



December 11, 2015

Via Electronic and Regular Mail

Honorable Thomas C. Miller, J.S.C.  
Somerset County Courthouse  
20 North Bridge Street, 2<sup>nd</sup> Fl.  
Somerville, N.J. 08876

Re: Bernards Township Citizens For a Safe and Clean Quarry, Inc. v. Township of  
Bernards, Docket No. SOM-L-803-14

Dear Judge Miller:

I am writing to you on behalf of plaintiff, Bernards Township Citizens For a Safe and Clean Quarry, Inc. (“Bernards Citizens”), a nonprofit membership corporation, to outline its’ position with respect to the above-captioned action that it initiated in June, 2014. New Jersey Appleseed is itself a nonprofit corporation that seeks, *inter alia*, to assist community organizations hold their local governments accountable, and we have a specific interest in areas concerning community and environmental health. In accord with our mission, we were recently retained by Bernards Citizens to move its action forward, given that it has been without counsel for several months.

It is my understanding that William Walsh, a member of the citizens group, submitted to you on August 11, 2015, a 59-page pretrial-memorandum that sets forth the legal theories and facts of this prerogative writ action, with reference to documents already in the record and additional attachments Exhibits A-S. I do not know if the court retained this memorandum, because Mr. Walsh was representing Bernards Citizens, *pro se*, but it was given to John Belardo, attorney for the Township of Bernards (the “Township” or the “Township Committee”). Mr. Belardo was thus given notice of the scope and nature of the complaint and should, as a result, better understand the public’s grievance with the Township: **the improper use of the settlement process (concerning litigation initiated by the quarry owner against the Township in 2008) to circumvent the public review process applicable, by ordinance, to all quarry rehabilitation plans, including the 2011 Rehabilitation Plan.** Without public hearings or a public record, Township residents have had no opportunity to comment on the matter before the Township Committee, but also have been left with no understanding of the basis on which the Committee rejected the Planning Board’s factual findings and recommendations with respect to the importation of off-site fill to the meadow area of the quarry --- a decision that the Planning

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Board had reached after numerous public hearings and public deliberations (as reflected in its Report to the Bernards Township Committee On the Review of the 2011 Millington Quarry Rehabilitation Plan, dated May 7, 2013, hereinafter the “2011 Planning Board Report,” attached hereto as Exhibit 1). This is the central grievance of the complaint and must be addressed in any resolution of this litigation.

Instead of re-submitting Mr. Walsh’s memorandum (which includes numerous references to specific transcripts, certifications and documents), I am going to present this court with a less detailed statement of the case (than Mr. Walsh’s pre-trial memorandum), procedural history and summary of the facts (including a short description of all the relevant ordinances pertaining to this matter) in order to facilitate the Court’s understanding of the significant “government accountability” problem presented in this case for purposes of Monday’s pre-trial settlement conference. As I noted in my letter to the court, dated December 2, 2015, I think this matter is better suited for resolution by summary judgment, rather than a trial; but given the significant public policy issue involved, perhaps a remedy may be achieved through settlement.

### STATEMENT OF THE CASE

Bernards Citizens is a group of concerned citizens, who have historically been active in the Township’s regulation of the quarry within the Township’s jurisdiction. Currently, there are approximately thirty-members in the group, but at the time it was formed, it sought to represent the interests of approximately 625 residents who had signed an online petition expressing their opposition to Resolution #2014-0186, which approved the “Settlement Agreement” by and between the Township and Millington Quarry, Inc. (“MQI”) (attached hereto as Exhibit 2). These residents were, and continue to be, upset because of the Township Committee reversed -- behind closed doors -- the Planning Board’s recommendation to “postpone” a decision on the meadow area of the quarry due to seriously flawed deficiencies with the applicant/owner’s 2011 rehabilitation plan for such meadow area.

The postponement recommendation followed 17 public fact-finding hearings conducted by the Planning Board over two years. To put it in context, the hearings generated 2,986 Pages of transcripts and 75 exhibits (and an additional 4130 pages of documents from the New Jersey Department of Environmental Protection, (“DEP”)). Most importantly, the testimony of the Planning Board’s experts supported postponing the decision on the meadow area. The result of the postponement, if approved by the Township, would have forced the applicant, MQI, back to the drawing board to come up with, among other things, a proper soil protocol that would reduce or eliminate the need to bring in offsite materials to satisfy the vegetative layer requirement under the Township’s Quarrying Ordinance, Section 4-9 (attached hereto as Exhibit 3).

Rather than conduct its review publically, which it is required to do pursuant to the state Open Public Meetings Act (“OPM”), and local ordinances implementing that Act, (and which it had done regarding MQI’s 2003 and 2008 Rehabilitation Plans), the Township Committee, behind closed doors, retained and consulted with the same experts hired by the Planning Board -- whose opinions were used by the Planning Board in support of its conclusion that MQI failed to prove that its proposed rehabilitation of the meadow would not negatively impact the “environmental, health, safety and other factors effecting [sic] the public welfare,” Ord. §4-

9.5(a)(5). For reasons that have never been explained to the public, the Township rejected the Planning Board's recommendation to postpone action regarding the meadow, and instead negotiated changes to MQI's 2011 Rehabilitation Plans ostensibly in the context of negotiations to settle a 2008 prerogative writ action in which MQI challenged the Township's Resolution #080308, disapproving its proposed 2008 Quarry Rehabilitation Plan;<sup>1</sup> a lawsuit that was arguably moot in 2011, when MQI's licensure required it to submit a new rehabilitation plan. Regardless of whether the 2008 action was moot, it is certain that such litigation could not be used to circumvent the required review processes applicable to all quarry rehabilitation plans pursuant to the Township's Quarrying Ordinance.

### The Verified Complaint

Specifically, Bernard Citizens filed a prerogative writ action that stated three counts:

Count One alleges that "the adoption of Resolution #2014-0186 was *ultra vires* beyond the authority of the Committee, and was done with insufficient notice and process." Pursuant to this count, Bernard Citizens assert three separate violations, the first of which is the most significant and substantive. **That is, the Settlement Agreement is invalid to the extent that the Township approved MQI's 2011 Rehabilitation Plan pursuant to a review process that was not held in public as required by the Township's Quarrying Ordinance, §4-9.5(a)(5), read together with the state OPM law, N.J.S.A.10:4-6 et seq., the Township's local OPM ordinance, Ord. §2-1.5 (Open Meetings; Rules of Township Committee) and relevant OPM resolutions, Bernard's Resolution #2013-0043 (Establishing Rules and Procedures for the Conduct of Business at Township Committee Meetings held in 2013) and Bernard's Resolution #2014-0043 (Establishing Rules and Procedures for the Conduct of Business at Township Committee Meetings held in 2014).**<sup>2</sup>

Although courts favor settlement agreements insofar as they conserve judicial resources and often represent a practical solution to a controversial problem, in this case the settlement addressed an alleged dispute (*i.e.*, "a dispute has arisen among the Township and MQI regarding the Board's adoption of a report on May 7, 2013, . . . which recommends certain conditions for approval of the 2011 Rehabilitation Plan submitted by MQI. "), which was not the subject of any litigation (Res. #2014-0186 at 1). Moreover, and most importantly, **such alleged dispute involved a recommendation by the Planning Board (not a final agency action), which by ordinance, the Township was required to review publically and act upon during a public hearing with a full public record as the basis for such action.** Accordingly, Bernard Citizens are not alleging that the process employed by the Township when it adopted the Settlement Agreement Resolution was unlawful, but rather **that the Settlement Agreement itself is invalid to the extent that the agreement constitutes a final decision by the Township to approve MQI's 2011 Rehabilitation Plan pursuant to a legally deficient review process.** Even if the Township and MQI differed on how to deal with the Planning Board's Report, it was necessary to have those differences resolved through a public review process, which pursuant to the Township's OPM resolutions permitted public comment.

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<sup>1</sup> A copy of Resolution #080308 is attached hereto as Exhibit 4.

<sup>2</sup> Township OPM ordinance and resolutions attached hereto as Exhibit 5.

The second and third violations involve inadequate notice. The Township's half-hearted attempt to permit limited public comment on the pros and cons of the Settlement Agreement, after it was "signed, sealed and delivered" does not cure the Township's failure to provide adequate notice under applicable OPM laws. Notice of the relevant Committee meeting did not state that the Settlement embodied a decision by the Township (1) to lift the ban on importation of fill contained in Ord. §4-9.14, and (2) to amend Res. #080308's mandate, which requires that "[n]o further fill is permitted to be brought or imported into the Quarry Property, except as may be specifically first reviewed and approved by the Planning Board and subsequently reviewed and approved by the Township Committee exclusively for purposes of augmenting or supplementing the need for a 2-foot depth of soil to support a vegetative cover." Res. #080308 at 4. If such adequate notice had been given, perhaps more than the 100 or so residents who did show up at the April 29, 2014 hearing, at which the Resolution approving the Settlement Agreement was adopted, would have attended and would have been prepared to testify on the merits of the Settlement Agreement. If more people had known the content of the Agreement and had testified, there is little doubt that they would have tried to convince the Township that its Settlement Agreement was invalid because it needed to conduct its review of the Planning Board's 2011 Report in a public manner with all the Committee's deliberations, considerations of testimony, findings of fact and conclusions appearing in a public record; and perhaps, if there had been more speakers some alternative method to allay residents' concerns may have been achieved.

In any case, it is plaintiff's position that all the above violations require the Township, at minimum, to hold such a review hearing, properly noticed, with a full disclosure of all the information on which it relied if the court is reluctant to deem such process and notice violations sufficient to invalidate the Settlement Agreement, and set it aside.

Count II provides that "the Committee's adoption of Resolution #2014-0186 was arbitrary, capricious and unreasonable, and was done with insufficient notice and process." This Count though similar to Count I insofar as it alleges that the Resolution was done with insufficient notice and process is targeted at the content of the Settlement Agreement itself. At this time, members of Bernards Citizens do not know the actual factual and legal basis on which the Township relied when it rejected certain aspects of the Planning Board's Report, and approved MQI's 2011 Rehabilitation Plan. Members of the group only know the factual record on which the Planning Board based its decision, and thus the Township's decision to permit MQI to proceed with importing fill to the meadow area appears arbitrary, capricious and eminently unreasonable. Open Public Record requests by the plaintiff have not resulted in disclosure of any new expert testimony on which the Township relied when approving the 2011 Rehabilitation Plan. However, there is some evidence that the Township received erroneous legal advice on which, at least some members relied.<sup>3</sup> Until full disclosure of such material is made and plaintiff

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<sup>3</sup> While the current Quarrying Ordinance explicitly authorizes the Township to require a vegetative layer of less than two (2) feet in conjunction with a rehabilitation plan, it appears that the Township relied on a 1972 ordinance to affirm MQI's contention that it must be permitted to rehabilitate the property with a two (2) foot vegetative layer. An e-mail, dated April 14, 2014, from Township Attorney to the Mayor John Carpenter on the eve of the scheduled April 15,

is certain as to the facts and ordinances upon which the Township relied, plaintiff is not prepared to proceed on this count. On the other hand, disclosure of all the information on which the Township relied may convince plaintiff's that this count cannot be supported.

Count III, lodged pursuant to the Uniform Declaratory Act, seeks a declaration that the Settlement Agreement "contravene[s] and violat[es] the requirement that any plan be approved by the Planning Board prior to lifting the prohibition on importation of fill." This claim rests on Bernards Citizens' interpretation of Ord. §4-9.14, in light of language in Res. #080308, which was adopted at the same Township hearing at which the Township introduced for first reading Ordinance No. 2025 (which was codified upon adoption as Ord. §4-9.14).<sup>4</sup> As explained in Mr. Walsh's pretrial memorandum, plaintiff has direct evidence (primarily Township minutes) indicating that the Mayor and other Committee members believed that the Ordinance and Resolution were "consistent" with one another, and that members thought that they were enacting in the Ordinance the same provision that they adopted in the Resolution. Although this court may disagree with Bernards Citizens' interpretation of Ord. §4-9.14, and simply rely on the language of the Ordinance which admittedly is more expansive than plaintiff asserts (insofar as it appears that the Township may lift the prohibition on importation of fill itself, without first securing Planning Board approval), this court must appreciate the public's confidence in the fact-finding authority and capacity of the Planning Board in making such a determination, in contrast to the Township. Indeed, from a policy perspective, this Count at heart makes the same complaint as Count I, but in a different way.

As will be detailed in the Statement of Facts below, the Planning Board never approved the importation of off-site materials into the Quarry Property's 94-acre meadow area. Indeed, the Planning Board had no choice but to postpone any decision on the meadow area because MQI refused to address serious deficiencies with its proposed plan with respect to this area and refused to provide the Planning Board with certain calculations it requested. Accordingly, plaintiff asserts that MQI should not be able to circumvent the public hearing process at the Planning Board as well as the Township by securing approval of its plan to allow importation of 300,000 cubic yards of soil until January 31, 2017, with an adoption for an additional 52,000 cubic yards, through a settlement agreement with the Township instead of through the public process applicable to review of quarry rehabilitation plans generally—a process that requires Planning Board fact-finding followed by Township review. Accordingly, the violation identified

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2014 public vote on the Settlement Agreement and Release contains in its subject line: "Quarry Ordinance - 1972" and a document entitled Ordinance "292.PDF" is attached. Subsequently, in response to an OPRA request made by Mr. Walsh, the Township, in an e-mail dated January 20, 2015 refused to produce the file titled "292.pdf" with the stated reason that "privileged- legal advice [is] sought." Moreover, Mayor Carpenter cited Ordinance 292, when he justified his vote and stated: "MQI owners will cite our forty-year old ordinance that says that they are entitled to 24 inches of vegetative cover". To date, the Township neglects to acknowledge that this 1972 has been amended; since at least 2003, the Township is permitted to authorize a vegetative depth layer of less than two (2) feet. See Ord. §4-9.5(b)(2).

<sup>4</sup> Ordinance No. 2025 is attached hereto as Exhibit 6 and will be further discussed in the Statement of Facts.

in this count requires, at minimum, disclosure of the facts on which the Township relied when it came to a conclusion directly contrary to that of the Planning Board. The public has to see the “facts” on which the Township relied before its concerns can be allayed, especially since it is inconceivable that those facts are the same as those found by the Planning Board during its public process and in its Report.

In short, in this action, Bernard Citizens allege that the Township wrongfully conflated its settlement discussions with MQI regarding litigation initiated by MQI in 2008 with its obligations under ordinance to publically review the Planning Board’s Report concerning MQI’s proposed 2011 Rehabilitation Plan. Any claims that MQI may have had with respect to the Planning Board’s Report were not yet judiciable in a court of law, because the process (i.e., public review by the Township Committee of the entire rehabilitation plan including the meadow area) was never completed. Without the finished review process, the matter was not able to be collapsed into the existing lawsuit. Though MQI may have conditioned withdrawal of its 2008 action upon Township approval of its 2011 Rehabilitation Plan, it was improper for the Township to conduct its review of that Plan, as required by ordinance, behind closed doors. **Public review of the rehabilitation plan was not negotiable, even if Bernards’ residents were given, after the secret review had occurred and the decision made, the opportunity to comment on the Settlement Agreement** prior to its adoption by the Committee by resolution.

#### PROCEDURAL HISTORY

This action was initiated by Bernards Citizens, on June 14, 2014, as a prerogative writ action challenging Resolution #2014-0186 approving a Settlement Agreement and release between the Township and MQI. A Verified Complaint was filed at that time, and an Order to Show Cause (“OTSC”) was heard on July 16, 2014, by Judge Coleman. Judge Coleman denied the preliminary relief requested in an Order entered that day, and issued a written Memorandum sometime thereafter. Judge Coleman’s decision focused primarily on Count III, involving the interpretation of Township Ord. §4-9.14. It did not address Bernard Citizens’ claim that the Settlement Agreement violated Ord. §4-9.5(a)(5), read together with the state OPM law, N.J.S.A.10:4-6 et seq., the Township’s local OPM ordinance, Ord. §2-1.5 and relevant OPM resolutions, Resolution # 2013-0043 and Resolution # 2014-0043.

On or about August 1, 2014, the Township filed its Answer in this matter, and no discovery requests were served. Mr. Walsh, however, did review all the Township’s meeting agendas and minutes for meetings conducted between May 7, 2013 (i.e., the date the Planning Board adopted its 2011 Report regarding MQI’s proposed Rehabilitation Plan) through April 15, 2014 (i.e., the date on which the Township was scheduled to consider Resolution #2014-86), and then submitted an OPRA request seeking, among other things, copies of minutes from each of nine (9) executive sessions that he had identified as sessions in which the Committee met to discuss “pending litigation” between MQI and the Township. He also requested invoices from the ELM Group (i.e., consultants that had previously been retained by the Planning Board with respect to MQI’s 2008 Rehabilitation Plan), which reflected the fact that such consultant group was reviewing the Planning Board’s 2011 Report on behalf of the Township without first executing a contract.

On April 11, 2015, Mr. Walsh, now acting, *pro se*, on behalf of Bernards Citizens submitted a pre-trial memorandum to the court pursuant to a Pre-trial Conference Order. At that time, the court informed Mr. Walsh that plaintiff, a nonprofit corporation, could not proceed with this matter without counsel. Mr. Walsh and other members of the group sought counsel, and on December 1, 2015, Bernards Citizens retained New Jersey Appleseed PILC as counsel. On December 2, 2015, New Jersey Appleseed filed a Notice of Appearance with the Court, and it now makes this submission in connection with a Pre-trial Scheduling Order dated November 24, 2015.

### STATEMENT OF FACTS

In order to evaluate the strength of Plaintiff's claims, I am providing the Court with a description of the statutory framework at play herein and the factual context in which the controversy arose.

#### A. Statutory Framework

At all relevant times in this litigation, the Township is and was a body politic and corporate in law, constituted and established pursuant to N.J.S.A. 40A:63-1 et seq., comprised of the residents of Bernards. In accord with N.J.S.A. 40A:63-1(a), the Township Committee is and was the legislative body of the Township. Pursuant to N.J.S.A. 40A:63-4, the Committee has the authority to, subject to general law and the provisions of the enabling statute, pass, adopt, amend and repeal any ordinance or, where permitted, any resolution for any purpose required for the government of the municipality or for the accomplishment of any public purpose for which the municipality is authorized to act under general law. Specifically, pursuant to N.J.S.A. 40:48-1, -2, and Bernardsville Quarry v. Borough of Bernardsville, 129 N.J. 221, 228-230 (1992), the Committee has the authority under its police powers to enact ordinances to limit quarry operations in the interests of the public health, safety, and welfare.

In addition to its police power authority to regulate quarries, the Township and its Committee are subject to the state OPM statute, N.J.S.A. 10:4-6 et. seq. Pursuant to this law, it is "the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies." N.J.S.A. 10:4-7. The Legislature has declared that such right "is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society" and thus that it is "the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon." Ibid. Township Ordinance § 2-1.5, specifically adopts the state's OPM law, and authorizes the Committee to adopt additional rules of procedure by resolution. The Committee has done so, and has granted residents the right to participate in deliberation, policy formulation, and decision making process, such as the review of quarry rehabilitation plans, through "public comment." See Resolution # 2013-0043, ¶2(n), for meetings conducted during 2013, and Resolution #2014-0043, ¶2(o), for meetings conducted during 2014.

#### The Quarry Licensing Ordinance

Ord. §4-9.1 provides that it is the intent of the Township to regulate quarries located within the

municipality

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.

Ord. §4-9.3 makes it “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 [Ord. §4-9.1, et seq.]” and Ord. §4-9.10 provides, in pertinent part:

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 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. 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.

At all relevant times since May 27, 2003, the Township’s quarrying/mining ordinance requires all quarry licensees to apply for and obtain an “approved” rehabilitation plan for the quarry property “to insure that quarried areas shall be suitably and reasonably rehabilitated after quarrying operations have been completed or otherwise terminated.” Ord. §4-9.1. In order to maintain its quarrying license, a quarry licensee must submit a new rehabilitation plan for approval every three years, and the failure to file a new plan subjects the licensee to non-renewal of its annual license. Ord. §4-9.5(a)(4). A quarry licensee is required to submit an “application to renew a quarry license . . . with the township by January 15 of each year” and 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.  
(Ord. §4-9.10)

## The Quarrying Rehabilitation Plan Ordinance

**The provisions of the Quarrying Ordinance that set forth the approval process of a licensee's rehabilitation plan require the quarry licensee to engage in a two-step review and approval process every three years:** Planning Board Review: Since May 27, 2003, §4-9.5(a)(4) requires the Bernards Township Planning Board to review a quarry licensee's rehabilitation plans "to ensure consistency with each and every provision of Subsections 4-9.4 and 4-9.5, including environmental, health, safety and other factors effecting [sic] the public welfare" and to submit findings and recommendations to the Committee. Township Committee Approval: Subsequent to the Planning Board's Review, the Township is required to undertake a review. Ord. §4-9.5(a)(5) provides that "[t]he 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 approves the plan, it will at the same time establish the security that will be required and the form it will take."

Both these review processes are required to take place pursuant to public processes, and the Planning Board's Review is not considered final municipal action on the rehabilitation plan; said review is a delegation of fact-finding by the Township Committee under municipal land use law, N.J.S.A. 40:55D-26(b)(stating that "the governing body may by ordinance provide for the reference of any matter or class of matters to the planning board before final action thereon by a municipal body or municipal officer having final authority thereon, except of any matter under the jurisdiction of the board of adjustment. Whenever the planning board shall have made a recommendation regarding a matter authorized by this act to another municipal body, such recommendation may be rejected only by a majority of the full authorized membership of such other body").

## The Final Grade Requirement of the Quarrying Rehabilitation Plan Ordinance

In this litigation, there has been some confusion about the final grade that is permissible in a rehabilitation plan. As originally adopted in 1972, Ordinance §21-10.9 "M-1 Mining Zone" of the Township's General Ordinances and Ordinance 292 provided at Section 5 that "[a]fter the [termination of quarry] operation, the area shall be brought to a final grade by a layer of earth two (2) feet in thickness or its original depth, whichever is less, but in any event capable of supporting vegetation. Fill shall be of suitable material approved by the Township Engineer" (the "Final Grade's Vegetative Layer"). Since May 27, 2003, however, Section 5, codified at Ord. §4-9.5(b)(2), was amended to provide that the Final Grade's Vegetative Layer may be at a depth of less than two (2) feet, provided that the lesser depth is "approved in the rehabilitation plan." It is unclear whether the Committee appreciated this amendment, permitting a depth less than two feet, when it approved the Settlement Agreement; thus, possibly rendering its adoption thereof unreasonable.

### B. MQI's 2008 Rehabilitation Plan; Adoption of a More Restrictive Anti-Fill Ordinance

On January 28, 2008, MQI submitted a rehabilitation plan to the Bernards Planning Board (the "2008 Rehabilitation Plan"). The Planning Board conducted its public review of the

2008 Rehabilitation Plan, and on June 11, 2008, it issued a report to the Committee with its findings and recommendations. The 2008 Planning Board Report provided in pertinent part:

1. The rehabilitation plan presented by the applicant in this matter, dated January 24, 2008, should be rejected, and the applicant should be required to submit a rehabilitation plan for approval by the Township Committee which satisfies the following recommendations.

\* \* \*

2. No further fill shall be brought to the quarry, except as may be specifically approved by the Township Committee for purposes of augmenting or supplementing the need for a 2 foot depth of soil to support a vegetative cover.

The Committee commenced its review of the 2008 Planning Board Report on June 24, 2008, in a public meeting as required by the state OPR law, N.J.S.A. 10:4-6 *et seq.* Unable to complete its review of the 2008 Planning Board Report at the initial public meeting, the Committee carried the review until its next public meeting on July 2, 2008. At its continued public meeting of the 2008 Report, the Committee introduced both Resolution #080308 and Ordinance No. 2025 (subsequently recodified in the Bernard's Municipal Code as Ord. §4-9.14) - An Ordinance Amending Chapter IV Entitled "General Licensing", Section 4-9 Entitled "Quarrying" of the Revised General Ordinances of the Township of Bernards, to Add New Section 4-9.14 Entitled "Importation of Fill Material onto Quarry Property Is Prohibited" ("Ord. §2025").

Resolution #080308 states, in pertinent part:

*1. The rehabilitation plan presented by the applicant in this matter, dated January 24, 2008, should be rejected, and the applicant should be required to submit a rehabilitation plan for approval by the Township Committee which satisfies the following recommendations.*

**The Proposed Rehabilitation Plan is REJECTED. MQI and Tilcon are required to submit a revised rehabilitation plan which satisfies the requirements indicated herein to the Planning Board by October 3, 2008.**

\* \* \*

*2. No further fill shall be brought to the quarry, except as may be specifically approved by the Township Committee for purposes of augmenting or supplementing the need for a 2 foot depth of soil to support a vegetative cover.*

**No further fill is permitted to be brought or imported into the Quarry Property, except as may be specifically first reviewed and approved by the Planning Board and subsequently reviewed and approved by the Township Committee exclusively for purposes of augmenting or supplementing the need for a 2-foot depth of soil to support a vegetative cover. Should the Planning Board and Township Committee approve such limited importation of fill material into the Quarry Property, the importation of fill material must be in conformance with: (1) source testing requirements (see Condition**

**# 7), JDEP/Township approved testing protocol (see Condition # 7), and such observation, sampling and testing standards required by Township Committee resolution or ordinance, as may be amended from time to time. (the “Anti-Fill Resolution”)**

While Ordinance No. 2025 states, in pertinent part:

NOW, THEREFORE, BE IT RESOLVED by the Township Committee of the Township of Bernards, as follows:

**Section 1.** Chapter IV Entitled “General Licensing”, Section 4-9 Entitled “Quarrying”, of the Revised General Ordinances of the Township of Bernards, is hereby supplemented and amended to add new Section 4-9.14 entitled “Importation of Fill Material Onto Quarry Property Is Prohibited”, as follows:

**§ 4-9.14 Importation of Fill Material onto Quarry Property Is Prohibited**

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. (hereinafter, the “Anti-Fill Ordinance”)

On behalf of the Township, the Committee adopted the Anti-Fill Resolution at its public meeting on July 2, 2008, which among other things, rejected the 2008 Rehabilitation Plan. With respect to the Anti-Fill Ordinance it followed the procedure set forth in N.J.S.A. 40:49-2 applicable to ordinances. That is, the Anti-Fill Ordinance was first introduced to the Committee in the form set forth above in paragraph 20, was passed after its first reading by the Committee on July 2, 2008, without any changes, and, on July 7, 2008, notice of the Anti-Fill Ordinance was published together with notice of the scheduled second hearing to be held on July 15, 2008. Immediately prior to its passage on July 2, 2008, then Committee member and Mayor John Carpenter concluded that “[Ordinance No. 2025] is consistent with our [Anti-fill Resolution] as well” (His statement is documented in a video clip of the meeting). On July 15, 2008, the Committee adopted the Anti-Fill Ordinance after a public hearing, and no changes were made to the Ordinance between its date of introduction on July 2, 2008, and its adoption on July 15, 2008.

C. Litigation Between the Township and MQI

On August 15, 2008, MQI filed a Third Amended Complaint in a civil action it had

previously filed against the Township and the Committee, adding the Planning Board as a new party and asserting claims against both the Committee and Planning Board with respect to the rejection of MQI's 2008 Rehabilitation Plan, as memorialized in Resolution #080308. The aforesaid civil action initially had been filed on March 28, 2008, in the Superior Court of New Jersey, Law Division, Somerset County under the caption "Millington Quarry, Inc. v. Township of Bernards and the Township Committee of the Township of Bernards," Docket No. SOM-L-475-08 (the "2008 MQI Lawsuit"). The 2008 MQI Lawsuit alleged certain claims against the Township arising from its enactment of Ordinance No. 2008, which imposed a moratorium on the transportation of all fill material to MQI's Quarry Property. Among the claims alleged, MQI asserted that Ordinance No. 2008 caused it immediate and irreparable harm justifying injunctive relief because it would result in, among other things, MQI's "loss of suitable and readily available fill material needed to complete [the 2 to 1 slope regrading requirement of] the Rehabilitation Plan to the Property". This 2-1 Slope Requirement, however, was formally eliminated on May 13, 2008, when the Township adopted Ordinance No. 2011.

As a result, in its Third Amended Complaint, MQI sought to enjoin the Township from eliminating the 2-1 Slope Requirement under Ordinance No. 2011, alleging among other things, that "rehabilitation of the [Quarry] Property in accordance with the 2003 Rehabilitation Plan [was] already significantly underway" and that "MQI would be irreparably harmed by such a requirement with respect to the 2008 Rehabilitation Plan, as well as future rehabilitation plans." Thereafter on May 19, 2011, the Township filed an Answer to the Third Amended Complaint and asserted a Counterclaim, seeking among other things revocation of MQI's annual quarrying license and an injunction prohibiting it from quarrying "until such time as MQI obtains from the Township a quarry license and submits a revised rehabilitation plan that is reviewed by the Planning Board and approved by the Township Committee."

At no time during the 2008 MQI Lawsuit did this Court enter an order requiring MQI to submit a new rehabilitation plan to the Township; rather, in and about September 21, 2011, MQI requested the Hon. Edward M. Coleman, J.S.C., to enter an Amended Case Management Order. Such Amended Case Management Order was issued by consent and granted a stay of the 2008 MQI Lawsuit, in Recital ¶ 1(a), "to provide Plaintiff with an opportunity to submit a new reclamation plan for the Milling Quarry ("Plan") and to allow Defendant Planning Board time to consider and act on same."

#### D. MQI's 2011 Rehabilitation Plan

On October 17, 2011, MQI submitted a new rehabilitation plan to the Bernards Planning Board ("MQI's 2011 Plan"). This plan was submitted as a precondition to renewing its annual quarrying/mining license, Ord. §4-9.10; it was not submitted to the Planning Board pursuant to a court order entered in the then pending 2008 MQI Lawsuit. In the 2011 Rehabilitation Plan, MQI did not request permission to import fill in order to comply with the 2-1 Slope Requirement it had initially challenged in its 2008 litigation (but which had since been eliminated pursuant to Ordinance No 2011).

The Planning Board's review of MQI's 2011 Plan required seventeen public hearings spanning over two years, and resulted in the issuance of a report (adopted May 7, 2013) (the

“2011 Board Report”). The Planning Board concluded in its 2011 Board Report that MQI failed to prove it was necessary to import off-site fill in order to satisfy its obligation under Ord. §4-9.5(b)(2) to create a vegetative layer atop the final grade of approximately 95 acres of the 180 acre Quarry Property (i.e., 40% of the Quarry Property that MQI referred to as its “meadow area), and that as a result of MQI’s deficient proofs, the Board was unable to complete its review of the proposed rehabilitation of the meadow area and “ensure [MQI’s 2011 Plan’s] consistency with each and every provision of Subsections 4-9.4 and 4-9.5, including environmental, health, safety and other factors effecting [sic] the public welfare” as required by Ord. 4-9.5(a)(2).

Accordingly, as part of its 2011 Board Report, the Planning Board recommended to the Township that its decision on rehabilitation the 40% meadow area be postponed until MQI cured its deficient proofs regarding its fill calculations, and that an “interim rehabilitation plan be accepted” to rehabilitate the remaining 60% of the Quarry Property.

E. Township “Secret” Review of 2011 Rehabilitation Plan

After the Planning Board issued its report on May 7, 2013, there was silence from the Township Committee with respect to its review of the Planning Board’s recommendations. A review of the minutes of Committee meetings indicates, however, that the Township did commence a review of the 2011 Board Report as required by Ord. §4-9.5(a)(5). It just did not do so in public, as required by Ord. §2-1.5, Resolution # 2013-0043, and Resolution # 2014-0043. Specifically, on June 28, 2013, MQI’s representatives met with then Mayor Carolyn Gaziano and then Deputy Mayor John Carpenter to discuss the 2011 Rehabilitation Plan; on August 27, 2013, Executive Session minutes reflect that although the Committee announced that it was holding an executive session closed to the public to discuss the 2008 MQI Lawsuit, it actually reviewed the 2011 Board Report during that session; similarly, on October 15, 2013, Executive Session minutes reflect the distribution of draft confirmatory soil sample collection and analysis procedures prepared earlier in the day by an expert retained by the Township with respect to matters at issue in the 2011 Rehabilitation Plan; again, on November 12, 2013, Executive Session minutes reflect detailed discussions directly related to the Township’s review of the 2011 Rehabilitation Plan, even though such matters such as fill depth, importation of clean soil categories, on-site sampling costs, and acceptable truck traffic were discussed as “conditions” to be demanded in settlement; and on January 14, 2014, February 11, 2014, and March 11, 2014, the respective Executive Session minutes also reveal Committee review of the 2011 Rehabilitation Plan couched in the language of settlement negotiations.

Subsequently, on April 3, 2014, MQI delivered to the Township a signed agreement which, among other things, modified the 2011 Board Report to allow importation of off-site fill into the 40% meadow area (even though the Planning Board had concluded that MQI had failed to demonstrate that it required off-site fill to establish an appropriate vegetative layer under its 2011 Rehabilitation Plan).

F. Resolution Adopting Settlement of 2008 Litigation

Nearly one year after the Planning Board adopted its 2011 Board Report and without any advance warning or notice, the Township Committee posted an agenda for its regularly

scheduled meeting on April 15, 2014, and listed as Item No. 13(B) the following to occur at 9:20 p.m.:

Resolution #2014-0186 - Approving Settlement Agreement and Release including Exhibit A - Clean Soil Acceptance Plan, Exhibit B - Bill of Lading, Exhibit C - Cost Estimate 2011 Reclamation Plan by and between Bernards Township and Millington Quarry, Inc.

The published April 15<sup>th</sup> Agenda does not mention anything about Township review of the 2011 Planning Board nor indicate that it will be making any modifications to that Report in such Resolution. Likewise, the April 15<sup>th</sup> Agenda does not reference the Township's decision to "approve" lifting the ban on importation of fill contained in Ord. §4-9.1, nor its intent to amend Resolution #080308, insofar as it was exercising its authority to permit importation of fill into the Quarry Property without first receiving Planning Board approval. Simply put, prior to the posting of April 15<sup>th</sup> Agenda, no member of the public was aware that the Township had already "reviewed" the 2011 Board Report and had entered into a service contract with the ELM Group (who previously had been retained by the Planning Board). However, in a certification submitted by MQI at the time of the OTSC hearing, MQI admits that it was aware that the Committee had, in fact, "received and reviewed the Planning Board's Report soon after it was adopted by the Planning Board." See *Thomas C. Carton Cert.*, ¶ 23.

On April 15, 2014, few residents appeared at the Committee hearing. At that time, limited public comment was permitted. Nonetheless, at some point during the meeting, a motion was made to amend the agenda in order to table the decision on the MQI Settlement Resolution until April 29, 2014. It was approved, and the Mayor also announced that a "special public comment" period will be scheduled prior to the consideration of the Resolution on the 29<sup>th</sup>. Thereafter, the Committee posted an agenda for its meeting on April 29, 2014, and listed as Item No. 7(B) the following to occur at 8:00 p.m.:

Resolution #2014-0186 - Approving Settlement Agreement and Release including Exhibit A - Clean Soil Acceptance Plan, Exhibit B - Bill of Lading, Exhibit C - Cost Estimate 2011 Reclamation Plan by and between Bernards Township and Millington Quarry, Inc.

On April 29, 2014, the meeting was held, and a significant number of residents were present, although only a handful of those present were prepared to speak. Opposition was strong, and citizen testimony revealed a genuine outrage with the fact that the Committee had apparently engaged in a year-long review of the 2011 Planning Board Report in closed executive session under the OPM privilege typically granted litigation settlement discussions. The connection between the Township's "review," as required by ordinance, and settlement discussions with MQI related to its 2008 litigation was made explicit by the Township Attorney. He stated,

. . . As many of you are aware there were hearings before the Planning Board from 2011 to May of 2013 when the Panning Board finally issued its report last year. Our ordinance indicates as follows, "the township committee shall review the report from the Planning Board. It may then approve the rehabilitation plan." I have not heard any sentiment during settlement negotiations that there be an

outright approval of the rehabilitation plan. It may approve it with changes with the agreement of the applicant. The settlement agreement before you tonight would do that or it may reject the plan, as Mr Malay has argued for, and state its reasons. That essentially is what is before this Committee tonight. If it does reject the plan it needs to state its reasons, it needs to state its reasons in detail. The reasons would then ultimately be examined by a judge to determine whether they were rational and reasonable and not arbitrary capricious and unreasonable. But regardless of whether that action is taken tonight, if the matter is not approved in terms of the settlement agreement we will have a trial on the prior ordinance challenge. The Ordinance No. 2025 that bans the importation of fill that was enacted by this Township Committee, I should say a prior Township Committee in July of 2005. The settlement agreement if approved and we don't know if it is going to be approved until they vote obviously would mean that the Quarry would dismiss all challenges in the 2008 lawsuit with prejudice.  
(Transcript from Township Committee April 29, 2014 Meeting).

After the Committee voted to approve Resolution #2014-0186, this litigation was commenced by a newly established nonprofit community organization seeking to represent the interests of Bernards' residents concerned about MQI's rehabilitation activities, as approved by the Township.

#### CONCLUSION

For the foregoing reasons, Bernards Citizens requests that this Court acknowledge the significant violation of law that has occurred, and accordingly, set aside the Settlement Agreement that was negotiated between the Township and MQI in order to resolve MQI's challenge to the Township's rejection of MQI's 2008 Rehabilitation Plan. Settlement negotiations concerning litigation claims may be conducted behind closed doors, but the Township had an obligation, in this case, to conduct a public review of the Planning Boards' 2011 Report, and it is not permitted to avoid that obligation by conducting such review as part of settlement discussions arising from litigation involving a distinct and separate municipal action.

Respectfully submitted,

NEW JERSEY APPLESEED PILC

By: \_\_\_\_\_  
Renée Steinhagen, Esq.