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and the Township Committee of the Township of Bernards

TILCON NEW YORK INC.,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: SOMERSET COUNTY
	:	
Plaintiff,	:	DOCKET No. SOM-L-476-08
v.	:	
	:	CIVIL ACTION
TOWNSHIP OF BERNARDS, and	:	
TOWNSHIP COMMITTEE OF THE	:	
TOWNSHIP OF BERNARDS,	:	CERTIFICATION OF PETER MESSINA,
	:	TOWNSHIP ENGINEER, IN OPPOSITION
Defendants.	:	TO PLAINTIFF'S ORDER SHOW CAUSE
	:	

I, PETER A. MESSINA, certify as follows:

1. I have been the Township Engineer for Bernards Township (the "Township") from 1978 to 1986 and 1993 to present. I am personally familiar with the facts set forth in this certification, and attended most, if not all, of the fifteen Planning Board public hearings and discussions on the proposed rehabilitation plan from March 18, 2003, to February 8, 2005. I also attended the three Township Committee meetings during which the Township Committee discussed the Planning Board's

Rehabilitation Plan report and Resolution, from April 21 to July 26, 2005.

2. I have a B.S. in Civil Engineering from Newark College of Engineering in 1972 and a M.S. in Civil Engineering from NJIT in 1975. I am a licensed professional engineer and planner in New Jersey, a certified municipal engineer, and the Past President (1997) of the New Jersey Society of Municipal Engineers. (N.J.P.E. 24694, N.J.P.P. 2083, N.J.CME 564).

3. The fill which is currently being imported into the Quarry Property is NOT being placed or graded by MQI and/or Tilcon in accordance with the Rehabilitation Plan (dated January 2, 2003, revised February 5, 2004) which was comprehensively reviewed by the Planning Board, and approved by the Township Committee on July 26, 2005, (the "2005 Approved Rehabilitation Plan").

4. The fill which is currently being trucked into the Quarry Property is also NOT being placed or graded in accordance with the revised Rehabilitation Plan (revised January 17, 2006) which submitted by MQI to the Township in January 2006 to comply with the 2:1 slope requirement in conjunction with the entering of the Stipulation of Settlement (the "2006 Revised Draft Rehabilitation Plan"). Neither the Planning Board nor the Township Committee have held any hearings to review or approve the 2006 Revised Draft Rehabilitation Plan.

5. Pursuant to Ordinance §4-9.5.a.4., the Township's approval of the 2005 Approved Rehabilitation Plan will expire on July 26, 2008, about three months from now.

"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."

As required by the Ordinance, MQI and Tilcon submitted a revised rehabilitation plan six months prior to expiration of the 2005 Approved Rehabilitation Plan, on January 24, 2008. The revised plan submitted to the Township is dated January 24, 2008, consisting of six sheets, prepared by Kevin Page, PE & PP, Lic. No. 25114, of Page Engineering Consultants, PC, (the "2008 Proposed Rehabilitation Plan").

6. MQI and Tilcon currently are, and apparently have been since at least early 2007, placing and grading the fill being imported into the Quarry Property in different locations and in different slope ratios than authorized by the Township. Based on my review and comparison of the 2006 Revised Draft Rehabilitation Plan and the 2008 Proposed Rehabilitation Plan, I discovered that MQI and Tilcon are proceeding- without Township review or authorization- in implementing their new 2008 Proposed Rehabilitation Plan, rather than complying with the 2006 Revised Draft Rehabilitation Plan submitted to the Township.

7. See Exhibit 1 attached hereto - Photograph Nos. 1 to 4 taken on March 10, 2008, with superimposed notations indicating where the imported fill has been deposited and slopes have been graded by MQI and/or Tilcon, NOT in accordance with the 2006 Revised Draft Rehabilitation Plan. See also Exhibit 2 attached hereto - sheet 2 of the 2008 Proposed Rehabilitation Plan, with added color markings plainly showing where existing slopes have been created onsite which are not in accordance with any Township approved rehabilitation plan.

8. Based on my review of the 2008 Proposed Rehabilitation Plan, the "existing" topography (as of October 31, 2007,) proves conclusively that MQI and Tilcon were placing and grading imported fill material in total disregard for the parameters approved by the Township, which unauthorized placement and grading clearly was commenced by MQI and Tilcon well before October 31, 2007. Since about January, 2008, approximately 300,000 CY of imported fill has been placed and is being graded on the Quarry floor area rather than by the cliff walls to create 2:1 slopes as authorized. (See Ex. 1, Photographs 1-4). This is in direct contradiction to Mr. Page's testimony at the October 21, 2003, Planning Board hearing, where he testified that the approximately 259,000 CY overburden native fill already onsite - not imported fill - would be used to create the two-foot vegetative cover on the floor area of the Quarry. Further, I was also very surprised to discover when reviewing the new

2008 Proposed Rehabilitation Plan that the contour elevations indicated to be "existing" were in many cases 50 to 100 feet higher in elevation than the 2006 "proposed" grades. The recently filled areas by the cliff walls are less steep, "flatter", than the 2:1 slopes required and approved by the Township. Areas of 3:1 and even 4:1 slopes were observed to be existing as of October 31, 2007. In particular, in reaching this conclusion, I compared the proposed "future" grades of the 2006 Revised Draft Rehabilitation Plan to the "existing" grades (as of October 31, 2007) shown on the 2008 Proposed Rehabilitation Plan. [See **Exhibit 3** attached hereto, numerical comparison of "proposed" conditions shown on Sheet 2 of 2006 Revised Draft Rehabilitation Plan versus "existing" conditions shown Sheet 2 of the 2008 Proposed Rehabilitation Plan.]

9. The photographs and numerical calculations clearly indicate that **MQI and/or Tilcon have been placing and grading imported fill material in areas and quantities not indicated or contemplated in the 2006 Revised Draft Rehabilitation Plan.** As a result, additional fill has been imported into the Quarry Property over and above, certainly not in compliance with, the requirements and parameters of Township Committee Resolution #050249 or the 2006 Revised Draft Rehabilitation Plan.

10. Over time, MQI's engineer, Kevin Page, PE, of Page Engineering Consultants, has substantially increased his original estimates of the amount of fill which will be required

to accomplish the 2:1 slope requirement along the 4,500 foot long, 120 to 170 feet high, sheer rock cliff face in the quarry. Both the Planning Board and the Township Committee were provided with, and discussed during their separate reviews of the proposed Rehabilitation Plan, the same estimate of 2,000,000 cubic yards ("CY") of fill. Now, with the newly proposed 2008 Proposed Rehabilitation Plan, in addition to all of the millions of cubic yards of fill imported as of October 31, 2007, MQI and Tilcon are proposing an ADDITIONAL 5,258,141 CY of fill.

**Increases to MQI and Tilcon Estimates of Fill Material
Required for 2:1 Slopes (*in Cubic Yards*)**

Original 2005 Approved Rehabilitation Plan, dated 1/2/03, revised <u>February 5, 2004</u> , by MQI Engineer Kevin Page, PE*	<u>Excess Fill: 122,519</u>
MQI Engineer Kevin Page, PE, Estimate at Planning Board Hearings, as noted in the <u>November 2, 2003</u> , Transcript**	<u>Needed Fill: 2,000,000</u>
MQI Engineer Kevin Page, PE, Estimate, as indicated in his <u>July 26, 2005</u> , correspondence to my attention in conjunction with revising implementation cost estimate***	<u>Needed Fill: 3,200,000</u>
2006 Revised Draft Rehabilitation Plan, dated 1/2/03, revised <u>January 17, 2006</u> , by MQI Engineer Kevin Page, PE, in conjunction with lawsuit settlement, to account for 2:1 slope*	<u>Needed Fill: 3,726,044</u>

Brand New 2008 Proposed Rehabilitation Plan, dated <u>January 24 2008</u> , by MQI Engineer Kevin Page, PE*	<u>Needed[†] Fill: 5,258,141</u>
[†] Additional fill proposed; number does <u>not</u> include fill imported prior to October 31, 2007	

*Copies of the three title blocks showing revision dates for the referenced Page plans are attached hereto as **Exhibit 4**. Copies of the three revised "Cut/Fill Analysis" Charts from Sheet 5 of the Page plans are attached hereto as **Exhibit 5**.

Referenced excerpt of Transcript is attached hereto as **Exhibit 6.

***Page July 26, 2005, letter is attached hereto as **Exhibit 7**.

11. The 2005 Approved Rehabilitation Plan [the proposed Rehabilitation Plan which was reviewed by the Planning Board over the course of the 16 hearings conducted from March 2003 through December 2004, dated January 2, 2003, and revised in the course of the hearings on February 5, 2004], was not 2:1 slope compliant and indicated excess fill was already on site. During discussions by the Planning Board of what would be required for a 2:1 slope, Mr. Page verbally testified that an estimated additional 2,000,000 CY of fill would be needed.

12. The 2005 Approved Rehabilitation Plan which formed the basis for the Planning Board Resolution and Report that was reviewed by the Township Committee over the course of its hearings held from April 2005 through July 2005, showed excess fill of 122,519 CY; and the revised estimate for 2:1 slope compliance that was reviewed and discussed by the Township Committee at its May 24, 2005, meeting was that same 2,000,000 CY fill estimate.

13. On July 26, 2005 - the very day that the Township Committee voted on Resolution #050249, Mr. Page faxed to my office in the late afternoon, with a copy handed to me as I arrived at the meeting, a copy of his correspondence indicating a revised estimate of 3,200,000 CY of fill. [See Exhibit 7.] I only received, reviewed, and referenced to the Township

Committee the revised fill estimate in the specific context of my determining the correct dollar amount for the estimate of costs to implement the rehabilitation plan, as required pursuant to Ordinance §4-9.6:

"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."

At that time I did not review Page's new number to determine any difference or non-compliance from the original 2,000,000 CY fill estimate presented by MQI and Tilcon.

14. NO revised plans showing compliance with the 2:1 slope requirement or indicating any updated fill estimate were submitted to the Township until six months after the Township Committee adopted Resolution #050249 approving the proposed rehabilitation plan with conditions. It was not until January 2006, in conjunction with the Stipulation of Settlement entered between MQI and Tilcon and the Township, that I received plans from Mr. Page indicating an estimated 80% increase in estimated fill required - from 2,000,000 to 3,726,044 CY of fill.

15. In submitting new proposed plans for the Township review process, Mr. Page has once again increased his estimate, indicating that an additional 5,258,141 CY are required - over and above the millions of cubic yards of fill already imported to the Quarry Property by MQI and/or Tilcon through October 2007. This **brand new proposed amount of fill** is a 160% increase,

over one and one-half times, the original 2,000,000 CY estimate contemplated by the Planning Board and Township Committee in their last review, and does not even include the fill already imported through October 31, 2007. Not only were millions of cubic yards of fill already imported into the Quarry Property, but the new proposal seeks approval to go ahead and import almost double that amount of fill. The fill numbers from MQI and Tilcon just keep increasing by enormous leaps and bounds.

16. The length of the entire sheer rock cliff face at the Quarry Property required by the Township to be turned into 2:1 slopes (before any importation or grading of fill material occurred) was approximately 4,500 feet. (See **Exhibit 1**, Photograph 4) Of that 4,500 feet of cliffs, only approximately 800 feet (only about one-fifth of the total cliff length) has been turned by MQI and/or Tilcon into graded slopes through importation and grading of fill. There still remains (roughly estimated) a 3,700-foot length of 120 to 170 feet high sheer rock cliff face which has not even been touched yet, and will still need fill and grading in addition to what was already imported to be turned into 2:1 slopes. The 2:1 slope still to be run 3,700 feet along the cliffs is essentially a wedge or triangle of earth that must extend from the existing vertical cliff wall an average of 300 feet at the base and 150 feet high at the cliff wall.

17. It was discovered during the course of the Planning Board review hearings and testimony that, sometime in the late 1990s, MQI had commenced importing fill into the Quarry Property without notice to the Township, without any review or authorization of the Township, and without any testing of the fill material. At the Planning Board's request, Kevin Page, PE, MQI's engineer, then provided rough estimates of the timeframe and quantity of imported fill. At the December 2, 2003, Planning Board Hearing, pp. 29., Mr. Page estimated that during roughly 1994 - 1998, or 1997 - 2001, that 700,000 CY of fill, covering 6 to 8 acres were imported, and another 150,000 to 200,000 CY of fill, covering 3 to 4 acres, had been imported.

18. After MQI's unauthorized importation of fill into the Quarry Property came to light, the unauthorized fill on site was required by the Township to be tested after the fact for any environmental contaminants. Also, a policy was put into place and an agreement between the parties was made that, as Township Engineer, I was to be provided with complete records regarding the quantity, origin and ultimate placement within the Quarry Property for ALL imported fill. The policy was pursuant to Condition 17 of Township Committee Resolution #050249, adopted on July 26, 2005, approving the 2005 Approved Rehabilitation Plan:

"(17) The quarry owner shall institute a screening policy in order to prevent unsuitable materials from being imported into the quarry upon adoption of this plan. The policy shall require (a) record keeping of

origin of material, (b) testing of the material to make sure it is comparable to native material, (c) locational information on exactly where it is left on site. **All such records shall be available for inspection and copied to the township engineering department.**" (emphasis supplied)

The agreement by MQI and Tilcon to supply records and information was set forth in paragraph 5 of the Stipulation of Settlement dated January 24, 2006:

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

19. Accordingly, by letter dated May 5, 2006, I requested records, specifically the soil log report, from Tilcon for the period of January to May 2006. I was NOT provided with those requested records. Recently, by letter dated March 14, 2008, I once again requested from Tilcon records of imported fill for the January - May 2006 period, but to date have received no records and no reply. A copy of those letters dated May 5, 2006, and March 14, 2008, are attached hereto as **Exhibit 8**. I did receive from Tilcon information regarding fill imported from the period of July 2006 - February 2008. A review of those records indicates a total of 1,974,855 CY of fill (131,647 truckloads) were imported into the Quarry Property from July 2006 - February 2008. A summary of truck and fill quantities for that period, based on the records provided to me by Tilcon, is attached hereto as **Exhibit 9**. I have not yet received records for fill

importation during March, 2008, but based on the average from the prior 20-month average, I estimate that 100,000 CY of fill (6,582 truckloads) were imported in March 2008.

20. I have reviewed the quarry cliff areas remaining to be filled to achieve the 2:1 slope along the railroad border. Based on the additional fill and grading of cliff walls that has been completed since the October 2007 "existing" topography, I estimate if the new 2008 Proposed Rehabilitation Plan with lesser "flatter" slopes is approved by the Township, approximately an additional 4,400,000 CY (about 300,000 truck loads) of fill are still be required to achieve the 2:1 slope design. If the 2006 Revised Draft Rehabilitation Plan with steeper slopes was implemented, I estimate approximately 2,406,648 CY of additional imported fill is still needed to accomplish the 2:1 slopes on the remaining property. In calculating the amount of fill still required to accomplish the 2:1 slopes on the remaining site, I started with the data supplied by Page Engineering in the 2006 Revised Draft Rehabilitation Plan. The areas that have been previously filled (albeit over-filled) are from approximately stations 0+00 to 10+00 (0 to 1000 feet west to east). I deducted the cut and fill numbers from these stations provided in the Page Cut/Fill Analysis on sheet 5 of the 2006 Revised Draft Rehabilitation Plan from the total cut/fill numbers. Using the 3,726,044 CY "needed fill" from the Cut/Fill Analysis chart minus the

cut/fill from 0+00 to 10+00 stations, (1,319,396 CY), I was able to conclude that 2,406,648 CY of additional imported fill is still needed to accomplish the 2:1 slopes on the remaining property.

21. A review of the 2008 Proposed Rehabilitation Plan versus the 2005 Approved Rehabilitation Plan reveals that MQI and Tilcon are proposing substantial changes to the entire quarry reclamation plan. They are proposing:

- a. A drastic reduction in the size of the lake: from a 62-acre lake with a depth of 150 feet, to only a 24-acre lake with a depth of 40 feet.
- b. A substantial change in grading of cliff walls: not only adding the 2:1 slopes required by the Township, but going much further to propose 3:1 and even 4:1 slopes in certain areas.
- c. A tremendous increase in the amount of total fill required: from an estimate of excess fill in the amount of 122,519 CY, to an estimate of needed fill in the amount of 5,258,141 CY.
- d. A substantial increase in proposed residential lots: from 41 lots to 50 lots.

Certainly, changes from the 2005 Approved Plan would be necessary now that 2:1 slopes are required; however, not only have MQI and Tilcon proposed substantially lesser "flatter" slopes, which require more fill than steeper slopes, and proposed to cut the size of the proposed lake by 38 acres (size) and 110 feet (depth), but, contrary to the statements made by Kevin Page, PE, (Page Cert., ¶18) and John Selman (Selman Cert., ¶28) in certifications submitted to the Court, MQI and Tilcon have been moving full steam ahead in creating lesser slopes

(triggering the need for more fill than is required to create steeper 2:1 slopes) implementing the new 2008 proposal without any Township review or authorization. [See Exhibit 1 - photographs of site, and Exhibit 2 - color markup of plan.]

22. In fact, on previous occasions, Thomas Carton has told me that MQI intends to bring in as much fill as possible to increase the number of residential housing lots that will be able to be created and built after the quarry mining operations cease.

23. By moving forward with their 2008 Proposed Rehabilitation Plan far in advance of any Planning Board or Township Committee review or approval, MQI and Tilcon have created a situation where they have already utilized excessive quantities of imported fill for areas where much lesser amounts of fill were originally contemplated when the 2:1 slope requirement was discussed and approved by the Planning Board and Township Committee.

24. Pursuant to Ordinance § 4-9.7, as amended by Ordinance #2001 on February 26, 2008, by the Township Committee, the required annual quarry inspection escrow amount was increased to \$150,000. The escrow account funds are used, in part, to cover fees for the cover the monthly inspections, including the inspections of the importation of fill material, monthly reports, investigations of violations by the Township Engineer, and special expert review of dust, blasting, noise, samplings of

importation of fill material. The license holder is required to deposit the annual escrow fee by January 2 of each year, and to replenish the escrow account as necessary within 15 days of a written replenishment request made by the Township.

25. After adoption by the Township Committee of Ordinance #2001 increasing the amount of the required annual escrow account deposit, I wrote to Tilcon on February 27, 2008, advising that a check for the increased amount - \$135,000, be provided immediately. (A copy of my letter dated February 27, 2008, is attached hereto as **Exhibit 10**.) Although the applicant is supposed to replenish the account within 15 days of a written request from the Township, to date I still have not received a check from Tilcon for the additional \$135,000 required. Contrary to the statements made in the Certification of John Selman (¶ 29) which was submitted to the Court: "[n]either Tilcon nor MQI opposed the increased testing as a further means to ensure that the material would be of appropriate environmental quality, and Tilcon has made an escrow payment of \$150,000," the Township has NOT received any check for the increased amount needed pursuant to Ordinance #2001 for the quarry inspection fees escrow account.

26. To conduct quarrying and mining operations, a quarry license is required pursuant to Ordinance § 4-9.3, License Required, "[i]t 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." An application for a license must include 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." Ordinance § 4-9.4.e.13. The Township has not yet approved the 2007 Quarry License for the Quarry Property. The current quarrying and mining operations are continuing on a carryover basis from the Township Committee's approval of a 2006 Quarry License.

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

Peter A. Messina, P.E., P.P.

Dated: April 7, 2008