

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, an independent quasi-judicial)
body of the City of Westbrook, and)
RICHARD GOUZIE, in his capacity as)
Code Enforcement Officer of the City of)
Westbrook,)

Defendants.)

**COMPLAINT FOR REVIEW OF
GOVERNMENTAL ACTION AND
INDEPENDENT CLAIMS FOR RELIEF
(M.R.CIV.P. 80B)**

Plaintiff, Pike Industries, Inc. (“Pike”) and its predecessors including the City of Westbrook itself have operated a rock quarry off Spring Street (the “Spring Street Quarry” or “Quarry”) in the City of Westbrook (“City”) for more than 40 years. Pike now brings this appeal to preserve its rights to continue use of the Quarry against the newly undertaken efforts of the City to shut the Quarry down.

More than one million tons of crushed rock has been removed from the Quarry by Pike and its predecessor. The Quarry has operated since before either state or municipal permits were needed for mineral extraction. The Quarry received a City approval to operate an asphalt plant and concrete plant issued on November 7, 1968, which approval has never been appealed,

challenged, or revoked. The Quarry received a permit from the State of Maine Mining Commission, after notice to the City, on September 28, 1971. More recently, the City has issued building permits for scales, a scale house and numerous blasting permits. The City officials responsible for enforcing the Land Use Ordinance have continuously had actual knowledge of the Quarry over many decades, and have never questioned the lawfulness of the use. Pike, therefore, files this complaint for review of governmental action and independent claims for relief, pursuant to M.R.Civ.P. 80B, to preserve and establish its rights to continue the longstanding use of the Quarry.¹

On July 22, 2009, the Westbrook Zoning Board of Appeals (the “ZBA”)² reversed a decision by the Code Enforcement Officer, who found that Pike had grandfathered rights at the Spring Street Quarry. The ZBA decided, instead, that the Quarry is *not* a legally existing non-conforming use. The ZBA’s July 22 Decision (attached as **Exhibit 1**) is erroneous as a matter of law, contains findings unsupported by substantial evidence and should be reversed.

The ZBA members recognized that their decision was utterly inconsistent with the City’s long treatment of the Quarry as lawful and described the decision “mind-boggling.” The ZBA based its decision not on what they saw as right, but on their attorney’s advice that the ZBA could not consider equitable matters, such as the City’s treatment of the Quarry as lawful. In the words of the ZBA’s attorney, “[F]airness is . . . for the courts to decide.” The ZBA invited Pike to pursue judicial review to establish its equitable rights. Meanwhile, the City issued a Cease and Desist Order (attached as **Exhibit 2**) purporting to bar Pike from operating the Quarry.

¹ On February 26, 2009 Pike filed a declaratory judgment action, *Pike Industries, Inc. v. City of Westbrook*, Docket No. CV-09-118, to establish its vested rights to use the Spring Street Quarry. Pike will shortly file a motion to consolidate that action with this one given the substantial overlap between the two claims. The claims in the declaratory judgment action are narrowed and included herein, in part, as independent claims for relief.

² The ZBA’s predecessor entity as of 1968 was called the Zoning Appeals Board. For the sake of consistency the Zoning Appeals Board (“ZBA”) is referred to as the ZBA.

Pike's independent claims for relief under Rule 80B(i) are equitable claims to defend against the ZBA Decision and the City's Cease and Desist Order.

For its Complaint Pike states as follows:

PARTIES

1. Pike Industries, Inc. is a Delaware corporation qualified to do business in the State of Maine. Its principle place of business is in Belmont, New Hampshire.

2. Pike has been operating in Maine since 1983. Pike employs between 450 and 525 Maine people and averages between \$100 and \$125 million per year in gross sales in Maine. As of April 1, 2008, Pike was the 6th largest taxpayer in the City.

3. The City of Westbrook is a municipality with a principal place of business in Westbrook, Maine.

4. The Westbrook Zoning Board of Appeals (the "ZBA") is a body of the City of Westbrook.

5. Richard Gouzie is the Code Enforcement Officer of the City of Westbrook.

JURISDICTION

6. This Court has jurisdiction over the subject matter of this action by virtue of Maine Rule of Civil Procedure 80B, 30-A M.R.S.A. § 2691, 4 M.R.S.A. § 105, Westbrook Land Use Ordinance § 709 and other applicable law.

7. This Court has personal jurisdiction over the Defendant by virtue of the fact that its place of business is located within the State of Maine.

8. Venue is proper in Cumberland County, pursuant to 14 M.R.S.A. § 501, because the Defendant's place of business is located there and events giving rise to this action occurred there.

RELEVANT CITY OF WESTBROOK ZONING ORDINANCES

9. On November 9, 1951 the City adopted its first Zoning Ordinance.
10. The City's 1951 Zoning Map showed that the Spring Street Quarry was located within a Farming Zone.
11. On June 25, 1968, the Planning Board voted to amend the Westbrook Zoning Map to locate the Spring Street Quarry in the Industrial Zone. The City Council then changed the zone for the specific purpose of allowing rock quarrying and accessory uses at the Spring Street Quarry.
12. In 1968, the Industrial Zone 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.
13. 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." As an activity that is not a nuisance, mineral extraction and rock crushing were permitted at the Spring Street Quarry as of 1968 without further City approval.
14. On December 1, 1969, the City again amended its zoning ordinance. Section XIV(C)(2) of the 1969 Zoning Ordinance states that "[e]xtractive industries, including quarrying and mining operations" were allowed as a "Special Exception" use in the Industrial District. The City's land use ordinances after 1969 have continued to treat mineral extraction as a "conditional use" or a "special exception" use in the Industrial zone.

15. Section VI of the 1969 Zoning Ordinance states that a “Special Exception” is a permitted use of a property. “A special exception is a use that would not be appropriate generally or without restriction throughout the zoning district but which, if controlled as to number, area, location, or relation to the neighborhood, would promote the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity, or general welfare. Such uses may be permitted in such zoning district as special exceptions, if specific provision for such special exceptions is made in this Zoning Ordinance.”

16. Section III(B) of the 1969 Zoning Ordinance specifically addressed a disputed 15 acre tract of the Spring Street Quarry (Parcel 11-A on the plan attached as **Exhibit 3**).

17. Section III(B) of the 1969 Zoning Ordinance provides for certain vested rights with respect to the 15 acre tract (Parcel 11-A on **Exhibit 3**):

[T]he new limitations and conditions imposed by this Ordinance relative to property located in an Industrial Zone under this Ordinance shall not apply to said [disputed] parcel of land and *any lawful rights as to the use of said premises* or parts thereof that the said C. Company, Inc. or its successors in interest may now have in and to said premises or the use thereof and existing at the effective date of this Ordinance *shall be deemed vested* and may be continued as a non conforming use, notwithstanding the conditions and limitations imposed by other sections of this Ordinance upon Industrial Zones.

(emphasis added).

18. On February 9, 2004, the City adopted the current Westbrook Land Use Ordinance. The Quarry is still located in the Industrial zone. Pursuant to Section 310 of the Ordinance, Extractive Industry is allowed as a Special Exception.

19. A Special Exception is a conforming use that requires Planning Board approval pursuant to Section 204 of the Ordinance.

FACTUAL HISTORY

20. Pike owns the Spring Street Quarry located at 645 Spring Street in Westbrook, Maine, delineated as Tax Map 5, Lot 11 and Tax Map 5B, Lot 3.
21. Pike acquired the Quarry from Blue Rock Industries, Inc. by deed dated December 16, 2005, and recorded in the Cumberland County Registry of Deeds Book 23504, Page 113; and a corrective deed dated December 30, 2005 and recorded in said Registry in Book 23578, Page 296.
22. The property containing the Spring Street Quarry is made up of land acquired by Blue Rock (successor by merger to Cumberland Sand & Gravel Co., Inc.; W. H. Hinman, Inc.; Blue Rock Quarry; and The Wildland Company), as a result of several transactions from 1965 to 1993.
23. A plan showing the Quarry is attached as **Exhibit 3**. The plan shows the location of the Spring Street Quarry (31.88 acres) as well as the various parcels of land acquired by Blue Rock over time (total of about 78 acres).
24. Pike, Blue Rock and others, including the City itself, before it have operated the Spring Street Quarry for more than 40 years. The property has a long history of use as a quarry, stretching back to the early days of the Twentieth Century.
25. Over the years Pike and Blue Rock have removed more than one million tons of rock from the quarry.
26. Pike and Blue Rock have operated the Quarry with the City's actual knowledge and approval.
27. On November 7, 1968, the ZBA granted to Blue Rock Approval to operate a quarry, rock crusher, concrete plant and asphalt plant at the Quarry subject to certain safeguards.

28. The safeguards in the Approval anticipated certain undertakings by the City, including that the City would convey a quit claim deed to the C Company property (property adjacent to certain land then owned by Blue Rock at the Quarry), that certain quarry performance standards would be incorporated into the deed, and that Blue Rock would then relocate its existing operation on Main Street in Westbrook to Spring Street. The City refused to complete the undertakings contemplated by the Approval, primarily by refusing to release its interest in the C Company land.

29. By preventing Blue Rock from meeting certain conditions, the City waived those conditions and cannot use Blue Rock's inability to meet conditions as a basis to void the Approval or consider Pike's use of the Quarry to be illegal.

30. To the extent that Blue Rock (or later Pike) failed to meet any conditions in the Approval, the City has never acted to revoke, appeal, or modify the Approval. Any failure to meet conditions does not void the Approval *ab initio*.

31. After receiving the 1968 Approval in November, Blue Rock began blasting and rock extraction at the Quarry in December. The City had actual knowledge of this activity, and took no action to stop the activity.

32. On April 5, 1971, the City received notice of the issuance of a Site Location Project number under Maine law by the Environmental Improvement Commission for the Quarry.

33. On June 14, 1971, Blue Rock submitted an application to the Maine Mining Commission for approval to operate a quarry on 31.88 acres of land. The application refers to the 31.88 Quarry as "grandfathered."

34. The City received a written copy of the Mining Commission application. The City did not object to anything in the application, including the statement that the Quarry was “grandfathered.”

35. On September 28, 1971, the Maine Mining Commission approved Blue Rock’s mining operation at Spring Street.

36. On December 14, 1971, a memorandum in City files indicates that the City’s Building Inspector knew about the ongoing Quarry operations and did not recommend any action by the City to stop the operations.

37. On October 24, 1986, Blue Rock sent a letter to the CEO requesting approval to construct a sales office and display building at the Quarry. The request was approved.

38. Harry LeClair, who served as the CEO for the City from the 1980s to 2000 averred in 2009 that, to his knowledge, “Blue Rock Industries or Pike Industries have been actively operating at the Spring Street quarry since the late 1960s.”

39. During his time as CEO, Mr. LeClair “was familiar with Blue Rock Industries’ quarrying activities at Spring Street in Westbrook. During this time, numerous other City of Westbrook officials were also aware of Blue Rock’s quarrying activities at Spring Street.”

40. 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.”

41. Mr. LeClair’s successor as Code Enforcement Officer, Richard Gouzie, also took the position that Pike has had a lawful right to continue mineral extraction at the quarry.

42. On April 5, 2006, Mr. Gouzie issued a building permit for Pike to install a platform, scales, and a scale house at the Quarry. There was no question that the City considered

the Quarry to be lawful. That same year, Pike constructed over \$30,000 in improvements for the Quarry pursuant to the City permit.

43. After the City began requiring blasting permits at the quarry in or about 2006, Mr. Gouzie issued blasting permits for the Quarry.

44. Pike conducted substantial blasting pursuant to the blasting permits.

45. On May 5, 2008, the Mayor of the City of Westbrook asked the City Planner to look into whether Pike had a legal right to operate the Spring Street Quarry. The Planner responded, "We have reviewed our files for Pike/Blue Rock and all of our records reflect approval of the existing overall operation in the 1960s and early 1970s."

46. On April 9, 2009, Mr. Gouzie approved a 2009 blasting permit for the Quarry authorizing the extraction of up to 250,000 cubic yards of material.

47. Condition No. 4 of the 2009 blasting permit provides, in part, "In the event that a final, non-appealable outcome of that [ZBA] 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."

48. The City officials responsible for enforcing its Land Use Ordinance have had continuous actual knowledge that Blue Rock, followed by Pike, has operated the Quarry from at least 1968 to the present.

49. The City has never objected to mineral extraction at the Quarry, issued any notice of violation, or taken any enforcement action at the Quarry.

50. The City has consistently treated the Spring Street Quarry as a lawfully existing use for more than 40 years.

51. From 1968 to the present no 12 month period has passed without substantial quarrying activity at the Quarry.

PROCEDURAL HISTORY

52. In the 1990s, IDEXX Laboratories, Inc. (“IDEXX”) purchased an existing building in the industrial park, located in the same industrial zone as the Quarry, and now operates a manufacturing plant near the Spring Street Quarry.

53. Neither IDEXX nor its predecessors objected to Pike or Blue Rock’s use of the Quarry prior to 2008.

54. Blue Rock, and now Pike, also owns another, larger quarry in the City that mines the same vein of “Blue Rock” as does Spring Street Quarry. Main Street Quarry is now depleted. Pike and Blue Rock both have had longstanding plans to close the quarry located off Main Street in Westbrook, redevelop Main Street, and consolidate quarry operations at the Spring Street location.

55. IDEXX has publicly stated that it considers Extractive Industry, which is presently a conforming use at the Five Star Industrial Park where the Spring Street Quarry is located, to be inconsistent with IDEXX’s “image” and has threatened to leave Westbrook unless the City closes the Quarry.

56. On September 9, 2008, 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. The City asked Pike to respond to the complaint.

57. On January 9, 2009, Pike submitted a letter to the CEO responding to IDEXX’s complaint. 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 an Approval issued by the Westbrook Zoning Board of Appeals on November 7, 1968.

58. On January 29, 2009, the CEO issued an opinion letter finding, *inter alia*, as follows:

- A. Pike has a grandfathered right to operate the existing 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.

59. On February 27, 2009, Pike appealed the CEO's letter to the ZBA.

60. Also on February 27, 2009, IDEXX appealed the CEO's letter to the ZBA.

61. The ZBA consolidated the two appeals and held 7 nights of hearings (March 24, 26 and 31, April 13, May 6, June 10, and July 22, 2009).

62. On July 22, 2009 the ZBA made a decision (dated July 27, 2009) reversing the CEO's determination that Pike has a right to mineral extraction at the Quarry as a lawfully existing non-conforming use and granting IDEXX's appeal.

63. The ZBA also reversed the CEO's determination with regard to 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 conduct rock crushing as a grandfathered use.

64. The ZBA found that no 12 month period has passed since 1968 without substantive quarrying activity and, therefore, that Pike's rights have not been lost through discontinuance.

65. The ZBA also determined, based on advice of counsel, that it lacked jurisdiction to address the equitable claims raised by Pike which relied on the history of the City's many

actions permitting the Quarry to operate. The decision reads, in part, “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[.]”

66. 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 permit.

67. Separately, the City Council has referred to the Planning Board a proposal to re-zone the entire Five Star Industrial Park area, including the Spring Street Quarry, to a light manufacturing zone.

68. The proposed “Light Manufacturing” zone, which remains under consideration by the Planning Board, would, if adopted as written specifically preclude mineral extraction, asphalt plants, and cement plants at the Spring Street Quarry. Nonsensically, the proposed zone would continue to allow other industry, including an existing 500 megawatt gas fired power plant (the largest gas plant in Maine) adjacent to Idexx, factories, a large metal machining operation, warehouses, and other uses equally or more inconsistent with IDEXX’s vision of a future Westbrook without industry.

GROUND FOR REVERSAL OF ZONING BOARD OF APPEALS DECISION

**COUNT I
(Lawful Use Under 1968 Land Use Ordinance)**

69. Pike repeats and realleges the allegations contained in Paragraphs 1 through 68 of this Complaint as if fully set forth herein.

70. 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 a quarrying and accessory uses at the Quarry.

71. The City Council adopted the zoning change.

72. As of December of 1968, the Industrial Zone 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 was specifically listed as requiring approval.

73. 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." Mineral extraction and rock crushing is not on the list of uses that require specific approval.

74. At most mineral extraction and rock crushing are uses that *could be* undertaken in a manner that *could* constitute a nuisance, but such uses have never been operated in such a manner at the Spring Street Quarry, nor has the City ever so alleged.

75. As of December of 1968, mineral extraction and rock crushing were lawful permitted uses in the Industrial Zone without any further City approval.

76. The ZBA's attorney, Ralph Austin, advised the ZBA that mineral extraction is not a *per se* nuisance.

77. The ZBA erred as a matter of law in finding that Pike does not have grandfathered rights to mineral extraction and rock crushing at the Spring Street Quarry as a use that was lawful when Blue Rock began the use in December of 1968.

COUNT II
(November 7, 1968 ZBA Approval)

78. Pike repeats and realleges the allegations contained in Paragraphs 1 through 77 of this Complaint as if fully set forth herein.

79. On September 23, 1968, Blue Rock applied for a building permit and/or occupancy permit for “the operation of the existing Spring Street Quarry and the operation of Blue Rock’s Read-Mix Concrete and Bituminous Concrete Plant” pursuant to Section VII(1) of the Zoning Ordinance.

80. On or about October 10, 1968, the City’s Building Inspector, Harold G. Wescott, denied the application.

81. On October 29, 1968, Blue Rock filed an appeal to the Zoning Appeals Board.

82. On November 7, 1968, the Zoning Appeals Board issued a decision unanimously granting Blue Rock’s appeal (“1968 ZBA Approval”). The Board decided that “the operation of the existing Spring Street Quarry and the operation of Blue Rock’s Read-Mix Concrete and Bituminous Concrete Plant” would *not* be “substantially injurious, noxious or offensive” provided certain safeguards were effected.

83. 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.³ (hereafter referred to as Blue Rock Quarry) *permission to operate a quarry, rock crushing plant, Read-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).

³ On November 4, 1968, Cook & Company, Inc. changed its name to C Company, Inc.

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

85. 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.

86. The City has never revoked, amended, modified, suspended, or otherwise changed or removed the 1968 ZBA Approval.

87. The conditions in the 1968 ZBA Approval were either met or, if they could not be met, they were not met because the City prevented Blue Rock from fulfilling those conditions.

88. The City prevented Blue Rock from taking certain action contemplated by the 1968 ZBA Approval by refusing to convey to Blue Rock the C Company land. The City Council had committed to do so prior to the 1968 ZBA Approval, and the ZBA issued the Approval with that 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. By refusing to convey the land, conditions tied to that conveyance are waived, deemed met, or are null and void.

89. Even if certain conditions in the 1968 ZBA Approval were not met and failure to comply with such conditions was not excused or waived because the City prevented the fulfillment of such conditions, the failure to meet a condition does not effect the underlying lawful status of the use as approved. The failure to meet a condition in the Approval does not automatically void, revoke, or modify the Approval.

90. If Blue Rock did not meet a condition in the 1968 ZBA Approval, the City could have sought liquidated damages, the remedy identified in the Approval itself, or initiated a proceeding to enforce the conditions.

91. Page c. of the 1968 ZBA Approval provides:

“Item: Liquidated Damages It is agreed that if the grantee, its successors and assigns shall violate any of the restrictive covenants enumerated above, then the offending party (the grantee, its successors and assigns) promises to pay to the grantor the following monies as payable on demand.

1. If the results of tests made by the Westbrook City Engineer, or under his direction, during a blasting operation, exceed any of the limits established in this covenant, it will constitute a violation, and liquidated damages of \$300.00 plus the costs of testing will be paid to the grantor by the grantee.

2. If the results of tests or inspections made by the Westbrook City Engineer, or under his direction, during periods other than blasting operations, show that the restrictive items of this covenant have been violated, notice of this violation shall be sent to the operators of the Quarry, in writing, signed by the Westbrook City Clerk, or his deputy clerk, and delivered to the Quarry Company offices in Westbrook, attested by the constable serving it, a four (4) hour grace period shall commence from the time such notice of violation is served. If the violation persists in excess of this grace period, then liquidated damages of \$300.00 for each and every day said violation continues, will be paid to the grantor by the grantee. The written notification will be sufficient notice for a seven (7) day period.” (See ZBA Hearing, Exhibit PIKE00000188).

92. There is no evidence to suggest that a notice of violation was ever sent to Blue Rock with respect to the Spring Street Quarry or that any tests exceeded the limits set forth by the safeguards.

93. The ZBA in 2009 failed to consider or address the impact of the liquidated damages clause on Blue Rock’s and Pike’s rights under the 1968 ZBA Approval.

94. The ZBA erred as a matter of law in finding that Pike does not have grandfathered rights to mineral extraction and rock crushing at the Spring Street Quarry by virtue of the 1968 ZBA Approval.

COUNT III
(Refusal to Consider Actions by City in Preventing Fulfillment of Conditions
in 1968 ZBA Approval)

95. Pike repeats and realleges the allegations contained in Paragraphs 1 through 94 of this Complaint as if fully set forth herein.

96. During the course of its presentation to the ZBA, Pike argued that the City's refusal in December 1968 to convey the C Company parcel to Blue Rock made it impossible for Blue Rock to implement all of the safeguards set forth in the 1968 ZBA Approval.

97. To the extent the City prevented the fulfillment of the conditions set forth in the 1968 ZAB Approval, those conditions should be deemed waived or fulfilled and the Approval should remain valid and legally enforceable.

98. The ZBA's attorney, however, advised the ZBA that it could not consider this "prevention doctrine," even by analogy, because the prevention doctrine was an "equitable" principle and because there was no basis to apply principles of contract law to municipal zoning cases.

99. The ZBA's 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. 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 ZAB Approval.

100. It is clear from the ZBA's deliberations that at least some of the Board members would have upheld the validity of the 1968 ZAB Approval if they had been permitted to consider the prevention doctrine as an appropriate, analogous legal principle. 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.” (ZBA Hearing, May 6, 2009, 52:8 – 53:3 (Holmes)).

101. The ZBA erred as a matter of law in determining that consideration of the City’s actions in preventing Blue Rock from meeting conditions in the 1968 ZBA Approval (i.e., Pike’s “prevention doctrine” argument) required that the ZBA exercise equitable jurisdiction.

COUNT IV
(Vested Rights in C Company Parcel)

102. Pike repeats and realleges the allegations contained in Paragraphs 1 through 101 of this Complaint as if fully set forth herein.

103. In December of 1968 C Company filed a lawsuit in Cumberland County Superior Court against the City of Westbrook for damages and to abate a trespass. The lawsuit alleged that the City had allowed garbage from the adjacent town dump to intrude onto land owned by C Company.

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

105. At that time the City was also in the process of re-zoning the C Company Parcel to a Farming Zone.

106. In or about February of 1969, Justice Armand Dufresne, Jr. entered a Temporary Restraining Order barring the City from re-zoning the C Company parcel while the litigation was pending.

107. On December 1, 1969, while the C Company litigation remained pending, the City amended its Zoning Ordinance. The amendment specifically addressed the C Company land.

108. 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.”

109. The 1969 Zoning Ordinance also states that the “new limitations and conditions imposed by this Ordinance” would “not apply” to the C Company parcel.

110. The ZBA in 2009 erred as a matter of law in concluding that Section III(B) of the 1969 Zoning Ordinance fails to provide Pike with rights to engage in all lawful uses of 1969, including mineral extraction on that parcel.

COUNT V
(Grandfathered Special Exception)

111. Pike repeats and realleges the allegations contained in Paragraphs 1 through 110 of this Complaint as if fully set forth herein.

112. Since February 9, 2004, when the City adopted the 2004 Land Use Ordinance, the Pike Property has been located in the Industrial Zone. In that zone, Extractive Industry (which includes quarrying) is allowed as a Special Exception.

113. A Special Exception use is defined as a type of *permitted* use by Ordinance § 201.88. A Special Exception is a use which is by policy *permitted* in a particular zoning district and consistent with the City’s most recently adopted comprehensive plan; is neither a nonconforming use nor subject to a variance under customary circumstances; which is by policy considered to be of an essential or desirable nature for the general welfare of the community, and at the same time is not essentially incompatible with existing uses in the district, but not at every or any location therein or without restriction or conditions as may be imposed on the use.

114. As defined, Special Exception uses are “conforming” uses. The ZBA erred in finding that the Spring Street Quarry is a nonconforming use.

115. The Ordinance does not require that pre-existing Special Exception uses obtain a new approval under the Ordinance. The ZBA made no findings on the subject.

116. Per the Ordinance, the Planning Board has authority to approve Special Exception uses. The ZBA erred in deciding that it too must approve such uses.

117. The Spring Street Quarry was in use before the Westbrook Ordinance required Special Exception approval for mineral extraction uses. The Quarry is, therefore, a grandfathered Special Exception. The Board erred in failing to so find.

COUNT VI

(Both the ZBA and the CEO Lacked Jurisdiction or Authority to Determine Whether the 1968 ZBA Decision Was Legally Enforceable)

118. Pike repeats and realleges the allegations contained in Paragraphs 1 through 117 of this Complaint as if fully set forth herein.

119. On November 7, 1968, the Westbrook Zoning Appeals Board rendered a decision to approve certain uses at the Spring Street Quarry.

120. The 1968 ZBA Approval was never appealed by the City, IDEXX’s predecessor in title, or by any interested party.

121. The September 9, 2008 complaint by IDEXX does not constitute a proper or timely challenge of the 1968 ZBA Approval.

122. Because there was never an appeal, there is no basis for the ZBA to reverse the 1968 Approval. An appeal would have been required to the superior court. The 1968 ZBA Approval is, therefore, administrative *res judicata* that cannot be undone by the CEO or ZBA in 2009.

123. The CEO does not have jurisdiction or authority to determine the validity of the 1968 ZBA Approval; the ZBA erred to the extent it found otherwise.

COUNT VII

**(The ZBA Lacked Jurisdiction or Authority to Review the
CEO's action on IDEXX's Complaint and/or CEO's Enforcement Decision)**

124. Pike repeats and realleges the allegations contained in Paragraphs 1 through 123 of this Complaint as if fully set forth herein.

125. In his January 29, 2009 decision, the CEO determined that Pike's Spring Street Quarry operations are not in violation of the City's Land Use Ordinances.

126. Under the Ordinance, enforcement of the Ordinances is the sole responsibility of the CEO. Ordinance, Chapt. VIII. Zoning Boards do not have the authority to "second-guess" enforcement decisions of the CEO.

127. The Westbrook Ordinance does not provide for appeal from complaints (or decisions on complaints) made to the CEO. See Ordinance §§ 604.4 (Complaints); 604.5 (Violation Procedure), and 801 (Enforcement). The only procedure specified by Ordinance § 604.4 in connection with a response to a complaint is that the CEO is to examine the subject of the complaint, take appropriate action, keep a record of the complaints, action upon them, and report to the complainer upon request.

128. The Ordinance states that the Code Enforcement Officer may "report to the complainer" upon request, but does not provide for any appeal to the ZBA from any opinion or decision the Code Enforcement officer may make with regard to a complaint.

129. Section 801 of the Ordinance states that the Land Use Ordinance is to be enforced by the Code Enforcement Officer in accordance with 30-A M.R.S.A. § 4452, as amended.

130. The Zoning Board of Appeals has no authority to enforce the Land Use Ordinance.

131. Any decision by the Zoning Board of Appeals on an appeal from action or inaction by the Code Enforcement Officer in response to an enforcement decision on a complaint would be advisory only.

132. The ZBA erred as a matter of law insofar as it found that it had authority to review the CEO's January 29, 2009 decision.

INDEPENDENT CLAIMS FOR RELIEF
(M.R.Civ.P. 80B(i))

COUNT I
(Equitable Estoppel)

133. Pike repeats and realleges the allegations contained in Paragraphs 1 through 132 of this Complaint as if fully set forth herein.

134. The ZBA Decision contains findings in support of a conclusion that the City is estopped from taking any action to prevent Pike from mineral extraction or stone crushing at the Spring Street Quarry.

135. The ZBA found that the City has had actual knowledge that Blue Rock, followed by Pike, has operated a quarry at the Spring Street property since 1968.

136. The ZBA found that no City official or board has ever objected to the operation of a quarry at the Spring Street property.

137. The ZBA found the City granted building permits for the construction of structures accessory to quarry operations at the Quarry.

138. The ZBA found that the City granted permits to conduct blasting at the Quarry.

139. Blue Rock and Pike have relied on the City's words, actions and inactions, to their detriment.

140. It would be fundamentally unfair and offend basic notions of justice for the City to now prevent Pike from continuing to engage in uses about which the City has known, supported, and approved for a period of more than 40 years.

141. The ZBA's findings and the record on appeal support a conclusion that the City is estopped from taking any enforcement action related to the use of the Spring Street Quarry for mineral extraction or stone crushing.

COUNT II
(Waiver)

142. Pike repeats and realleges the allegations contained in Paragraphs 1 through 141 of this Complaint as if fully set forth herein.

143. By its statements and pattern and practice and course of dealing over the past 40 years and having not issued a single citation regarding the Spring Street Quarry despite its actual knowledge, the City has voluntarily relinquished any rights it had to enforce any safeguard in the November 7, 1968 Zoning Board of Appeals Decision with which Pike or its predecessors have not complied.

144. By its statements and pattern and practice and course of dealing over the past 40 years and having not issued a single citation regarding the Spring Street Quarry despite its actual knowledge, the City has voluntarily relinquished any rights it had to enforce any provision of its Land Use Ordinance that would prevent Pike from continuing mineral extraction and rock crushing at the Spring Street Quarry.

COUNT III
(Laches)

145. Pike repeats and realleges the allegations contained in Paragraphs 1 through 144 of this Complaint as if fully set forth herein.

146. The City is barred from taking any enforcement action related to the use of the Spring Street Quarry for mineral extraction or stone crushing as a result of the City's delay and failure to take such action for an unreasonable period of time under circumstances that are prejudicial and inequitable to Pike.

RELIEF REQUESTED

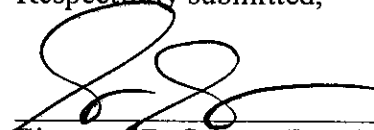
WHEREFORE, Pike Industries, Inc. respectfully requests this Court grant:

- (A) reverse the ZBA's decision to deny Pike's appeal;
- (B) grant Pike's appeal; or in the alternative,
- (C) remand this matter to the ZBA for proceedings consistent with this Court's opinion;
- (D) declare the 1968 ZBA Approval is valid and operative to permit Pike to engage in all uses permitted therein;
- (E) issue a declaration as to Pike's equitable rights with respect to the Spring Street Quarry to engage in mineral extraction and rock crushing;
- (F) stay the ZBA's decision, the CEO's cease and desist letter, and any other action by the City to prevent Pike from operating the Spring Street Quarry until a final non-appealable judgment is rendered in this matter;
- (G) permanently enjoin the City from interfering with Pike's equitable rights with respect to the Spring Street Quarry;
- (H) allow Pike to recover its court costs; and

(I) grant such other and further relief as may be just.

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

Respectfully submitted,



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