

# Smiling Hill Farm

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Honorable Bruce Chuluda  
Mayor, City of Westbrook  
Westbrook City Hall  
2 York Street  
Westbrook, ME 04092

Ref: Spring Street Quarry

Dear Mayor Chuluda;

Having read both the Memorandum submitted by William Plouffe of Drummond Woodsum dated September 9, 2008 and the response by David Toolan of Oldcastle Materials dated January 9, 2009 I felt that it is important to address some of the history surrounding the Spring Street quarry. Both submissions are from a legal perspective and overlook (*and in some cases misinterpret*) the people and events that surround the Spring Street quarry issue. As you may know my father, Roger Knight, was a member of the Zoning Appeals Board ("ZAB") in 1968. Due to the proximity of Smiling Hill Farm to the proposed quarry site, Roger recused himself from participating in the ZAB debate and the subsequent vote on the quarry. However, Roger's attendance at the numerous meetings has provided me with some insight into the local politics, the perspective of the City and the private agendas of the personalities involved. It is my desire to supply this information in order to illuminate some of the unique aspects of this contentious issue and explain our farm's position.

1968 actually has many similarities to 2008. 1968 was an election year, there was a controversial war being waged overseas, national political disputes were reflected in local government and the City was addressing many changes. Urban Renewal was a local issue being debated with the future of the downtown in question as the very first anchor tenant for the Maine Mall (*Jordan Marsh*) was being constructed in South Portland. The Relief Route (*now William Clarke Drive and the spur to Exit 47*) was in the planning stages with two routes being considered. The City was also actively pursuing an industrial park development to expand the tax base and local employment options. Amidst these issues, the City was confronted with the prospect of a second quarry site to be located on Spring Street.

## I No Grandfathered Rights

Smiling Hill Farm has operated at its current location for many years and has witnessed the constant parade of new neighbors and new developments that have occurred. We are very familiar with the quarry site on Spring Street. In his response, Mr. Toolan has attempted to define the area as one single quarry with historic grandfathered rights, this is not the case. Mr. Toolan refers to the two quarries as one quarry with two working pits and then attempts to show a grandfathered status that extends back in time prior to the adoption of the City of Westbrook's first Zoning Ordinance in 1951. Mr. Toolan attempts to show that the original quarry was in legal operation until such time as

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Smiling Hill Farm also makes the Earth smile by utilizing recycled & reusable products.

necessary to confer grandfathered rights to the lot of land that Blue Rock purchased in the 1960's under the name of Wildland Company ("Wildland lot").

On the farm we have referred to the site as Babb's Hill, Thompson's Hill and Tickle-Belly Hill. It was a high point of terrain in the neighborhood, a popular berry picking spot and a great sledding hill in winter. The Wildland lot had been previously used as farmland. The abandoned farmland had been overgrown with scrub and timber and a portion of the land was cleared to allow an electrical transmission right-of-way to pass to the west in 1956. The lot had no history or previous use as a site for extractive activities.

Mr. Toolan's letter makes the argument that Blue Rock's purchase of a lot adjacent to a lot containing an "old"<sup>1</sup> quarry, extended to Blue Rock's Wildland lot any and all vested rights that had been previously conferred upon the adjacent lot. This is all an effort to somehow entwine the previous legitimacy and history of the old quarry with Blue Rock's subsequent actions on the Wildland lot.

The history does not support Mr. Toolan's contention;

- 1) The original quarry ("old quarry") was located on a separate and distinct lot from the Wildland lot. Blue Rock's ZAB submission shows the separate lots and reveals that Blue Rock was aware of and accepting of the separate nature of the lots in 1968. The submission even contains a reference to the "old quarry" on the separate lot showing that Blue Rock also knew and accepted in 1968 the status of a separate and "old" quarry existing on a separate and unique lot.
- 2) What vested rights accompany a lot of land do not automatically extended to other abutting lots. Also, the vested rights of a lot of land do not automatically extended to lots co-joined to the original lot, due to common ownership, at a future date.
- 3) Mr. Toolan's letter is vague concerning the date that the old quarry ceased operation. The reason for this is that this date refutes any possibility that grandfathered status could somehow be exchanged between the two lots (*despite 2. above*). The 1951 Zoning Ordinance (Section IX, 1) states that, "No non-conforming use that has been discontinued for a period of one year shall be reestablished except in conformity with this Ordinance unless authorized by the Appeal Board." Mr. Toolan is correct that the old quarry predated the 1951 Zoning Ordinance and the old quarry held lawful grandfathered status. However, if the old quarry discontinued operation for a 12 month period between 1951 and 1969 then the old quarry relinquished its lawful grandfathered non-conforming status. In order to reestablish a lawful status, the old quarry would have been required to obtain permission from the Appeals Board. Documents show this did not happen. Facts also show that the quarry ceased operation in or around 1959 and that no further extractive activity has been documented to have taken place at the old quarry to the present date. Photographic evidence shows that in 1964 the quarry had filled with water (*note the reflection in the aerial photo*). Testimonials can prove that the old quarry achieved status as an attractive nuisance in the early 1960's. The old quarry was a popular swimming hole during the 1960's and 70's for local youths.

If there were any legitimacy to this grandfathering story, it would have been told in 1968 when the history was

1. The use of the term "old" is Blue Rock's own 1968 reference to the quarry on the submission to the Zoning Appeals Board. Blue Rock's use of the term "old" in describing the quarry can be interpreted as "abandoned" or "no longer in use". Otherwise Blue Rock could have designated the quarry simply as "quarry" or "existing quarry". The definition of "old" includes "belonging only or chiefly to the past; former or previous" Webster's Abridged. While this is not proof of an abandoned site, the conscious use of the term by Blue Rock in 1968 is revealing nonetheless

fresher and the principals still alive. Blue Rock could have avoided the Code Enforcement Officer and ZAB altogether if this grandfathering story were true. But that story was not presented in 1968 primarily because Blue Rock only owned the Wildland lot at the time and had no ownership in the old quarry in 1968.

Mr. Toolan is hopeful that the soft lens of time will blur the stark facts of 1968. The first mention of the grandfathering story by Blue Rock is in the 1971 *Application of Approval of Mining Plan* submitted to the State of Maine. On the application, in the spot where number of acres affected is to be filled in, Blue Rock wrote “31.88” and then added the words “GRANDFATHERED” on top. This gratuitous embellishment of a State application form reveals that Blue Rock was attempting to usurp local ordinances via State approvals. This attempt also reveals that Blue Rock was aware of the local illegitimacy of their quarry activities.

By 1971 Blue Rock had been successful in obtaining clear title and ownership of the lot on which the old quarry was located. By co-joining this lot with the lot on which Blue Rock had been unable to get local approval to quarry, Blue Rock sought to do under the guise of a State application (*through “grandfathering”*) what Blue Rock had been unsuccessful in doing through the normal municipal process three years prior in 1968.

Further proof that the old quarry was dormant for a period of at least 12 months from 1956 to 1969 can be shown by the Superior Court proceedings in *C. Company v. City of Westbrook*. The City maintained that the agreement to sell the old quarry stipulated that the old quarry was to be operated at least once in any five year period. The current and previous owners of the old quarry could offer no proof in 1968 that the quarry was operated at least once within any five year period from 1951 to 1968. Therefore, the City exerted a claim of ownership based on the violation of the sale agreement. In Superior Court a judge ruled that the previous owner who could prove that the quarry was operated at least once in the initial five year period from 1951 to 1956 met the contractual obligation. The court interpreted the agreement to mean that the obligation was to operate only once in the initial five year period rather than once in “any” five year period.

What can be deduced from this is that the previous and current owners of the old quarry in 1968 lacked proof that the quarry had been operated at least once in “any” five year period. If this proof had existed, the plaintiffs could have produced it and avoided litigation. From this fact, it can be determined that the quarry was not operated from 1956 to 1968 for a minimum of five years. This is certainly longer than the minimum 12 months necessary to extinguish any vested rights of non-conformity attached to the lot.

Because the Court did not produce any findings on the use post 1956, Mr. Toolan has interpreted this to mean that there is a possibility that the old quarry operated at least once in every 12 month period from 1951 to 1968. If true, this would have allowed grandfathered status to be preserved. However, this interpretation by Mr. Toolan defies logic since if the old quarry had operated even at least once in every 60 month period from 1951 to 1968 then the City would not have had any rights pertaining to the property and the case would never have been litigated.

## II The 1968 ZAB Decision

In 1968, Blue Rock sought to have the Wildland lot approved for extractive uses by submitting an application to quarry to the Building Inspector on September 23, 1968. The Building Inspector denied the application. Blue Rock then appealed this decision to the ZAB on October 29, 1968.

On November 7, 1968 the ZAB produced a unanimous decision that allowed Blue Rock to conduct extractive activities “...provided the following safeguards are effected...” Four numbered safeguards were listed. It was the intention

of the ZAB that all four safeguards would be a requirement for the lawful operation of the extractive activities.

As of 2009, these safeguards have not been fulfilled by either Blue Rock or Pike Industries. Blue Rock in 1968 did agree to the “*reasonableness*” of some of the provisions in the ZAB decision. Yet, while abiding by *some* of the provisions of the ZAB decision is preferable to the appellant abiding by *none* of the provisions, it is still not evidence of the complete acceptance and full compliance required of any ZAB decision. Blue Rock treated the ZAB decision as an *a la carte* menu from which they selectively choose which items they agreed with and would abide by. Blue Rock was unsuccessful in consummating an agreement with the City as required in the ZAB decision. Blue Rock was unwilling to make the concessions necessary to insure political acceptance of their proposed use of the site.

It is clear that neither Safeguard #1 nor Safeguard #2 was ever complied with. The Safeguards each reference the requirement of a future agreement with the City. These agreements were never consummated and do not exist. Blue Rock and Pike’s compliance with some of the covenants that would have been included in an agreement, while exhibiting good faith, does not retroactively cause to be endorsed an agreement that was not signed in 1968.

Safeguard #3 was never complied with as Pike’s continuing operation on Main Street is self-evident. More importantly Safeguard #3 was a major, one might even say the predominant, issue surrounding the entire controversy in 1968. The City Engineer discussed this issue in his letter to the Mayor on April 1, 1968 (*this letter is included in the Council minutes*). The issue was also raised by City Council members according to the minutes. The three days of hearings held by the ZAB dealt extensively with this issue as it was included in the final decision with a penalty attached for non-performance. This safeguard was the requirement that Blue Rock abandon and regroom the quarry on Main Street within three years.

Safeguard #3 specifically prohibited Blue Rock from operating two quarry sites in the City of Westbrook. The ZAB was aware that a quarry was a controversial noxious use that would encounter opposition regardless of location. The ZAB was also aware of the perpetual finality that accompanied a quarry use. Once the area was quarried, the land could not be reused. The hole remaining would represent a loss of potential in perpetuity for the City. No future development potential, no future property tax income (*most assessments treat inactive pits or bodies of water as wasteland and not taxable*). In 1968 the City realized that if Blue Rock moved to Spring Street, then the site on Main Street was still salvageable for development (“*Land now used by Blue Rock on Main Street can be very easily adopted to commercial and/or industrial used at this time. However if Blue Rock continues to quarry this area, this land would be rendered useless by becoming prohibitively expensive to develop*” - *City Engineer’s letter to Mayor April 1, 1968*). The City did not wish to lose two valuable sites for development. Safeguard #3, was included to avoid this scenario.

In 1968 Blue Rock was presented with the restriction in the ZAB decision that ONLY one site could be used for a quarry. Blue Rock was not going to be allowed to devalue and render useless for perpetuity two separate development sites. This was clearly the City’s motive in including Safeguard #3 in the decision. By continuing to quarry the Main Street site for an additional 40 years and then attempting to move to Spring Street, Blue Rock/Pike are violating the clear desires of the ZAB. Safeguard #3 was to prevent the continued degradation of a prime development site and to prevent the subsequent loss of tax revenue to the City that the quarrying of two development sites would engender. Pike should not be allowed to move to Spring Street today after continuing to quarry to exhaustion the Main Street site in direct violation of the 1968 ZAB decision. This is the specific scenario that the ZAB decision did not wish to allow.

Safeguard #4 was not complied with. We have not seen documentary evidence that any tests concerning vibration blasting were conducted during the 1st phase of the quarry operation. Mr. Toolan references tests, but the tests

and the resultant data have not been supplied. If such data is available it should be made public for review. Also, if such data exists, then it should also be determined that the testing was conducted to satisfy the City requirements and not done post 1971 in an attempt to use the State licensing requirements to trump local control (*Application of Approval of Mining Plan*).

### III Promissory Estoppel - The Railroad Option

Mr. Toolan argues promissory estoppel. The argument is that Blue Rock reasonably believed that the City would come to an agreement with Blue Rock as required in the safeguards contained in the 1968 ZAB decision. As prior compensation for this agreement, Blue Rock then executed an option agreement the Portland Terminal Company, claiming that this option agreement was quid pro quo for the future City agreement with Blue Rock concerning the quarry.

It is both interesting and odd that Pike would even broach the subject of the option agreement (*known as the Railroad option*) as the episode reflects poorly on the conduct of Blue Rock and is a contributing factor in Blue Rock's later political travails. The Railroad option concerned the sale of property owned by Blue Rock to the Portland Terminal Company. This property would enhance access to larger adjacent parcels owned by the Portland Terminal Company that were being considered as a site for an industrial park.

The Railroad option agreement and the quarry issue were only related insofar as Mr. Philip Corey, President of Blue Rock, had attempted to unduly influence City officials by using the separate and unique Railroad option agreement to extort a quid pro quo. In a memo to the office of the Mayor dated April 1, 1968, the City Engineer reveals the contents of an existing option agreement between Blue Rock and the Portland Terminal Company. Blue Rock placed a contingency in that agreement that for the option to be exercised, the City would have to "*release any vested interests that it might have in the land owned by Cook and Company, which is the old quarry located on Spring Street...*"

One staggers at the boldness of this gesture. Blue Rock was using an agreement with a third party to obtain title to City property without compensation. This tactic would have been considered heavy-handed at the time and may have, by itself, contributed to Blue Rock's inability to garner future political support for its Spring Street quarry plans. Mr. Toolan did not include a copy of this predecessor option agreement in his response. Either Blue Rock did not keep the original or did not supply it to Pike.

The historical background is that in 1968 the City was actively seeking an industrial park to supplement the tax base. Industrial parks were a relatively new zoning concept at this time and Westbrook sought to encourage such development within the city. There were two simultaneous proposals for development submitted; 1) The Railroad Industrial Park championed by the Portland Terminal Company which was to be located on property adjacent to both Blue Rock's Main Street location and the Saunders Bros. Mill, owned by the family of Mayor Donald Saunders (*in the vicinity of and including property where Terminal Street is located today*), and 2) The future Five Star Industrial Park championed by ADC Corp. that was to be located on property owned by the City including the city dump and the former city farm.

Both Blue Rock and Saunders Bros, stood to benefit significantly by a relief route which would provide highway access and visibility to their respective businesses and from the co-location of an adjacent industrial park which certainly would have enhanced the value of their respective holdings. By inserting a contingency provision into an option agreement with the Portland Terminal Company, Mr. Corey evidently thought that he could extract clear title from the City for the old quarry, then move Blue Rock en masse to Spring Street, have the relief route built, and finally

develop the Main Street location in conjunction with the development of the future Railroad Industrial Park.

On November 20, 1968, Blue Rock signed a new option agreement with the Portland Terminal Company that removed the clause pertaining to the City having to abandon its vested rights in the old quarry. Blue Rock had come to realize that the protracted delay in the option agreement caused by Mr. Corey's machinations was proving fatal to the development of the Railroad Industrial Park. The Five Star Industrial Park was moving forward and had garnered greater momentum and City support. The signing of the option agreement on November 20th was a desperate act in an attempt to jump-start a dying development project that Mr. Corey and Blue Rock themselves caused to be delayed. The signing of the agreement was not at the behest of or to the benefit of the City as Mr. Toolan has argued.

At best, Blue Rock can claim that they signed the option with the *hope* that good-will might be cultivated with the City which might influence the City's future actions toward Blue Rock. It is ironic that Blue Rock's attempt to influence City actions through the option agreement delayed the development plans of the Portland Terminal Company to realize an industrial park at that location and allowed a competing industrial park developed by ADC on Spring Street to be realized. The future industrial park on Spring Street was mentioned as a major factor by City Council members in voting against locating a quarry in the same proximity.

It appears that Mr. Corey, may have relied too heavily on his business and social acquaintance, Mayor Saunders. Mayor Saunders may have given assurances to Mr. Corey concerning the ultimate disposition of the quarry issue, assurances that Mr. Corey relied on to Blue Rock's detriment. Mayor Saunders was not to be the ultimate authority on the quarry issue as shown when the Mayor's three vetoes were overturned by the Council on December 9, 1968. Mr. Corey and hence Blue Rock may have felt that the Mayor's inability to deliver on previous promises constituted a breach of City responsibilities. This would go far to explain the actions of Blue Rock in clearing land and blasting rock in December of 1968. Due to weather conditions all paving and most site-work construction ceases in the winter months in Maine. This is the case today and certainly would have been the case in 1968. There would have been no economic reason for Blue Rock to conduct blasting activities on December 26th in 1968. The reason for the blast appears to be only to make a petty and vindictive (*although highly visible*) statement that despite City ordinances to the contrary, Blue Rock was going to quarry regardless.

#### IV Lack of Enforcement

It is discomfoting to think that Blue Rock and Pike have been able to operate a quarry in violation of the Zoning Ordinance for over 40 years without City enforcement. However, history does provide some understanding of how this could have occurred. Following the December 26, 1968 blast by Blue Rock, there was an outcry from Council members and residents for Mayor Saunders to require the Building Inspector to enforce the ZAB decision. There was a memorable exchange in open session of the Council in early 1969 between Councilor Ben Blanchette and the Mayor Saunders over this issue. The ensuing argument was so acrimonious and lengthy that those in attendance recall it to this day. Councilor Blanchette was adamant that the Mayor enforce the City's ordinances. The Mayor never did. Over time, as it became apparent that Blue Rock was not going to move to Spring Street and without further sustained blasting, the controversy ceased to be a priority.

Blue Rock's extractive activities on the site in the previous 40 years were episodic, inconsistent, and unpredictable. Aerial photographs reveal that while there is evidence of extractive activities through the years the level and consistency of those activities was erratic. The activities at the site were shielded from view by vegetation and terrain from all surrounding roadways. The driveway into the site was blocked by a locked iron gate. Throughout much of the

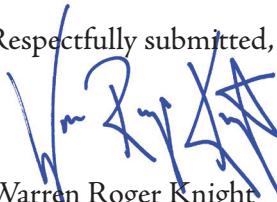
history of site there was no signage to indicate ownership or activity taking place on the site (*the requisite sign permit will show when a sign was first installed at the location*). There would be no reason for a code enforcement officer to suspect illegal activity taking place on the site in violation of the ordinance. The locked gate and lack of signage reveal that the activities at the site were minimal and surreptitious. No posted hours of operation, no advertisement of activities and no reason for the activities to arouse suspicion and bring cause for a code enforcement action.

That Blue Rock had been able to operate a quarry at a minimal level so as not to arouse City enforcement action should not be used as an excuse to allow continued operation. This would be rewarding stealth and subterfuge. Mr. Toolan claims that the City had *“actual knowledge of the quarrying activities for over 40 years”*. Mr. Toolan does not provide proof of this knowledge. Even as abutting neighbors, we were not aware of the continuous quarrying activities. The City had every expectation to believe that the property owner was operating in a manner consistent with the Zoning Ordinances. It is not incumbent upon the City to catch every zoning violation that occurs in real time. Nor is there a statute of limitations available for zoning violators who successfully avoid detection.

As with many zoning violations, the details only come to light when the property changes ownership or when the owner or tenant seeks additional permits, which would initiate a visit and inspection by the Code Enforcement Officer. This was the case in this situation. Pike purchased the property from Blue Rock and then greatly increased the level of activity at the site. Pike then sought to further expand the uses at the site with a proposed asphalt plant. This proposal required Code Enforcement Officer participation and initiated the close scrutiny that revealed the violation still continuing today.

## V Conclusion

It is difficult to read the 1968 ZAB decision and draw any conclusion other than that the current quarry is in violation of the decision. Mr. Toolan's creative interpretations aside, a common-sense logical reading of the decision reveals that all four Safeguards required by the ZAB were not completed. Because of this, the quarry operating currently at the site is not lawful and should be closed. This closure does not preclude the current owner, Pike Industries, from submitting an application today for a non-conforming use on this site. What is obvious is that in 1968, the ZAB worked diligently to protect the residents and resources of the City. While Pike Industries' current predicament is sympathetic, it would be unfortunate to have the diligent efforts of the 1968 ZAB undermined by the duplicity and subterfuge of the previous owner, Blue Rock.

Respectfully submitted,  
  
Warren Roger Knight

CC: William Dale