family residences and public parks, roads and other public purpose uses, the July 25, 2018, Deed Restriction prohibits these uses on proposed Lot 6.01. Moreover, the Township posits that MQI’s subdivision application for proposed Lot 6.01 appears to be an improper attempt to garner approval from the ZBA of a non-permitted use in the M-1 Mining Zone, which requires a (d)(1) use variance. It also points out that MQI has not sought from the ZBA a (d)(1) use variance.

The Township claims that “by polluting its own property with contaminated fill, MQI has lost the ability to develop 12 of the 50 two acre residential lots shown on the 2008 Page Concept Plan.” (See Timko Cert. ¶6, Exhibit D.) The size of the lake has been reduced from 50 to 33.6 acres. The Township offers that it is unreasonable for MQI to demand the Township place blind
trust in MQI’s future rehabilitation efforts despite a history that demonstrates MQI has utterly failed to manage the 180 acre quarry property in an environmentally sound manner.

The Township indicates that it has an absolute right pursuant to Ordinance Sections 4.9.5b.1. and 15 to review what the future “permitted” uses of the quarry property will be if subdivided because the 2008 Page Concept Plan previously approved is no longer valid as a result of the loss of at least twenty-four (24%) of the single family two acre homes, and 17 acres of the lake. Moreover, since the residually deed restricted proposed Lot 6.01 will no longer contain 12 single family residential homes, the Township proffers that it has the right to ask MQI what “permitted” use will now be put to the 50.285 acre contaminated capped lot 6.01. The Township also submits that MQI has yet refused to inform the Township of any “permitted” use for this proposed lot. The Township states that its concerns are now heightened markedly as a result of the proposed subdivision before the ZBA.

In fact, the Township contends that its interest in the ZBA subdivision application is “so paramount” that Resolution No. 2019-0162 authorized the Township Attorney, Township Planner and Township Engineer to appear at MQI’s hearing. The ZBA attorney has established a briefing schedule and return date of May 16, 2019, to determine if the ZBA even has jurisdiction to hear what can only be described as MQI’s back door effort to avert Township and Planning Board approval of a revised Rehabilitation Plan. (See Pisano Cert. ¶¶ 3-4, Exhibits D and E.)

For all of those reasons, the Township indicates that it believes that MQI has breached both the 2014 Settlement Agreement and the Township Quarrying Ordinance. As a result, the Township submits that MQI should be ordered to submit to the Planning Board a revised Rehabilitation Plan by April 30, 2019.

2) **Plaintiff’s Response to the Township’s Cross Motion**

Plaintiff asserts that after they spent more than $10 million to substantially complete the 2011 Rehabilitation Plan, the Township now contends that Plaintiff is “somehow in breach of the Settlement Agreement.” Plaintiff contends that the Township’s position is also belied by the inspection reports of its own consultants and the parties “course of performance under the Settlement Agreement.”

Plaintiff states that despite the overwhelming weight of the evidence against it, the Township argues that the Settlement Agreement required the submission of a revised rehabilitation plan. When Plaintiff made its reclamation submission on October 31, 2016 (as
contemplated by the Settlement Agreement), Plaintiff requested a hearing and advised the Township that its implementation of the 2011 Rehabilitation Plan was substantially complete. Eight days later, on November 8, 2016, Plaintiff explicitly informed the Township that it did “not intend to submit a revised reclamation plan for consideration by the Township” based on its implementation of the 2011 Rehabilitation Plan. In the absence of any objection, any attempt to schedule a hearing (as requested by Plaintiff), and the continued monthly inspections from the Township Engineer and several other municipal consultants, Plaintiff proceeded to substantially complete the Rehabilitation Plan. Based on Plaintiff’s compliance with the Settlement Agreement, the Township agreed to reduce Plaintiff’s reclamation performance bond by $5 million from the total of $8.4 million. This was a 60% reduction in the total reclamation performance security Plaintiff had on deposit with the Township.

Plaintiff submits that nearly three years later, the Township cannot credibly claim that Plaintiff breached the Settlement Agreement when the Township was repeatedly on-site to examine the conditions of the Property and repeatedly concluded in its inspection reports that Plaintiff’s implementation of the 2011 Rehabilitation was “satisfactory.” Plaintiff contends that the Township is equitably estopped from now claiming Plaintiff breached the Settlement Agreement. Plaintiff also states that it reasonably relied on the Township’s approval of the Settlement Agreement and on the Township’s conduct since then in spending millions of dollars to implement the 2011 Rehabilitation Plan.

Plaintiff theorizes that the Township’s allegations of breach only arose after Carol Bianchi assumed the role of Mayor of Bernards Township on January 2, 2019. In the Plaintiff’s view, Mayor Bianchi’s previous statements to this Court (in her capacity as a potential Intervenor and co-leader of a Citizens Group) and to the Press demonstrate a clear bias toward Plaintiff. Plaintiff submits that it was her bias that resulted in her voluntary recusal as Chairperson from the Planning Board proceedings concerning the 2011 Rehabilitation Plan. Nevertheless, since Mayor Bianchi took office, the Township formed the “improper Quarry Advisory Task Force” on January 29, 2019; served four municipal summonses on Plaintiff on March 4, 2019 relating to alleged conduct in November 2018; directed Plaintiff on March 5, 2019 to submit a revised rehabilitation plan, even though the reclamation is substantially complete; and on March 5, 2019, directed its Township Attorney to appear before the Township Zoning Board of Adjustment and seek the dismissal of Plaintiff’s pending subdivision application. Mayor Bianchi has not voluntarily
recused herself from the Township Committee’s proceedings concerning Plaintiff and, as a result, Plaintiff is now forced to confront what it believes are Mayor Bianchi’s politically-motivated actions that seek to undo the finality achieved by the parties’ Settlement Agreement.

Plaintiff claims that changing political winds and political bias are the reasons for the Township’s change in position. As such, Plaintiff submits that the Settlement Agreement and the parties’ course of performance relating to the Settlement Agreement should be, in this case, enforced as a matter of law.

3) Court’s Decision

(a) In General

In this Motion, the Township asks the Court to declare that MQI is in breach of its obligations under the Settlement Agreement in that MQI has failed to submit a revised rehabilitation plan on or before October 31, 2016. While MQI has countered by offering several “defenses” or counter arguments to the Township’s position, MQI (initially) contends that it substantially completed the work required under the project so that the preparation and submission of another rehabilitation plan is not required. The Township, of course, rejects MQI’s interpretation by indicating that the project is not “substantially complete” and, in any event, substantial completion is not an exception that eliminated MQI’s requirement to submit a revised rehabilitation plan. The resolution of the issues that are raised in the Township’s Motion and in MQI’s opposition raise various issues which the Court is required to address. This opinion is designed to appropriately address those issues which are raised in the context of this Motion.

(b) Is an Updated Rehabilitation Plan Required and/or Warranted?

Initially the Township contends that MQI continues to have an obligation to submit an updated rehabilitation plan as such a plan is required pursuant to the Agreement as well as pursuant to local law, the Township also argues that such a plan is warranted under the circumstances as being in the public interest.

In fact, there are several good reasons why the revised rehabilitation plan6 continues to be reasonably necessary. The Township contends that as a direct result of MQI’s “environmental contamination” of its quarry property, MQI has purportedly lost the ability to develop 12 of the 50 lots shown on the January 24, 2008, concept plan of its engineer Kevin Page, P.E. (See Timko

6 Or at least some “limited” rehabilitation plan.
Cert. ¶6, Exhibit D). MQI’s minor subdivision plan would result in 19.4 acres of the 33.6 acres of the lake on “Restricted Area” proposed lot 6.01, and 14.5 acres of the lake on the “Outside Restricted Area” proposed lot 6.02.7 (See Timko Cert., ¶7, Exhibit E, MCB Engineering Associates, L.L.C, Sheet 2 of 2, Patrick McClellan, P.E. License No. 28571 Preliminary and Major Subdivision, Block 6001, Lot 6, dated September 28, 2018, last revised to add supplemental environmental constraints dated January 7, 2019, filed as part of ZBA Application No. 18-0261.)

Further, Section 4-9.5(a)(3) of the Township Quarry Ordinance required MQI to file by December 25, 2018, a revised rehabilitation plan as a result of MQI’s submission to the Zoning Board of Application 18-026 on October 25, 2018. But, MQI has failed to do so.

“3. Alternative or Revised Rehabilitation Plan. The applicant shall submit an alternative or revised rehabilitation plan within 60 days of application submittal, if the quarry or property owner has submitted a land use development application that would, if approved, result in a change or revision to the last approved and still valid rehabilitation plan. An alternative or 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.”

(See Section 4-9, Quarrying Ordinance, Pisano Cert., ¶1, Exhibit A) MQI’s application if approved “results in a change or revision to the last approved and still valid” 2011 Rehabilitation Plan.

Section 4-9.5b states that “[e]very 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…and 15. The plan shall suggest appropriate final uses for the quarry property, based on conditions projected to obtain at each five-year interval and at the stable level of water in the pit.” (emphasis added) (See Pisano Cert., ¶2, Section 4-9 Quarrying Ordinance, Exhibit A.) The Township states that now that MQI no longer has a quarry license and all quarrying activity has ceased, the permitted uses at the quarry property pursuant to Section 21-10.9 M-1 Mining Zone of the Township’s Land Development Ordinances are:

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7 MCB’s plans now show a lake of 33.6 acres. Previously, MQI’s expert, Omni Environmental in a January 17, 2013, report to the Planning Board stated “quarry reclamation…will result in the formation of a 50-acre lake.” See Timko Cert. ¶7, Exhibit F.

8 “DEVELOPMENT PLAN – Shall mean the application form and all accompanying documents required by this chapter for consideration by the Board for approval. A development plan includes a minor subdivision, major subdivision, site plan, planned development, conditional use, request for variance relief, issuance of a permit or any development as defined as above, or any combination of these terms.” See Section 21-3, Land Development Ordinance, and see also N.J.S.A. 40:5D 3 and 4 defining “Application for Development” and “Development.” (emphasis added.)
a. Uses.

1. Permitted Use. This zone is designed for stone quarrying. Until such time as all quarrying activity has ceased and the quarry use is abandoned, no other use shall be permitted in the zone except child-care centers. At such time as all quarrying activity has ceased and the quarry use is abandoned, the following uses shall be permitted:

(a). Any uses permitted in the R-3 Zone and constructed in accordance with the requirements for that zone.

(b). Public parks, roads and other public purpose uses.

2. Accessory Uses. Accessory uses customarily incidental to the above permitted uses. (emphasis added.)

The Residential R-3 Zone and Table 401 permit single family residential homes with a minimum lot area of two acres. (See Pisano Cert. at ¶2, Exhibits B and C.)

The Township also claims that MQI “by polluting its own property with contaminated fill, has lost the ability to develop 12 of the 50 two acre residential lots shown on the 2008 Page Concept Plan.” (See Timko Cert. ¶6, Exhibit D.) The size of the lake has been reduced from 50 to 33.6 acres. The Township offers that it is unreasonable for MQI to demand the Township place blind trust in MQI’s future rehabilitation efforts despite a history that demonstrates MQI has utterly failed to manage the 180 acre quarry property in an environmentally sound manner.

For those reasons, as enunciated by the Township, which have been summarized above, the Court finds that the Township has demonstrated that an updated rehabilitation plan is required under the terms of the parties’ Agreement and by Local Law. Additionally, for the reasons offered by the Township, the requirement for an updated Rehabilitation Plan is warranted in the public interest. In fact, the Township has a legitimate interest, pursuant to Ordinance Sections 4.9.5b.1. and 15, to review what the future “permitted” uses of the quarry property will be if subdivided because the 2008 Page Concept Plan previously approved is no longer valid as a result of the loss of at least twenty-four (24%) of the single family two acre homes, and 17 acres of the lake. Moreover, since the residually deed restricted proposed Lot 6.01 will no longer contain 12 single family residential homes, has the right to “ask” MQI what “permitted” use will now be put to the 50.285 acre contaminated capped lot 6.01. In that regard, the Township also submits that MQI has yet refused to inform the Township of any “permitted” use for this proposed lot. Certainly an
updated Rehabilitation Plan\textsuperscript{9} may "flush out" that issue, which clearly is a matter that is in the public interest.

(c) \textit{Does MQI have Defenses that Obviate the Requirement or Need for an Updated Rehabilitation Plan?}

Notwithstanding the Court's findings in Point (b) above, the Court will next address the reasons or justifications that MQI has offered as to why a revised rehabilitation plan is not needed and/or why MQI claims to have been relieved from the requirement to provide such a plan.

i. \textit{Does the Parties' Course of Performance Unambiguously Demonstrate Plaintiff's Compliance with the Settlement Agreement?}

MQI offers that there can be no credible dispute based on the parties' course of performance under the Settlement Agreement that Plaintiff substantially complied with its obligations. New Jersey courts look to "all the relevant circumstances surrounding [a] transaction, as well as evidence of the parties' course of dealing, usage and course of performance." \textit{Twp. of White v. Castle Ridge Dev. Corp.}, 419 N.J. Super. 68, 76-77 (App. Div. 2011) (quoting \textit{Elliott & Frantz, Inc. v. Ingersoll-Rand Co.}, 457 F.3d 312 (3d Cir. 2006)); \textit{see also State Troopers Fraternal Ass'n of N.J. v. State}, 149 N.J. 38, 50 (1997) ("[t]he actual conduct and practical understanding of the parties exhibited in the performance of a contract may color its interpretation" (alteration in original) (quoting \textit{Medivox Prods., Inc. v. Hoffman-LaRoche, Inc.}, 107 N.J. Super. 47, 60-61 (Law Div. 1969))).

A "course of performance" includes occasions upon which one party to the contract has performed, and the other party has knowledge of the nature of the performance and the opportunity to object to it. \textit{Twp. of White}, 419 N.J. Super. at 77. MQI posits, for example, that in \textit{Cumberland County Improvement Authority, v. GSP Recycling Co.}, there was a dispute between the parties regarding whether the defendant was required to pay for nonconforming deliveries. 358 N.J. Super. 484, 496 (App. Div. 2003). The defendant had withheld payment for nonconforming deliveries throughout performance of the contract, and the plaintiff had never objected, or made the defendant's payment a condition of future deliveries. \textit{Id.} at 497. In fact, it was in the context of litigation that the plaintiff \textbf{first} asserted that the defendant had breached the contract by withholding payment for nonconforming goods. \textit{Id.} The Appellate Division, taking note of this

\textsuperscript{9} Or even a limited Rehabilitation Plan.
course of performance, rejected the plaintiff's assertion that the defendant was contractually required to pay for nonconforming deliveries. Id. The court held that "the parties' course of dealing supports defendant's position that its failure to pay the invoices for the nonconforming [deliveries] was not a breach of the parties' agreement." Id.

According to MQI, the reasoning of Cumberland County should apply to the circumstances of this matter. MQI offers that following Plaintiff's October 31, 2016 submission, and its November 8, 2016 letter, Plaintiff received no indication from the Township that it required a revised rehabilitation plan, or that it was otherwise dissatisfied with Plaintiff's October 31, 2016 submission or its implementation of the 2011 Rehabilitation Plan. Carton Reply Cert., ¶ 12. Section 7 of the Settlement Agreement provides that an Oversight Subcommittee shall be established by the Township Committee "to address any issues that may arise during the course of implementing the [2011] Rehabilitation Plan." Although, to Plaintiff's knowledge, the Oversight Subcommittee was never formed, the Court has determined that the Committee does exist. However, MQI posits that accepting as true for the purposes of this motion that the Township's representation that "the Quarry Oversight [Sub]Committee . . . has existed since April 29, 2014," then it is noteworthy that neither the Oversight Subcommittee nor any other municipal representative contacted Plaintiff regarding its October 31, 2016 submission. Id. It is equally noteworthy that the Oversight Subcommittee has never contacted Plaintiff to express any concerns regarding Plaintiff's implementation of the 2011 Rehabilitation Plan. Id.

Further, MQI argues that in reliance on the Township's lack of comment, objection, or action to schedule a hearing (as requested) on Plaintiff's October 31, 2016 submission, Plaintiff proceeded with its ongoing efforts to complete the 2011 Rehabilitation Plan, expending significant resources. Id., ¶ 15. In the immediate five (5) months that followed the October 31, 2016 submission, Plaintiff claims to have spent approximately $814,000 implementing the 2011 Rehabilitation Plan. Id. In reliance on the Settlement Agreement, Plaintiff spent in excess of $10 million implementing the 2011 Rehabilitation Plan. Id.

MQI postulates that based on its "substantial completion" of the 2011 Rehabilitation Plan, and the millions of dollars expended toward those efforts, Plaintiff's representatives met with Township representatives on February 15, 2018, and requested a reduction of the $8.4 million reclamation performance bond. Id., ¶ 16. At the February 15, 2018 meeting, Plaintiff requested a $6.8 million reduction in its reclamation performance bond. Id., Exhibit D. MQI claims that at no
time during the February 15, 2018 meeting did the Township express any concerns regarding the fact that Plaintiff did not submit a revised rehabilitation plan on October 31, 2016, nor did the Township express any concerns regarding Plaintiff’s implementation of the 2011 Rehabilitation Plan during that meeting. **Id., ¶ 17.** MQI states that although the Township agreed that a reduction in the bond was appropriate, the Township refused to reduce the reclamation performance bond by $6.8 million as requested by Plaintiff. **Id., ¶ 18.** MQI indicates that in order to avoid yet another protracted dispute, Plaintiff and the Township jointly agreed to settle the bond dispute and agreed to a $5 million reduction of the reclamation bond. **Id.** In fact, on April 10, 2018, the Township adopted Resolution 2018-2014, confirming the $5 million reduction of the reclamation performance bond. **See Morgan Cert., Exhibit D.**

MQI theorizes that the course of performance among the parties since Plaintiff’s October 31, 2016 submission unequivocally demonstrates that the Township was satisfied with Plaintiff’s performance and implementation of the 2011 Rehabilitation Plan. **Id., ¶ 20.** That course of performance included:

a. Regular inspections by the Township Engineer and Township Consultants to assess the progress of the 2011 Rehabilitation Plan. **Id.**

b. The issuance of favorable reports by the Township regarding Plaintiff’s performance and implementation of the 2011 Rehabilitation Plan. **Id.**

c. The Township’s authorization to reduce the amount of Plaintiff’s reclamation performance bond by $5 million. **Id.**

d. The Township issued and never revoked a quarry license to Plaintiff in 2016 that was expressly predicated on Plaintiff’s implementation of the 2011 Rehabilitation Plan. The quarry license application submitted by Plaintiff on January 31, 2016 provided that “Reclamation is presently being conducted concurrent with the mining operations pursuant to the 2011 Reclamation Plan approved by the Bernards Township Committee by settlement agreement (Resolution 2014-0186”). **Id., Exhibit E.**

e. The written invitation to the entire Township Committee to visit the quarry to assess the progress of Plaintiff’s implementation of the 2011 Rehabilitation Plan on November 9, 2016 — nine (9) days after the October 31, 2016 submission. **Id., Exhibit F.**

f. The absence of any communications from the Township’s Oversight Subcommittee established under the Settlement Agreement to address any concerns regarding the implementation of the 2011 Rehabilitation Plan. **Id.**
The problem with Plaintiff’s theory, however, is that the facts upon which MQI relies are sharply disputed. The Township disputes MQI’s assertions that (1) its consultants have basically agreed that with MQI’s consultants that the rehabilitation work is substantially complete; (2) that the work is, in fact, substantially complete; (3) that the oversight committee (through the Township Engineer) has not repeatedly advised the Plaintiff about certain issues concerning the rehabilitation work; (4) that the Township’s failure to provide a response to MQI for work that MQI was obligated to perform, anyway has any significance; (5) that the cost of the rehabilitation work performed to date (allegedly $10 million) is a recognized number by the Township; (6) the Township disputes the contention that it has not expressed concern regarding the implementation of the plan; (7) that no further work has occurred since the release of security by Resolution 2018-0214; (8) that the four summonses that have been issued are only for off-hours work; (9) that Mr. Carton’s Certification fails to indicate why the Township did not require MQI to submit a revised rehabilitation plan by October 31, 2016, which was because of the award of Shopoff Advisors, LP, a contract for purchase of the MQI Quarry. Further, the Township notes that the Purchase and Sale Agreement between MQI and Shopoff provided:

I understand that during the discussions [on February 11, 2016] it was recognized that there has to be a “pathway to the end of the Rehabilitation/reclamation plan” and that we all need to be in agreement about what happens at the end of that plan. It was discussed that the Rehab/Reclamation plan really establishes a minimum base line level of improvement and is the first step to the redevelopment of the property. Shopoff’s plans for the property want to create enhancements of where the Rehab plan ends off, for example with the Lake.

The Township would like you to review the contract between Millington Q and Shopoff in the context of what happens at the end of the Quarry’s Rehab/reclamation plan and then discuss with me whether 1) there has to be a revised rehab/reclamation plan or 2) “something else.” That something else would probably be an agreement among the Township, Millington Q and Shopoff to make sure that the requirements of the Rehab/reclamation plans are fulfilled, and that Shopoff can undertake its own plans and enhancements. (emphasis added)

There are some other issues from the meeting my client would like me to explore with you that were raised at the meeting – should this be a formal “Redevelopment” area – is this necessary or helpful/pros and cons? What would be the affordable housing obligation, if any? What impact do you think the Millington/Tilcon litigation has if any?
The Township interprets that contractual provision to constitute an admission or recognition by MQI that its obligations to provide additional or updated rehabilitation plans are not completed. Thus, the Township states that the actions taken by the Township during the pendency of the Shopoff and CIP contracts belies MQI’s assertions (See Timko Certification dated April 18, 2019). Further, the Township offers that although eight years have passed after the submission of the 2011 Rehabilitation Plan to the Planning Board, yet MQI has failed to complete $3,458,608 of the bonded rehabilitation items, or forty nine (49%) percent of the original $8,353,608 of the secured work.

It is clear from those factual submissions from the Township that the Court is not able to determine in the context of this motion that the parties’ course of conduct unequivocally demonstrates the Plaintiff’s full compliance with the Settlement Agreement. Nor has the Plaintiff unequivocally demonstrated, in the Court’s view, that they have substantially completed the project. In fact, there is substantial evidence to the contrary. As such, the Court is not able to sustain MQI’s position that, as a matter of law, the parties’ course of conduct demonstrates the Plaintiff’s compliance with the Settlement Agreement.

The Court’s finding is not meant to conclusively decide the issue against MQI however either. The arguments that MQI makes on its version of the facts is plausible as well. In other words, the Court is not able to determine that MQI has not substantially completed the project either. The Court’s ruling only means that the Court is not able to rule against the Township, and in favor of MQI, on this issue that is subject to factual dispute.

ii. **Is the Township Equitably Estopped from Claiming that Plaintiff has not Complied with the Settlement Agreement?**

MQI also contends that in addition to the fact that Plaintiff has complied with the Settlement Agreement, the Township should be prohibited as a matter of law from claiming that Plaintiff violated the Settlement Agreement by failing to submit a revised rehabilitation plan on October 31, 2016. The doctrines of equitable estoppel and laches preclude the Township from now claiming, in March of 2019, that Plaintiff violated the Settlement Agreement over two years ago, in October of 2016.

Equitable estoppel serves to “prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment.” *Knorr v. Smeal*, 178 N.J. 169, 178 (2003). “The doctrine is invoked in ‘the interests of justice, morality and common fairness.’”
Id. (quoting *Palatine I v. Planning Bd.*, 133 N.J. 546, 560 (1993)). Equitable estoppel applies where the party against whom it is asserted “engaged in conduct, either intentionally or under circumstances that induced reliance,” and where the party invoking the doctrine “acted or changed their position to their detriment.” *Knorr*, 178 N.J. at 178.

Laches is an equitable defense that arises based upon an “inexcusable delay in asserting a right.” *Nw. Covenant Med. Ctr. v. Fishman*, 167 N.J. 123, 140 (2001) (quoting *City of Atl. City v. Civil Serv. Comm’n*, 3 N.J. Super. 57, 60 (App. Div. 1949)). It operates to preclude a party from asserting a claim if their unexplained and inexcusable delay in doing so has been prejudicial to the party against whom the claim is to be asserted. *Id.* Where necessary to avoid an overwhelmingly inequitable result, laches can operate to shorten an otherwise applicable statute of limitation. See *Chance v. McCann*, 405 N.J. Super. 547, 569 (App. Div. 2009). In determining whether to apply laches, courts consider “[t]he length of delay, reasons for delay, and changing conditions of either or both parties during the delay.” *Nw. Covenant Med. Ctr.*, 167 N.J. at 141 (alteration in original) (quoting *Lavin v. Bd. of Ed. of Hackensack*, 90 N.J. 145, 152 (1982)). The “primary factor” in such determination is “whether there has been a general change in condition during the passage of time that has made it inequitable to allow the claim to proceed.” *Nw. Covenant Med. Ctr.*, 167 N.J. at 141.

MQI therefore postulates that here, if the Court were to accept the Township’s position that the Settlement Agreement required Plaintiff to submit a revised rehabilitation plan on October 31, 2016, then it would follow that the Township was aware of Plaintiff’s violation of the Settlement Agreement on November 1, 2016. However, MQI states that between November 1, 2016, and the filing of this cross-motion, every single action taken by the Township demonstrated to Plaintiff that the Township approved of Plaintiff’s continued performance of and adherence to the 2011 Rehabilitation Plan. See Carton Reply Cert., ¶¶12–20. MQI further indicates that in reliance upon the Township’s clear expression of approval, Plaintiff spent more than $10 million implementing the 2011 Rehabilitation Plan of which $814,000 was spent in the immediate five (5) months following the October 31, 2016 submission. *Id.*, ¶15. As such, MQI offers that it was reasonably led to believe, based upon the Township’s conduct, that there was no need for Plaintiff to submit a revised rehabilitation plan. For those reasons, MQI contends that the Township should therefore barred, by the doctrines of equitable estoppel and laches, from claiming at this juncture that the
Settlement Agreement required Plaintiff to submit a revised rehabilitation plan on October 31, 2016.

For the same reasons expressed in Point (c)(i) above, the Court is not in a position to determine that the Township’s conduct raises to the level that would allow this Court to determine as a matter of law that the Township is equitably estopped from claiming that the Plaintiff has not fully complied with the Settlement Agreement. The disputed factual versions simply do not justify the Court’s adoption of the Plaintiff’s position in the context of this Motion.

iii. Regarding MQI’s Claim that the Township’s Attempt to undo the Settlement Agreement is Motivated by Mayor Carol Bianchi’s Political Agenda and Well-Documented Bias

MQI avers that in their view it is apparent that Mayor Carol Bianchi, a lawyer, who has previously recused herself from matters relating to Plaintiff based upon her well-documented anti-Quarry activities and co-leadership of the Citizens for a Clean and Safe Millington Quarry (“Citizens Group”), is pursuing a political agenda to disrupt the Settlement Agreement that resolved the six (6) year-long litigation previously before the Court. Id., ¶¶ 28, 34. MQI indicates that on the day that Mayor Bianchi assumed office, on January 2, 2019, she explicitly announced her intention to establish a “Quarry Oversight Committee,” which later came to fruition as the “Quarry Advisory Task Force.” Id., ¶29, Exhibit H. Since that time, the Township has:

a. Adopted Resolution 2019-0082 on January 29, 2019 to form the Quarry Advisory Task Force to serve the role already contemplated by the Oversight Subcommittee established in the Settlement Agreement. See Morgan Cert., Exhibit E.

b. Adopted Resolution 2019-0162 on March 5, 2019, requiring the submission of a revised rehabilitation plan despite Plaintiff’s substantial completion of the 2011 Rehabilitation Plan approved by the Settlement Agreement. See Pisano Cert., Exhibit D.

c. Issued four (4) municipal court summonses (1802-SC-006320, 7047, 7048, 7049) on March 4, 2019, relating to alleged truck traffic violations that took place in November 2018 – four months earlier. See Carton Reply Cert., ¶ 30, Exhibit I.

d. Filed a cross-motion alleging for the first time that Plaintiff breached the Settlement Agreement when it “failed to submit a revised rehabilitation plan on or before October 31, 2016” – a breach that is alleged to have occurred more than two and a half years ago, but which has never been previously raised in any manner. See Township’s Brief at 2.
MQI indicates that it appears that Resolution 2019-0162 appears to have been adopted during an Executive Session of the Township Committee and without any notice to Plaintiff. See Carton Reply Cert., ¶31. Mayor Bianchi participated in the Township Committee’s deliberations regarding Resolution 2019-162 and, in fact, cast a vote in support of Resolution 2019-162. Id., Exhibit J. MQI states that in their view Mayor Bianchi’s participation in any proceedings regarding Plaintiff is improper given her public statements as the co-leader Citizens Group and her previous attempts to personally intervene in this litigation, which the Honorable Yolanda Ciccone, A.J.S.C. rejected. Id., ¶32. By way of example, on January 12, 2011, Mayor Bianchi – in her capacity as co-leader of the Citizens Group – wrote a letter to the DEP Commissioner and Governor describing her “great . . . distrust” of Plaintiff. Id., ¶33, Exhibit K.

Therefore, MQI avers that this Court should reject the Township’s cross-motion for precisely what it is: an improper attempt on the part of the Township, based upon changing political winds, to completely undo the finality contemplated by the Settlement Agreement entered into on April 29, 2014. The Township’s ultimate goal in demanding that Plaintiff “submit a revised rehabilitation Plan by April 30, 2019” is to haul Plaintiff back before the Township Committee and Planning Board for dozens more hearings to impose additional rehabilitation requirements purely to satisfy Mayor Bianchi’s political agenda. MQI indicates that additional hearings will surely result in more litigation before this Court to contest the continued arbitrary actions taken by the Township. As such, MQI urges that after fifteen (15) years of litigation involving this Property, the finality contemplated by the Settlement Agreement should be enforced.

Of course, an analysis of whether the Township is attempting to undo the Settlement Agreement as a result of political motives or interests or whether the Township is legitimately attempting to protect its interests and the interests of its residents is an inquiry that is fact sensitive and clearly beyond the scope of this Motion. As noted the competing factual positions make it impossible for the Court to adopt, as a matter of law, the proposition that is offered by MQI.

iv. Regarding the Proposition Offered by MQI that it is not Obligated, Independent of the Settlement Agreement, to Comply with the Township’s Quarry Ordinance

MQI theorizes that in entering into the Settlement Agreement, Plaintiff agreed to adhere to the provisions of the Township’s Quarry Ordinance referenced therein in the manner required
by the Settlement Agreement. However, MQI contends that the Quarry Ordinance is no longer applicable to Plaintiff because Plaintiff no longer owns a “quarry” or engages in “quarrying,” as those terms are defined in the Quarry Ordinance. As such, MQI contends that to the extent that the Township seeks to impose any obligation upon Plaintiff to comply with any provisions of the Quarry Ordinance that are not contained in the Settlement Agreement, “the Township has clearly overreached.”

MQI postulates that the Township enacted the Quarry Ordinance only for the limited purpose of “licens[ing] and regulat[ing] quarries.” (§4-9.1). See March 20, 2019 Certification of Deputy Municipal Clerk Rhonda Pisano in Support of Defendants’ Cross-Motion (“Pisano Cert.”), at Ex. A. The Quarry Ordinance defines a “quarry” to mean “a place where stone, slate, or other natural mineral resources are blasted, excavated, crushed, washed or graded, for use on or off of such place.” (§4-9.2) (emphasis added). Id. The term “quarrying” is defined to mean “(a) the operation of a quarry; or (b) the business of conducting a quarry; or (c) the sale or shipping of excavated material form a quarry located in the township; or (d) the operation, including warm-up, of equipment used in the operation of a quarry.” (§4-9.2). Id. The Quarry Ordinance requires a license applicant to submit an initial rehabilitation plan (§4-9.5a.2), requires a license applicant to submit an alternative or revised rehabilitation plan if it has submitted a land use development application that would result in a change or revision to the last approved rehabilitation plan (§4-9.5a.3), and sets forth a procedure for renewal upon expiration of an initial rehabilitation plan (§4-9.5a.4). Id.

As a result, MQI proffers that Plaintiff has no independent obligation to comply with the Quarry Ordinance because: (1) the Property is no longer a quarry, as defined by the Quarry Ordinance; (2) Plaintiff no longer conducts quarrying activities, as defined by the Quarry Ordinance; and (3) Plaintiff has not held a quarry license for nearly three years. See Carton Reply Cert., ¶2. MQI therefore advocates that since the Quarry Ordinance no longer applies to Plaintiff, the extent of Plaintiff’s current obligations is limited to those portions of the Quarry Ordinance with which Plaintiff has agreed to comply pursuant to the Settlement Agreement. Thus, MQI therefore postulates that even if approval of Plaintiff’s ZBA application would result in a change to the 2011 Rehabilitation Plan, (although MIQ urges that it would not) (see Section I, supra), Plaintiff should not be required to submit a revised rehabilitation plan under § 4-9.5a.3, especially given the fact that the 2011 Rehabilitation Plan is substantially complete.
MQI's position appears to be based upon the proposition that the moment a quarry claims to be an inactive quarry, or perhaps as soon as the quarry license is not renewed, surrendered or revoked, that the obligations that would be imposed upon a quarry immediately cease. In the Court's view, that premise is fallacious.

One of the chief purposes of the quarry ordinance is to achieve restoration of a former quarry so that the Township and its residents are not burdened with the negative effects of a former quarry. Certainly such a general purpose or goal is within the authority of the Municipality and serves a laudable public purpose.

The Legislature has granted to municipalities the power to license and regulate broad categories of activity. Coast Cigarettes Sales, Inc. v. Mayor & City Council of Long Branch, 121 N.J. Super. 439, 444 (Law Div. 1972). Encompassed within this power is the power to license and regulate quarries. Bernardsville Quarry, Inc. v. Borough of Bernardsville, 129 N.J. 221, 230 (1992). However, a municipality's power to license and regulate is limited. Coast Cigarettes, 121 N.J. Super. at 445. Such powers may be exercised only with respect to "matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants." Id. Where an ordinance is limited in scope to the regulation of a specified type of activity, it may not be applied more broadly to activities falling outside of its limited scope. See, e.g., Propark Am. N.Y., LLC v. City of Hoboken, 27 N.J. Tax 565, 569-70 (Tax Ct. 2014) (finding that a city ordinance imposing a parking tax on non-residential tenants did not apply to residential tenants); Ajarian v. N. Bergen Twp., 103 N.J. Super. 61, 71 (Law Div. 1968) (finding that a building code that was limited in scope to buildings erected after its adoption could not be applied to buildings erected before its adoption), aff'd, 107 N.J. Super. 61 (App. Div. 1968).

MQI also argues that even if such an Ordinance is found to serve a public purpose, it contends that the Settlement Agreement between the parties obviates MQI's obligation to comply with the Ordinance. MQI does not point to any provision of the Agreement that explicitly affirms such a proposition. Nor does MQI point to any other legal authority that supports their theory. As such, the Court rejects the proposition offered by MQI.

The Court is not prepared to address this issue by providing either party with a "declaration" concerning the law regarding this subject. The Court has been provided with self-serving factual backgrounds by both parties, which, in the Court's view, cannot be said to be a
complete record. The Court is simply reluctant to venture into this issue without a more robust record.

Also, the issue raised is not one that is specifically addressed by the Settlement Agreement itself. The matter is more properly raised in the context of a Declaratory Judgment action or a challenge to the Ordinances, as applied. In either instance, the Court would be provided with a more complete record in order to properly rule on the matter.

(d) Should the Court Declare MQI to be “in breach” as Requested by the Township?

The Township also asks the Court to declare MQI to be “in breach” of the Settlement Agreement since it has not submitted a new and compliant rehabilitation plan.

However, the Court declines to rule on an issue with such significant ramifications in the context of this Motion. The Court has found that MQI continues to have an obligation to file a Rehabilitation Plan. Notwithstanding that finding, the Court also finds that given the complicated and disparate factual versions offered by the parties, as well as the contested issues of law that have been analyzed in this opinion, it would be unfair, unjust and unwarranted to simultaneously declare MQI to be “in breach” as well. Further, this Court’s opinion now serves to clarify certain issues that have arisen regarding the parties’ interpretation of the Agreement and their respective positions. It would be inequitable to declare MQI to be in breach when the Court’s opinion on the disputed issues has only now been issued.

Also, for the reasons expressed in this opinion, the Court has determined that some of the “defenses” raised by MQI (see point (c) of this opinion) continue to be viable defenses, that could not be ruled upon as a matter of law as a result of the factual disputes that burdens the motion record. The Court certainly cannot declare MQI to be in breach or to require them to take certain action which the Township has requested the Court to order.

As such, the Court will DENY WITHOUT PREJUDICE that portion of the relief requested by the Township.

CONCLUSION

For the reasons expressed in this opinion, the Court has DENIED IN PART and GRANTED IN PART the Plaintiff’s Motion as outlined in the Court’s opinion.

In addition, for the reasons expressed in this opinion, the Court has DENIED WITHOUT PREJUDICE the Township’s Cross Motion to declare MQI in breach, however.
EXHIBIT C
PLANNING BOARD

Minutes of the Bernards Township Planning Board meeting held on September 13, 1983.
Roll Call: Lind, Hoare, Haenggi, Harris, Holmes, Hatfield, Dunham.
Late: Kunna.
Absent: Beckman, Feitner, Wiley.
Attorney Arthur Garvin, Engineer Peter Messina and Planning Consultant Marshall Frost were also present.

Chairman Dunham called the meeting to order at 7:40 p.m. and read the following open meeting and procedural statements:

"In accordance with the requirements of the Open Public Meetings Law of 1975, notice of this regular meeting of the Planning Board of the Township of Bernards was posted on the bulletin board in the reception hall of the Municipal Building, Collyer Lane, Basking Ridge, was mailed to the Bernardsville News, Bernardsville; the Courier News, Bridgewater and the Daily Record, Morristown, all on January 12, 1983, and was mailed to all those people who have requested individual notice and paid the required fee. While such notice is adequate to meet the requirements of the Open Public Meetings Law, it in no way is intended to satisfy any special notice requirements which are required by law to be met by applicants appearing before this Board."

"The following procedure has been adopted by the Bernards Township Planning Board. There will be no new cases heard after 11 p.m., no new witnesses heard after 11:15 p.m. and additional meetings will be held for the completion of unfinished business."

Millington Quarry - Site Plan - Block 164, Lot 4

Attorney Garvin read the following proposed resolution:

PRELIMINARY AND FINAL SITE PLAN APPROVAL
MILLINGTON QUARRY, INC.

WHEREAS, the applicant owner, Millington Quarry, Inc. has applied for preliminary and final site plan approval for property shown as Lot 4, Block 164 on the Tax Map of Bernards Township and located on Stonehouse Road to construct an office building for the quarry business all as shown on and in accordance with the plans entitled "Proposed Office Building for Millington Quarry" prepared by Paul T. Abia dated July 7, 1983 and consists of three sheets plus architectural plan prepared by James J. Macrae dated July 14, 1983; and

WHEREAS, the Planning Board of Bernards Township has conducted a public hearing on the application at its meeting held on August 23, 1983, of which public notice and notice by the applicant have been given as required by law; and

WHEREAS, the Planning Board after considering the application, documents and testimony has made the following findings of fact:

1. The property which is the subject of this application is known as Lot 4, Block 164 on the Tax Map of Bernards Township and is located in the M-1 zone.
2. The proposed development consists of the construction of a proposed office building for the quarry business all as shown on and in accordance with plans entitled "Proposed Office Building for Millington Quarry" prepared by Paul T. Sabia dated July 7, 1983, and consists of three sheets plus architectural plan prepared by James J. Macrae dated July 14, 1983.

3. The application adequately addresses parking, lighting, landscaping, water supply which will be by well, sewerage which will be septic and drainage.

4. The application has been reviewed by the Bernards Township Technical Coordinating Committee, is complete and in conformance with the Bernards Township Land Development Ordinance with the exception that construction details for sidewalk and parking need to be submitted.

NOW THEREFORE, be it resolved by the Planning Board of Bernards Township on this 13th day of September, 1983, that the action taken by the aforesaid Planning Board on August 23, 1983, in approving the application of the Millington Quarry, Inc., for preliminary and final site plan approval for Lot 4, Block 164 on the Tax Map of Bernards Township and as shown on and in accordance with the aforesaid plans is hereby AFFIRMED and MEMORIALIZED subject, however, to the following conditions:

1. That the applicant shall receive approval from any and all boards, authorities or agencies, including the Bernards Township Sewerage Authority and Board of Health, of any Federal, State, County or local entity of whatsoever nature which shall be required by law in connection with this application.

2. The payment of all fees required by the Bernards Township Land Development Ordinance.

3. Proof shall be submitted by the applicant that all real estate taxes have been paid in full.

4. Compliance with all laws and/or regulations applicable to the property.

5. That the applicant shall make an off-tract improvement contribution to the Township's transportation program based on four additional trip-ends per day.

Mr. Kunna arrived.

Moved by Lind that the resolution be approved as submitted.
Seconded by Hatfield.
Roll Call: Hatfield-yes, Lind-yes, Dunham-yes.
Motion carried.