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<p>Linda Huntley,</p> <p style="text-align: right;">Plaintiff,</p> <p>v.</p> <p>Finbar Equity Investments LLC, Tilcon New York Inc., Joseph V. McMahon Esq., in his capacity as Escrow Agency, the Borough of Bloomingdale, John Does 1-10, and ABC Corporations 1-10,</p> <p style="text-align: right;">Defendants.</p>	<p style="text-align: center;">SUPERIOR COURT OF NEW JERSEY LAW DIVISION PASSAIC COUNTY</p> <p style="text-align: center;">DOCKET # PAS-L-3306-16</p> <p style="text-align: center;">CIVIL ACTION</p>
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BRIEF FROM THE NEW JERSEY HIGHLANDS COALITION, AMICUS  
CURIAE

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Raghu Murthy, on the brief

## PRELIMINARY STATEMENT

Tilcon New York Inc. proposes to turn forty-five acres of preserved open space in the New Jersey Highlands Region (the “Meer Tract”) into a quarry. This would deal a huge blow to the State’s water supply, leaving taxpayers with the expense of replacing the clean drinking water provided to the State by the Meer Tract. The quarrying proposal would also destroy one of the most unique and valuable wildlife habitats in Passaic County. This is exactly the type of development that the Highlands Water Protection and Planning Act was intended to prevent. Tilcon’s proposal also violates a Conservation Easement executed by the prior owners of the Meer Tract, which preserves the majority of the property as open space. Finally, Tilcon seeks to complete this deal behind closed doors without the required review by the public and NJDEP, in violation of the Conservation Restriction and Historic Preservation Restriction Act.

For decades, Amicus Curiae, the New Jersey Highlands Coalition, has worked to protect properties like the Meer Tract, which exemplify the essential character of the Highlands Region. The New Jersey Highlands Coalition is a conservation organization whose mission includes protection of the Highlands’ water supply, and protection of the Highlands’ unique and valuable wildlife habitats.

Every day, the Meer Tract supplies clean drinking water to the State’s residents and businesses. The Meer Tract also serves as a critical habitat for

numerous threatened species and species of concern. For these reasons, the New Jersey Highlands Water Protection and Planning Council has determined that the Meer Tract is one of the most valuable remaining open spaces in Passaic County.

Tilcon's proposal, to clear and quarry forty-five acres of Open Space, fails to meet the standards of the State's Highlands Regional Master Plan. The Highlands Water Protection and Planning Act discourages such development.

Tilcon seeks to evade the required public and NJDEP review because the company knows that the quarrying proposal, which degrades the State's water supply and the Highlands' environment, would never survive review by the public or by NJDEP.

For all of these reasons, the Court should grant the relief sought by Plaintiff and enforce the August 2010 Conservation Easement.

## STATEMENT OF FACTS

In this case, this court must determine whether Tilcon's proposal, to clear 45 acres of Block 5105, Lot 14 in the Borough of Bloomingdale (the "Meer Tract") for quarrying, lives up to the standards of the Highlands Water Protection and Planning Act, and whether to enforce the Conservation Easement executed in October 2010, which preserves the majority of the Meer Tract as open space.

The Highlands Council has scored the Meer Tract as one of the most valuable remaining open spaces in Passaic County, for two reasons. Certification of Elliott Ruga ("Ruga Cert"). paras. 7-9. First, the Meer Tract supplies a significant volume of clean drinking water to the State every single day. Id. para. 16. Second, the Meer Tract is one of the most unique and most valuable wildlife habitats in Passaic County. Id. para. 39.

Due to the property's importance, the Highlands Council has placed the Meer Tract within the Protection Zone. Id. paras 8-9. The Highlands Council urges that development on parcels in the Protection Zone should be extremely limited, and subject to stringent limitations on water use, degradation of water quality, and impacts to environmentally sensitive lands. Id. para. 8.

The Highlands Council has determined that development of the Meer Tract is inconsistent with the Regional Master Plan. Id. para. 9.

Tilcon proposes to clear forty-five acres of the Meer Tract for quarrying. Id. para. 10. Quarrying is an especially destructive land use, because it annihilates all of the surficial natural resources and the ecological functions that those natural resources provide. Id. Quarrying also destroys all established subsurface hydrological systems and flows. Id. As detailed below, the proposed quarry would devastate the Meer Tract's water supply and the property's critical wildlife habitats.

### **Impact of the Proposed Quarry on the Meer Tract's Water Supply**

Two features of the Meer Tract are responsible for the Meer Tract's water collection and water purification functions: the property's high-value contiguous forests and its Open Waters. Id. para. 17. Tilcon's proposal would damage both of these features, and therefore degrade the quality and quantity of the Meer Tract's drinking water supply. Id. paras. 18-32.

Tilcon's proposal would clear forty-five acres of forests and leave the remainder fragmented. Id. paras. 18-23. When contiguous forest is fragmented, the remaining forested area has severely degraded ability to continue collecting and purifying water. Id. paras. 21-23. The proposal would also clear significant acreage of Open Waters, as well as the forested corridors that act as buffers for these Open Waters. Id. paras. 24-32. Finally, the proposal would grade a significant percentage of the Meer Tract's steep slopes, which has severe consequences for water collection and purification functions. Id. para. 33-37.

Several acres of the Meer Tract provide extremely efficient groundwater recharge; the Highlands Council refers to these acres as Prime Groundwater Recharge Area. Id. para. 16. Tilcon's proposal would clear a significant portion of this area, further damaging the Meer Tract's water ability to collect and filter water. Id.

The importance of the Highlands to New Jersey's water supply has been known for more than a century:

The Highlands' watersheds are the best in the State in respect to ease of collection ... in elevation, giving opportunity for gravity delivery, and in softness as shown by chemical analysis. These watersheds should be preserved from pollution at all hazards, for upon them the most populous portions of the State must depend for water-supplies. There has been too much laxness in the past regarding this important matter.

Report of the Potable Water Commission, 1907. Ruga Cert. para. 11.

Highlands experts warn that overdevelopment that degrades the Highlands water supply will necessitate expensive new water treatment systems, the costs of which will fall on taxpayers. Id. para. 12.

### **The Meer Tract's Ecological Function**

The Meer Tract's forests, Open Waters and steep slopes create a unique and especially valuable wildlife habitat. Id. para 38. This property is critical to the survival of several threatened species, and several species of concern. Id. paras. 40-48.

More than half of the Meer Tract lies within one thousand feet of a Vernal Pool. Id. para. 46. Numerous amphibious species spend their entire

breed and reproduce only in Vernal Pools, and live in the land surrounding them. Id.

Tilcon's proposal would clear forty-five acres of forested Critical Wildlife Habitat, and a significant acreage of Vernal Pools. Id. paras. 43-48. The remaining fragmented forested areas would have severely degraded ecological function. Id.

### **The August 2010 Conservation Easement**

In August 2010, the Meer Tract was owned by Meer Bloomingdale Estates LP and Reem Ventures Inc. Complaint for Declaratory Judgement and in Lieu of Prerogative Writs by Linda Huntley ("Huntley Complaint"), para. 47.

On August 21, 2010, the owners of the Meer Tract executed a Conservation Easement, which preserved the majority of the Meer Tract as open space. Id. para. 50, Answer of Defendants Tilcon New York Inc. and Finbar Equity Investments LLC ("Answer"), para. 50. The August 2010 Conservation Easement was subsequently delivered to the Borough. Huntley Complaint para. 51.

In February 2016, Finbar Equity Investments LLC acquired the Meer Tract. Huntley Complaint para. 60, Answer para. 60. Finbar had actual knowledge of the October 2010 Conservation Easement at the time of acquisition. Huntley Complaint para. 69, Answer para. 69.

The August 2010 Conservation Easement prohibits development of the forty-five acres of the Meer Tract which Tilcon proposes to clear for quarrying.

## **ARGUMENT**

In this brief, Amicus Curiae, the Highlands Council explains why the preservation of the Meer Tract as open space is critically important for the State's drinking water supply and the State's environment, and why Tilcon's proposal, which severely damages the Meer Tract, violates New Jersey law.

The Meer Tract supplies clean drinking water to the State every single day. Tilcon's quarrying proposal would severely degrade the quality and quantity of water coming from the Meer Tract. The burden of replacing the Meer Tract's water collection and water purification functions will fall upon taxpayers.

The Meer Tract's contiguous high-value forest, its unique topography, and its extensive Open Waters and Vernal Pools make it one of the most unique and valuable wildlife habitats in Passaic County. Several threatened species and species of concern thrive on this property. Tilcon's proposal would destroy this habitat, and damage the essential character of the Highlands.

Through the Highlands Water Protection and Planning Act (the "Highlands Act", N.J.S.A. 13:20), the Legislature intended to limit Highlands development to "appropriate" proposals, which minimizes impacts to water resources and the environment, and met the standards of the State's

Highlands Regional Master Plan. N.J.S.A. 13:20-2. Tilcon's proposal does not conform to the Regional Master Plan and devastates the Meer Tract's water supply and environment; this is exactly the type of development that the Highlands Act was intended to prevent.

Fortunately, in August 2010, the Meer Tract's owners executed a Conservation Easement, which preserves the majority of the property as open space. Like all Conservation Easements, the August 2010 Conservation Easement is "intended to guide and protect the public at large, and to preserve ... a valuable environmental resource for posterity." In re Flood Hazard Area Verification Approval & Freshwater Wetlands Letter of Interpretation, 2014 WL 2810153, \*18 (App. Div. 2014).

Tilcon's quarrying proposal violates the August 2010 Conservation Easement.

The August 2010 Conservation Restriction has not been recorded. Nevertheless, the August 2010 Conservation Easement is valid and enforceable against Finbar because this company had actual knowledge of the easement when it acquired the Meer Tract. Under the Recording Act, unrecorded easements are valid and effective against successive owners who have actual notice of the easements. N.J.S.A. 46:26A-12.

The August 2010 Conservation Easement is further strengthened against Tilcon's attacks by the Conservation Restriction and Historic Preservation Restriction Act (the "Conservation Restriction Act", N.J.S.A.

13:8). The Conservation Restriction Act requires a public hearing and NJDEP approval before the August 2010 Conservation Easement can be set aside.

N.J.S.A. 13:8-6. As detailed in Point III, courts interpreting the Conservation Restriction Act have enforced unrecorded Conservation Easements against purchasers with actual knowledge of the easement, following the rule set by the Recording Act.

In sum, Tilcon's proposal violates the Highlands Act, the August 2010 Conservation Easement, and the Conservation Restriction Act. This court's enforcement of these laws is critical because the Meer Tract performs invaluable water collection, water purification and ecological functions for Passaic County.

I. TILCON'S PROPOSAL VIOLATES THE HIGHLAND ACT ,  
DEVASTATES VALUABLE OPEN SPACE, WATER SUPPLY  
SOURCES AND THE ENVIRONMENT.

This court must determine whether Tilcon's quarrying proposal conforms to the New Jersey Highlands Water Protection and Planning Act of 2004 (the "Highlands Act"). Through this statute, the Legislature created the Highlands Water Protection and Planning Council (the "Highlands Council") as the state body that would oversee Highlands development, and required the Highlands Council to create a Highlands Regional Master Plan. N.J.S.A. 13:20-4 & -8.

The Highlands Act discourages "unplanned development": that is, development which fails to meet the standards of the Regional Master Plan. N.J.S.A. 13:20-2. The Highlands Council has closely examined the Meer Tract and declared development on this property would not meet those standards:

The Highlands Council does not dispute the findings of inconsistency [of proposed Meer Tract development] with regard to Highlands Resource protections as sought by the [Regional Master Plan]... The property is indeed extensively constrained by Highlands Resource features including Critical Wildlife Habitat, High Integrity Riparian Area, Highlands Open Waters (including wetlands and streams), Open Water Buffers, Forest in a Forest Resource Area, and Steep Slopes. ...the [Regional Master Plan] designated the site in a Conservation Priority Area ... indicating that the site is a priority for open space protection.

Ruga Cert. para. 9.<sup>1</sup>

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<sup>1</sup> Municipalities where development conforms to the Regional Master Plan are entitled to financial incentives. N.J.S.A. 13:20-15. If Tilcon's quarry is built, Bloomingdale will not be eligible for these incentives.

The Highlands Act also discourages “inappropriate” development. N.J.S.A. 13:20-1, N.J.S.A. 13:20-10(c)(9). The Highlands Council has urged that development in properties as valuable as the Meer Tract must be “extremely limited”, and “subject to stringent limitations on ... water use, degradation of water quality, and impacts to environmentally sensitive lands.” Ruga Cert. para. 8. Tilcon’s quarrying proposal is not limited in any way, includes significant harmful impacts to environmentally sensitive lands, and will severely degrade water quality. Given the Highlands Council’s limitations on Meer Tract development, Tilcon’s proposal is entirely “inappropriate”.

The Legislature intended to “protect, restore and enhance the quality and quantity of surface and ground waters” of the Highlands. N.J.S.A. 13:20-10.<sup>2</sup> The Borough’s allowance of a quarrying project that severely degrades the quality and quantity of the Meer Tract’s waters clearly does not satisfy the legislative intent behind the Highlands Act.

Since the Highlands Act was passed, the State’s reliance on Highlands water supply has only increased. Ruga Cert. para. 14. Therefore, preservation of Highlands open space is more important than ever.

In sum, Tilcon’s quarrying plan is unplanned, inappropriate development which will degrade the Meer Tract’s water supply and

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<sup>2</sup> One reason for this intent is that taxpayers must shoulder the burden for replacement of Highlands water supply lost through inappropriate development. Ruga Cert. para. 39.

environment. This is exactly the type of development that the Legislature intended to prevent through the Highlands Act.

## II. THE AUGUST 2010 CONSERVATION EASEMENT IS VALID AND ENFORCEABLE AGAINST THE CURRENT PROPERTY OWNER.

The next issue before the Court is whether to enforce the Conservation Easement executed by the Meer Tract's prior owners in August 2010, which preserves the majority of the property as open space. This includes the forty-five acres which Tilcon now wishes to clear and quarry. The Recording Act, N.J.S.A. 46:26A-12, supports enforcement of this Conservation Easement.

The August 2010 Conservation Easement has not been recorded. Nevertheless, the Recording Act makes clear that an unrecorded easement is still effective against the owner that executed it, and any successor with actual knowledge of the easement:

b. A claim under a recorded document affecting the title to real property shall not be subject to the effect of a document that was ... not recorded **unless the claimant was on notice of the ... unrecorded document.**

c. A deed or other conveyance of an interest in real property shall be of no effect against subsequent judgment creditors **without notice**, and against subsequent bona fide purchasers and mortgagees for valuable consideration **without notice** and whose conveyance or mortgage is recorded, unless that conveyance is evidenced by a document that is first recorded.

N.J.S.A. 46:26A-12.

Finbar Equity Investments LLC had full knowledge of the August 2010 Conservation Easement at the time the company acquired the Meer Tract, in

February 2016. Huntley Complaint para. 69, Answer para. 69. Therefore, under the Recording Act, Finbar is bound by that easement.

Courts interpreting the Recording Act have enforced unrecorded easements against successors who had actual knowledge of the easement. PNC Bank v. Axelsson, 373 N.J.Super. 186 (N.J.Sup.Ct. 2004)(holding that an unrecorded easement would be valid and enforceable against a future owner, if that owner had actual knowledge of the easement: "... if plaintiff knew of defendants' unrecorded easement when it took its mortgage, [the Recording Act] would validate the unrecorded easement as against the [plaintiff].") See also Siligato v. State, 268 N.J.Super. 21, 28 (App.Div. 1993)("The law is well settled that an unrecorded deed is ... perfectly efficacious in passing title from grantor to grantee...")

In sum, the August 2010 Conservation Easement must be enforced because Finbar acquired the Meer Tract with full knowledge of the easement.

### III. TILCON'S PROPOSAL TO SET ASIDE THE AUGUST 2010 CONSERVATION EASEMENT VIOLATES THE CONSERVATION RESTRICTION AND HISTORIC PRESERVATION RESTRICTION ACT.

The final issue before the Court is whether Tilcon must undergo a public hearing and obtain NJDEP approval as required by N.J.S.A. 13:8-6 of the Conservation Restriction Act, before the August 2010 Conservation Easement can be set aside. Plaintiff's position, that the Conservation Restriction Act does apply to this easement, is correct for two reasons. First, the August 2010 Conservation Easement satisfies the statute's definition.

Second, following the rule set by the Recording Act, the Conservation Restriction Act validates unrecorded Conservation Easements against purchasers like Finbar, who had actual knowledge of the easement at the time of purchase.

The Conservation Restriction Act defines a Conservation Restriction as an easement, executed by or on behalf of a landowner, that preserves property as open space:

“Conservation restriction” means an interest in land less than fee simple absolute, stated in the form of a right, restriction, easement, covenant, or condition, in any deed, will or other instrument, other than a lease, executed by or on behalf of the owner of the land, appropriate to retaining land or water areas predominantly in their natural, scenic or open or wooded condition, or for conservation of soil or wildlife, or for outdoor recreation or park use, or as suitable habitat for fish or wildlife...”

N.J.S.A. 13:8B-2

Once the August 2010 Conservation Easement was executed, it met the statute’s definition and gained the protection of the Conservation Restriction Act. The definition pointedly does **not** require the document to be recorded.

Moreover, the fact that the August 2010 Conservation Easement has not been recorded is irrelevant as to a purchaser like Finbar, who had full knowledge of the easement at the time of purchase.

The Conservation Restriction Act includes a requirement that after execution, Conservation Restrictions must be recorded in order to provide

guidance to the public. N.J.S.A. 13:8A-4. The recording obligation does not invalidate unrecorded Conservation Easements; to the contrary, “the manifest purpose of the recording obligation is to place the public appropriately on notice of the conservation restrictions, so that the future owners, occupants, neighbors, and other citizens can limit their activities accordingly.” In re Flood Hazard Area Verification Approval & Freshwater Wetlands Letter of Interpretation, supra, 2014 WL 2810153 at \*17.

In 2014, the Appellate Division considered ten unrecorded Conservation Restrictions and unequivocally rejected the proposition that “conservation restrictions ... are of no effect because they were never recorded.” In re Flood Hazard Area Verification Approval, supra, 2014 WL 2810153 at \*17.

In this case, the Appellate Division ruled that all ten unrecorded Conservation Restrictions were still valid, and that “the only statutory mechanism for a Conservation Restriction to be removed or altered” was a public hearing and NJDEP approval, as required by the Conservation Restriction Act. Id. at \*17. The Appellate Division rejected the property owner’s argument that an open space agreement “can no longer be binding because it was never recorded.” Id.

Tilcon seeks to distinguish the holding of this case by pointing to the fact that the first nine lots were sold about a decade before the property owner sought release from the Conservation Restrictions. Id. at \*2. The court

notes this fact in passing during its recitation of the facts, but does not mention in anywhere in its reasoning for ruling that the unrecorded Conservation Restrictions were valid. Id. at \*14-\*21. The court made no distinction between the Conservation Restrictions on the lots that were sold, or the Conservation Restriction on the unsold lot: because the sale was irrelevant to the validity of the Conservation Restrictions.

See also Gallagher v. Borough of Seaside Park, 2015 WL 8957635, \*5 (D.N.J. 2015)(The court enforced an unrecorded Conservation Easement, ruling that the property owner “intended to be bound”).

In sum, Tilcon’s proposal must undergo public review and obtain NJDEP approval, because the August 2010 Conservation Easement is protected by and governed by the Conservation Restriction Act. The August 2010 Conservation Easement satisfies that statute’s definition. Also, an unrecorded Conservation Easement is enforceable against a purchaser like Finbar that acquires the property with full knowledge of that easement.

## CONCLUSION

For the reasons detailed above, this Court should grant the relief sought by Plaintiff, and enforce the August 2010 Conservation Easement.

Respectfully submitted,

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Date

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