

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF JEFFERSON

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THOUSAND ISLANDS LAND TRUST, INC.,

Plaintiff,

-against-

Index No.:

RON CLAPP and CARLETON VILLA, LLC,

Defendants.

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**MEMORANDUM OF LAW IN SUPPORT OF THOUSAND ISLAND LAND  
TRUST, INC.'S MOTION FOR A PRELIMINARY INJUNCTION AND  
TEMPORARY RESTRAINING ORDER**

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**PRELIMINARY STATEMENT**

This action involves the proposed and actual development on real property located in the Town of Cape Vincent, Jefferson County, New York and on Carleton Island, which is an island on the St. Lawrence River. Plaintiff Thousand Islands Land Trust, Inc. (“TILT”) holds a Conservation Easement (the “Easement”) on Carleton Island, which presently consists of all single-family residential or undeveloped lots. Parcel No. 1 is the property at issue in this case (the “Villa Property”), which is owned by defendants Ron Clapp and Carleton Villa, LLC and which is protected by the Easement. This case involves blatant violations and likely future violations of the Easement, as well as a Declaration of Restrictions (the “Declaration”). TILT is moving for a temporary restraining order and a preliminary injunction to enjoin construction work on the Villa Property that began on April 9, 2024 and that will result in irreversible damage to that property. On the other hand, Defendants will not suffer any hardship by granting this motion because the Villa Property has been vacant and unused for decades, as well as because Defendants do not even have municipal approvals for their development yet.

As brief background on conservation easements, the State Legislature created them in order to “conserve[e], preserv[e] and protect[] its environmental assets and natural and man-made resources, . . . open spaces, . . . agricultural and forest lands, [and other] areas which are significant because of their scenic or natural beauty or wetland, shoreline, geological or ecological, including old-growth forest, character.” N.Y. Env’tl. Conserv. Law § 49-303(1) (Consol. 2024). The Legislature clearly determined that conservation easements are “fundamental to the maintenance, enhancement and improvement of recreational opportunities, tourism, community attractiveness, balanced economic growth and the quality of life in all areas of the state.” *Id.* § 49-301. In fact, these policy values appear in the State Constitution itself.

N.Y. Const. art XIV, § 4 (2024). In other words, conservation easements provide an incredible value to the citizens of this State through the protection of natural resources and open spaces.

### **STATEMENT OF FACTS**

TILT respectfully refers to the Verified Complaint and Affidavit of Spencer Busler (the “Busler Affidavit” or “Busler Aff.”) for a full discussion of the facts relevant to this case and this motion. Briefly, Defendants are in the process of a proposed development, for which they have received no permits or approvals yet (Busler Aff. ¶¶ 21-36, 45). The proposed development would violate several provisions of the Easement and the Declaration (*id.* ¶¶ 21-36, 46-51), and TILT had previously informed Defendants of this by letter dated March 1, 2024 (*id.* ¶ 36).

On April 9, 2024, TILT staff arrived at Carleton Island between 8:30 and 9:00 AM for a monitoring visit to collect more information on the current condition of the Villa Property, which is something that TILT routinely does pursuant to its rights under the Easement. TILT had given prior notice of its visit to Defendants (Busler Aff. ¶¶ 37, 39). TILT had no reason to believe that any work would be occurring on the Villa Property on that day, as Defendants had not started any such work yet and no approvals or permits had been granted for their proposed development (*id.* ¶ 45). However, to their surprise, shortly after TILT’s staff members arrived, heavy equipment began arriving at the Villa Property via the RJ marine barge (*id.* ¶¶ 42-44). Equipment operators began clearing vegetation almost immediately (*id.*). TILT’s staff took photographs of both the work and the Villa Property (*id.*).

### **ARGUMENT**

Generally, to obtain a preliminary injunction or a temporary restraining order, a movant must establish the following elements: (1) a likelihood of success on the merits; (2) a

likelihood of an irreparable injury if injunctive relief is denied; and (3) a balancing of the equities in the movant's favor. See N.Y. CPLR § 6312(c) (Consol. 2024); *AJMRT, LLC v. Kern*, 154 A.D.3d 1288, 1289 (4th Dep't 2017); *John G. Ullman & Assocs. v. BCK Partners*, 139 A.D.3d 1358, 1358 (4th Dep't 2016); see also *Free Country Ltd v. Drennen*, 235 F.Supp.3d 559, 565 (SDNY 2016) ("The standard for an entry of a TRO is essentially the same as for a preliminary injunction") (applying New York law); N.Y. CPLR § 6301 (Consol. 2024). Furthermore, "[t]he purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits." See *Arcamone-Makinano v. Britton Prop., Inc.*, 83 A.D.3d 623, 624 (2d Dep't 2011). More importantly, the law is well settled that injunctive relief is warranted to avoid further damage to real property and to preserve the status of that property. See, e.g., *Karabatos v. Hagopian*, 39 A.D.3d 930, 932 (3d Dep't 2007).

Here, as discussed below, TILT has undoubtedly presented overwhelming evidence that establishes each of these elements. In particular, the evidence proves the following: (1) that TILT will be successful on the merits because Defendants have committed straightforward violations of the Easement and the Declaration, as well as that they are likely to continue to violate both; (2) that irreparable injury has occurred and will continue to occur to the Villa Property because Defendants are removing trees, clearing other vegetation, and performing excavation activities, as well as because they have the equipment onsite and motivation to continue doing so; and (3) the equities favor an injunction because Defendants' work will cause irreversible damage to the Villa Property, which greatly outweighs any hardship to Defendants given that this property has sat vacant and unused for decades (up until, apparently, April 9, 2024). Therefore, TILT is entitled to a temporary restraining order and, ultimately, a preliminary injunction prohibiting development work on the Villa Property.

**POINT I**

**TILT HAS ESTABLISHED A LIKELIHOOD OF SUCCESS BECAUSE THE EVIDENCE PROVES THAT THE EASEMENT AND THE DECLARATION HAS BEEN VIOLATED AND/OR WILL BE IMMEDIATELY VIOLATED BY DEFENDANTS' DEVELOPMENT WORK ON THE PROPERTY**

Here, based on the evidence available at this early stage, Defendants' proposed development of the Villa Property has and will violate both the Easement (Subpoint A, *infra*) and the Declaration (Subpoint B, *infra*) (Busler Aff. ¶ 25).

**A. The Conservation Easement.**

Conservation easements—like other easements and restrictive covenants—will be enforced according to the terms of the easement, and any conduct in contravention of those terms is a violation. *See Stonegate Family Holdings, Inc. v. Revolutionary Trails, Inc., Boy Scouts of Am.*, 73 A.D.3d 1257, 1261-62 (3d Dep't 2010), *lv. denied* 15 N.Y.3d 715 (2010). Given the public importance of conservation easements—as discussed above—courts have repeatedly held them to be “of a character wholly distinct from the easements traditionally recognized at common law and are exempted from any of the defenses that would defeat a common-law easement.” *Argyle Farm and Properties, LLC v. Watershed Agricultural Council*, 135 A.D.3d 1262, 1264 (3d Dep't 2016) (quoting *Stonegate*, 73 A.D.3d at 1261 and citing *Matter of Friends of Shawangunks v. Knowlton*, 64 N.Y.2d 387, 392, (1985)). Furthermore, “conservation easement[s] should be interpreted so as to give effect to the intent of the parties as expressed by the language employed” and “if there is any doubt as to the extent or scope of an easement, the terms of such grant are to be construed most favorably to the grantee.” *Matter of Darwak v. City of N.Y.*, 188 A.D.3d 1511, 1513 (3d Dep't 2020) (emphasis added).



Put simply, the culmination of these rules and the important policy objectives underlying conservation easements is that they should be strictly enforced. The proposed development of the Villa Property on Carleton Island violates several provisions of the Easement, especially when broadly construed in favor of TILT (as it must be under the *Darwak* decision). Defendants submitted a special use permit application and site plan, which proposes new construction on and development of the Villa Property for use as a bed and breakfast, as well as for “a campground/glampground (cabins and prebuilt safari tents).”<sup>1</sup>

The Easement establishes several limitations applicable to an area within 100 feet of the shoreline on almost all of Carleton Island, including the Villa Property; this area is referred to as the “100-foot shoreline buffer.” The limitations, which are found within Section 3 of the Easement, are summarized as follows:

- (a) Structures, “permanent or temporary,” are prohibited except “duck blinds, docks, and boathouses”;<sup>2</sup>
- (b) No more than 50% of the natural vegetation may be cut, and at least 100 feet of continuous vegetation must be left within any 300-foot frontage;<sup>3</sup>
- (c) Temporary, seasonal, or permanent occupancy is prohibited; and

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<sup>1</sup> According to the Merriam-Webster Dictionary, glamping is defined as “outdoor camping with amenities and comforts (such as beds, electricity, and access to indoor plumbing) not usually used when camping” (available at <https://www.merriam-webster.com/dictionary/glamping>) (last accessed Apr. 10, 2024).

<sup>2</sup> The Court of Appeals has defined a “structure” as follows: “any production or piece of work artificially built up or composed of parts joined together in some definite manner.” *Joblon v. Solow*, 91 N.Y.2d 457, 464 (1998) (quoting *Lewis-Moors v. Contel of N.Y.*, 78 NY2d 942, 943)).

<sup>3</sup> Section 3(b) is not limited to the 100-foot shoreline buffer and extends to the entirety of Carleton Island, including the Villa Property.

- (d) Fires are prohibited as a management technique within protected vegetation areas.

Paragraph 2(a) of the Easement also conveys the “affirmative right” to “identify and to protect in perpetuity, the natural, wildlife, wetland, open space, aesthetic, scenic, successive vegetative, and woodland features and values of the property.” The Easement permits TILT to seek to enjoin any nonconforming activity that interferes with the conservation values of Carleton Island (including the Villa Property), even if the activity does not violate the specific prohibitions. Many of the conservation values are described in the “Whereas” paragraphs of the Easement, as well as in paragraph 1, entitled “Purpose.”

There are numerous violations of the Easement apparent from the site plan. Namely, as stated above, Section 3(a) prohibits structures, permanent or temporary, other than duck blinds, docks, and boathouses within 100 feet of the shoreline (the “buffer zone”). As shown on the marked map attached to the Affirmation of Phillip A. Oswald, Esq. (“Oswald Aff.”), the “Beach Expansion” is a structure within the meaning of this prohibition, particularly given that it appears to involve expanding the beach well beyond the existing shoreline (Oswald Aff. Ex. B). Further, there are signs, gravel and/or cobblestone paved paths, several beach-amenity structures, utility fixtures and a suspected utility line, a wall, and a fence (*id.*). Further, Sections 6-2.17 and 6-2.19 of the New York State Department of Health’s regulations mandate various fixtures at public bathing beaches such as that proposed in the site plan, including elevated lifeguard stands and large warning signs. Each of these constitute permanent or temporary “structures” within the meaning of the prohibition.

The construction barge depicted in the water to the southwest of the Villa Property and the floating platform depicted in the water northwest of the Villa Property are also both structures within the meaning of the prohibition. (Oswald Aff. Ex. B). Defendants may argue that the Easement only applies to the land, but the rights of an upland owners and interest holders to use land beneath water adjacent to their property (“riparian rights”) are “incident to the ownership of the bank and is a part of the estate of its owner.” *See Squaw Island Freight Terminal Co. v. Buffalo*, 246 A.D. 472, 476-77 (4th Dep’t 1936). Thus, Defendants’ riparian rights are part of its estate in the Villa Property (*i.e.*, Lot 1 on Carleton Island) and, therefore, are subject to the Easement.

Furthermore, Section 3(b) of the Easement prohibits removal of more than 50% of natural vegetation and requires that at least 100 feet of continuous vegetation remain on every 300 feet of frontage along the river (Busler Aff. ¶ 12). Photographs taken by TILT staff as recently as April 9, 2024 show that more than half of the Villa Property remains in an undeveloped, uncleared, and naturally vegetative state. Defendants’ site plan, however, calls for the removal of the majority of this vegetation to construct and emplace a variety of structures, including those listed above as being within the 100-foot shoreline buffer and several others (such as cabins and a “comfort station” with restrooms, a laundry room, and covered seating). Indeed, the site plan identifies only a select number of “[t]rees to remain” on the Villa Property (*id.* ¶¶ 27-30, 44). Further, when TILT staff arrived at the Villa Property on April 9, 2024 for a monitoring visit, the staff actually observed heavy equipment delivered to the Villa Property and then observed the start of the clearing work necessary for these structures (*id.* ¶ 42).

Moreover, Defendants' proposed development clearly violates the spirit of the Easement and the character of Carleton Island based on past and present use because it would transform a property there into one used for widespread commercial purposes, which purposes, according to Defendants' application, are for use as a bed and breakfast and "a campground/glampground (cabins and prebuilt safari tents)" (Busler Aff. ¶ 25). According to Defendants' application, the Villa Property would be developed to accommodate 196 people, consisting of a maximum capacity of 150 people for the bed and breakfast and a maximum capacity of another 46 people for the campground/glampground (*id.* ¶ 33). However, the majority of Carleton Island remains in an undeveloped and natural vegetative state, with the only occupancy and structures there being for single-family residential uses (*id.* ¶ 26). In addition to the reasons discussed above, transforming the character of the Villa Property and putting it to such a commercial use is a nonconforming use under the Easement (*id.* ¶ 19). As a result, TILT has the right to cease it by way of an order and judgment in this action.

**B. The Declaration of Restrictions.**

The Declaration of Restrictions likewise establishes several restrictive covenants that apply to most of Carleton Island, including the Villa Property. The relevant covenants are summarized as follows:

4. Trailers, mobile homes, or motor homes are prohibited;
7. The dumping of ashes, trash, garbage and other unsightly material;
9. Structures are prohibited within 100 feet of the shore except duck blinds, docks and boathouses;
15. There shall be no commercial excavation of the Villa Property.
16. There shall be no "grading of land surface, excavation, or exhumation activity" within "limits of nominated lands" as shown on the subdivision map for Carleton Island without at least 30 days' notice to TILT.

Here, like the violations of the Easement, Defendants' development work has and will violate the Declaration. First and foremost, this work has already violated the Declaration because based on firsthand observations by TILT's staff, Defendants began grading and clearing land on April 9, 2024 without giving any notice to TILT, which clearly violates Section 16 of the Declaration (Busler Aff. ¶ 44). Thus, Defendants have already violated an important provision of the Declaration, which provision is important for TILT to protect and preserve Carleton Island as provided for under the Easement by ensuring that all uses are consistent with the Easement and do not threaten or harm any of the conservation and/or ecological values specified in the Easement.

Additionally, for the same reasons that the structures discussed above violate the Section 3(a) of the Easement, those same structures violate Section 9 of the Declaration, which is basically identical to Section 3(a) of the Easement. Furthermore, by their own admissions, Defendants' development will be for a commercial purpose—*i.e.*, to operate the Villa Property as a bed and breakfast and “a campground/glampground.” (*Id.* ¶ 25). Thus, the excavation that is undoubtedly necessary for the cabins, “comfort station” with restrooms, gravel and/or cobblestone paved paths, utility fixtures and a suspected utility line, and a wall would violate the prohibition against commercial excavation under Section 15 of the Declaration (*id.* ¶ 30). Lastly, Section 7 prohibits the dumping of ashes, trash, garbage or “unsightly material.” The area designated on the site plan as a “construction zone” points to likely future violations of this covenant, especially given the amount of construction that would be necessary for Defendants' development and given the anticipated occupancy of 196 future patrons (*id.* ¶ 33).

Therefore, even at this early stage of the litigation, there is evidence that Defendants' proposed development would violate both the Easement and the Declaration. Indeed, Defendants have already violated Section 16 of the Declaration by not giving the required 30-day notice to TILT of the work that Defendants began on April 9, 2024 (Busler Aff. ¶¶ 46, 49). Further, this violation is not a mere technicality given the broad rights that TILT has to ensure that no property on Carleton Island is used in violation of the Easement or the Declaration, as well as to ensure that the ecological and conservation values acknowledged under the Easement are preserved and protected. Also, Defendants are likely in the process of violating the vegetation-removal restrictions under Section 3(b) of the Easement. Given their intended development—as evidenced by their own application and site plan—these violations are likely to continue, and others are likely to occur as well. Accordingly, TILT has met its burden to prove a likelihood of success on the merits.

## POINT II

### **TILT WILL SUFFER AN IRREPARABLE INJURY IN THE ABSENCE OF INJUNCTIVE RELIEF BECAUSE THE DAMAGE AND CHANGES TO THE VILLA PROPERTY AND CARLETON ISLAND AS A WHOLE WILL BE EITHER IRREVERSIBLE OR TAKE DECADES TO RESTORE.**

Generally, under New York law, the irreparable-injury requirement for injunctive relief is met when a party's conduct results in permanent changes to real property at issue. More specifically, the Appellate Division has unequivocally held that when the activities consist of excavation and the removal of trees and/or vegetation, the landowner has sufficiently demonstrated irreparable injury because such removal can be irreversible. *See Karabatos v. Hagopian*, 39 A.D.3d 930, 931 (3d Dep't 2007) (“inasmuch as . . . the removal of soil, rock, trees and other vegetation is both irreversible and threatens the structural integrity of the properties adjoining the road, plaintiffs demonstrated a danger of irreparable injury”). The

Appellate Division further has held that tree removal generally—whether or not such removal causes permanent damage—is sufficient to constitute irreparable injury to warrant injunctive relief. *See Walsh v. St. Mary’s Church*, 248 A.D.2d 792, 794 (3d Dep’t 1998) (holding “the threat of removal of several large trees . . . constitutes irreparable harm”).

Here, it cannot be disputed that Defendants’ conduct—*i.e.*, the undertaking of clearing of vegetation in alignment with their proposed development—either has already or will most certainly result in permanent (and possibly irreversible) damage and changes to the Villa Property, as well as the scenic aesthetics and natural resources of Carleton Island as a whole (Busler Aff. ¶ 30). As discussed above, the clearing of trees and other vegetation, likely landscaping work such as grading, and the erection of structures will change significant portions of the Villa Property from a naturally vegetative state to one that has been cleared and developed in order to operate a bed and breakfast and “a campground/glampground” that can accommodate up to 196 patrons (*id.* ¶ 33). Accordingly, the threatened damage to the Property here is significant and certainly sufficient to constitute irreparable injury.

In addition to the inherent nature of the damage to the Villa Property—which, again, has alone been held to constitute irreparable injury — the fact that several ecological and conservation values are at stake here also increases the potential irreparability of damage to that property. In the following averments from his affidavit, TILT’s Assistant Director and Director of Land Conservation explained how Defendants’ proposed development would result in significant damage to the Villa Property, which likely would spill over to and adversely affect Carleton Island as a whole.

As shown in the above photograph and as marked by the red rectangle, there is a narrow strip of land within the Villa Property

that is bordered by two bays, which are known as North Bay (shown to the left of the rectangle as looking at the above photograph) and South Bay (shown to the right of the rectangle as looking at the above photograph). As shown in this photograph, this narrow strip of land is in a natural vegetative state, as it mostly is comprised of trees, bushes, and shrubs. This is consistent with my personal observations of the Villa Property. To further show this natural vegetative state, photographs taken of the Villa Property (both by air with the use of a drone, as well as by land and water by use of a handheld camera) on a monitoring visit that I conducted on April 9, 2024 are attached hereto as Exhibit J. These photographs are fair and accurate depictions of the Villa Property as I observed them on that date.

Based on the most recent version of Defendants' site plan for their proposed development (attached hereto as Exhibit K), it is my belief that the majority of the vegetation in this narrow strip of land would be removed and/or cleared. Specifically, the site plan proposes a "comfort station" with restrooms, a laundry room, and covered seating, several cabins, gravel and/or cobblestone paved paths, a "beach expansion," signage, and other structures (i.e., manmade, artificial fixtures to the property) being located within this narrow strip of land. It is my opinion that the removal and/or clearing of this vegetation would be necessary to accommodate these structures and would violate Section 3(b) of the Conservation Easement.

Additionally, many of these structures (i.e., manmade, artificial fixtures to the property) would be located within the 100-foot shoreline buffer, even according to Defendants' own site plan. Specifically, that buffer is marked on the Carleton Island Map by a shaded area running roughly parallel to the shoreline, but it also is purportedly marked on Defendants' site plan by orange lines on both sides of that narrow strip of land. As can be seen by that site plan, several structures are located between those orange lines and the shorelines on North Bay and South Bay, including signage, gravel and/or cobblestone paved paths, a "beach expansion," several beach-amenity structures, utility fixtures, and a fence. There is also a "floating platform" located just off the shore in North Bay. It is my opinion that each of these structures would violate Section 3(a) of the Conservation Easement because they are located within the shoreline buffer and are not docks, boathouses, or duck blinds.

Furthermore, the conservation and ecological values of the Villa Property as part of Carleton Island likely would be disrupted to a significant extent from the clearing, construction, and disturbance



from these structures, as well as the cabins and structures ancillary to those cabins. Specifically, the emplacement and continued (and seemingly permanent) existence of these structures would remove wildlife habitat, would change the scenic and aesthetic appearance of the Villa Property and Carleton Island as a whole, would reduce the amount of open space, would disturb the ground, soils, and plant life, would change the woodland character of the Villa Property, and would otherwise disrupt and threaten the ecological features of the Villa Property and Carleton Island as a whole.

Also, the increase in human occupation that would necessarily result from changing a longtime unoccupied property to a property used to accommodate up to 196 people would also cause these adverse effects to the ecological and conservation attributes of the Villa Property and Carleton Island as a whole. Specifically, an increase in human occupation and presence is likely to cause further disruption to wildlife, is likely to cause pollution from the increase in garbage and waste, and is likely to cause disturbance to the natural ground conditions from the various services required for increased human occupation, such as utility services and waste-disposal services.

...

These consequences would extend well beyond the Villa Property at issue and would undermine the landscape approach to conserving the shoreline, which, again, is embodied in the Town's Comprehensive Plan, the State's Open Space Conservation Plan, and the Conservation Easement. A landscape approach to conservation means that several properties in a region are conserved in a manner that protects the landscape and natural resources that exist at large across the region. This is important because the landscape and natural resources do not end at human boundary lines, and the destruction or harm to landscape and resources will often have a detrimental effect on the entire landscape and ecosystem region wide and beyond the boundaries of any one particular property. Here, preserving the shoreline and vegetative state on certain properties is important to preserving the entire shoreline, including the regional landscape and ecosystems.

(Busler Aff. ¶¶ 29-33, 48). These averments are supported by photographic evidence, as well as general experience and familiarity with the Villa Property and Carleton Island as whole

(*id.* ¶¶ 26-35, 44). Further, in addition to the Easement and Declaration, Defendants' proposed development would be inconsistent with and would likely violate the Town and Village of Cape

Vincent Comprehensive Plan Update, the 2016 New York State Open Space Conservation Plan (*i.e.*, the NYS Coastal & Estuarine Land Conservation Program Plan), and TILT's Strategic Conservation Plan (*id.* ¶¶ 14-16, 34, 48).

Lastly, in addition to causing irreparable injury to the Villa Property, the evidence also proves that these injuries are *imminent* because TILT staff happened to observe the start of the development work on April 9, 2024, which, by the way, begun without any municipal approval of Defendants' pending applications (*id.* ¶¶ 27, 29, 39, 44). Therefore, TILT has met its burden to prove this element for injunctive relief, both in the form of a temporary restraining order and a preliminary injunction. TILT respectfully requests that this Court act now to enjoin future development work and, therefore, avoid future irreparable injuries that will most certainly occur in the absence of injunctive relief. The only way to prevent future irreparable injury to the Villa Property is for this Court to intervene now by granting this motion.

### **POINT III**

#### **THE EQUITIES SUPPORT AN INJUNCTION BECAUSE TILT AND THE LOCAL COMMUNITY WILL BE HARMED IF THE DEVELOPMENT CONTINUES, WHILE DEFENDANTS WILL NOT SUFFER ANY HARDSHIP FROM MAINTAINING THE STATUS QUO.**

To determine whether the equities are balanced in a movant's favor, courts generally will analyze whether "the irreparable injury to be sustained by the [movant] is more burdensome to it than the harm caused to [the non-movant] through imposition of the injunction." *See Poling Transp. V. A & P Tanker*, 84 A.D.2d 796, 797 (2d Dep't 1981). More importantly, when the hardship that allegedly would be suffered by a party opposing the injunctive relief is self-created, that hardship should not tip the equities in that party's favor. *Chambers v. Old Stone Hill Rd. Assocs.*, 1 N.Y.3d 424, 434 (2004) (landowner had "knowledge

of the restrictive covenants and of [the holders’] intention to enforce them”); *J.J. Cassone Bakery, Inc. v. Neri’s Land Improvement, LLC*, 65 A.D.3d 1288, 1289, 1290 (2d Dep’t 2009) (landowner expressly acknowledged the covenant in its deed). Furthermore, when the party opposing the injunctive relief will not be harmed by maintaining the status quo during the litigation, a court should err on the side of maintaining it. *See Abou-Saif v. Berkeley Associates Co.*, 99 A.D.2d 425, 425 (1st Dep’t 1984) (“the status quo should be maintained until the rights of the parties can be properly determined”).

Here, first and foremost, the extent of irreparable injuries that TILT—and the general public for that matter—will sustain cannot be understated; these injuries were discussed in the last section and will not be repeated here. With respect to the harm and hardship to the local community, this is established, inter alia, by the Legislative acknowledgement and adoption of the significant policies underlying conservation easements, as well as the several state and local policies that would be undermined by Defendants’ proposed development. Again, these state and local policies are reflected in the Town and Village of Cape Vincent Comprehensive Plan Update, the 2016 New York State Open Space Conservation Plan (*i.e.*, the NYS Coastal & Estuarine Land Conservation Program Plan), and TILT’s Strategic Conservation Plan (Busler Aff. ¶¶ 15-16).

There simply is no hardship that Defendants could suffer from not being able to develop the Villa Property during the pendency of this action that even comes close to outweighing the hardships arising from the irreparable injuries discussed above. Most importantly, Defendants are not currently operating their proposed business there, nor do they even have the necessary approvals to develop the Villa Property for their proposed business.

Indeed, by Defendants' own admission, the Villa Property has been vacant and unused for approximately 90 years (*id.* ¶ 24). Put simply, Defendants already need to wait for municipal approvals, and, therefore, they will not suffer any hardship by waiting pursuant to an injunction until, at the very least, they receive those approvals (*id.* ¶ 45).

Even assuming, arguendo, that Defendants were able to come up with some form of hardship, it would not tip the equities in their favor because such a hardship has been entirely self-created as they knowingly agreed to the terms of the Easement and the Declaration when they purchased the Villa Property, as both are filed on record. Furthermore, Defendants do not even know whether they will receive municipal approvals yet, so any investment they make in the Villa Property by having work performed there already is at risk of being lost (Busler Aff. ¶ 45). Indeed, Defendants likely are doing nothing more than trying to manufacture an investment in the Villa Property as leverage to use in securing a favorable ruling on their applications. In any event, Defendants knowingly agreed to the Easement and the Declaration, and they cannot now argue that any hardship resulting therefrom allows them to renege on that agreement.

Additionally, the timing of Defendants' recent construction activities heavily favors tipping the equities against them. On March 1, 2024, TILT notified Defendants that their proposed development would violate both the Easement and the Declaration (Busler Aff. ¶ 36). On March 20, 2024, Defendants' counsel wrote back clearly stating that Defendants would not be dropping their development plans (*id.*) On April 5, 2024, TILT gave notice to Defendants that TILT would be exercising its right to conduct a monitoring visit on the Villa Property (*id.* ¶ 37). Then, coincidentally, Defendants began development work on the same day that TILT did its monitoring visit (*id.* ¶¶ 42—46). Thus, the timing of these events clearly supports that

Defendants began their work as a form of “self-help” and in order to avoid prevent TILT from stopping the development as in violation of both the Easement and the Declaration. Such egregious conduct does not warrant any equity in Defendants’ favor, but, instead, warrants just the opposition—to wit, a holding that Defendants have acted in a particularly inequitable manner.

Lastly, the equities favor an injunction because TILT would be effectively stripped of its ability to enforce the Easement if it is not awarded injunctive relief. Given the clear importance of conservation easements as acknowledged by the courts and the legislature, such a result must be avoided. Therefore, the injuries and hardships that TILT will sustain as a result of Defendants’ conduct far outweigh any difficulties or hardships that Defendants could ever purport to sustain. As a result, the equities clearly weigh in favor of granting this motion.

In sum, TILT is a not-for profit conservation organization that has done nothing but attempt to carry out its duties and obligations to the public in a faithful and diligent manner. Namely, TILT merely informed Defendants of the likely violations of the Easement and the Declaration resulting from Defendants’ proposed development (Busler Aff. ¶ 3). TILT was trying to avoid contentious litigation by ensuring Defendants’ compliance with the Easement and the Declaration. However, Defendants proceeded with their development work without providing any notice to TILT, which only discovered this work while carrying out a monitoring visit. Put simply, TILT has done nothing but act in good faith and is doing everything in its power to avoid the current problem and this lawsuit, which is a direct result of defendants’ refusal to honor the terms of the Easement (id. ¶ 30). The unfortunate reality is that due to their blatant contempt for the Easement and the Declaration (as well as for TILT and the local

community), Defendants have necessitated this litigation, which will become more onerous and complex if they are allowed to continue their development work on the Villa Property.

### CONCLUSION

In sum, TILT has established that (1) it is likely to succeed on the merits in light of the straightforward violations of the Easement and the Declaration; (2) it will suffer irreparable injuries if injunctive relief is denied given the well-settled case law that damage to real property such as the damage here is an irreparable injury, especially in light of the added injury to conservation and ecological values that extend across artificial boundary lines; and (3) the equities support granting injunctive relief because the irreparable injuries to TILT far outweigh any hardship that Defendants might sustain, which, in fact, is nonexistent and nevertheless would be entirely self-created. From a more practical perspective, this Court should grant a temporary restraining order and ultimately an injunction because nothing is lost by maintaining the status quo, while everything could be lost by not doing so. Under any test, TILT clearly has met its burden for a temporary restraining order and a preliminary injunction.

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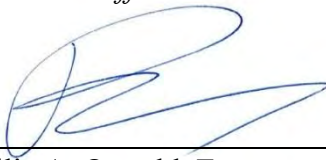
**RELIEF REQUESTED**

Accordingly, for the reasons discussed at length above and based on the averments in the Verified Complaint and the other materials submitted in support of this motion, TILT respectfully requests that this Court issue a temporary restraining order and that it ultimately issue a preliminary injunction that enjoins Defendants from pursuing any further work on the Villa Property, including, but not limited to, excavation, land clearing, vegetation removal, erection of structures, foundation work, paving, and any other work in furtherance of Defendants' proposed development. TILT respectfully requests that the permanent injunction remain effective during the pendency of this action or until further order from this Court. In the alternative, however, TILT respectfully requests that the permanent injunction remain effective until Defendants all municipal approvals are secured, at which time, submissions can be made to the Court to rule on the continuation of the injunction. TILT also respectfully requests that this Court award it such other and further relief that this Court deems just and proper.

Dated: April 10, 2024  
Saratoga Springs, New York

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Dated: April 10, 2024  
Saratoga Springs, New York

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