



# City of Westbrook

## ZONING BOARD OF APPEALS

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### Zoning Board of Appeals – Decision 07/22/2009

Applicant: Pike Industries

Applicant Address: 645 Spring Street

Tax Map No: 005, Lot: 011 & Tax Map: 005B, Lot 003

Zones: Industrial Park District

Date of Hearings: March 24, March 26, March 31, April 13, May 6, June 10 and July 22

Location: Westbrook High School, Room 114, 7:00 p.m.

Applicant: Artel, Inc., Westbrook Works and Others

Tax Map No: 005, Lot: 011 & Tax Map: 005B, Lot 003

Zones: Industrial Park District

Date of Hearings: March 24, March 26, March 31, April 13, May 6, June 10 and July 22

Location: Westbrook High School, Room 114, 7:00 p.m.

Present: Philip Brown (Ward 5 - Chair), Joyce Hebert (Ward 1 – Vice Chair), William Holmes (Ward 2), Aaron Burns (Ward 5), John Turcotte (Alternate)

Absent: Steven Morrow (Ward 4)

Staff: Richard Gouzie

#### **Matter being appealed to the Zoning Board of Appeals, as follows:**

Administrative Appeal, Pike Industries, 645 Spring Street, is appealing the decision of Richard Gouzie, Code Enforcement Officer. Tax Map: 005, Lot: 011 & Tax Map: 005B, Lot 003, Zone Industrial Park District

Administrative Appeal, Artel, Inc., Westbrook Works and Others are appealing a portion of Richard Gouzie, Code Enforcement Officer Letter dated January 29, 2009. Tax Map: 005, Lot: 011 & Tax Map: 005B, Lot 003, Zone Industrial Park District

#### **Background**

1. Pike Industries, Inc. (“Pike”) owns property located at 645 Spring Street in Westbrook, Maine, also delineated as Tax Map 5, Lot 11 and Tax Map 5B, Lot 3 (the “Pike Property”), on which it operates a quarry business.

2. Westbrook Works is an association of businesses (including Idexx Laboratories, Inc. and Artel, Inc.) and individuals who own property in the Five Star Industrial Park, the “Bird Land” neighborhood and other locations near the Pike Property (collectively “Westbrook Works”).

3. On or about September 9, 2008, Idexx submitted a letter to the Westbrook Code Enforcement Officer (“CEO”), claiming that Pike does not have a right to continue operating a quarry and related uses at the Pike Property.

4. On or about January 9, 2009, Pike submitted a letter to the CEO, claiming that it has vested rights to continue operating a quarry, a rock crushing plant, a concrete plant, and an asphalt plant on the Pike Property.

5. On or about January 29, 2009, the CEO issued an opinion letter addressed to attorneys for both Pike and Idexx, in which the CEO reached decisions on the four claims made by Pike in its January 9, 2009 letter, as follows:

- A. Pike retains certain grandfathered rights to operate an existing quarry on the Pike Property;
- B. Pike does not have any grandfathered rights to operate a rock crushing plant on the Pike Property;
- C. Pike does not have any grandfathered rights to operate a concrete plant on the Pike Property; and
- D. Pike does not have any grandfathered rights to operate an asphalt plant on the Pike Property.

6. On or about February 27, 2009, Pike filed an Administrative Appeal with the Westbrook Zoning Board of Appeals (“Board”) as to those portions of the CEO’s January 29, 2009 decision determining that Pike did not have grandfathered rights to operate a rock crushing plant, a concrete plant, and an asphalt plant on the Pike Property.

7. On or about February 27, 2009, Westbrook Works filed an Administrative Appeal with the Board as to that portion of the CEO’s January 29, 2009 decision that determined Pike retains grandfathered rights to operate an existing quarry on the Pike Property.

### **Procedural History**

1. The Board held hearings on these two Administrative Appeals on March 24, March 26, March 31, April 13, May 6, June 10, and July 22, 2009. At those hearings, Pike was represented by the firm of Preti Flaherty (Attorney Sigmund Schutz and William Hagedorn); Westbrook Works was represented by the firm of Drummond Woodsum and MacMahon (Attorney William Plouffe); the CEO was represented by the

firm of Jensen Baird Gardner & Henry (Attorney Natalie Burns); and the Board was represented by the firm Woodman Edmands Danylik & Austin (Attorney Ralph Austin).

2. On March 18, 2009, a pre-hearing conference was held with Board Member Aaron Burns, Esq., under authority of a Board vote taken on March 11, 2009, in order to establish recommended rules of procedure for these two administrative appeals. A report of the conference was issued by Mr. Burns on March 19, 2009, and was unanimously approved by the Board at its meeting on March 24, 2009 (a copy of said report, containing the procedural rules followed by the Board, is attached hereto).

3. At the March 24, 2009 meeting, Board Member William Holmes disclosed that he had a relationship that could be viewed as a potential conflict of interest. Board Member Holmes stated that his sister-in-law in Massachusetts works for a competitor of Idexx and that the same sister-in-law has a friend who works in the administration of Pike Industries. Board Member Holmes expressed his belief that this would not adversely affect his ability to act impartially in these matters. Upon motion duly made and seconded, the Board voted (four in favor and none against; Holmes abstaining) that there was no conflict of interest that would disqualify Board Member Holmes.

4. Also at the March 24, 2009 meeting, Board Member Steven Morrow disclosed a conflict of interest that would affect his ability to impartially hear these appeals, and recused himself from these matters. The Board accepted Member Morrow's recusal.

5. At the April 13, 2009 hearing, upon motion duly made and seconded, the Board voted (five to zero) to consolidate these two administrative appeals into one administrative appeal.

6. At the April 13, 2009 hearing, in response to a claim by Pike that the Board has no jurisdiction under the Westbrook Land Use Ordinance to hear these appeals, the Board, upon motion duly made and seconded, voted (five to zero) that it does have jurisdiction to hear these appeals, in that the CEO made a "determination" and "interpretation" under Section 604.1 of the Westbrook Land Use Ordinance.

7. At the April 13, 2009 hearing, in response to a claim by Westbrook Works that the Board does not have jurisdiction to hear and determine the equitable claims of Pike, the Board, upon motion duly made and seconded, voted (five to zero) that it does not have jurisdiction or authority to hear and/or determine any equitable issues.

8. At the April 13, 2009 hearing, at the conclusion of comments by all parties and the public, the Board, upon motion duly made and seconded, voted (five to zero) to close the public hearing.

9. At the June 10, 2009 meeting, in response to a request of Pike to reopen the record in these matters for the limited purpose of submitting additional City documentation, the Board, upon motion duly made and seconded, voted (five to zero) not

to reopen the record, based on the procedural rules adopted on March 24, 2009 and on the fact that the requested documentation would be redundant as similar information was already part of the record.

10. At the June 10, 2009 meeting, in response to a request of Pike to admit into the record a May 21, 2009 letter from Attorney Schutz to Attorney Austin and a June 2, 2009 letter from Attorney Plouffe to Attorney Austin (both letters containing arguments on certain legal issues for which Attorney Austin was drafting a memorandum to the Board), the Board, upon motion duly made and seconded, voted (five to zero) to admit the aforesaid letters into the record.

11. At the July 22, 2009 meeting, in response to a request of Pike to admit into the record the response of its attorney to the draft Decision prepared by Board Attorney Austin, the Board, upon motion duly made and seconded, voted (four to one, with Brown opposed) to admit into the record the responses from Pike's attorney, Westbrook Works' attorney, and the CEO's attorney, all dated July 21, 2009.

### **Findings of Fact<sup>1</sup>**

1. Pike operates a quarry on the Pike Property located at 645 Spring Street in Westbrook, Maine, having acquired that property from Blue Rock Industries ("Blue Rock") in 2005.

2. The property constituting the so-called "Spring Street quarry" which Pike obtained from Blue Rock is comprised of four separate parcels, which were in turn acquired by Blue Rock at different times. As shown on an exhibit submitted by Westbrook Works (WW #11), Blue Rock obtained its first parcel in 1969 by merger with Wildland Corporation (area shown in green on WW #11); it acquired the second parcel in October of 1970 from Merrill Company (area shown in red on WW #11); it acquired the third parcel in January of 1972 from City of Portland (area shown in purple on WW #11); and it acquired the fourth parcel from Maine Rubber Company in June of 1993 (area shown in blue on WW #11).

3. Prior to 1940, a rock quarrying operation had been established on the Merrill Company portion of the Pike Property.

4. A quarry existed on the Pike Property prior to the City's first enactment of a zoning ordinance on November 9, 1951. The City sold the land on which the quarry was located to Sheldon S. Grant, by a deed dated October 24, 1951. The deed from the City contained several conditions. One of the conditions required Mr. Grant to set up and operate a rock crusher on the property. Another stated: "In the event that the Grantee should for any reason fail to operate the quarry or crusher for a period of five years title to the land to revert to the City." Other conditions required the sale to the City of

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<sup>1</sup> Findings of Fact may be considered Conclusions of Law, and Conclusions of Law may be considered Findings of Fact, if appropriate.

specified amounts of crushed rock produced on the site, at a reduced rate, and the sale of asphalt to the City at a reduced rate if an asphalt plant were established on the site. Mr. Grant transferred the quarry property to Cook and Company, later known as C Company, on November 1, 1955. This deed stated that the transfer was subject to all of the conditions included in the deed from the City to Mr. Grant.

5. According to the Maine Law Court decision in *C Company v. City of Westbrook*, the City took the position that title to the quarry property had reverted to it because Mr. Grant and Cook and Company did not operate the quarry and rock crusher for the period of time required by the terms of the deed. C Company disagreed and challenged the City's claim in court. The Law Court issued an opinion on October 1, 1970. The opinion determined that Mr. Grant had met the conditions in the deed and that the property had not reverted to the City. The Law Court rejected the City's position that it was entitled to possession of the property based upon its claim that the quarry and the crusher were not operated after 1956. The Law Court ruled that the operation of the quarry or crusher for the five years immediately following the transfer of the property satisfied the condition in the City's deed. The Court's decision does not address the specifics of when the quarry operation ceased, whether it was both the quarry and the rock crusher that were not operated for a period of time, and what the period of non-operation was for each use. The Court's decision does not discuss the discontinuance of the use in the context of the City's zoning ordinance.

6. The Board finds that, although no evidence was submitted as to the exact date, at some point prior to May 1, 1964, quarry operations on the Merrill property ceased. Aerial photos, as well as testimony of several witnesses, confirmed that the quarry on the Merrill property was filled with water as of May 1, 1964. Robert Nunley, former Blue Rock engineer, testified that when he visited the quarry on the Merrill property in 1968, it was filled with water; that there were old cars submerged in it; and that rock processing equipment near the quarry was rusting and unusable by Blue Rock. Other aerial photos show that this particular quarry was filled with water in 1975 and thereafter.

7. In early 1968, the president of Wildland Corporation wrote to the Mayor of Westbrook, disclosing Blue Rock's plans to begin quarrying, rock crushing, asphalt manufacturing, and cement manufacturing at a new location on the Pike Property.

8. In 1968, Wildland contacted the Westbrook Code Enforcement Officer, seeking a permit for a quarry operation on the Pike Property. On October 11, 1968, the CEO denied that permit, and on October 29, 1968, Wildland filed an appeal of the CEO's decision to the Zoning Appeals Board ("ZAB").

9. On November 7, 1968, the ZAB granted approval to Wildland Company and Blue Rock to operate a quarry, rock crushing plant, concrete plant and asphalt plant on its property, provided that four certain conditions set forth in that approval were met by Wildland / Blue Rock (the "1968 Approval").

10. In May of 1968, the City Council voted to convey the Merrill portion of the Pike Property to Wildland Company / Blue Rock. On December 2, 1968, the City Council voted to rescind its May 1968 order. The Mayor vetoed the Council's decision. On December 9, 1968, the City Council overrode the Mayor's veto.

11. The first condition in the 1968 Approval required certain performance standards to be included in a covenant "which will in fact become a part of the deed to land the City of Westbrook will sell to Blue Rock Quarry, or otherwise become legally binding on the Quarry operators."

12. There was no deed from the City of Westbrook to Wildland or Blue Rock containing the performance standards as required by condition No. 1.

13. The second condition in the 1968 Approval required that there be an agreement between the City of Westbrook and Blue Rock Quarry "to extend the provisions and safeguards of the attached Covenant Items and bind them to all abutting properties now owned, or acquired in the future by Blue Rock Quarry."

14. No such agreement was ever consummated between the City of Westbrook and Blue Rock Quarry.

15. The third condition of the 1968 Approval required that Blue Rock Quarry cease its operations on Main Street in Westbrook within a three-year period that was to have commenced "with the passing of papers by the parties."

16. There was no transfer of property from the City to Blue Rock ("passing of papers"), and Blue Rock did not cease its operations at its Main Street property.

17. The fourth condition of the 1968 Approval required that Blue Rock conduct tests of vibration levels while blasting "during the first phase of quarry operations on Spring Street." Additionally, copies of test results were to have been forwarded to the Westbrook City Engineer.

18. There were no such test results forwarded by Blue Rock to the City Engineer or otherwise in the City's records.

19. Neither Blue Rock nor the City nor any interested party appealed the 1968 Approval to Superior Court.

20. Subsequent to the 1968 Approval, Blue Rock began limited blasting and rock extraction at the quarry located on the Wildland property. Blue Rock conducted a blast on the Wildland Property to create the new quarry on December 24 or 26, 1968.

21. On June 14, 1971, Blue Rock submitted an application to the Maine Mining Commission for approval to operate a quarry on its 31.88 acres of land, a copy of which application was sent to the City of Westbrook by the Environmental Improvement

Commission. That application was approved by the Maine Mining Commission on September 28, 1971. The application has the word “grandfathered” written above the sentence “It is our intention to affect 31.88 acres of land.”

22. On or about December 14, 1971, Building Inspector John R. Bennette notified Blue Rock’s general manager Cassidy that Blue Rock “would be treated as a new industry in the area.”

23. Since 1971, Blue Rock and then later Pike have conducted quarry operations on the Pike Property.

24. Quarrying operations on the Pike Property have intensified at least since 2006.

25. From 1968 to the present, no 12-month period has passed without substantive quarrying activity at the Pike Property.

26. There is no evidence that Blue Rock ever operated a concrete plant or asphalt plant on the Pike Property.

27. With the exception of the 1968 Approval, the City has not granted a permit to Pike or Blue Rock to operate a quarry at the Pike Property.

28. The City through its Building Inspector and Code Enforcement offices had actual knowledge that Blue Rock, followed by Pike, operated a quarry at the Pike Property from December 14, 1971 to the present.

29. There is no evidence that any City official or board ever objected to the operation of a quarry at the Pike Property by Blue Rock, followed by Pike, since December 14, 1971.

30. On October 24, 1986, Blue Rock sent a letter to the CEO requesting approval to construct a sales office and display building on the Pike Property.

31. On April 5, 2006, the CEO issued a building permit to Pike for the installation of platform, scales and a building at the Pike Property.

32. On February 9, 2006, the CEO issued a blasting permit to Pike for the period from April 1, 2006 through December 31, 2006. On April 7, 2008, the CEO issued a blasting permit to Pike for the period from April 7, 2008 through December 31, 2008. Said blasting permits were issued for Pike to conduct blasting activities at the Pike Property.

33. The current Westbrook Land Use Ordinance was adopted on February 9, 2004 (the “2004 Ordinance”). Pursuant to the 2004 Ordinance, the Pike Property is located in the Industrial Park District. In that zone, Extractive Industries (which includes

quarrying) is allowed as a Special Exception, requiring approval from both the Zoning Board of Appeals (Section 310.2) and from the Planning Board (Section 204.1).

34. The Westbrook Land Use Ordinance prior to the 2004 Ordinance was adopted on December 3, 1973 (the "1973 Ordinance"). Under the 1973 Ordinance, the Pike Property was likewise located in the Industrial Zone. Extractive Industries was allowed in the Industrial Zone in the 1973 Ordinance as a Conditional Use, again requiring approval from both the Zoning Board of Appeals (Section XVII (C) (2)) and from the Planning Board (Section XXIV (A)).

35. The Westbrook Land Use Ordinance prior to the 1973 Ordinance was adopted on December 1, 1969 (the "1969 Ordinance"). Under the 1969 Ordinance, the Pike Property was likewise in the Industrial Zone. Extractive Industries was allowed in the Industrial Zone in the 1969 Ordinance as a Special Exception, requiring approval from the Board of Appeals (Section XIV (C) (2)).

36. The 1969 Ordinance also contained a special nonconformance provision related specifically to a portion of the current Pike Property, being that portion which the City of Westbrook conveyed to Sheldon Grant by deed recorded in the Cumberland County Registry of Deeds in Book 2055, Page 339 (Section III (B)). Said property is also that parcel outlined in red on WW #11 and identified as "Merrill to Blue Rock."

37. Neither Blue Rock nor Pike has ever submitted an application to either the Planning Board or the Zoning Board of Appeals (or its predecessors) for approval for an extractive industry business under the 1969 Ordinance, the 1973 Ordinance or the 2004 Ordinance.

### **Conclusions**

1. Because Blue Rock did not meet and/or satisfy all of the conditions of the 1968 Approval, neither Blue Rock nor its successor Pike obtained any "grandfathered" rights from that approval.

2. After 1968, neither Blue Rock nor its successor Pike applied to any City agency or board for approval of an extractive industry use at the Pike Property.

3. This Board does not have jurisdiction to address the equitable claims of laches, estoppel and the "prevention doctrine" which were raised by Pike.

4. Pike does not have the right to operate a quarry at the Pike Property as a legally-existing nonconforming ("grandfathered") use.

5. Rock crushing is an integral aspect and part of a quarrying operation. However, because Pike does not have the right to operate a quarry at the Pike Property as a grandfathered use, it also does not have the right to conduct rock crushing at the Pike Property as a grandfathered use.

6. Pike does not have the right to establish a concrete plant or an asphalt plant at the Pike Property as grandfathered uses.

7. 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, nor does it address what rights Pike may have to those uses under the current Land Use Ordinance should it apply to the appropriate agencies for any or all of them.

**Decision**


1. The administrative appeal of Pike is denied.
2. The decision of the CEO finding that Pike has grandfathered rights to operate its quarry on the Pike Property is overturned.
3. The administrative appeal of Westbrook Works is granted.
4. The decision of the CEO finding that Pike has no grandfathered rights to operate a rock crushing plant, a concrete plant and an asphalt plant on Pike Property is affirmed.

Any person aggrieved by this decision may file an appeal to the Superior Court of Maine in accordance with Section 709 of the Westbrook Land Use Ordinance and Rule 80B of the Maine Rules of Civil Procedure.

**All members concur 5-0 in favor**

Dated at Westbrook, Maine this 27th day of July, 2009

For the Zoning Board of Appeals,

  
Philip Brown  
Chair