

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
REPLY STATEMENT OF FACTS	3
LEGAL ARGUMENT	8
MQI IS ENTITLED TO A TEMPORARY RESTRAINING ORDER	8
I. THE TOWNSHIP’S IMPOSITION OF THE MORATORIUM IS NOT SUPPORTED BY THE FACTS, IS IN VIOLATION OF MQI’S DUE PROCESS RIGHTS AND IS ARBITRARY, CAPRICIOUS AND UNREASONABLE	8
II. THE TOWNSHIP CANNOT DISREGARD THE RIGHTS OF MQI IN THE 2003 REHABILITATION PLAN AND THE STIPULATION OF SETTLEMENT	11
III. THE TOWNSHIP HAS BREACHED THE STIPULATION OF SETTLEMENT	12
IV. MQI WILL SUFFER IRREPARABLE HARM IF A TEMPORARY RESTRAINING ORDER IS NOT ENTERED	13
V. A BALANCING OF THE HARMS FAVORS MQI AND THE IMPOSITION OF TEMPORARY RESTRAINTS	14
CONCLUSION	16

TABLE OF AUTHORITIES

	<u>Page</u>
51 N.J. 108 (1968)	12
<i>Bistricer v. Bistricer</i> , 231 N.J. Super. 143 (Ch. Div. 1987)	12
<i>City of Paterson v. Housing Authority of City of Paterson</i> , 96 N.J. Super. 394 (Law Div. 1967)	11
<i>Doe v. Poritz</i> , 142 N.J. 1 (1995).....	9
<i>Morton v. Clark</i> , 102 N.J. Super. 84 (Law Div. 1968), <i>aff'd</i> , 108 N.J. Super. 74 (App. Div. 1969)	11
<i>Outdoor Sports Corp. v. America Federation of Labor, Local 23132</i> , 6 N.J. 217 (1951)	14
<i>Pascarella v. Bruck</i> , 190 N.J. Super. 118 (App. Div. 1983)	12
<i>Pelullo v. State</i> , 294 N.J. Super. 336 (App. Div. 1996).....	9
<i>Sheer v. Twp. of Evesham</i> , 184 N.J. Super. 11 (Law Div. 1982)	12
<i>Silverstein v. Abco Vending Serv.</i> , 37 N.J. Super. 439 (App. Div. 1955).....	14
<i>Sun Oil Co. v. Clifton</i> , 16 N.J. Super. 265 (App. Div. 1951)	11
<i>Throne v. DJF Realty, Inc.</i> , 2007 WL 1827463 (N.J. Super. App. Div. June 27, 2007).....	11
<i>Walle v. S. Brunswick Board of Adjustment</i> , 124 N.J. Super. 244 (App. Div. 1973).....	10

PRELIMINARY STATEMENT¹

A review of the Township's papers in opposition to MQI's and Tilcon's application for injunctive relief makes one thing abundantly clear: there is no factual support nor legal basis for the actions taken by the Township in imposing the moratorium in issue. The Township's papers amount to nothing more than pure sensationalism, designed to incite fear, as the Township throws irrelevant fact after fact into the mix in order to obfuscate the real issues.

The main question that the Court must address is simply: "What did MQI or Tilcon do that would justify the imposition of a moratorium on the importation of fill to the Property pursuant to the 2003 Rehabilitation Plan and Stipulation of Settlement?" With this fact in hand, the legal issues that the Court must resolve in determining whether to impose temporary restraints are:

- (1) Whether the Township acted arbitrarily, capriciously or unreasonably in enacting Ordinance #2008 and imposing a moratorium on the importation of fill to the Property?
- (2) Whether the Township deprived MQI and Tilcon of their right to due process?
- (3) Whether MQI and Tilcon have a right to rely upon and operate in accordance with the 2003 Rehabilitation Plan and the Stipulation of Settlement?
- (4) Whether the Township breached the Stipulation of Settlement by imposing the moratorium?

Based upon the facts and legal precedent here extant, the answer for each of these questions is "yes." MQI will demonstrate that it has a reasonable likelihood of success on the merits on its breach of contract and due process claims, and thus has met one criterion for injunctive relief.

The proofs before the Court also support the conclusion that MQI has met the other two criteria for injunctive relief. MQI's irreparable harm is undeniable. Through the moratorium,

¹ MQI will rely upon the same defined terms set forth in its original Brief filed with the Court on March 27, 2008.

MQI stands to lose customers, a future revenue stream and continuing sources of clean fill. MQI will be precluded from proceeding with the reclamation and future development of the Property. Most importantly, MQI will be deprived of its constitutional due process rights. Weighing the inevitable harm that will fall upon MQI against the lack of any demonstrated likelihood of harm to the Township, MQI has established its right to injunctive relief with respect to Ordinance #2008 and that temporary restraints should be imposed against the Township pending the return date of the preliminary injunction.

REPLY STATEMENT OF FACTS

The Township's Opposition Brief and the Certifications filed in support thereof do nothing more than to introduce page of irrelevant facts into the mix in an attempt to portray MQI and Tilcon as criminals. Contrary to what the Township would like the Court to believe, the only relevant facts to the Court's consideration of whether injunctive relief should be granted are those which transpired between July 26, 2005 (the date the Township Committee ratified the 2003 Rehabilitation Plan) and March 25, 2008 (the date the Township Committee enacted Ordinance #2008).

On July 26, 2005, the Township Committee passed Resolution #050249 ratifying the 2003 Rehabilitation Plan. Carton Aff., ¶13, Ex. C. Resolution #050249 incorporated the 33 conditions which were imposed by the Planning Board when it approved the 2003 Rehabilitation Plan for the Quarry on February 8, 2005, following the conclusion of 2½ years of hearings, and recommended to the Township Committee that it adopt the 2003 Rehabilitation Plan. *Id.*, ¶12, Ex. B. The 2003 Rehabilitation Plan does not expire until July 26, 2008.

In connection with its ratification of the 2003 Rehabilitation Plan, the Township Committee insisted upon two additional conditions: one, that the entire Property be graded to a slope of 2 to 1 as part of the 2003 Rehabilitation Plan; and two, that MQI and Tilcon post a certain amount of security with respect to the 2003 Rehabilitation Plan. Carton Aff., ¶¶14-15. MQI and Tilcon disputed the Township's 2 to 1 slope requirement as previously approved rehabilitation plans allowed for a steeper face to exist following reclamation and did not require a 2 to 1 slope. *Id.*, ¶16.

In September 2005, Tilcon filed suit against the Township, the Township Committee and MQI contesting the two additional conditions. Carton Aff., ¶18. After several months of

litigation, MQI and Tilcon reached a settlement with the Township Committee wherein they agreed to the conditions imposed, including the creation of “no slopes steeper than two feet horizontal to one foot vertical” (*i.e.*, this is the *maximum* grade level to which the Property may be graded) and posting the bond demanded by the Township of \$4,814,820. *Id.*, ¶¶19-20; Selman Cert., Ex. B at p.9 (b.4). A Stipulation of Settlement and Dismissal Without Prejudice was executed by the parties and was filed with the Court on January 27, 2006. Carton Aff., ¶21, Ex. D.

The terms of the Stipulation of Settlement were the subject to extensive negotiations between MQI and the Township. Carton Aff. II², ¶5. The Stipulation of Settlement memorialized the terms insisted upon by the Township regarding the importation of fill to grade the entire Property at a *maximum* of a 2 to 1 slope (*i.e.*, the slope would be greater than 2 to 1, allowing for more gentle slopes on the Property). *Id.*, ¶6. Following the Stipulation of Settlement, MQI and Tilcon spent countless hours revising the proposed 2003 Rehabilitation Plan to include the conditions imposed by the Township, including the importation of fill to grade the entire Property at a *maximum* of a 2 to 1 slope, as well as changing the specifications of the proposed lake on the Property. *Id.*, ¶7. The maximum 2 to 1 slope requirement would be measured *after* regrading activities of the entire Property have been completed, not now, during continuing quarrying operations.

On January 24, 2008, Tilcon submitted the proposed 2008 Rehabilitation Plan to the Township’s engineer for Planning Board review as required by Ordinance #1638. Selman Cert., Ex. F. To date, the Planning Board has not taken any action on the proposed 2008 Rehabilitation Plan since its submission, despite that hearings with expert testimony could have been held over

² References to the “Carton Aff. II” are intended to refer to the Affidavit of Thomas C. Carton in Further Support of Order to Show Cause, dated April 9, 2008, submitted herewith.

the course of the past three months. Carton Aff. II, ¶29. Since that plan would not go into effect, at the earliest, until July 2008, it is not at issue in these proceedings.

On February 28, 2008, the Township adopted Ordinance #2001, which amended the quarrying license to require increased environmental sampling and testing of fill imported to the Property. Carton Aff., ¶35; Selman Cert., Ex. G. Neither Tilcon nor MQI objected to this increased sampling nor the bond to effectuate it. Selman Cert., ¶29. Ordinance #2001 describes that fill will be imported to the Property in connection with the 2003 Rehabilitation Plan and the proposed 2008 Rehabilitation Plan, once approved. *See* Selman Cert., Ex. G. The Township's knowledge that MQI and Tilcon would be importing fill to the Property to carry out the 2003 Rehabilitation Plan cannot be doubted. It is set forth in a January 10, 2006 email from the Township Attorney to Tilcon's counsel, and is confirmed by the Stipulation of Settlement. Carton Aff., Ex. D; Carton Aff. II, ¶5.

On March 4, 2008, the Planning Board adopted a motion which requested that the Township Committee effect a moratorium on the importation of fill to the Property pending the Planning Board's review of the proposed 2008 Rehabilitation Plan. Carton Aff., ¶36; Selman Cert., Ex. H. Contrary to the assertions made by Ms. Szabo, the Township Clerk, MQI was not provided with actual notice of the Planning Board's March 4, 2008 meeting and motion. Carton Aff. II, ¶18. On March 11, 2008, the Township Committee passed Ordinance #2008 on a first reading over MQI's and Tilcon's objections and their requests for a meeting with the Township before its implementation. Carton Aff., ¶37. The Township refused to conduct hearings or to receive evidence or expert testimony. The Township Committee ratified Ordinance #2008 on a second reading on March 25, 2008, over MQI's and Tilcon's objections. *Id.*, ¶38. Ordinance #2008 imposes a moratorium on the importation of fill to the Property from April 1, 2008 at

12:00 a.m. until *at least* midnight of December 31, 2008. *Id.*, ¶37, Ex. F. No factual or expert testimony was presented at the March 11 or March 25, 2008 meetings, and the Township Committee merely heard and acted upon the complaints of a few residents. *Carton Aff. II*, ¶20.

Despite a requirement to do so, and in spite of MQI's specific request, MQI was never afforded an opportunity to respond to the Township's allegations in a forum where evidence, facts and testimony could be provided. *Id.*, ¶24. MQI's efforts to meet, discuss and work toward an amicable resolution of the Township Committee's purported concerns were ignored. *Id.*, ¶25. The Township never issued any notice of violation or cease and desist order to MQI or Tilcon with respect to the activities occurring at the Property, despite having the power and opportunity to do so; nor has it alleged that MQI has ever violated the 2003 Rehabilitation Plan or breached the Stipulation of Settlement. *Id.*, ¶¶21-23.

As stated in Ordinance #2008, the moratorium seeks to address the Township's purported concerns with respect to: (1) the environmental condition of imported fill; (2) the quantity of imported fill; and (3) the increase in truck traffic to the Property. *Carton Aff.*, Ex. F. The Certification of Geoffrey Goll, which would appear to justify only the environmental concerns, contains several misleading and inaccurate statements, carefully crafted to support the Township's position. Sampling and testing procedures are, and have been, in place with respect to the importation of fill at all times since, and prior to, the final approval of the 2003 Rehabilitation Plan. *See, e.g.*, *Selman Cert.*, ¶¶29-30. The Township's environmental consultant, Princeton Hydro, has conducted sampling of truckloads of fill whenever it wanted and was never required to give notice for its testing contrary to the implications of Mr. Goll's Certification. *See id.*, ¶21. The fill imported to the Property has been tested by Princeton Hydro in accordance with the Township's mandatory testing protocol. *Carton Aff. II*, ¶10. All tests

support the conclusion that only clean material has been placed in the Property. Selman Cert., ¶23. Other than the one truck identified, the Township, Princeton Hydro and Tilcon have never informed MQI of any test results revealing contamination at the Property. Carton Aff. II, ¶13. In fact, the Princeton Hydro test result information provided to MQI from Tilcon have consistently revealed that there is no contamination at the Property. *Id.*, ¶14. As of March 4, 2008, MQI has never been informed of any test results arising out of the increased environmental sampling that revealed any contamination at the Property. *Id.*, ¶17. In fact, testing performed in 2004 confirmed that there was no environmental contamination at the Property at that time either. Selman Cert., ¶24. Of the several thousands of truckloads of fill imported to the Property, only one was found to contain any contamination, and the material contained in that truck was never allowed to be placed at the Property for fill. *See* Selman Cert., ¶23; Carton Aff. II, ¶¶11-12. The contaminants in the single contaminated load were from some asphalt present in the fill. Selman Cert., ¶23.

The changing amount of fill necessary to reclaim the Property is due to the fact that the quarrying and reclamation process are ongoing and evolving processes. MQI and Tilcon have supported efforts by the Township police department to control truck traffic into and out of the Property. Selman Cert., ¶25. Indeed, there is no proof submitted by the Township justifying any moratorium on the basis of any increase in truck traffic. No evidence of traffic ordinance violations, or evidence of problems due to truck traffic, has been presented.

LEGAL ARGUMENT

**MQI IS ENTITLED TO A TEMPORARY
RESTRAINING ORDER.**

I. THE TOWNSHIP'S IMPOSITION OF THE MORATORIUM IS NOT SUPPORTED BY THE FACTS, IS IN VIOLATION OF MQI'S DUE PROCESS RIGHTS AND IS ARBITRARY, CAPRICIOUS AND UNREASONABLE.

The primary question that the Court must consider in evaluating whether the Township's actions in enacting Ordinance #2008 were arbitrary, capricious or unreasonable is: What did MQI or Tilcon do that would justify the imposition of a moratorium on the importation of fill to the Property pursuant to the 2003 Rehabilitation Plan and Stipulation of Settlement? MQI submits that the answer to this question is, quite simply, absolutely nothing. Through the enactment of Ordinance #2008, the Township has unilaterally determined that MQI and/or Tilcon have violated the terms of either the 2003 Rehabilitation Plan or the Stipulation of Settlement, without providing either party an opportunity to be heard in violation of their due process rights. The moratorium is another, in a series of attempts by the Township, to stall the ultimate development of the Property by MQI simply because the Township and certain of its residents do not like the Quarry.

Because no hearings were held with respect to reasons for the enactment of Ordinance #2008, the reasons stated in the text of Ordinance #2008 must be evaluated in determining whether there was any valid basis for imposing the moratorium. Significantly, there is no assertion in Ordinance #2008 that MQI or Tilcon have violated any agreement with the Township or that they are not acting in accordance with the 2003 Rehabilitation Plan or the Stipulation of Settlement. Rather, a fair reading of the Township's opposition papers demonstrates that the Township is attempting to establish a violation (*i.e.*, the importation of contaminated fill to the Property) through an assumption and implication that, because

contaminated fill was found in one truck, MQI and Tilcon have been importing and placing contaminated fill at the Property.³ Indeed, it is not simply detecting contaminated fill in a truck that is a violation, but rather placing contaminated fill at the Property. That is why the random sampling and testing procedures were established: to prevent contaminated fill from being placed at the Property. There has been no deviation from the process, and testing has confirmed that there is no contamination at the Property. The fact that contaminated material was found in one truck of thousands does not create a presumption, as the Township would have the Court believe, that MQI and Tilcon have place contaminated fill to the Property. Rather, it demonstrates that the procedures in place actually work as planned.

The facts demonstrate that the Township has deprived MQI and Tilcon of their due process rights in violation of law. At a minimum, due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner, appropriate to the nature of the case. *See, e.g., Pelullo v. State*, 294 N.J. Super. 336, 345-46 (App. Div. 1996) (citing *Doe v. Poritz*, 142 N.J. 1, 106 (1995)). Neither MQI nor Tilcon was provided with notice of the Planning Board's intention to adopt a motion to request that the Township Committee effect a moratorium on the importation of fill to the Property. The action of the Township Committee was based upon the Planning Board's recommendation, sitting in its quasi-judicial capacity. No hearing was afforded to MQI and Tilcon as the Planning Board acted on its own motion to recommend the imposition of a moratorium. Despite the Township claims that it acted properly pursuant to its legislative police powers, the end result of the moratorium was a quasi-judicial determination that MQI and/or Tilcon were in breach of the 2003 Rehabilitation Plan or the Stipulation of Settlement and that imposition of a significant penalty, *i.e.*, the moratorium, was

³ The Township's attorney's implication that, because MQI's owners have been involved in work at certain environmental sites, contaminated fill must be entering the Quarry is both without basis and unethical advocacy.

somehow justified. Whether MQI or Tilcon were in breach of the 2003 Rehabilitation or Stipulation of Settlement is a determination for which MQI and Tilcon must be afforded due process, especially considering the significant private property rights in issue.

Without providing MQI and Tilcon notice and an opportunity to be heard, the Township imposed a moratorium which has the effect of rescinding the prior approval of the 2003 Rehabilitation Plan and the Stipulation of Settlement. In so doing, the Township, without any authority, has attempted to shift the burden of proof that should be applicable to the issues *sub judice*. Because of the moratorium, MQI and Tilcon were constrained to demonstrate, via legal proceedings, that the Township's actions were arbitrary, capricious or unreasonable, or otherwise in violation of law, rather than the Township having the burden to demonstrate that there was a violation by MQI or Tilcon which would justify the moratorium.

The Township completely ignored the process and procedures that are available to it, which it is required to follow where a violation of an agreement or condition of approval is believed to have occurred. The Township could have moved to re-open the 2005 litigation if it believed a breach of the Stipulation of Settlement had occurred. It did not. The Township could have issued a notice of violation to MQI and Tilcon and then proceeded to a municipal hearing if it believed a violation of the terms of the 2003 Rehabilitation Plan had occurred. It did not. *See Walle v. S. Brunswick Bd. of Adjustment*, 124 N.J. Super. 244 (App. Div. 1973) (remedies available to municipality for violation of Municipal Land Use Law or local zoning ordinance include: filing suit for injunctive relief, initiating proceedings in municipal court to impose penalties for a violation, or declaring a forfeiture following formal proceedings). Alternatively, the Township could have addressed its concerns and sought further protections in connection with the Planning Board's review of the 2008 Rehabilitation Plan. It did not.

Ordinance #2008 was based on unfounded fears that a problem *could* arise. This is not a valid basis for imposition of a moratorium without affording due process, and the Township's actions in this regard, effectively rescinding the 2003 Rehabilitation Plan and Stipulation of Settlement, were arbitrary, capricious and unreasonable. *See, e.g., Morton v. Clark*, 102 N.J. Super. 84 (Law Div. 1968), *aff'd*, 108 N.J. Super. 74 (App. Div. 1969) (holding that municipality had no authority to rescind previous grant of approval); *Throne v. DJF Realty, Inc.*, 2007 WL 1827463 (N.J. Super. App. Div. June 27, 2007) (holding that board resolution which rescinded approval was null and void).

II. THE TOWNSHIP CANNOT DISREGARD THE RIGHTS OF MQI IN THE 2003 REHABILITATION PLAN AND THE STIPULATION OF SETTLEMENT.

As the owner of the Property, MQI has vested rights in the 2003 Rehabilitation Plan and the Stipulation of Settlement which substantially affect the value and use of the Property. As stated, the Township cannot rescind approvals or permits previously granted as they constitute vested rights which cannot be revoked. *See, e.g., Sun Oil Co. v. Clifton*, 16 N.J. Super. 265, 269 (App. Div. 1951). Municipal action seeking to prevent a party from proceeding pursuant to granted approvals is invalid. *City of Paterson v. Housing Auth. of City of Paterson*, 96 N.J. Super. 394 (Law Div. 1967). The 2003 Rehabilitation Plan was approved by the Planning Board, following 2½ years of hearings, and ratified by the Township Council. MQI and Tilcon entered into the Stipulation of Settlement with the Township following litigation through which they agreed to significant conditions demanded by the Township. Substantial resources have been expended to commence reclamation of the Property in accordance with the 2003 Rehabilitation Plan, the Stipulation of Settlement and the attendant rights granted to MQI. MQI's reliance on the approvals granted by the Township and the vested rights granted to MQI require that the requested temporary restraints be imposed upon the Township with respect to the

moratorium. Failure to do so would effectively constitute a regulatory taking of MQI's Property by the Township. *See, e.g., Lomarch Corp. v. Mayor & Common Council of City of Englewood*; 51 N.J. 108 (1968); *Sheer v. Twp. of Evesham*, 184 N.J. Super. 11 (Law Div. 1982).

III. THE TOWNSHIP HAS BREACHED THE STIPULATION OF SETTLEMENT.

It is well-settled that an "agreement to settle a lawsuit, voluntarily entered into, is binding upon the parties...." *Pascarella v. Bruck*, 190 N.J. Super. 118 (App. Div. 1983); *see also Bistricher v. Bistricher*, 231 N.J. Super. 143, 146 (Ch. Div. 1987). There is no dispute that MQI, Tilcon and the Township entered into the Stipulation of Settlement with respect to the litigation filed in 2005. *See Carton Aff., Ex. D.* Through the Stipulation of Settlement, MQI and Tilcon agreed to create the maximum 2 to 1 slope in all areas of the Property through the importation of fill from external sources. MQI and Tilcon have, at all times, complied and performed in accordance with the Stipulation of Settlement and the 2003 Rehabilitation Plan, as revised pursuant to the Stipulation of Settlement..

Despite MQI and Tilcon having complied with their contractual obligations, the Township has undeniably breached the Stipulation of Settlement through the enactment of Ordinance #2008 and the imposition of the moratorium. By its actions, the Township is preventing MQI from fulfilling its contractual obligations. MQI and Tilcon have a right to continue reclamation activities at the Property, through the importation of fill, and to rely upon the Stipulation of Settlement and the 2003 Rehabilitation Plan, which has not yet expired, in connection therewith. Any action by the Township which has the effect of abridging those rights constitutes a breach of the Stipulation of Settlement by the Township. The 2003 Rehabilitation Plan has not yet expired and MQI and Tilcon have a right to continue to operate the Quarry pursuant to that agreement. The implied threat that it can vitiate those rights in July 2008 when

the present plan expires cannot be used to justify this moratorium on the 2003 Rehabilitation Plan and the Stipulation of Settlement.

The Township's allegation that the dismissal without prejudice renders the Stipulation of Settlement somehow unenforceable is pure nonsense. The parties to that agreement heavily negotiated its terms, and the Township's attorney himself insisted upon the inclusion of certain terms, including the maximum 2 to 1 slope requirement, all of which were incorporated into the Stipulation of Settlement. Dismissal of the litigation without prejudice does not permit the Township to ignore its obligations under the Stipulation of Settlement. Rather, if the Township seeks some form of relief as a result of an alleged violation of the Stipulation of Settlement by MQI or Tilcon, its recourse is to re-open the litigation, or issue a notice of violation to allow hearings, but not to impose a moratorium abrogating the rights of MQI and Tilcon.

IV. MQI WILL SUFFER IRREPARABLE HARM IF A TEMPORARY RESTRAINING ORDER IS NOT ENTERED.

Contrary to the Township's assertions, MQI and Tilcon stand to suffer much more harm than mere monetary damages. The moratorium will result in the immediate, and likely permanent, loss of customers who provide suitable fill material to the Property and a continual revenue stream to the Property. MQI and Tilcon have built substantial relationships with various independent excavators and contractors over the years. As part of the contractual arrangement with these contractors and excavators, fill is imported and deposited via truck and quarried rock is then taken by these same trucks from the Property. The moratorium will deny these contractors and excavators with whom MQI and Tilcon have developed long-standing relationships with from depositing suitable fill at the Property. Once denied access, these contractors must immediately find other locations to deposit their fill material. Once they develop new relationships for depositing fill, they will not return. The New Jersey courts have

consistently held that the loss of customers and future profit constitutes irreparable harm and thus justifies the imposition of injunctive relief. See *Outdoor Sports Corp. v. Am. Fed'n of Labor, Local 23132*, 6 N.J. 217, 230 (1951); *Silverstein v. Abco Vending Serv.*, 37 N.J. Super. 439, 446 (App. Div. 1955). Further, without entry of an order enjoining the enforcement of the moratorium, MQI will immediately and forever lose sources of suitable fill material for importation to the Property. Given the scarce availability of fill material in this economy, MQI will suffer immediate and irreparable harm. Carton Aff. II, ¶27.

Through the moratorium, the Township is essentially tying MQI's hands with respect to the operation, reclamation and future development of the Property and the moratorium will result in substantial delay and the loss of valuable time with respect to the entire development project. MQI will thus lose the use of the Property if it is not reclaimed in accordance with the Rehabilitation Plan because any prospective redevelopment opportunities will be delayed, and may be lost forever. Finally, and perhaps most compelling, is the fact that, by imposing the moratorium, MQI and Tilcon were deprived of their due process rights which, in and of itself, is a sufficient basis for a finding of irreparable harm.

V. A BALANCING OF THE HARMS FAVORS MQI AND THE IMPOSITION OF TEMPORARY RESTRAINTS.

Since entry of the stay by the Court on March 27, 2008, there has been no harm to the Township, nor has the Township even claimed that it has suffered harm in the interim. Nor can there be said to be any potential harm to the Township if the requested temporary restraints are imposed because there are intensive procedures in place which serve to protect the Township and its residents from their alleged concerns, including increased sampling and testing of imported fill and controls with respect to truck traffic – the very procedures insisted upon by the Township in the Stipulation of Settlement and by the adoption of Ordinance #2001. The fact that one truck

among thousands was detected to contain some form of contamination and that such fill was not placed at the Property demonstrates that the sampling and testing procedures in place are working to the benefit of the Township. Further, the Court can fashion any remedy it deems necessary to adequately protect the Township from any perceived harm during the pendency of this litigation.

MQI and Tilcon have always acted, and will continue to act, in accordance with the 2003 Rehabilitation Plan and the Stipulation of Settlement, both of which were approved by the Township. Any remaining Township concerns can be adequately addressed by the Township through the Planning Board's review of the proposed 2008 Rehabilitation Plan, which has been in the Township's possession since January 2008. Indeed, MQI has a very substantial interest in ensuring that its Property is reclaimed and left in a safe condition. Allowing contaminated fill to be deposited at the Property will only diminish MQI's investment and potential ability to resell the Property at a future date. The balancing of the harms therefore weighs in favor of MQI and supports the imposition of temporary restraints on the Township with respect to Ordinance #2008.


CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in its moving papers, Plaintiff Millington Quarry, Inc., respectfully requests that the Court grant a temporary restraining order against the Township with respect to enforcement of Ordinance #2008 until the return date for the preliminary injunction.

Respectfully submitted,

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By:


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Dated: April 11, 2008