

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Consolidated Docket Nos. BCD-WB-AP-09-31¹

PIKE INDUSTRIES, INC.,

Plaintiff

v.

ORDER ON PLAINTIFF'S
MOTION FOR STAY

CITY OF WESTBROOK, ET AL,

Respondents

Before the court is the motion of Plaintiff Pike Industries, Inc. ("Plaintiff" or "Pike"), for a stay pursuant to Rule 80B(b).

FACTUAL BACKGROUND

Pike owns property located at 465 Spring Street, in Westbrook, Maine on which it operates a quarry business (the "Property"). Pike acquired the Property from its predecessor-in-interest, Blue Rock Industries ("Blue Rock") in 2005.

A quarry business was first established on a portion of the Property prior to 1940. ZBA Decision, Findings of Fact ¶ 3. A quarry existed on the Property prior to the City of Westbrook's first enactment of a zoning ordinance on November 9, 1951. *Id.* at ¶ 4. At some point prior to May 1, 1964, the quarry ceased operation. *Id.* ¶ 6. In 1968, Blue Rock² sought and was granted approval by the City to operate a quarry, rock crushing plant, concrete plant and

¹ On September 28, 2009, this Rule 80B action was ordered consolidated with a declaratory judgment action in Docket No. BCD-WB-CV-09-54 *Pike Industries, Inc. v. City of Westbrook, et al.* However, on November 10, 2009, Plaintiff's unopposed oral motion to dismiss the declaratory judgment action was granted.

² The court recognizes that Wildland Corporation sought approval to operate the quarry with Blue Rock and that those two entities later merged. *See* ZBA Decision, Findings of Fact ¶ 2. The court will, however, refer to Blue Rock and Wildland collectively for ease of reference.

asphalt plant on its property, subject to several conditions (the “1968 Approval”). *Id.* ¶ 9. Following the grant of the 1968 Approval, Blue Rock began limited blasting and rock extraction at the Property. In 1971 it sought and was granted approval from the Maine Mining Commission to operate a quarry on the Property.

Since 1971, Blue Rock and then later Pike have conducted quarry operations on the Property. Indeed, from 1968 to July 2009, no 12-month period has passed without substantive quarry activity on the Property. *Id.* The City, through its Building Inspector and Code Enforcement offices had actual knowledge that Blue Rock, followed by Pike, operated a quarry at the Property from December 14, 1971 to the present. *Id.* ¶ 28.

On February 9, 2006, the City’s Code Enforcement Officer (“CEO”) issued a blasting permit to Pike for the period from April 1, 2006 through December 31, 2006. *Id.* ¶ 32. On April 7, 2008, the CEO issued a blasting permit to Pike for the period from April 7, 2008 through December 31, 2008. *Id.* On April 9, 2009, the CEO issued a blasting permit for the period from March 1, 2009 to December 15, 2009, subject to conditions which were later amended on May 9, 2009.

On September 9, 2008, prior to the City’s issuance of the most recent blasting permit, Intervenor, Idexx Laboratories, Inc. (“Idexx”), submitted a letter to the CEO claiming that Pike does not have a right to continue operating a quarry and related uses on the Property. ZBA Decision, Background ¶ 3. On 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 Property. *Id.* ¶ 4.

On January 29, 2009, the CEO issued an opinion letter addressed to the attorneys for Pike and Idexx, in which the CEO concluded:

1. Pike retains certain grandfathered rights to operate an existing quarry on the Property;
2. Pike does not have any grandfathered rights to operate a rock crushing plant on the Property;
3. Pike does not have any grandfathered rights to operate a concrete plant on the Pike Property; and
4. Pike does not have any grandfathered rights to operate an asphalt plant on the Property.

Id. ¶ 5.

On February 27, 2009, Pike filed an administrative appeal with the Westbrook Zoning Board of Appeals (“ZBA”) as to those portions of the CEO’s decision that determined that Pike does not have grandfathered rights to operate a rock crushing plant, a concrete plant, and an asphalt plant on the Property. *Id.* ¶ 6. Also on February 27, 2009, Westbrook Works³ filed an appeal to the ZBA as to that portion of the CEO’s decision that determined that Pike retains grandfathered rights to operate an existing quarry on the Property. *Id.* ¶ 7.

The ZBA consolidated both appeals and held public hearings on March 24, March 26, March 31, April 13, May 6, June 10 and July 22, 2009. At the April 13, 2009 hearing, the ZBA voted (5 to 0) that it had jurisdiction under the Westbrook Land Use Ordinance (“Ordinance”) to hear the appeals because they were based a “determination” and “interpretation” by the CEO under Section 604.1 of the Ordinance. ZBA Decision, Procedural Background ¶ 6. The ZBA also voted (5 to 0) that it does not have jurisdiction or authority to hear and/or determine any of the equitable claims or issues raised by Pike. *Id.* ¶ 7.

On July 27, 2009, the ZBA issued its Decision, together with findings of fact and conclusions of law. In that Decision, the ZBA voted unanimously to: (1) deny Pike’s appeal; (2)

³ Westbrook Works is an association of businesses (including Idexx and Intervenor Artel, Inc.), an individual who owns property in the Five Star Industrial Park, the “Bird Land” neighborhood and other locations near the Property. ZBA Decision, Background ¶ 2.

overturn the CEO's decision that Pike has grandfathered rights to operate its quarry on the Property; (3) grant Westbrook Work's appeal; and (4) affirm the CEO's decision that Pike has no grandfathered rights to operate a rock crushing plant, a concrete plant, and an asphalt plant on the Property. On July 30, 2009, the City's CEO issued a "Cease and Desist" order revoking the April 29, 2009 blasting permit and ordering Pike to cease operations.

On August 19, 2009, Pike filed this action for review of governmental action, together with independent claims for relief, under M.R. Civ. P. 80B. Pike also filed the instant motion asking the court to stay the effects of the ZBA's decision, including the "Cease and Desist" order, until such time as its appeal and its independent claims have been fully and finally decided.

DISCUSSION

I. The Applicable Standard for Granting a Stay Under Rule 80B(b)

Pike's motion for a stay is brought pursuant to M.R. Civ. P. 80B(b), which provides, in pertinent part:

Except as otherwise provided by statute, 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.*

Id. (emphasis added).

The parties disagree over the burden of proof applicable to motions for stay brought pursuant to Rule 80B(b). The City asserts that stays are in the nature of an injunction and are governed by Rule 65 and related Maine case law. *See* M.R. Civ. P. 65. From this premise, the City contends that the standard for obtaining temporary or preliminary injunctive relief outlined

in *Ingraham v. Univ. of Maine at Orono*, 441 A.2d 691, 693 (Me. 1982) should also govern the court's consideration of Pike's motion for a stay.⁴

However, the court agrees with Pike that, based on the language of Rule 80B(b) and the Law Court's discussion of it in *Cobbossee Dev. Group v. Town of Winthrop*, 585 A.2d 190 (Me. 1991), the standard for granting a stay under Rule 80B(b) is different and less exacting than that for injunctive relief.

[Rule 80B(b)] gives persons a mechanism to test a government decision but, by imposing time limits to appeal and not automatically staying the action being reviewed, it recognizes the countervailing policy that the administration of government should not be unnecessarily impeded. A broad reading of the non-stay provision in the rule best reconciles these two policies by not holding government hostage by private parties *unless there is some showing made to a court that a stay is proper*.

Id. at 194 (citations omitted) (emphasis added). Under the express language of the Rule, a stay of the underlying administrative order, while not automatic, is available upon such terms as the court deems "proper." Nothing in the body of the Rule nor in the Law Court's interpretations of it thusfar, suggest that the *Ingraham* standard applies to motions for a stay under Rule 80B(b).

Although not determinative of the issue, it is illuminating that a number of statutes have set standards for the issuance of stays in the context of administrative proceedings, some of which seem to track some or all of the elements of the *Ingraham* standard, while others adopt

⁴ Under *Ingraham*, "[b]efore granting a preliminary or permanent injunction, the Court must find that four criteria" have been satisfied:

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

Id. at 693.

entirely different standards.⁵ More telling is the distinction between Rule 80B(b) and Rule 80C(b). Rule 80C governs appeals of final agency action and draws in the express language of 5 M.R.S. § 11004, which requires that a stay be based upon “a showing of irreparable injury to the petitioner, a strong likelihood of success on the merits, and no substantial harm to adverse parties or the general public” *Id.* This language is markedly different from Rule 80B(b) and, in the court’s view, the difference is significant. Had the Supreme Judicial Court intended to apply the same standards to both rules, it certainly could have done so, yet it did not.

Accordingly, the court cannot conclude that staying an administrative decision and granting injunctive relief are necessarily synonymous, and the court will not read a standard into the language of Rule 80B(b) that is not supported by the express language adopted by its drafters or by the seemingly disparate statutory standards for stays under the law. Thus, consistent with the language of Rule 80B(b), the court will determine whether it should exercise its discretion and grant a stay upon such terms as it deems proper, – meaning, “specially suitable,” or “appropriate” – under the circumstances of this case. Webster’s New World Dictionary of the American Language 517 (4th College Ed. 2003).

⁵ See 2 Field, McKusick & Wroth, *Maine Civil Practice* § 80B.3 at 571 (Supp. 1981) (observing that various Maine statutes “set standards for the granting of a stay”). For example:

- Under 26 M.R.S. § 968(5)(D) which relates to cease and desist orders issued by the Maine Labor Relations Board, the court may not stay a decision by the MLRB “except where it is clearly shown to the satisfaction of the court that substantial and irreparable injury shall be sustained or that there is a substantial risk of danger to the public health or safety.” *Id.*
- Under 35-A M.R.S. § 1320, however, which deals with the appeal to the Law Court of determinations by the Public Utilities Commission, the Chief Justice of the Law Court (or, in her absence, another justice) may “stay the effect of the ruling or order upon the terms and conditions as [s/]he determines proper”). 35-A M.R.S. § 1320(7).

II. The Merits of Pike’s Motion For a Stay

At its core, Pike’s motion seeks to maintain the status quo with respect to Pike’s quarry operations until its legal challenges to the ZBA’s decision are finally resolved. According to Pike that status quo includes blasting, rock crushing, extraction and removal of excavated materials.

While this court concludes that that the *Ingraham* factors do not control the granting of a stay under Rule 80B(b) and that a failure to meet every one of those factors will not necessarily result in a denial of Pike’s motion, this court does agree with the Superior Court’s comment in *E.Perry Iron & Metal, Inc.*,⁶ that *Ingraham* may offer some guidance to the court’s evaluative process with respect to the scope and bounds of the court’s discretion under Rule 80B(b).

(a) Irreparable Harm

The first *Ingraham* factor requires a showing of irreparable injury, meaning an “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, 133. Citing a First Circuit decision, Pike claims that it will face substantial financial losses if it is unable to operate the quarry and that it lacks any opportunity to seek money damages from the City based on that loss. *Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 222 (1st Cir. 2003) (explaining that irreparable harm exists “[w]here a plaintiff stands to suffer a substantial injury that cannot adequately be compensated by an end-of-case award of money damages”).

⁶ The use of the word “comment” instead of “holding” is deliberate. The *E. Perry Iron & Metal, Inc.* case (“Perry Case”) was an 80B appeal regarding the enforcement of a municipal ordinance regarding scrap metal recycling facilities. The authority relied upon by the court in the Perry Case regarding the issuance of a stay was not the same as that in the instant case. Early in the Perry Case the Superior Court had granted a stay pursuant to Rule 80B(b) pending resolution of the appeal. After the court entered judgment for the defendant City, the plaintiff moved for a continuation of the stay pending its appeal to the Law Court. The Superior Court’s decision to grant the plaintiff’s motion was based upon the automatic stay provision of M.R. Civ. P. 62(a), and not upon Rule 80B(b).

The City responds that Pike's purported financial losses are too speculative to warrant an injunction. The City further contends that Pike has an adequate remedy because it is entitled to indemnification from Blue Rock under an agreement between Pike and Blue Rock if Pike is unable to use the Property as a quarry.

First, the court is persuaded that on this motion record enforcement of the ZBA's decision prior to the resolution of the instant appeal will impact Pike in a manner that may not be fully redressed through money damages. As outlined in the affidavits submitted by Pike in support of its motion, the Property is unique and central to Pike's business interests and any enforcement action taken by the City to foreclose Pike's use of the Property will effectively change the nature of Pike's use of it and adversely affect Pike's ability to conduct its business. Moreover, the court notes that the City's Cease and Desist Order, issued in response to the ZBA's decision, prohibits Pike from operating its business on the Property. In the court's view, and contrary to the City's suggestion, prohibiting Pike from extracting materials and conducting a business it has long conducted on the Property will result in very real harm to Pike and is not speculative.

Second, the court is persuaded that any judgment entered in favor of Pike in connection with either its appeal or its independent claims will not result in a damage award against the City. Instead, any victory for Pike will simply include an order vacating the ZBA's decision or prohibiting enforcement of the ordinance under equitable principles. Money damages to compensate Pike for its losses are not available vis-à-vis the City.

Further, although the City has made much of an indemnity agreement between Pike and Blue Rock, pursuant to which Blue Rock purportedly agreed to indemnify Pike for any losses suffered should it be unable to operate the quarry, the court is unable to conclude that that

agreement represents a sufficient remedy at law. Although the City has submitted affidavit testimony relating to the existence and general terms of the indemnity agreement, because the agreement itself is not before the court, it is impossible to know the scope of the indemnity provisions and whether and to what extent the agreement sufficiently covers Pike's past and future damage.

Accordingly, based upon the foregoing, the court cannot conclude on this motion record that Pike has an adequate remedy at law for the harm it will suffer if a stay is not granted.

(b) Balancing the Harms

Pike also contends that the threatened harm to its property and business outweighs any harm that Defendant would suffer if the stay is granted. The parties have submitted numerous affidavits evidencing the harm they each claim they will suffer in this case. In the court's view, the balancing of these asserted harms is the single most important factor governing its decision. After careful consideration, the court concludes that the harm Pike will suffer if a stay with appropriate conditions is not granted outweighs the harm that will be suffered by the City and the intervenors.

Pike has submitted affidavit testimony demonstrating its projected loss of business and, more importantly, its inability to utilize the unique qualities of the Property if a stay is not granted. The City and the intervenors, on the other hand, have submitted a number of affidavits from neighbors of Pike, both commercial and residential, outlining the noise, disruption, and business losses that will result if Pike is permitted to continue operations at the Property and, in particular, if it is allowed to continue blasting operations.

In this balancing process, the court concludes that the harm to Pike will outweigh that to the City and its inhabitants. The court understands the severity of the impact that Pike's

operations have on its neighbors and stresses that it in no way intends to minimize the harm that flows from that impact. However, the court is left to conclude that denying Pike's motion would cause it to suffer harm entirely distinct from any harm it has previously suffered, while granting it imposes no more harm on the City and its inhabitants than they have had to endure for the past several years. The following salient findings of the ZBA also inform the latter point:

- Pike and its predecessors have conducted substantial quarry operations at the Property during every twelve-month period for the past 40 years.
- Over time, those operations have included limited blasting, rock crushing, extraction and removal of materials, all done with the City's knowledge.
- Since February 2006, the City has issued three blasting permits to Pike and the last such permit was issued during the pendency of the administrative appeals underlying this court action.
- From 2006 to 2008, pursuant to the first two permits, Pike conducted 28 blasts on the Property and the more recent 2009 permit issued to Pike authorized up to 25 blasts.
- No appeal to the ZBA from the issuance of any of those permits, including the 2009 permit, was ever taken.

Of course, the court would prefer to avoid sanctioning any harm but, when faced with an opportunity to maintain the status quo rather than impose new, substantial injury, the court finds in favor of maintaining the status quo, but with appropriate conditions and limitations, until such time as the merits of this case are resolved by a judgment of this court.

(c) Likelihood of Success

Not unlike the commentary in the Perry Case, this court concludes that the "likelihood of success" element of the *Ingraham* standard has limited applicability to cases such as this, where Pike has already lost at the administrative level and seeks a stay pending the outcome of its appeal. Even if this particular *Ingraham* factor did apply, however, the court concludes that Pike has demonstrated at least a substantial *possibility* of success, a rather low standard, on its equitable claims. *See Ingraham*, 441 A.2d at 693. Although this court expresses no opinion about whether Pike will ultimately be entitled to a judgment on its equitable claims in the context

of its appeal, or its affirmative independent claims, or as an affirmative defense to the City's counterclaim, it does conclude that Pike has sufficiently demonstrated the possibility of success.

(d) The Public Interest

The final element of the *Ingraham* standard is whether the injunctive relief sought by the movant will harm the public interest. In this case, the harm the City alleges it will suffer is comprised of the alleged harm to the public. This element was addressed by the court in its preceding "balancing of harms analysis" in which the court concludes that the maintenance of the status quo with appropriate conditions and limitations until the merits of this case are resolved by a judgment of this court will result in no additional harm to the public.

DECISION

Based upon the foregoing, the court concludes that Pike has sufficiently demonstrated entitlement to a stay of the ZBA's decision, but with such conditions as the court deems proper. Those conditions are particularly informed by the court's preceding "balancing of harms" analysis, which determined that blasting by Pike and its residual impacts constituted the primary harm to the intervenors and neighbors proximate to the Property, and by the ZBA findings highlighted in that analysis.

Accordingly, pursuant to M.R. Civ. P. Rule 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference and the entry is

Plaintiff's Motion For A Stay is GRANTED, but on the following conditions which the court deems proper:

The court grants Plaintiff a limited stay of the July 27, 2009 Decision by the Westbrook ZBA pending the issuance of a judgment by the Superior Court with respect to the Rule 80B appeal in this case, on the following conditions:

- (a) Plaintiff shall not conduct any further blasting at the Property;

- (b) Plaintiff may continue limited quarrying operations at the Property, which shall only include rock crushing and excavation at, and the extraction and removal of any previously blasted rock and materials from, the Property;
- (c) Any removal of excavated materials shall occur only on Monday through Friday, between 8:00 a.m. and 5:00 p.m.
- (d) The limited quarrying operations permitted by this Order shall not abrogate any legal rights or obligations the City may have to enforce any safety or environmental concerns that either exist on the Property as of the date of this Order or hereafter occur on the Property as a result of the limited quarrying operations permitted by this Order.
- (e) The purpose of this Order is to maintain a reasonable measure of the status quo, and the granting of this limited stay does not, and shall not be deemed to, confirm, create, vest or establish any challenged right or rights in Plaintiff, including, but not limited to, the limited quarrying operations allowed by this stay; and, further, the court does not purport to declare by this Order that Plaintiff is or is not entitled to any future permits for which it might apply to the Respondent City.

Date: November 17, 2009

s/Thomas E. Humphrey
Chief Justice, Superior Court