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January 20, 2009

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RE: Pike Industries Quarry, Spring Street, Westbrook, Maine

Dear Bill:

I am writing on behalf of IDEXX Laboratories, Inc. to respond to David Toolan's analysis of the Pike Spring Street quarry issues submitted to Mayor Chuluda by letter dated January 9, 2009. Attorney Toolan is Associate General Counsel to Oldcastle Materials, Inc., owner of Pike.

1. Pike presents no new material facts.

Mr. Toolan's letter responds to my Memorandum to you of September 9, 2008, a copy of which Mr. Toolan has had for three months. What is notable is that, after three months and access to public records and, assumedly, after access to all of Blue Rock's records, Pike has been unable to produce even one piece of documentary "evidence" that the City of Westbrook granted approvals for the quarrying activities at the new quarry after November 1968. There are no Board of Appeals approvals, no Planning Board approvals, no building permits, no City site inspection reports and no records of communications between Blue Rock or Pike and the City. This is even more interesting given that Pike recently bought the site from Blue Rock and presumably conducted "due diligence" on the permitting issue before closing on the transaction.

Mr. Toolan suggests that my Memorandum omits some critical historical facts that are necessary for a correct evaluation of the situation and that he is attaching to his letter "additional documents necessary to analyze this matter." He attaches 5 exhibits. Three of these were attached to my Memorandum (Ex.1 is my Tab 24; Ex.2 is my Tab 19; Ex. 3 is my Tab 28). They are not "additional documents." His

Exhibit 4 is a letter from the City Clerk dated May 14, 1968 that informs the addressees of a vote of the City Council to sell the old quarry to Blue Rock for \$2,000 “when the Mayor and the Quarry have settled in writing the problems involved in straightening of Spring Street, and the noise, blasting and other related quarrying problems.” His Exhibit 5 is a 90 day option dated November 20, 1968 under which Blue Rock agreed to sell property to Portland Terminal Co. There is no description of the property in the Option Agreement. Mr. Toolan states that it was “4 acres of property on Main Street.” Thus, Exhibits 4 and 5 are the only “additional documents” and both relate to Mr. Toolan’s claim of promissory estoppel. Neither of his new exhibits changes the zoning analysis in my Memorandum.

2. “Old” quarry versus “new” quarry and “grandfather” status.

Mr. Toolan references the statutes governing the licensing of quarries by the Maine DEP to argue that, under Maine law, the site is one quarry with two working pits. He then asserts that the old quarry was grandfathered as of 1968 and that the entire site, including the new quarry location, can take advantage of this. There are several problems with Pike’s argument.

First, the Maine DEP definitions, enacted in the 1990’s, are simply not relevant to the inquiry under the City’s ordinances. This was the essential point in the Law Court’s opinion in *Hollenburg v. Town of Union*, 918 A.2d 1214 (Me. 2007).

Second, it contains factual error. Mr. Toolan asserts (Toolan letter, p. 3) that “the City’s aerial photographs demonstrate that the quarry and crusher were operating in 1964.” In fact, the 1964 photo shows that the old quarry was mostly filled with water. Mr. Toolan apparently mistakes the City’s dump area in the photo for the old quarry. There was no quarrying or crushing activity ongoing in 1964.

Mr. Toolan correctly states that Sheldon Grant, who had acquired the old quarry from the City in 1951, sold it to Cook & Co. in 1955. He then states that Cook “*continued to operate* the quarry and sold the same to Paul E. Merrill on June 30, 1969.” (emphasis added) He later “backs off” that statement by saying that the old quarry and crusher were operated *at least* until October 24, 1956. (He apparently chose October 24 because it is the 5 year anniversary of the City’s conveyance to Grant.) The Law Court opinion in *C Company v. City of Westbrook*, 269 A.2d 307 (Me. 1970), states that the City claimed that no quarrying occurred after 1956. The opinion does not state that this allegation was refuted by the C Company. The allegation was not further discussed in the opinion because it was not necessary given the Court’s holding that any 5 year period of operation satisfied the deed condition. Based upon the photographic evidence and the

language of the Court's opinion, it seems fair to conclude that quarrying at the site stopped in 1956.

The third problem with Pike's argument is that it fails to address a critical provision in the Ordinance. The old quarry was a nonconforming use under the 1951 Ordinance because that area of Spring Street was in the Farming Zone, which did not allow quarries. Mr. Toolan asserts that the old quarry was a lawful nonconforming use because its existence preceded the Ordinance. I agree. However, Mr. Toolan fails to address the following provision in the 1951 Ordinance:

No non-conforming use that has been discontinued for a period of one year shall be re-established except in conformity with this Ordinance unless authorized by the Appeal Board.

Ord. (1951), Sec. IX.1. From 1956 through 1968, no quarrying occurred at the old quarry site. This 12 year hiatus means that the right to continue this use lapsed and could not be re-established without Appeal Board approval.

Mr. Toolan contends that the rezoning of the Spring Street site from Farming to Industrial in June 1968 somehow rendered the issue of continued non-conforming use moot. (Letter p. 3.) That is not quite correct. Blue Rock (who apparently held an option to purchase the site from the C Company or Paul Merrill) might have argued, as Mr. Toolan now argues, that its proposed new quarry was grandfathered by the old quarry. This would lead to the conclusion that Blue Rock could create the new quarry by gaining approval from the Appeal Board for the resumption of the lapsed non-conforming use. (The 1951 Ordinance does not state what criteria the Board would use to approve or deny the resumption of use.) However, as discussed below, that is not the route which Blue Rock chose. Instead, it applied to the Appeal Board as though it were seeking approval for a new quarry on a site at which there never had been a quarry. Blue Rock abandoned the non-conforming use concept. (The language of the application to the Appeal Board is confusing on this point as is the ownership of the various sites. In fact, Blue Rock owned no land in this area as of November 1968.)

It should be noted that the new quarry appears to be located on land owned in 1968 by the Wildlands Company while the old quarry, which is the basis for the grandfathering argument, was located on land on by the C Company. This is a problem for Pike's argument in that the law appears to be that non-conforming status will not extend beyond the lot on which the grandfathered quarry is located. See *Town of Levant v. Seymour v. Seymour*, 855 A.2d 1159 (Me. 2004).

As noted in my Memorandum to you (p. 10), the land owner who claims non-conforming use status has the burden to prove the lawful non-conforming use status. Pike has not been able to sustain its burden.

3. The November 7, 1968 Appeal Board decision.

Under the 1951 Ordinance, Appeal Board approval was needed to operate a quarry in the Industrial Zone because quarrying was a an “industry or use that is substantially injurious, noxious or offensive to a neighborhood by reason of . . . dust . . . vibration or noise or other cause . . .” See Ord. (1951), Sec. VII. Nevertheless, on September 23, 1968, Wildland Company applied to the City Building Inspector for a building permit and/or occupancy certificate for land on Spring Street. The intended use was the operation of the existing Spring Street quarry and Blue Rock concrete plant. The request was filed pursuant to Section VII of the Zoning Ordinance. (Plouffe Memo, Tab 19.) On October 11, 1968, the Building Inspector denied the request “due to the emission of noise, vibration, and dust which I feel would be detrimental to the neighborhood.” *Id.* On October 29, 1968, Wildland Company appealed the Building Inspector’s decision to the Appeal Board. It is of interest that Wildland Company did not own the site of the old quarry. That was owned by C Company. Wildland owned property located southerly of the C Company property and it is on this property that the new quarry was established.

This brings us to a central disagreement, viz.: The meaning of the November 7, 1968 Appeal Board decision. What was before the Board was an appeal from the decision of the Building Inspector. The application that he denied was pursuant to Section VII. The Board did *not* have before it an application for the re-establishment of a non-conforming use under Section IX.1 of the Ordinance. In effect, the Building Inspector had found that the quarry and concrete plant sought by the Wildland Company would have negative effects on the neighborhood (see above) and, under the provisions of the Ordinance pertaining to the Industrial Zone, only the Appeal Board could approve the use. The matter was before the Appeal Board on appeal from the Building Inspector decision.

The fundamental problem with Mr. Toolan’s analysis of the Board decision is his contention that the conditions attached to the permit were complied with by Blue Rock. This was not the view of the situation at the time, as evidenced by the contemporary news accounts, and it is not true today. (Plouffe Memo, Tabs 22 – 25.)

In order to “insure that this industrial use shall not be ‘Substantially injurious, noxious, or offensive to a neighborhood by reasons of the emission of odor, fumes, dust, smoke, or other cause’” the Board imposed four conditions to its approval of the quarry and other activities. (The approval ran to Blue Rock Quarry, Wildlands Co. and Cook & Co., Inc.)

- a. *The first condition.* The first condition required that certain environmental controls having to do with noise, vibration, water pollution and air pollution be included in a covenant that will become part of the deed of land that the City will sell to Blue Rock “or otherwise become legally binding on the Quarry operators.” The City land was the same as the C Company land and was the site of the old quarry. The City’s interest in the land was never conveyed to Blue Rock because the Council refused to approve the conveyance. (More than one year later, the Court determined that the City did not have an interest.) The refusal of the City to convey the land meant that the controls never became a covenant on the old quarry land and that the controls did not “otherwise become legally binding” on the operators of the quarry, old or new.

Mr. Toolan deals with the rather obvious non-compliance with the condition by stating: “Pike agreed to be legally bound by the provisions and safeguards referenced in the decision. Blue Rock and Pike, therefore, have complied with Article 1 of the ZAB decision.” I am not aware of any such agreement by Pike and, in any event, a unilateral assertion by Pike, 40 years after the Board decision, that it agrees to be bound by the controls is not a substitute for what the Board decision required.

- b. *The second condition.* The second condition required that there be an “Agreement” consummated between the City and Blue Rock to extend the environmental controls “to all abutting properties now owned, or acquired in the future by Blue Rock Quarry.” The Board obviously was concerned about the Wildlands Company property and other adjacent sites where quarry and other operations could spread (and did spread). This condition required an agreement with the City. Satisfaction of the condition was a bilateral matter and could not be unilaterally satisfied by Blue Rock. There was no agreement with the City and, therefore, the condition was never satisfied.

Mr. Toolan concedes that there was never an agreement. He attempts to deal with this by asserting: “Although the City . . . refused to sign the ‘Agreement’ . . . the City is bound by the terms of the Agreement.” How can the City be bound by an agreement that it did not sign? What are the terms of the agreement to which the City is supposedly bound? The condition called for an agreement to be worked out with the City and the City refused. The condition was never satisfied.

- c. *The third condition.* The third condition required that the “Agreement” referenced in the second condition also provide that Blue Rock will cease to maintain and operate its Main Street quarry and plant (asphalt) within a three year. During the three year period, Blue Rock would also “groom” the land at the Main Street

facility. There was to be a \$300 per day penalty paid to the City if the Main Street facility was not closed within three years of “the passing of papers by the parties.” The latter phrase could refer to signing of the Agreement by both parties or the conveyance of City land to Blue Rock. Mr. Toolan states that it refers to the Agreement.

We know that Blue Rock took rock out of the Spring Street quarry that it created in 1968. We also know that it continued operations at Main Street.

Mr. Toolan asserts: “Pike has complied with . . . [the third condition] . . . because it has been willing to transfer its Main Street operations to Spring Street.” Obviously, Pike’s willingness to move its operations from Main Street is not satisfaction of the condition. First, the condition spoke to Blue Rock’s moving its operations 40 years ago and not to Pike’s moving its operation today. In fact, we do not know whether Blue Rock was willing to move its operations and “groom” the Main Street site. Second, the plain fact is that the operation was not moved and the Main Street facility was not closed. The condition was not satisfied.

- d. *The fourth condition.* The fourth condition required Blue Rock to conduct vibration testing while blasting during the first phase of the quarry operations in order to ensure that the levels complied with the limits in the covenants imposed under the first condition. Copies were to be sent to the City Engineer. As far as we know, there are no such test results on file at the City notwithstanding that Blue Rock began blasting at the Spring Street site. This is evidence that Blue Rock did not consider itself to be blasting under the terms of the November 7, 1968 Board decision.

Mr. Toolan states: “Blue Rock conducted the required vibration testing and provided the results of the same to the City.” He does not provide copies of the results or any other evidence that the testing was done. As far as the public record shows, this condition was not satisfied.

In Part IV of his letter, Mr. Toolan makes a statement which is at the heart of his argument: “The ZAB decision was not made contingent upon the execution of the Agreement and is binding upon the City.” The statement is 180 degrees off the mark. The decision was subject to four explicit conditions which had to be satisfied in order for the approval granted to be effective. Blue Rock needed a positive response from the City Council in order to satisfy the conditions because the conditions included reaching an Agreement with the City. Blue Rock was not able to persuade the City Council to enter into the Agreement. The Agreement required two willing parties. The fact that Blue Rock may have been willing or that Pike is today willing to enter the Agreement and to

abide by the limitations imposed by the Board does not mean that the conditions were satisfied.

If Blue Rock objected to any portion of the November 7, 1968 decision, it should have appealed the decision to the Superior Court. It failed to do this and, therefore, the Board decision is final. What apparently happened is that Blue Rock eschewed the appeal process in favor of “self-help.”

4. The promissory estoppel argument.

The essence of this argument appears to be that Blue Rock entered into the option agreement with Portland Terminal Company, as described above, to sell property in the downtown area in reliance upon the City’s willingness to come to terms on the Agreement that was required by the Board decision. Mr. Toolan does not tell us whether Portland Terminal ever exercised the option and, if it did, how Blue Rock was harmed by the sale at what was presumably the fair market value. He also does not explain what the connection was between the Spring Street development and the downtown land sale. For example, there is no claim that Blue Rock was unable to carry on its Main Street quarry operations because it sold the quarry to Portland Terminal. Further, Blue Rock had no commitment from the City Council that it would come to terms on the Agreement, which was a separate document from the sale of the City’s land. Finally, how can Pike assert a promissory estoppel claim that it alleges Blue Rock had against the City 40 years ago?

5. The laches argument.

The City’s 40 years of non-enforcement is, indeed, troubling. However, it must be put in context. Testimony from neighbors at a recent City Council meeting was that Blue Rock’s quarrying activity at the Spring Street pit was minimal until recent years. Vibration from blasting was mostly unnoticed. Aerial photography of the site demonstrates that lateral expansion of the pit increased dramatically after about 2003. The neighbors have noticed a major qualitative and quantitative difference since Pike acquired the site in 2005. Noise from blasting and rock crushing has become very disturbing and vibrations from blasting have impacted both businesses and residences in the area. In other words, for many years, the quarry was not bothering people. Today, because of an increase in activity, it is having a major impact on surrounding properties.

My Memorandum to you anticipated that Pike would assert estoppel and laches defenses (p.15) and discussed the relevant legal principles. There is no need to repeat the analysis here. Blue Rock operated the new quarry, albeit at low levels, for years and derived value from it. It did so notwithstanding that the City Solicitor had publicly stated that it would be illegal to do so. Blue Rock’s vice-president even admitted that Blue Rock was

January 20, 2009

Page 8

in doubt about the legality of its operations. Blue Rock did not reasonably rely on representations by the City that it could operate the new quarry. See *Shackford and Gooch v. Town of Kennebunk*, 486 A.2d 2102 (Me. 1984). Further, given the value that Blue Rock derived from the rock that it removed from the quarry, it is difficult to see how it relied to its detriment. This is not a case in which the land owner invested large sums in construction and infrastructure only to have it declared “illegal.”

As to Pike, I am aware of no representations by the City that it could operate and/or expand the Spring Street quarry.¹ One would think that Pike’s pre-acquisition due diligence would have discovered the absence of City permits for quarrying at the site. There appears to be no basis for Pike to assert the equitable defenses of estoppel and laches.

We appreciate the opportunity to comment.

Very truly yours,



William L. Plouffe

WLP/kmr

cc: David M. Toolan, Esq.

Dick Daigle

¹ As you pointed out at the January 12th City Council meeting (Committee of the Whole) the legal status of the current operations at Spring Street is a separate question from the legislative proposal (zoning amendment) now before the Council. This letter addresses only the status of the current operation.