



City of Westbrook

CODE ENFORCEMENT DEPARTMENT

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Richard Gouzie
Code Enforcement Officer

January 29, 2009

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Dear Attorneys Toolan and Plouffe:

This opinion is issued in response to materials provided to me by Idexx Laboratories, Inc. (Idexx) and Pike Industries (Pike) concerning the historic operation of a quarry located on property near Spring Street. The property at issue is owned by Pike. In its submission to Mayor Bruce Chuluda, dated January 9, 2009, Pike states that it has vested rights to the following:

1. A quarry.
2. A rock crushing plant.
3. A concrete plant.
4. An asphalt plant.

Idexx has submitted materials in support of its claim that any grandfathered rights to operate a quarry on the site that may have existed have been lost through discontinuance under Section 203.2 of the Westbrook Land Use Ordinance (the Ordinance) or under similar sections of prior versions of the Ordinance and that the current operations on the site exceed the limits of any grandfathered rights. In addition to the submissions from Pike and Idexx, I have also received and reviewed a letter from Warren Knight, an abutter to the property in question, which included historical information about the property. I have referred to the Maine Supreme Judicial Court's decision in the case C Company v. City of Westbrook (1970). Finally, I have reviewed the City's records concerning the property and the Zoning Ordinances in effect from 1951 through the present.

DESCRIPTION OF THE SITE

Pike owns land on the westerly side of Spring Street. Pike's property consists of several parcels of land. Pike acquired this land from Blue Rock Industries by a deed dated December 16, 2005. According to the deed from Blue Rock Industries to Pike, Blue Rock Industries is the successor by merger to Blue Rock Quarry and Wildland Company. Records at the Secretary of State's Office show that this merger occurred on January 21, 1969.

Pike's Spring Street property also includes land that was owned by the City of Westbrook and transferred to Sheldon Grant on October 21, 1951. Sheldon Grant transferred the land to Cook and Company on November 1, 1955. C Company, the new name of Cook and Company, transferred this land to Paul E. Merrill on June 30, 1969. Mr. Merrill transferred the land to Blue Rock Industries on October 28, 1970.

ZONING OF THE SITE

The 1951 Zoning Ordinance designated the property as in the Farming Zone. Extractive operations were not allowed in that zoning district, but the quarry had been established prior to the enactment of the Zoning Ordinance and so was grandfathered. The 1951 Zoning Ordinance stated that nonconforming uses were terminated if discontinued for a year, but authorized the Zoning Board of Appeals (the ZBA) to approve the re-commencement of the use. In 1968, the City rezoned the property and other properties in the area to Industrial, presumably to authorize an extractive industry use in this area. The Industrial Zone at that time did not contain a list of permitted uses. Instead, it prohibited uses from having certain nuisance impacts on neighborhoods. The 1951 Ordinance authorized the Code Enforcement Officer to approve industrial uses that met this standard. Industrial uses that did not meet this standard had to be approved by the ZBA.

The zoning classification of the property remained Industrial with the enactment of the 1969 (enacted December 1, 1969) and 1973 (enacted December 3, 1973) Zoning Ordinances. New extractive uses required a special exception permit from the ZBA under the 1969 Ordinance. The 1973 Ordinance required a conditional use approval from the ZBA and also required Planning Board approval for extractive industries. This Ordinance also established several performance standards applicable to the use. The current Land Use Ordinance, adopted on February 9, 2004 allows the use with Planning Board approval, again with several performance standards applicable to the use. A summary of the various ordinance provisions is attached as Exhibit 1.

HISTORY OF THE QUARRY USE

A quarry existed on the land 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 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.

According to the 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 the 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.

On October 11, 1968, the Code Enforcement Officer wrote a letter to the Wildland Company stating that he was denying a permit for a quarry operation on land referred to as Lot #1. (Exhibit 2). The property in this area, including both this parcel and the quarry land owned by C Company, had been rezoned from Farming, the original classification under the 1951 Zoning Ordinance, to Industrial. The letter stated that the CEO based his denial upon "the emission of noise, vibration and dust which I feel would be detrimental to the neighborhood." This language related to Section VII of the 1951 Zoning Ordinance. This section stated that properties in the Industrial Zone could not be used "for any trade, industry or use that is substantially injurious, noxious, or offensive to a neighborhood by reason of the emission of odor, fumes, dust, smoke, vibration or noise or other cause" "unless authorized by the Appeal Board." (The 1951 Ordinance also included a list of uses prohibited regardless of the impact, but a quarry use was not included in that list.)

On October 29, 1968, Wildland Company filed an appeal of the CEO's decision. (Exhibit 3). The appeal included a sketch of the property owned by Wildland. The plan shows this property was adjacent to land owned by "Cook & Co. or City of Westbrook." There is an area on that parcel that appears to be the old quarry site. There is no other application for a quarry approval in the City files from Cook & Company or from Blue Rock. It is not clear whether such an application was ever fully or truly filed.

On November 7, 1968, the ZBA granted an approval to Wildland Company for the operation of a quarry on its property. (Exhibit 4). The decision noted that the Zoning Ordinance did not contain specific provisions for emissions, but that the Planning Board and the City's Administration had reached "tentative agreement" on emissions controls. The ZBA approval anticipated covenants to put these controls in a deed. According to the decision, the approval to operate a quarry was granted to Blue Rock Quarry, Wildland[] Company, and Cook and Co., Inc. 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." The approval was made subject to many conditions of approval. The decision noted that these conditions were required to ensure that the use would meet the standard of the Zoning Ordinance that prohibited a use that was injurious, noxious or offensive to the neighborhood. Part of the approval required either inclusion of a covenant in a deed that the City was to grant to Blue Rock Quarry "or otherwise become legally binding on the quarry operators." The approval further required that there would be an agreement between the City and Blue Rock that made the required covenant applicable to all abutting properties owned by Blue Rock or acquired in the future. Another condition required that Blue Rock's operations on Main Street would be relocated to the Spring Street site within three years. There is also a reference to a plan entitled "Blue Rock Quarry Proposed Location Spring Street, Westbrook, Maine" dated January 9, 1968. However, as noted above, I have not been able to locate a copy of this plan or any application related to it.

The City Council, however, refused to authorize the sale of land to Blue Rock. As a result, there is no deed from the City including the required covenants. There is no evidence that Blue Rock or any of the other applicants made the required conditions "legally binding on the quarry operations" in any other manner, as required by the ZBA approval.

On April 5, 1971, the City received a notice from the State of Maine Environmental Improvement Commission (EIC) (the predecessor to today's D.E.P.). (Exhibit 5). The notice indicated that it had received an application from Mr. Philip Corey of Blue Rock Quarry concerning "Blue Rock Quarry Excavation." The notice informed the City that it would receive a letter of review from the applicant and would be asked to return that letter to the applicant as soon as possible so that the applicant could submit the letter of review to the EIC as part of a complete Record of Intent.

On April 8, 1971, Mr. Corey, the President of Blue Rock Industries, sent a letter to Henry Warren, Site Location Consultant for the EIC. (Exhibit 6). This referred to a letter from Mr. Warren dated April 5, 1971. Mr. Corey's letter stated that Blue Rock was exempt from the Site Location Law. According to the letter, Blue Rock had purchased a rock deposit on Spring Street adjacent to an existing and operating quarry fifteen years earlier. Blue Rock stated that it had begun excavation on that land three years before and that it had also acquired the adjacent and operating quarry. According to the letter, Blue Rock did not plan to "expand these quarries" at that time "but rather, we will combine them for a more economical operation." The letter indicated that Blue Rock would forward a sketch to the Maine Mining Commission showing the properties and quarries involved and the general plan of operation.

On June 14, 1971, Blue Rock submitted its Application for Approval of Mining Plan to the Maine Mining Commission. (Exhibit 7). The application included a sketch of the property involved and the approximate location of the "Old Quarry" and the "New Quarry." The application indicated that the amount of land to be affected was 31.88 acres. Over the number of acres was written the word "Grandfathered." A later table attached to the application clarified that the 31.88 acres refers to the area where mining commenced in 1969. The application notes that the mining on the site was for quarry stone in connection with the crushing operation at Blue Rock's Main Street quarry. The Maine Mining Commission approved Blue Rock's plan on September 28, 1971.

On December 14, 1971, John Bennette, Building Inspector for the City, sent a memorandum to Roger Knight. (Exhibit 8). The memorandum discusses a conversation that Mr. Bennette had with "Mr. Cassidy, the General Manager of the Construction Division of Blue Rock." The conversation occurred in relationship to a building permit application that Blue Rock had filed for a temporary building to be located near the road going into the "old quarry on the side adjacent to the old City Dump." Mr. Bennette inquired as to the proposed operations on the site in light of a test blast that had occurred a few weeks prior to the memorandum. Mr. Bennette requested a letter of intent and also requested information concerning the approval from the Maine Mining Commission, including the plans that had been approved. The memo states that Mr. Bennette informed Mr. Cassidy that Blue Rock "will be operating under the new Zoning Ordinance and would be treated as a new industry in the area."

Since 1971, Blue Rock and later Pike have conducted limited and sporadic operations on this property, generally related to small amounts of blasting and removal of materials from the site. Pike, in its letter to me dated January 26, 2009, indicates that it can provide information to me from employees concerning the operation of the quarry. Such information should be provided to the City. However, it is clear that the City was aware that limited quarrying operations occurred on the site on a sporadic basis. It is also clear that the City had a copy of the Mining Commission Approval from 1971.

CONCLUSIONS

The first issue before me at this time is whether Pike is in violation of the City's Ordinances through continued operation of the Spring Street Quarry. As noted above, I have reviewed materials presented by Pike and Idexx, as well as historical information provided by Warren Knight. In addition, I reviewed the information in the City's files, as well as the current Land Use Ordinance and the prior Zoning Ordinances.

The first quarry use on Pike's Spring Street property occurred on the land owned by the City and later conveyed to C Company. This use predated the enactment of the 1951 Zoning Ordinance. The use continued after 1951 and was in operation when the City transferred the land that year. The terms of the deed required continued operation of the quarry for a period of time, as well as compliance with several other conditions. These issues are discussed at length in the C Company case.

It is my determination that Pike retains certain grandfathered rights to operate the existing quarry on the Spring Street property. These rights arise out of the historical use of the property. While there is some question as to whether prior quarry operators ceased operations for a year or more, which would have resulted in a termination of the rights under the 1951 Zoning Ordinance, that Ordinance allowed the ZBA to authorize a reestablishment of a nonconforming use. In 1968, the property was rezoned to Industrial and the ZBA authorized certain new operations on the property. Blue Rock never established the other uses authorized by that approval-the concrete plant and the asphalt plant. While there are different claims about whether the rock crusher use was ever established, I rely upon the 1971 State Mining Commission approval, which was based upon Blue Rock's own representation that its 31.88 acre quarry operation was proposed to provide rock which was then to be crushed at the Main Street site. This is evidence that Blue Rock did not intend to pursue rock crushing at the Spring Street site and did not claim that it had a grandfathered right to do so, as it claimed regarding operation of the quarry. In addition, Blue Rock informed the Maine Environmental Improvement Commission that it did not require site location approval from the State for its operations because it would only be operating 31.88 acres of quarry area, which it claimed were grandfathered. No new application was submitted to the State to allow these other uses or to operate a quarry in any other location on its property. While there is conflicting evidence about whether Blue Rock actually had the right to quarry this 31.88 acre area, the record shows that the City knew about the State Mining Commission approval, as well as the limited quarrying operations on the property. There is not an opinion on this issue in the City's files, but it appears that the City accepted Blue Rock's claim of right to the operation of this area under a claim of grandfathered rights. The City did not object to the State Mining Commission application and approval, and it has never taken any enforcement action concerning the limited quarry operations in the 31.88 acre area.

In addition to the 1971 Mining Commission approval, I rely upon Blue Rock's failure to comply with the conditions of the 1968 ZBA approval in my determination that Pike only has rights to quarry in the "grandfathered" 31.88 acre area and not to undertake other uses included in the ZBA approval. It is clear that the ZBA's conditions were the basis for the approval of the intensive uses proposed. While some of the conditions apply to all of the uses, others address environmental impacts from the asphalt plant and the concrete plant, especially the conditions related to air pollution and emissions. In the absence of compliance, the uses could not be undertaken and it is clear from the 1971 Mining Commission application that they were never undertaken. In my opinion, these uses are not accessory uses to the grandfathered quarry use and must have their own approvals. Thus, Pike's grandfathered rights are limited to quarrying in the 31.88 acre parcel shown on the approved 1971 State Mining Commission approval. Because Pike is operating under a claim of grandfathering, it is at this time limited to this 31.88 acre area. There are limits upon expansions of the current level of operations, but since I do not have a request for expansion of the nonconforming use, I will not address what would constitute a prohibited expansion of the nonconforming use at this time. Since Pike has not increased its operations beyond the limits allowed by the 1971 State Mining Commission approval and has not increased its operations beyond the occasional use that has occurred since then, I do not find that Pike is in violation of the Land Use Ordinance.

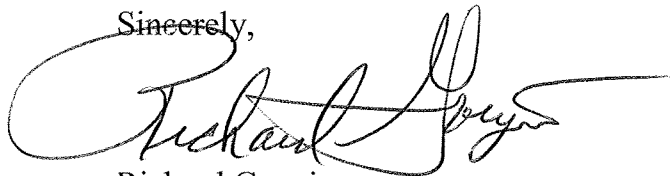
The final remaining issue is whether Pike has vested rights to any other operations beyond those discussed above. Under Maine law, a property owner can get vested rights to develop a property or establish a use even if a land use ordinance has changed to prohibit a use for which an approval or permit has been previously issued. In order to claim vested rights, a party must show that it had a permit for the operation, that it made substantial changes under the terms of the permit, that it incurred substantial expenses as a result of those changes and that the work was undertaken in the field in good faith. The issuance of a permit does not provide vested rights. Likewise, expenditures made for acquiring the permit do not provide vested rights. After receiving the ZBA approval in 1968, Blue Rock did not make any changes to the site concerning a rock crusher, asphalt plant or concrete plant. It did not satisfy the conditions of approval or even create a document making the conditions applicable to its land and enforceable by the City. While the City did not deed land to Blue Rock, as had been anticipated, the creation of the enforceable covenants was not limited by the ZBA approval to a deed from the City to Blue Rock. The ZBA approval required that the covenants either be created through that deed "or otherwise become legally binding on the quarry operators." There is also no evidence that Blue Rock or Pike expended money to establish any of these other operations. Based upon this, I find that Pike does not have vested rights to establish a concrete plant, asphalt plant or rock crushing operations on this site under the terms of the 1968 ZBA approval.

I have not addressed the issues raised by Pike about whether the City is estopped or barred by the doctrine of laches from raising issues concerning its operation of the quarry. It is my understanding that both of these issues are defenses that could be raised by Pike in court if the City were to undertake an enforcement action. These types of legal defenses are outside of the scope of my authority, and so I offer no opinion on them.

APPEAL

Section 703.1 of the Land Use Ordinance states that any person who is aggrieved by a decision of the Code Enforcement Officer may file an appeal to the Zoning Board of Appeals within 30 days of the action taken. Appeal forms are available in the Codes Office in City Hall. An appeal must be submitted within the 30-day period on the appeal form and must be accompanied by the required filing fee to cover the costs of noticing the appeal.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard Gouzie", with a long horizontal flourish extending to the right.

Richard Gouzie
Code Enforcement Officer

Enclosures