

**STATE OF MAINE  
CUMBERLAND, ss**

**SUPERIOR COURT  
Civil Action  
Docket No. AP-\_\_\_\_\_**

**PIKE INDUSTRIES, INC.,** )  
 )  
 )  
**a Delaware Corporation qualified to do** )  
**business in the State of Maine with a** )  
**principal place of business in the State of** )  
**New Hampshire,** )

**Plaintiff,** )

**v.** )

**CITY OF WESTBROOK,** )  
 )  
**a municipality with a principal place of** )  
**business in the State of Maine,** )  
**WESTBROOK ZONING BOARD OF** )  
**APPEALS, and RICHARD GOUZIE, In** )  
**His Capacity as Code Enforcement** )  
**Officer of the City of Westbrook,** )

**Defendants.** )

**MOTION FOR STAY AND  
INCORPORATED MEMORANDUM OF  
LAW  
(M.R.CIV.P. 80B(b))**

Plaintiff Pike Industries, Inc. ("Pike") brings this motion to preserve, while this appeal is pending, continued use of a rock quarry that has been considered lawful in the City of Westbrook for more than 40 years. From 1968 through July 30, 2009, the City has had actual knowledge of the quarry, has never objected, and has granted various approvals for the quarry and in furtherance of the quarry use. In April of 2009, the City granted to Pike a 2009 blasting permit for 25 blasts at the quarry, and the removal of 250,000 cubic yards of rock. The only activity not authorized by that permit that Pike seeks to continue in 2009 while this appeal is pending is to operate a stone crusher, an activity that is integral to a quarry operation. If a stay is not entered, Pike will suffer substantial economic losses, both short term and long term, and reputational harm for which the company has no avenue for redress against the City. Absent an avenue for

redress, the harm from the City's actions is irreparable. Pike respectfully moves this court to preserve the status quo as it has existed for many decades until a final non-appealable judgment is entered resolving this land use case pursuant to M.R.Civ.P. 80B(b).

The Zoning Board of Appeals ("ZBA") decision on appeal is flawed as a matter of law. (ZBA Decision attached at **Exhibit 1**). The quarry located off Spring Street in Westbrook (the "Spring Street Quarry" or "Quarry") was a lawful use in the industrial zone without further City approval prior to a zoning change adopted on December 1, 1969. In addition, a portion of the Quarry parcel had the benefit of a special "vesting of rights" approval written into the City's 1969 Zoning Ordinance. Finally, the ZBA erred as a matter of law in finding the approval issued for the quarry on November 7, 1968 (the "1968 Approval") to be invalid. The time to appeal the 1968 approval has long since lapsed and no appeals were taken. The ZBA questioned whether Pike's predecessor met conditions contained in that approval, yet the failure to meet conditions in an approval, assuming that were true, does not void the approval *ab initio* as a matter of law.

Even if the ZBA's decision were correct the court would still have good reason to issue a stay because the Board did not address Pike's "equitable" claims. The ZBA ruled that it was without jurisdiction to consider Pike's equitable claims and, therefore, could not decide those claims. Yet, the ZBA acknowledged that its decision, from which this appeal is taken, is unfair to Pike. On the seventh and final night of hearings the Chair of the ZBA, Phillip Brown, read a prepared statement describing the situation as "mind-boggling."

I would like to make a statement as Chair, and to say that in nearly 25 years on this Board this appeal stands apart from other issues that have come before us. It is unique in terms of its legal complexities and involving multiple meetings, hundreds of pages of documents, and dozens of witnesses; both expert and neighborhood representatives.

....

I note that this is a personally unsatisfying result. That the issue has gone unresolved for 40-plus years, is mind-boggling. In retrospect, it is clear that there were countless opportunities since 1968 to bring these issues to the appropriate City Board for action under the then current ordinance. I believe that the process would have been far more constructive and might have produced a better result from all concerned.

Transcript, July 22, 2009, at 103:11-104:18 (See 2009 Hearing Transcripts attached at **Exhibit 2**). The ZBA's legal counsel, Ralph Austin, advised the Board that it had no authority to consider the equities: "[F]airness gets into the issue of equity, and that's for the Courts to decide." Transcript, May 6, 2009, 44:21 – 45:5. A ZBA member described the narrowness of the Board's role as he saw it:

[W]e don't decide whether or not the City is prevented from or estopped from enforcing the ordinance now because there's been such a long knowing lack of enforcement and acquiescence and reliance and everything that kind of -- that's eating I think at everybody a little bit, saying gee, this doesn't seem quite right, how can something go on for this many years with all of this knowledge of the City and nobody is stepping in to do anything? And how come you can say now after 30 years you can't do it? Well, we don't know that -- A, it's not our call. And B, we're just being -- the only thing we're really -- the only thing we are being asked to determine is whether there is a legal existing nonconforming use or not. And I think if we stick to the dry technical issue on that, that's -- that's what we need to do, is stick to that narrow issue.

Transcript June 11, 2009, 43:5 – 23. The circumstances cry out for the Court to exercise its equitable jurisdiction. It would be a denial of due process and the right to a remedy by due course of law<sup>1</sup> if Pike were to lose its right to operate the Quarry without having had an opportunity for a full hearing on what are, on the facts here, compelling equitable claims.

For these reasons, explained in more detail in the following incorporated memorandum of law, a stay pursuant to Rule 80B(b) is warranted until this case is resolved on its merits. This motion is supported by numerous exhibits, including the Affidavits of Jonathan Olson and John Melrose.

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<sup>1</sup> Me. Const. art. I, §19.

## INCORPORATED MEMORANDUM OF LAW

### I. FACTUAL BACKGROUND

Pike operates the Spring Street Quarry at 645 Spring Street in Westbrook. ZBA Decision, Findings of Fact ¶ 1. Pike acquired the Quarry from Blue Rock in 2005. *Id.* The property has been the site of a quarry since prior to 1940, and was, at one time, owned and operated by the City of Westbrook. *Id.* ¶¶ 3-4. At some point prior to May 1, 1964, the quarry ceased operation. *Id.* ¶ 6.

In August of 1968 the City amended its Zoning Ordinance to re-zone the Quarry from Farming to Industrial. Transcript, March 26, 2009, 65:23-66:03. The Industrial zone prior to December 1, 1969 allowed any trade, industry, or use without further City authorization *unless* either “substantially injurious, noxious or offensive to a neighborhood by reason of the emission of odor, fumes, dust, smoke, vibration or noise or other cause” *or* the trade, industry, or use had been specifically listed as requiring approval. ZBA Decision, Findings of Fact ¶ 35.

On November 7, 1968, the ZBA granted Blue Rock approval “to operate a quarry, rock crushing plant, concrete plant and asphalt plant” at the Spring Street Quarry. ZBA Decision, Findings of Fact ¶ 9. No one appealed the 1968 Approval. *Id.* ¶ 19.

The 1968 Approval contained four conditions. *Id.* ¶ 9. The first three conditions related to the anticipated sale of “the Merrill portion of the Pike Property to Wildland Company / Blue Rock.” *Id.* ¶¶ 9-16. The City had voted to convey that land to Blue Rock in May of 1968, but rescinded its decision in December of 1968. *Id.* ¶ 10. The City’s own actions prevented those conditions from coming to pass causing the three related conditions to become a nullity. The fourth condition related to testing of vibration levels and the submission of test results to the City. *Id.* ¶¶ 17-19. No such results are on file, but a contemporaneous published photograph

shows that City representatives personally observed blasting at the quarry in December of 1968. ZBA Hearing, Exhibit PIKE00000235 (attached at **Exhibit 3**). If City representatives were unsatisfied with vibration levels, there is no evidence that they demanded further testing or documentation. Such test results may have been forwarded to the City, but have not been found now, more than 40 years later.

Regardless of whether Blue Rock complied with conditions in the 1968 Approval (and whether the City itself prevented Blue Rock from meeting conditions), there is no dispute that Blue Rock conducted a blast at the Quarry in December of 1968. ZBA Decision, Findings of Fact ¶ 20. “Subsequent to the 1968 Approval, Blue Rock began limited blasting and rock extraction at the quarry.” *Id.* “From 1968 to the present no 12 month period has passed without [substantial] quarrying activity” at the Spring Street Quarry. *Id.* ¶ 25, Stipulation.<sup>2</sup>

The ZBA found that the City had “actual knowledge that Blue Rock, followed by Pike, operated a quarry at the Pike Property from December 14, 1971 to the present.” *Id.* ¶ 28. As recently as May 5, 2008 the Westbrook City Planner reviewed the City’s records and determined that they “reflect approval of the existing overall operation in the 1960s and early 1970s.” ZBA Hearing, Exhibit PIKE00001925 – 1926 (attached at **Exhibit 4**). The record also contains uncontroverted evidence that the City had such actual knowledge starting with the first blasts by Blue Rock in December of 1968. ZBA Decision Findings of Fact ¶ 28. City officials personally observed those blasts. ZBA Hearing, Exhibit PIKE00000235 (attached at **Exhibit 3**). The City had actual knowledge of quarrying activities at Spring Street from the outset, in no small part because it once owned and operated the Quarry.

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<sup>2</sup> The ZBA Decision reads “substantive,” but the transcript indicates that the Board determined that the activity was “substantial.” The parties have agreed to stipulate to that change.

The ZBA found, “There is no evidence that any City official or board ever objected to the operation of the quarry at the Pike Property by Blue Rock, followed by Pike, since December 14, 1971.” ZBA Decision, Findings of Fact ¶ 29. Indeed, there is no evidence that the City *ever* made any formal objection, issued any citation, or undertook any action to stop Blue Rock or Pike from operating the Quarry.

Harry LeClair, who served as the Code Enforcement Officer (“CEO”) for the City for about 12 years prior to the current CEO, Richard Gouzie, attested to the City’s knowledge of the Spring Street Quarry. Transcript, at 69:20 – 71:14. He averred, “Blue Rock Industries or Pike Industries have been actively operating at the Spring Street quarry since the late 1960s.” *Id.* at ¶ 3. During his time as Code Enforcement Officer, Mr. LeClair and numerous other City of Westbrook officials were “familiar with Blue Rock Industries’ quarrying activities at Spring Street in Westbrook.” *Id.* at ¶ 4. Mr. LeClair declared that “[a]s Code Enforcement Officer, there was never any question in my mind that Blue Rock was operating legally at the Spring Street quarry.” *Id.* at ¶ 5. Mr. LeClair did not recall any Westbrook City officials ever having any questions or concerns about the legality of Blue Rock’s activities at the Spring Street quarry during the time that he served as Code Enforcement Officer. *Id.* at ¶ 6. Mr. Gouzie, likewise, considered the Quarry to be a legal use. Transcript, April 13, 2009, 37:25-38:3. The City’s legal counsel, Natalie Burns, testified:

MR. SCHUTZ: So is [it] fair to say that the City has consistently considered the Spring Street quarry a lawfully existing use from 1968 to the present time?

MS. BURNS: That certainly was – was what we inferred from the materials, that the City had treated the level of operation that has been in existence as having been there lawfully as a grandfathered use.

Transcript, April 13, 2009, 44:19-45:2.

The City also issued permits in furtherance of the use at the Quarry after the initial 1968 Approval. Pike requested approval to construct a sales office and display building in 1986. ZBA Decision, Findings of Fact ¶ 30. On April 5, 2006, the Code Enforcement Officer issued a building permit to Pike “for the installation of platform, scales, and a building.” *Id.* ¶ 31. The scales are used to weigh trucks carrying crushed rock out of the Quarry. The CEO has also issued blasting permits for the Quarry. *Id.* ¶ 32. The 2009 blasting permit allows Pike to conduct 25 blasts and to remove up to 250,000 cubic yards of rock. Olson Affidavit ¶ 10 (attached at **Exhibit 5**).

## **II. PROCEDURAL BACKGROUND**

### **A. Complaint to Code Enforcement Officer**

On September 9, 2008, IDEXX Laboratories, Inc. (“IDEXX”) submitted a letter complaining to the Westbrook Code Enforcement Officer (“CEO”) that Pike does not have a right to continue to operate the Quarry. ZBA Decision, Background ¶ 3. The City asked Pike to respond. On January 9, 2009, Pike submitted a letter to the CEO responding to IDEXX’s complaint. *Id.* ¶ 4. Pike asserted that it has vested rights to continue to operate a quarry and rock crusher, and also to build a concrete plant and asphalt plant pursuant to the 1968 Approval. *Id.*

### **B. Code Enforcement Officer Opinion**

On January 29, 2009, the CEO issued an opinion finding, *inter alia*, as follows: (A) Pike has grandfathered rights to operate the Quarry (i.e., mineral extraction); (B) Pike does not have rights to use a rock crusher at the Quarry; (C) Pike does not have rights to operate a concrete plant; and (D) Pike does not have rights to operate an asphalt plant. ZBA Decision, Background ¶ 5.

### C. Zoning Board of Appeals Hearings and Decision

On February 27, 2009, IDEXX and Pike filed cross-appeals from the CEO's opinion. ZBA Decision, Background ¶¶ 6-7. The ZBA consolidated the appeals. ZBA Decision, Procedural History ¶ 5. The Board held seven nights of hearings; the first was on March 24 and the last fell on July 22. *Id.* ¶ 1.

At its final hearing on July 22, 2009 the ZBA concluded, in part, as follow:

- reversed the CEO's determination that Pike has a right to mineral extraction at the Quarry as a legally existing non-conforming use. ZBA Decision, Decision ¶ 2.
- reversed the CEO's determination concerning rock crushing. The ZBA concluded that rock crushing is an integral aspect and part of a quarrying operation, but because Pike does not have a right to quarry it also does not have a right to rock crushing as a grandfathered use. ZBA Decision, Conclusions ¶ 5.
- found that no 12 month period has passed since 1968 without substantial<sup>3</sup> quarrying activity and, therefore, that Pike's rights have not been lost through discontinuance. ZBA Decision, Findings of Fact ¶ 25.
- decided, on the advice of counsel, that it lacked jurisdiction to address the equitable claims raised by Pike. "This decision does not address what rights Pike may have to these four uses (quarry; rock crushing; concrete plant; asphalt plant) under various equitable doctrines[.]" ZBA Decision, Conclusions ¶ 7. The ZBA had earlier ruled that "it does not have jurisdiction to hear and/or determine any equitable issues." ZBA Decision, Procedural History ¶ 7.

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<sup>3</sup> See Footnote 1 for explanation as to "substantial."

**D. City Issues Cease and Desist Order**

On July 30, 2009, the CEO issued a cease and desist order to Pike purporting to revoke the company's 2009 Blasting Permit and to, effectively, shut down activity at the Quarry despite the fact that there has not yet been "a final, non-appealable outcome" in accordance with Condition No. 4 of the 2009 Blasting Permit. Condition No. 4 states as follows:

Use of this site is the subject of a pending appeal before the Zoning Board of Appeals. This permit is issued without prejudice to the result of that appeal. In the event that *the final, non-appealable outcome* of that appeal determines that the current use of the quarry is not lawful in any respect, this permit may be revoked or modified to reflect that decision. Any work under this permit is done at the appellant's sole risk and no such work shall serve as the basis for a claim of vested or other similar rights.

2009 Blasting Permit, Condition No. 4 (emphasis added). The Permit may, therefore, be revoked or modified only upon a "final, non-appealable outcome" of the ZBA hearings. The ZBA's July 22, 2009 Decision is appealable to the Superior Court pursuant to Rule 80B and, therefore, is not a "final, non-appealable outcome." The ZBA decision does not trigger a condition that would justify revocation of the 2009 Blasting Permit.

**E. Harm Caused by the City**

The Spring Street Quarry has two major characteristics that make it uniquely valuable to Pike as compared to alternative sources of aggregate: rock quality and location. The rock at the Spring Street Quarry is very durable and of a uniform high quality, making it well suited for transportation projects and asphalt production (either on-site or off-site). The rock readily meets rigorous Maine Department of Transportation ("MDOT") product specifications. Olson Aff. ¶ 16.

The Spring Street Quarry is also in a prime location within the Greater Portland market. The transportation costs associated with trucking aggregate from a source location to the customer are a significant part of the price of the product: all other things being equal, the further

the source from market the higher the cost of the delivered product. *Id.* ¶ 19; Melrose Aff. ¶ 8 (attached at **Exhibit 5**).

As a result, access to the rock at the Spring Street Quarry is highly valuable to Pike's business in Southern Maine. Olson Aff. ¶ 23. If Pike is unable to continue to operate the Spring Street Quarry, there is a high likelihood that the company will suffer substantial economic losses, both short term and long term, as a direct result of its being unable to draw material from the Quarry. *Id.* Pike will suffer losses because it will have to quote certain projects at a higher price and at less profit, in order to account for the increased transportation costs of sourcing product from more remote locations operated by Pike in Wells, Poland, or elsewhere. *Id.* ¶ 24. Transportation costs contribute significantly to the overall cost of supplying product, and, therefore, pricing. If costs are higher, Pike's bid is typically higher as well. *Id.* ¶ 24. If Pike's bid or quote for a project is higher, Pike will lose projects. *Id.* ¶ 25.

Pike also faces an imminent risk of reputational harm. If Pike is forced to increase its bid prices while it is unable to use the Spring Street Quarry, then Pike will harm its reputation as the low cost supplier of aggregate in the Southern Maine marketplace. *Id.* ¶ 30. This reputation is extremely valuable to Pike, because its customers rely on reputation to select Pike as a partner, supplier, and/or subcontractor on projects. *Id.* ¶ 31. If Pike's reputation is tarnished because the company can no longer supply low cost and high quality aggregate from Spring Street, then Pike will miss out on business opportunities, particularly preferred long term contracts. *Id.* Pike's reputation with regard to pricing cannot easily be repaired. *Id.*

There is no way to force the City of Westbrook to reimburse Pike for losses if the company is unable to source product at Spring Street as a result of the ZBA's land use decision and the City's Cease and Desist Order. *Id.* ¶ 34.

The harm caused by closure of the Spring Street Quarry will have wide implications, beyond the economic impact on Pike itself. Melrose Aff. ¶ 10. Pike’s business – supplying aggregate and products made from aggregate (including asphalt) – is important to everyone who travels in the State and uses the State’s transportation infrastructure, particularly in Southern Maine. *Id.*

Pike is a primary supplier to MDOT and to the Maine Turnpike and a major player in the market for asphalt and aggregate, particularly in Southern Maine. *Id.* ¶ 15. In recent years Pike has provided between 40% and 50% of the tonnage of paving materials to MDOT statewide. *Id.* ¶ 13. Pike has about 75% of the paving market in Southern Maine. *Id.* ¶ 14. Pike is a primary supplier to the Maine Turnpike Authority. *Id.* ¶ 15. Pike’s Westbrook operations provide products and services that are vitally important to the economy and transportation infrastructure of southern Maine, including Westbrook. Melrose Aff. ¶ 11.

If Pike cannot source high quality aggregate efficiently in Greater Portland, that impacts everyone who uses the roads and pays for them by raising costs and, ultimately, the region’s competitive standing. *Id.* ¶ 22. This more widespread harm to the region is also harm resulting from the attempted closure of the Spring Street Quarry.

#### **STANDARD OF REVIEW**

M.R. Civ. P. 80B(b) provides that “the filing of the complaint does not stay any action of which review is sought, but the court may order a stay upon such terms as it deems proper.” A stay is committed to the sound discretion of the court, limited only to terms that are deemed “proper.” Rule 80B(b) does not require that the Court apply the rigorous standards for injunctive relief under Rule 65. The four-part *Ingraham* standard for injunctive relief is at most guidance

only. *E. Perry Iron & Metal Co. v. City of Portland*, 2007 Me. Super LEXIS 72 at \*2 (Me. Super. Ct. Apr. 9, 2007) (attached as **Exhibit 7**).

In the *E. Perry Iron & Metal Co.* case the Superior Court granted a stay pending a decision on the Plaintiff's Rule 80B appeal and then subsequently granted a continuation of that stay pending a decision on appeal to the Law Court. In opposition to the Plaintiff's motion for a stay, the City of Portland argued that the Plaintiff "had been operating too long without being in compliance with the ordinance," and that the Plaintiff could not meet the legal standard for a stay, citing *Ingraham v. University of Maine at Orono*, 441 A.2d 691 (Me. 1982), which sets forth the standard in Maine for obtaining a temporary or preliminary injunction. *Id.* at \*1-2. The court rejected the City's argument, however, and concluded that while the *Ingraham*, four-part test "may offer guidance for the court's exercise of discretion," it was not necessarily applicable to a request for a stay pending appeal. *Id.* at \*2.<sup>4</sup>

### ARGUMENT

To enter a stay pursuant to Rule 80B(b), the Court need only find that the terms of the requested stay are "proper." This is a lower and more flexible standard than the *Ingraham* four-factor standard applicable to injunctions under Rule 65.

However, because the *Ingraham* factors may offer guidance in evaluating whether a stay is proper, Pike will frame its argument around the *Ingraham* standard. The four-part *Ingraham* standard is as follows:

- (1) that plaintiff will suffer irreparable injury if the injunction is not granted;
- (2) that such injury outweighs any harm which granting the injunctive relief would inflict on the defendant;

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<sup>4</sup> The court also observed that where a party files an appeal of a judgment, Rule 62 provides that the a stay to preserve the status quo is "the default position" and is "preferred." Although this Motion seeks a stay of the municipal board's ruling and subsequent cease and desist order, and not of a decision, Pike submits that the same rationale applies.

- (3) that plaintiff has exhibited a likelihood of success on the merits (at most, a probability; at least, a substantial possibility); and
- (4) that the public interest will not be adversely affected by granting the injunction.

*Ingraham v. University of Maine at Orono*, 441 A.2d 691, 693 (Me.1982). “The purpose of a restraining order is to provide an ancillary remedy preserving the status quo pending a hearing on the merits of a complaint for injunction.” *Koplow v. City of Biddeford*, 494 A.2d 175, 176 (Me. 1985). The City’s improper revocation of the 2009 Blasting Permit makes clear that the City is not content to preserve the *status quo ante* while this appeal remains pending.

For the reasons that follow, the evidence demonstrates that Pike is entitled to a stay under either Rule 80B(b) and/or pursuant to the *Ingraham* factors.

**A. Pike Will Suffer Irreparable Injury If A Stay Is Not Granted.**

Irreparable injury is defined as “injury for which there is no adequate remedy at law.” *Bangor Historic Track, Inc. v. Dep’t of Agric. Food & Rural Res.*, 2003 ME 140, ¶ 10, 837 A.2d 129. The harm resulting from the City’s action on appeal is irreparable harm for four separate reasons:

**First**, “[w]here a plaintiff stands to suffer a substantial injury that cannot adequately be compensated by an end-of-case award of money damages, irreparable harm exists.” *Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 222 (1st Cir. 2003). In *Rosario-Urdaz*, for example, the First Circuit vacated and remanded an order denying a motion for a preliminary injunction on the grounds that “the district court was not justified in denying preliminary injunctive relief on the ground that the plaintiff had an adequate remedy at law” given the absence of any apparent damages remedy against state officials. *Id.* Here, Pike faces significant financial losses if it is unable to operate the Spring Street Quarry while this appeal remains pending. Pike cannot replace the aggregate that would have been sourced at Spring Street with material from other

sites at the same cost. Olson Aff. ¶ 28. If Pike's costs are higher, its bids will be higher and the company will lose jobs. *Id.* ¶ 24. Pike has no damages remedy against the City by which it can be reimbursed for those losses should it prevail. Given that there is no remedy available to Pike against the City, it faces irreparable harm if a stay is not entered.

**Second**, harm to reputation typically constitutes irreparable harm because such harm cannot be reduced to monetary terms. Although there are apparently no Maine cases on point, the First Circuit held in *Ross-Simons of Warnick, Inc. v. Baccarat, Inc.*, 217 F.3d 8 (1st Cir. 2000) that “[b]ecause injuries to goodwill and reputation are not easily quantifiable, courts often find this type of harm irreparable.” *Id.* at 15; *see also K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 915 (1st Cir. 1989) (stating “harm to goodwill, like harm to reputation, is the type of harm not readily measurable or fully compensable in damages -- and for that reason, more likely to be found ‘irreparable’”). Pike holds an enviable reputation as the low cost supplier of asphalt in Southern Maine. Olson Aff. ¶ 30. That reputation is contingent on the company's ability to deliver low bids on projects. *Id.* ¶ 31. If the company loses access to the Spring Street Quarry it is less able to deliver low cost bids on projects in Greater Portland, thereby undermining the company's valuable business reputation in the largest market in Maine. *Id.* This, too, is irreparable harm.

**Third**, the harm involved in shutting down Pike's operations at Spring Street is not limited to financial or reputational losses to the company itself. The harm is more widespread because the community depends on low cost, high quality access to aggregate and products made from aggregate, including asphalt, to maintain our transportation infrastructure and for building materials. Melrose Aff. ¶ 19. Everyone who drives a car (or truck) and pays taxes that are spent on transportation bears the burden of having to pay more for less if Pike is not able to provide a

local high quality source of aggregate – the Spring Street Quarry. *Id.* ¶ 21. This is not simply a case of a company making and selling widgets at profit, but of a company that provides essential products and services on which the community depends. This more generalized harm is not quantifiable, and is, therefore irreparable and so should be weighed.

**Fourth**, if the Court refuses to enter a stay and Pike ceases activity at the Quarry, the company may end up being prohibited from engaging in the quarrying use simply because it has been discontinued for too long, regardless of the outcome of this appeal. Section 203.2 of the City’s Land Use Ordinance<sup>5</sup> provides that the right to continue a legally existing non-conforming use may be lost through discontinuance. Although the ZBA found that Pike has actively and substantially engaged in the quarrying use since 1968, if the City prevents Pike from engaging in the use and the company does not operate while this appeal remains pending (and during a subsequent appeal to the Law Court) it is quite likely that the entire process will take more than 12 months. This could result in an unintended consequence and detriment to Pike: even if it prevails on appeal it may have lost rights through discontinuance. This appears to have been the basis for Justice Armand Dufresne’s issuance of an injunction in 1969 barring the City from changing its land use ordinance during litigation pertaining to the Quarry. This is yet another irreparable harm to the company if a stay is not entered.

Pike has shown irreparable harm in the absence of a stay.

**B. The Balance Of The Harms Favors Pike.**

The injury that Pike would suffer from a denial of a stay outweighs any harm that granting the stay would cause the City. Pike and its predecessors have been operating at the Spring Street Quarry for decades with the City’s actual knowledge, and pursuant to a number of

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<sup>5</sup> The City of Westbrook’s complete and current Code of Ordinances, including the Land Use Ordinance, can be found at the City’s website, <http://www.westbrookmaine.com> (last visited on August 18, 2009) under “Downloads.”

City approvals and permits. ZBA Decision, Findings of Fact ¶ 28. Most recently, in April of this year, the City issued a permit to Pike allowing it to blast 25 times and to remove 250,000 cubic yards of rock from the Spring Street Quarry before the end of 2009. Olson Aff. ¶ 10. It is hard to say that the City would suffer significant harm by the continuation of the use when it was comfortable with a mineral extraction operation at Spring Street for a 40 year period, approved the operation in April of 2009, and only took exception to the operation within the last few weeks.

The Spring Street Quarry is also consistent with the City's land use policy. Mineral Extraction is *not* a prohibited use in the Industrial zone where the Quarry is located. It is, instead, a Special Exception use pursuant to Westbrook Land Use Ordinance § 310.2. Although the Quarry does not have a Special Exception approval (because the Quarry lawfully pre-existed the enactment of that requirement), it is significant in weighing the harms that a Special Exception, as defined by the Ordinance, is a use which is "by policy permitted in a particular zoning district." Westbrook Land Use Ordinance § 201.88. A Special Exception is "consistent with the [City's] most recently adopted comprehensive plan." *Id.* Such uses are "neither a nonconforming use nor subject to a variance under customary circumstances." *Id.* The use is "by policy considered to be of an essential or desirable nature for the general welfare of the community." *Id.* The use is "not essentially incompatible with existing uses in the district." *Id.* As a Special Exception, however, the use may not be appropriate at "every or any location" without restriction or conditions. *Id.* In short, since Mineral Extraction is a Special Exception use, the Quarry is consistent with the City's comprehensive plan, a permitted use, generally considered to be desirable, and compatible with other existing uses in the district. As such, there is little or no harm in allowing the use to continue.

Further, there is no harm to IDEXX, which has been permitted to intervene in Pike's Declaratory Judgment action pending before this Court. IDEXX is not built on the same granite ledge as the Quarry and does not experience any vibrations from activity at the Quarry. IDEXX itself has conceded that, in its view, the Quarry simply creates "an image problem."

Denial of Pike's request for a stay, however, would inflict substantial irreparable harm on Pike, and would alter the status quo that has existed for many decades. Olson Aff. ¶¶ 23-34; Melrose Aff. ¶¶ 21-22. The balance of the harms, therefore, weighs in favor of a stay to preserve Pike's ability to operate the quarry while this appeal remains pending.

**C. Pike is Likely To Succeed On The Merits Of Its Appeal.**

Pike's appeal has a high likelihood of success on the merits for several independent reasons, both legal and equitable.<sup>6</sup>

**1. The quarry use pre-dated the requirement that Blue Rock obtain any City permit.**

In the classic scenario grandfathering rights arise where a use began before the applicable zoning ordinance prohibiting the use took effect. Pike will succeed on its claim that the Board erred by not finding that Pike has grandfathered rights on this theory.

On June 25, 1968, the Westbrook Planning Board voted to amend the City's Zoning Map to move the Spring Street Quarry from an "F" Farming Zone to an "I" Industrial Zone for the specific purpose of allowing quarrying and accessory uses at the Quarry. The City Council shortly thereafter adopted that zoning change. As of December of 1968, therefore, the Industrial Zone allowed any trade, industry, or use without further City authorization *unless* the use was either "substantially injurious, noxious or offensive to a neighborhood by reason of the emission

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<sup>6</sup> This motion does not address all of the issues on appeal for the sake of brevity. Pike reserves its right to fully brief all appeal issues in due course.

of odor, fumes, dust, smoke, vibration or noise or other cause” or the trade, industry, or use was specifically listed in the Ordinance as requiring approval.

Mineral extraction and rock crushing is not and was not a nuisance, i.e., “substantially injurious, noxious or offensive to a neighborhood by reason of the emission of odor, fumes, dust, smoke, vibration or noise or other cause.” The ZBA’s own attorney, Ralph Austin, advised the Board that mineral extraction is not a nuisance. Likewise, mineral extraction and rock crushing was not on the list of uses that required specific approval by any City body or officer as of December of 1968. In sum, as of December of 1968, mineral extraction and stone crushing were lawful permitted uses in the Industrial Zone without any further City approval.

Blue Rock began quarry activity at Spring Street in December of 1968. ZBA Decision, Findings of Fact ¶ 20. Blue Rock also engaged in substantial quarrying activity every year after 1968, including 1969. *Id.* ¶ 25. When the City adopted the 1969 Zoning Ordinance on December 1, 1969, which required that mineral extraction uses obtain Conditional Use approval, the quarry use had already been established at Spring Street. *Id.* ¶ 34 - ¶ 35. The use was, therefore, a lawfully existing use as of December 1, 1969 and remains grandfathered to this day.

The ZBA did not enter a finding specifically addressing this argument. It erred by failing to recognize that Pike’s predecessor began quarry activity at Spring Street before the City of Westbrook had adopted the 1969 Zoning Ordinance requiring that mineral extraction uses obtain a permit and that Pike’s continued use is, therefore, lawful.

**2. The ZBA approved the Spring Street Quarry on November 7, 1968.**

On November 7, 1968, the Zoning Appeals Board issued a decision unanimously granting Blue Rock approval for “the operation of the existing Spring Street Quarry and the operation of Blue Rock’s Read-Mix Concrete and Bituminous Concrete Plant.” 1968 Approval.

The ZBA found that such uses would *not* be “substantially injurious, noxious or offensive” provided certain safeguards were effected. The 1968 ZBA Approval states:

After Public hearings, investigation and deliberation, the Westbrook Zoning Appeals Board has unanimously voted to *grant* Blue Rock Quarry, Wildlands Co., and Cook & Co., Inc.<sup>7</sup> (hereafter referred to as Blue Rock Quarry) *permission to operate a quarry, rock crushing plant, Readi-Mix Concrete plant, Bituminous Concrete Plant, and related facilities*, in the Industrial Zone on the westerly side of Spring Street, provided the following safeguards are effected to insure this industrial use shall not be “Substantially injuries, noxious, or offensive to a neighborhood by reason of the emission of odor, fumes, dust, smoke, or other causes. (emphasis added).

The 1968 ZBA Approval does not contain any expiration date concerning the rights granted.

Neither Blue Rock, nor the City, nor any interested party appealed the 1968 Approval to Superior Court within the 30 day time limit set by the 1968 Ordinance. ZBA Decision, Findings of Fact ¶19. The City has never revoked, amended, modified, suspended, or otherwise changed or removed the 1968 ZBA Approval.

A major controversy raised during the 2009 ZBA proceedings, now on appeal, involves the conditions attached to the 1968 ZBA Approval. The ZBA found, in effect, that Blue Rock did not meet the conditions in the 1968 ZBA Approval and, therefore, the Approval did not establish that Blue Rock had a lawful right to operate. *Id.* ¶¶ 11-18. Pike responded with several arguments in the alternative that the ZBA either did not address or did not consider based on erroneous advice by its legal counsel.

**First**, Pike argued that if conditions in the 1968 ZBA Approval were not met that was because the City Council took action to prevent Blue Rock from fulfilling certain conditions by refusing to convey certain land at the quarry to Blue Rock. The City prevented Blue Rock from taking action contemplated by the 1968 ZBA Approval by refusing to convey to Blue Rock the C Company land. ZBA Decision, Findings of Fact ¶ 16. The City Council had committed to do so

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<sup>7</sup> On November 4, 1968, Cook & Company, Inc. changed its name to C Company, Inc.

prior to the 1968 ZBA Approval, and the ZBA issued the Approval with that commitment in mind. After the ZBA issued the Approval, however, the City Council reversed itself and refused to convey to Blue Rock the C Company land. *Id.* ¶ 10. By refusing to convey the land, the City prevented Blue Rock from taking action to satisfy certain conditions and those conditions are, therefore, waived, deemed met, or are null and void. *See LaSociete Generale Immobiliere v. Minneapolis Community Development Agency*, 44 F.3d 629, 638 (8th Cir. 1994); *see also Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 453 (7th Cir. 1982).

Several ZBA members appeared convinced that Pike's argument had merit. As one ZBA member noted: "Based on the testimony that we've heard and the evidence that was presented, it has been my impression that Blue Rock/Pike Industries did comply with the conditions of the 1968 Zoning Board of Appeals decision. However, based on the information from our attorney this evening, we're told that we cannot consider that in this case." Transcript, May 6, 2009, 52:8 – 53:3.

The ZBA did not consider Pike's argument because its counsel, deemed Pike's prevention argument to be "equitable" in nature and, therefore, outside the Board's jurisdiction. The ZBA's attorney advised the ZBA that it could not consider the "prevention doctrine" – the principle that a party cannot benefit from a condition by preventing the other party from meeting the condition – even by analogy.

The ZBA attorney's advice, upon which the ZBA relied in reaching its Decision, was erroneous. The "prevention doctrine" is not an "equitable" principle, but rather is a legal principle based in contract law. (See Pike Letter attached as **Exhibit 8**). Moreover, there is no legal basis for the ZBA attorney's position that the ZBA could not draw upon common sense

principles of contract law as guidance in evaluating the 1968 ZBA Approval. The ZBA erred by failing to consider Pike's argument.

**Second**, Pike argued in the alternative that a failure to meet the conditions did not void the 1968 ZBA Approval *ab initio*. If conditions were not met, then City may have had grounds to revoke or modify the Approval – or to have taken action to force Blue Rock to come into compliance with the conditions. The ZBA cannot simply look back 40 years, deem conditions to have been unmet at the time Blue Rock began quarrying activity in 1968 (and presumably never met over the ensuing 40 years) and declare that the permit was never valid in the first place. The ZBA erred as a matter of law and exceeded the bounds of its authority by, in effect, retroactively revoking an Approval pursuant to which Blue Rock (and Pike) have operated over the past 40 years. Even if the ZBA had authority to review the 1968 ZBA Approval, the ZBA never exercised that authority. Pike's activity is, therefore, lawful.

3. **As of December 1, 1969, the City amended its ordinance to grant vested rights with regard to the C Company parcel that is now a portion of the Spring Street Quarry.**

Blue Rock received a unique approval to engage in mineral extraction at the so-called C-Company parcel (part of the Quarry) by virtue of language included in the City's 1969 Zoning Ordinance. The language is the product, apparently, of a successful lawsuit to prevent the City from adopting re-zoning while title to the C-Company parcel remained uncertain.

In December of 1968, following the City Council's decision to renege on its commitment to convey a release deed conveying any interest the City had in the C Company parcel to Blue Rock, the C Company filed a lawsuit in Cumberland County Superior Court against the City of Westbrook for damages and to abate a trespass. ZBA Decision, Findings of Fact ¶ 5. The lawsuit alleged that the City had allowed garbage from the adjacent town dump to intrude onto

land owned by C Company. The City counterclaimed on the grounds that the C Company land had reverted to the City by virtue of the reverter clause in a prior deed and, therefore, the City had a right to dump its garbage on that property.

At this time, the City was also considering a new zoning ordinance. According to the minutes of a City Council meeting in February of 1969 Justice Armand Dufresne, Jr. entered a Temporary Restraining Order (“TRO”) barring the City from re-zoning the C Company parcel while the litigation was pending. The decision itself has not been found. The only apparent reason for the decision would have been to protect the C Company’s right to establish a use in the property prior to a zoning change while the title litigation remained pending.

On December 1, 1969, while the C Company litigation still remained pending, the City amended its Zoning Ordinance. The amendment specifically addressed the C Company parcel. Section III(B) of the 1969 Zoning Ordinance states that “any lawful rights as to the use of” the C Company parcel “shall be deemed vested.” The 1969 Zoning Ordinance also states that the “new limitations and conditions imposed by this Ordinance” would “not apply” to the C Company parcel.<sup>8</sup> (ZBA Hearing, Joint Exhibit JOINT0000002). This unique language had no expiration date, and did not require that C Company take any action to acquire or preserve such rights. The language is an open ended approval of any lawful use as of 1969 on that land and provides that such rights “vested.”

The ZBA Decision references, but does not specifically address Section III(B) of the 1969 Zoning Ordinance – much less explain why an approval written into the Ordinance itself did not establish rights to use the C Company parcel (at least) as a Quarry. As the current owner

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<sup>8</sup> The special vesting provision of the 1968 Ordinance, Section III(B), is not dependant on the outcome of the litigation, but the C Company prevailed in both the Superior Court and on appeal, *C Company v. City of Westbrook*, 269 A.2d 307, 308 (Me.1970).

of the C Company parcel, Pike has what are – by statute -- vested rights to continue to operate the Quarry on that parcel.

4. **Absent an appeal or other timely action to revoke the 1968 ZBA Approval, neither the ZBA nor the CEO had jurisdiction or authority to determine whether the 1968 ZAB Approval was legally enforceable.**

The ZBA erred as a matter of law by overstepping its authority with respect to the 1968 ZBA Approval. The September 9, 2008 memorandum from IDEXX’s counsel does not constitute a proper or timely challenge of the 1968 ZBA Approval. In *Wright v. Town of Kennebunkport*, the Law Court refused to revoke a property owner’s building permit because the complaining neighbor failed to file an appeal of the permit within the 30-day appeals period subsequent to the permit’s issuance. *Id.*, 1998 ME 184, ¶1. The Court explained that “[s]trict compliance with the appeal procedure of an ordinance is necessary to ensure that once an individual obtains a building permit, he can rely on that permit with confidence that it will not be revoked after he has commenced construction.” *Id.* Kennebunkport argued that because the permit was void *ab initio* or from the beginning, that it could be revoked after the 30-day appeal period. *Id.* at 165. The court disagreed with this argument holding the following:

The invalidity of the permit does not have any bearing on whether the Board had the authority to hear the Wrights’ appeal. Moreover, the Board’s reliance on the Wrights’ failure to discover the invalidity of the permit until after the appeal period had expired is also misplaced. The alleged illegality of the permit existed at the time of its issuance, and by using reasonable diligence the Wrights could have discovered its illegality. *Id.*

It is also noteworthy that in *Wright* case the abutters unsuccessfully argued in defense of their untimely appeal that the CEO’s refusal to revoke in response to their appeal constituted a “decision” and restarted the appeals period 30-day deadline. *Id.* at 164. The Court refused to revive the appeals period based on the denial of a party’s untimely request to revoke. *See also Fryeburg Water co. v. Town of Fryeburg*, 2006 ME 31, ¶19 (holding that parties may not revive an appeals period by requesting to revoke a permit or requesting a cease and desist order);

*Juliano v. Town of Poland*, 1999 ME 42, ¶3 (Me. 1999) (holding that a good cause exception for failure to meet the appeals period cannot be implied in an ordinance where the ordinance prescribes a specific appeals period).

Accordingly, because the 1968 ZAB Approval was never appealed by the City or any other party, neither the CEO nor the present ZBA had jurisdiction or authority to determine the validity of the 1968 ZBA Approval.

5. **The City is equitably estopped from preventing Pike from continuing to operate the Quarry.**

In the leading equitable estoppel case, *City of Auburn v. Desgrosseilliers*, the Law Court found that “[t]he law in Maine is . . . that depending on the totality of the particular circumstances involved, which will include the nature of the particular governmental official or agency acting and of the particular governmental functions being discharged as precipitating particular considerations of public policy, equitable estoppel may be applied to activities of a governmental official or agency in the discharge of governmental functions.” *Id.*, 578 A.2d 712, 714 (Me. 1990). There, the City of Auburn was estopped to enforce its land use ordinance, based, in part, on a finding that “the City misled the Desgrosseilliers into investing in their landscaping service and nursery businesses in 1985, failed to give them any indication that their business activities were illegal until 1987, and did not commence an enforcement action until 1988.” *Id.* at 715.

The Law Court made clear that failure to enforce is an important consideration in equitable cases when it held that “[w]hile we do not consider the City’s delay in enforcing the ordinance determinative of the estoppel issue, we do consider it a factor to be weighed.” *Id.* Indeed, the Law Court rejected the notion that equitable estoppel requires that government have acted deliberately. *Berry v. Board of Trustees*, 663 A.2d 14, 17 (Me. 1995); see also *See Town*

*of Freeport v. Ring*, 1999 ME 48, ¶13 (doctrine of equitable estoppel applies when an individual makes misrepresentations, including misleading statements, conduct, *or silence*, that induce detrimental reliance) (emphasis added).

Turning to the facts here, the ZBA found over 40 years of continuous substantial quarrying activity at Spring Street. “From 1968 to the present no 12 month period has passed without [substantial] quarrying activity” at the Spring Street Quarry. *Id.* ¶ 25; Stipulation (changing substantive to substantial).

The City had actual knowledge of that activity from the outset. According to the ZBA, the City had “actual knowledge that Blue Rock, followed by Pike, operated a quarry at the Pike Property from December 14, 1971 to the present.” *Id.* ¶ 28. The record also contains uncontroverted evidence that the City had actual knowledge of the quarry starting with the first blasts by Blue Rock in December of 1968. City officials personally observed those early blasts. ZBA Hearing, Exhibit PIKE00000235.

The City never objected to the Quarry (until now). ZBA found, “There is no evidence that any City official or board ever objected to the operation of the quarry at the Pike Property by Blue Rock, followed by Pike, since December 14, 1971.” ZBA Decision, Findings of Fact ¶ 29. Indeed, there is no evidence that the City *ever* made any formal objection, issued any citation, or undertook any action to stop Blue Rock or Pike from operating the Quarry.

The CEOs responsible for enforcing the City’s Land Use Ordinance testified that they have continuously deemed the Quarry to be a lawful use. Harry LeClair, Code Enforcement Officer from the late 1980s through 2000, declared that “[a]s Code Enforcement Officer, there was never any question in my mind that Blue Rock was operating legally at the Spring Street quarry.” LeClair Aff. at ¶ 5. Mr. Gouzie, the successor to Mr. LeClair and the current CEO,

likewise, considered the Quarry to be a legal use. Transcript, April 13, 2009, 37:25-38:3. The City's legal counsel, Natalie Burns, testified that the City considered the Quarry "as having been there lawfully as a grandfathered use since 1968." Transcript, April 13, 2009, 44:19-45:2.

The City officials have also granted building permits for the construction of structures accessory to the Spring Street Quarry and blasting permits for the Quarry. Pike requested approval to construct a sales office and display building in 1986. ZBA Decision, Findings of Fact ¶ 30. On April 5, 2006, the Code Enforcement Officer issued a building permit to Pike "for the installation of platform, scales, and a building." *Id.* ¶ 31. The permit refers to a \$30,000 cost of that project. ZBA Hearing, Exhibit PIKE00001755 (attached at **Exhibit 9**). The scales were built and are used to weigh trucks carrying crushed rock out of the Quarry. Transcript, March 24, 2009, at 82:25-85:02. The CEO has also issued blasting permits. *Id.* ¶ 32. The 2009 blasting permit allows Pike to conduct 25 blasts and to remove up to 250,000 cubic yards of rock. Olson Aff. ¶ 10. Blue Rock and Pike have relied on the City's words, actions, and inactions, in continuing to operate and improve the Quarry. Indeed, Pike purchased an active quarrying operation from Blue Rock in 2005. At that time the City considered the Quarry to be legal.

Pike has shown a high likelihood of success on its equitable estoppel claim.

**D. The Public Interest Will Not be Adversely Affected by a Stay**

A stay serves the public interest for much the same reasons that the balance of the harms favors a stay. There is little public interest in stopping a land use that has continued with the City's actual knowledge and pursuant to City approvals for more than 40 years during the comparatively brief time before this appeal is decided. The CEO determined earlier this year that the public would not be adversely affected by allowing Pike to blast 25 times at Spring

Street and to remove 250,000 cubic yards of rock from the Quarry. As a “Special Exception” use in the Industrial zone, mineral extraction activities are not fundamentally incompatible with the City’s land use ordinance or comprehensive plan. *See* 2004 Land Use Ordinance § 201.88.

Finally, there is a wider public interest at stake, as explained by former MDOT Commissioner John Melrose. *Melrose Aff.* ¶ 17 - 22. There is a significant public interest in maintaining high quality low cost sources of aggregate in Greater Portland. *Id.* The Spring Street Quarry is an important and irreplaceable source of aggregate used in local construction and transportation infrastructure projects. Pike is a key supplier. The region as a whole will suffer if the Spring Street Quarry is closed.

### CONCLUSION

WHEREFORE, Plaintiff Pike Industries, Inc. respectfully requests that the Court grant the following relief:

- (A) a stay of the ZBA Decision until a final non-appealable judgment is entered;
- (B) a stay of any action by the City of Westbrook and its officials, including the Code Enforcement Officer, to give effect to the ZBA Decision until a final non-appealable judgment is entered;
- (C) a stay of the City’s July 30, 2009 Notice to Cease Operations at the Spring Street Quarry and Revocation of Pike’s 2009 Blasting Permit until a final non-appealable judgment is entered;
- (D) a stay preventing the City from interfering with Pike’s rights to mineral extraction and stone crushing at the Spring Street Quarry until a final non-appealable judgment is entered;  
and
- (E) such other and further relief as may be just and proper.

Dated at Portland, Maine this 19th day of August, 2009.

Respectfully submitted,



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