STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-AP-09-31

PIKE INDUSTRIES, INC.,

Plaintiff

v.

ORDER ON RULE 80B APPEAL

CITY OF WESTBROOK, ET AL,

Respondents

Before the court is the 80B appeal of Plaintiff Pike Industries, Inc. ("Pike") from the interpretive decision of Defendant City of Westbrook's Zoning Board of Appeals ("ZBA") affirming in part and reversing in part a decision by the Westbrook Code Enforcement Officer ("CEO") regarding Pike's land use rights relative to a quarry and rock crushing plant it owns on Spring Street in Westbrook. M.R. Civ. P. 80B.

BACKGROUND

A. Historical Ownership and Use

Pike owns property located at 465 Spring Street, in Westbrook, Maine on which it operates a quarry business (the "Property"). The Property as it currently exists is comprised of four different parcels of land acquired by Pike and its predecessors over a period of years. Briefly, the history of the ownership and use of those four parcels is as follows:

Prior to 1951, Parcel 11-A,[1] was owned by the City of Westbrook. A deed dated October 24, 1951 conveyed Parcel 11-A from the City to Sheldon Grant. The deed refers to an existing quarry operation on the property, and requires that Mr. Grant set up and operate a rock crusher at

[1] As depicted on a Site Plan appearing at R. 2484

the property and sell crushed rock to the City at a discount. The deed to Sheldon Grant also states: "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." R. at 537. On November 1, 1955 Sheldon Grant conveyed Parcel 11-A, as well as an adjoining parcel, Parcel 11-B,[2] to Cook & Company, Inc. The deed to Cook & Company, Inc. refers to an existing "crushed rock plant and accessories and incidentals thereto." R. at 538.

Ownership of Parcels 11-A and 11-B was the subject of a court case filed by Cook & Company's corporate successor, C Company. *See C Company v. City of Westbrook*, 269 A.2d 307 (Me. 1970). At issue in that case was the proper interpretation of the deed from the City and thus whether Mr. Grant failed to continue operating the quarry as required under that deed such that ownership of Parcel 11-A had reverted back to the City. Ultimately, the Law Court affirmed the Superior Court's interpretation, and implicitly concluded that Mr. Grant had complied with the conditions outlined in his deed from the City. *Id.* Ownership of Parcel 11-A, therefore, had not reverted back to the City.

In January 1969, prior to the Law Court's decision in *C Company*, C Company conveyed Parcels 11-A and 11-B to Paul Merrill who, in turn, conveyed them to Pike's predecessor, Blue Rock, on October 29, 1970.[3] By 1972, the Property was comprised of Parcels 11-A and 11-B, as well as Parcels 8,[4] 9,[5] and 13.[6] In June 1993, Blue Rock also acquired Parcel 18 from Maine Rubber Company. R. at 2483

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[2] Sheldon Grant appears to have acquired Parcel 11-B in 1948. *See* R. at 2484.

[3] The parties do not appear to dispute that the quarry established on Parcel 11-A and maintained by Mr. Grant ceased operations sometime after 1956.

[4] In 1966, Parcel 8 was conveyed to the Wildland Company, which merged with Blue Rock in 1969.

[5] Parcel 9 was conveyed to the Wildland Company in 1965.

B. The 1968 Approval

In early 1968, prior to its merger with Blue Rock, the Wildland Company wrote to the Mayor of Westbrook indicating Blue Rock's plans to begin quarrying, rock crushing, asphalt manufacturing, and cement manufacturing on some portion of the Property. R. at 5. On September 23, 1968, Blue Rock, the Wildland Company and C Company applied for a building permit and/or occupancy permit to operate a quarry and concrete and asphalt plants on property owned by the Wildland Company and C Company. *See* R. at 5, 391, and 640. On October 11, 1968, the Building Inspector[7] denied both applications "due to the emission of noise, vibration, and dust which [he felt] would be detrimental to the neighborhood." R. at 477, and 682.[8]

Both Blue Rock and the Wildland Company appealed the Building Inspector's denials to the Westbrook Zoning Appeals Board ("ZAB") on October 29, 1968. R. at 5, & 691-92. On November 7, 1968, and consistent with negotiations that had taken place between the Wildland Company, Blue Rock, the City and the ZAB, the ZAB granted Blue Rock and the Wildland Company, an Approval (the "1968 Approval") to operate a quarry, rock crusher, concrete plant

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[6] Parcel 13 was conveyed by the City of Portland to Blue Rock in 1972.

[7] Under the 1951 Westbrook Zoning Ordinance in effect at the time, the Building Inspector had authority to enforce the Ordinance and issue permits. *See* R. at 23.

[8] Section VII of the 1951 Ordinance provided, in relevant part:

> In an I industrial zone no building shall be erected or altered and no building or premises shall be used for dwelling purposes, nor unless authorized by the Appeal Board, 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, or for any of the following industries or uses:
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> . . .
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> 2. Asphalt manufacture or refining;
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> . . .
>
> 4. Cement . . . manufacture;
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> . . .

R. at 19.

and asphalt plant at the Spring Street location, subject to certain conditions.[9] *See* R. at 5 & 479-84.

On December 9, 1968, following the issuance of the 1968 Approval, the City voted to rescind its agreement to sell Parcel 11-A to Blue Rock. R. at 751. On December 11, 1968, Blue Rock began activities associated with preparing the Property for quarrying operations and, on December 24 or 26, 1968, Blue Rock set off its first dynamite blast on the property, which was owned by the Wildland Company. *See* R. at 6 & 756. Since then, no twelve-month period has passed without substantial quarrying activity at the Property. R. at 7 & 10.

There is no dispute that, contrary to conditions 3 and 4 of the 1968 Approval, neither Blue Rock nor the Wildland Company submitted to the City any test results relating to blasting at the Property, nor did Blue Rock/Pike move its Main Street operations within the required 3–year period. In light of the City's December 9, 1968 vote rescinding its agreement to sell Parcel 11-A to Blue Rock and the Law Court's decision in *C Company*, essentially concluding that the City

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[9] The conditions particularly relevant to this case included:

(1) The City was to convey its interest in Parcel 11-A (which, pending the Law Court's decision in *C Company*, the City claimed it owned) to Blue Rock and certain protective covenants would be included in the deed or would "otherwise become legally binding on the Quarry operators";

(2) An agreement would be "consummated between the City of Westbrook and the Blue Rock Quarry to extend the" protective covenants "and bind them to all abutting properties now owned, or acquired in the future by Blue Rock Company;

(3) "Blue Rock Quarry, together with its associated corporations, will cease to maintain and operate it[]s quarry and attendant plant at Main Street in Westbrook, and all of it[]s functions will be transferred to the Spring Street location within a three (3) year period. This period will commence with the passing of papers by the parties . . .;" and

(4) "Blue Rock Quarry will conduct or have conducted tests of vibration levels while blasting, during the first phase of quarry operations on Spring Street, to insure the limits for vibration specified in the covenant items, will not be exceeded. Copies of test results will be forwarded to the Westbrook City Engineer, and become public record."

R. at 480.

had no ownership interest in that parcel, it is similarly undisputed that, contrary to condition 1 of the 1968 Approval, the City did not convey Parcel 11-A to Blue Rock, nor were any of the covenants that were to be included in the deed from the City otherwise made binding on the Property. However, Pike maintains that it complied with the performance standards set forth in the 1968 Approval and with more stringent standards imposed by the Maine Department of Environmental Protection. *See* R. at 3348.

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 Property. R. at 7.

C. Procedural History

In the spring of 2008, Pike made public its plan to expand quarrying operations at the Property. A nearby business, IDEXX Laboratories, Inc. ("IDEXX"), expressed its concerns about these plans. In March 2008 the Mayor introduced an amendment to the Zoning Ordinance that would prohibit quarrying and asphalt manufacture in the Industrial Park District where the Property is located. Pike objected to the amendment and argued, among other things, that it had a vested right to quarry the site.

On September 9, 2008, IDEXX submitted a Memorandum to the City Solicitor for the City of Westbrook in support of IDEXX'S position that Pike did not have grandfathered rights to operate a quarry and that the City could thus rezone the Property to prohibit quarrying by Pike or any other land user. R. at 253. At the City's request, Pike responded to IDEXX's Memorandum on January 9, 2009. Pike asserted that it had vested rights to continue to operate a quarry and rock crusher, and also to build a concrete plant and asphalt plant pursuant to the 1968 Approval. R. at 435.

On January 29, 2009, the City's CEO issued an opinion finding that Pike had no vested or "grandfathered" right to use a rock crusher at the Property or to build or operate an asphalt plant or concrete plant there. He did conclude, however, that Pike had a grandfathered right to continue operation of the quarry within an area of approximately 32 acres but not on the remainder of the approximately 80 acre site. R. at 472.

On February 27, 2009, Pike appealed to the ZBA those portions of the CEO's decision that found no right to crush rock or operate an asphalt plant or concrete plant. It also appealed that portion of the opinion that limited quarrying to the 32–acre area. Also on February 27, 2009, a neighborhood coalition, called Westbrook Works, together with other entities that included IDEXX, Artel, Inc. and Smiling Hill Farm, appealed to the ZBA those portions of the CEO's opinion that found a grandfathered right to quarry and that found no violations of the ordinance by Pike. R. at 3087.

The ZBA consolidated the appeals and conducted a *de novo* review of the CEO's opinion. The ZBA hearings spanned seven nights and involved numerous witnesses. The ZBA voted upon a decision on July 22, 2009 and issued a written decision dated July 27, 2009 ("ZBA Decision"). R. at 2. The ZBA's Decision denied Pike's appeal and upheld the neighborhood coalition's appeal. Thereafter, Pike filed this appeal pursuant to M.R. Civ. P. 80B.

DISCUSSION

I. Standard of Review

In an 80B appeal, the court reviews an administrative decision for errors of law, abuse of discretion or findings of fact unsupported by the record. *Yates v. Town of Southwest Harbor,* 2001 ME 2, ¶ 10, 763 A.2d 1168. When "reviewing an administrative . . . decision, the issue before the court is not whether it would have reached the same conclusion as the [administrative

tribunal], 'but whether the record contains competent and substantial evidence that supports the result reached.'" *Seider v. Bd. of Exam'rs of Psychologists*, 2000 ME 206, ¶ 8, 762 A.2d 551, 555 (quoting *CWCO, Inc. v. Superintendent of Ins.*, 1997 ME 226, ¶ 6, 703 A.2d 1258, 1261). "Substantial evidence is evidence that a reasonable mind would accept as sufficient to support a conclusion." *York v. Town of Ogunquit*, 2001 ME 53, ¶ 6, 769 A.2d 172, 175. The court may not substitute its own judgment for that of the administrative tribunal. *See id.;* and *Brooks v. Cumberland Farms, Inc.* 1997 ME 203, ¶ 12, 703 A.2d 844, 848. The administrative decision is not wrong because the record is inconsistent or a different conclusion could be drawn from it. *Twigg v. Town of Kennebunk*, 662 A.2d 914, 916 (Me. 1996). The burden of persuasion in an action challenging an administrative decision rests on the party seeking to overturn its decision. *See Sawyer Envtl. Recovery Facilities, Inc. v. Town of Hampden*, 2000 ME 179, ¶ 13, 760 A.2d 257, 260.

II. Jurisdiction

Pike argues that the ZBA lacked jurisdiction to review the CEO's January 29, 2009 decision. Although it appears that Pike's jurisdictional argument is not necessarily the primary ground upon which it bases this appeal, the court will consider it first in order to determine whether it may reach Pike's other allegations of substantive error.

According to Pike, there is no provision in the City's Zoning Ordinance for appealing the CEO's interpretive decision in this case. More specifically, Pike contends that, because the CEO did not take any enforcement action against Pike, the ZBA lacked jurisdiction to review the CEO's opinion.

Under the Maine statutes governing municipal Boards of Appeal:

> Any municipality establishing a board of appeals may give the board the power to hear any appeal by any person, affected directly or indirectly, from any decision,

> order, regulation or failure to act of any officer, board, agency or other body when an appeal is necessary, proper or required. *No board may assert jurisdiction over any matter unless the municipality has by charter or ordinance specified the precise subject matter that may be appealed to the board and the official or officials whose action or nonaction may be appealed to the board.*

30-A M.R.S. § 2691(4) (emphasis added). Under the Ordinance currently in effect, the Code Enforcement Officer is authorized to enforce the Ordinance as follows:

> The Code Enforcement officer (CEO) shall enforce this Ordinance. *The CEO shall make determinations under and interpretations for this Ordinance, subject to the right of appeal of any aggrieved person under Chapter 7 of this ordinance.* The [CEO's] interpretations of the ordinance shall create precedent and will be recorded for future determinations.

R. at 3796 § 604.1 (emphasis added). The ZBA, in turn, is granted appellate authority to hear "[a]ppeals under section 703.1 of this Ordinance," which, in turn, provides that "[a] person aggrieved by *a decision* of the [CEO], as provided by this ordinance, may appeal to the Zoning Board of Appeals." R. at 3798 (emphasis added).

Based on the foregoing, the court concludes both that the CEO has authority to interpret the Ordinance – even in the absence of any affirmative "action" – and that any such decision by the CEO is appealable to the ZBA pursuant to Section 703.1. Accordingly, the court concludes that the ZBA had jurisdiction to hear this matter and so too does this court.[10]

Pike also contends that the ZBA, and thus this court, is without jurisdiction because the inquiry triggered by IDEXX's Memorandum and the ZBA's Decision amounted to an untimely appeal of the 1968 ZAB Approval.

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[10] Contrary to Pike's assertions, this conclusion is consistent with the Law Court's decision in *Herrle v. Town of Waterboro*, 2001 ME 1, 763 A.2d 1159. In that case, the Law Court's conclusion that the ZBA had engaged in an impermissible advisory opinion was expressly based on the fact that the ordinance at issue did "not provide for an administrative appeal to the ZBA from a violation determination by the CEO." *Id.* ¶ 8, 763 A.2d 1161. As noted above, the Ordinance at issue here does provide for an appeal to the ZBA of decisions made by the CEO. *See* R. at § 703.1. There is no limitation placed on the kind of "decisions" that are appealable and, therefore, the court concludes that appeals of the interpretive decisions authorized under Section 604.1 are included within the appellate jurisdiction of the ZBA.

Distinct from the factual scenario underlying *Wright v. Town of Kennebunkport*, 1998 ME 184, 715 A.2d 162, 163, upon which Pike relies, IDEXX's Memorandum and the ZBA's actions in this case do not relate to the issuance of the 1968 Approval or to the extent to which that Approval was or was not authorized under the Ordinance. Rather, the memorandum and its appeal of the CEO's decision are directed to allegations of land use violations and a claim that Pike's operation of the quarry is not a lawfully grandfathered use under the City's Ordinance. In the court's view, the claim and resulting finding that a particular use is inconsistent either with the provisions of a land use ordinance or with the limits of a previously issued permit – meaning, in this case, the 1968 Approval – do not constitute an appeal of the permit. Instead, they represent distinct claims unrelated to the validity of the 1968 Approval. Accordingly, the court concludes that the ZBA had authority to consider and rule on the extent to which Pike is or would be engaging in lawful activity under the governing Ordinance were it to continue or expand its operations at the Property. And, in turn, this court has jurisdiction to hear the appeal of the ZBA's decision.

III. The Necessity of Approval

The court now addresses Pike's substantive arguments regarding the merits of its appeal and the ZBA's Decision.

Pike's first argument is that it has grandfathered rights to mineral extraction and rock crushing at the Quarry because they were lawful uses when Blue Rock began those operations in December of 1968. According to Pike, the version of the Ordinance in effect in December 1968 did not require approval for quarrying and rock crushing and, therefore, they were lawful permitted uses in the City's Industrial Zone where the Property is located. Pike asserts that the ZBA erroneously failed to consider this argument.

In its decision, the Board expressly concluded that "Pike does not have the right to operate a quarry at the Pike Property as a legally-existing nonconforming ('grandfathered') use." Therefore, contrary to Pike's assertions, the issue of whether its use of the Property is lawfully grandfathered under the ordinance in effect in 1968 was expressly ruled on by the ZBA. Although the ZBA did not go one step further and explain that quarrying is not a grandfathered use *because quarrying required approval in December 1968*, that lack of specificity does not represent an error of law. This is particularly true given that the ZBA's findings of fact amply support the application of its "grandfathered" holding to Pike's argument – which Pike raised before the ZBA.

Under the Ordinance in effect in December 1968:

> [N]o land or building shall be *changed in use*, until the Inspector has certified on the building permit, or if none is issued, has issued an occupancy certificate certifying that the plans and *inten[d]ed use of the land and/or building are in conformity with this ordinance*.

R. at 23.

The Ordinance goes on to provide that no premises in the I Industrial Zone shall, "unless authorized by the Appeal Board," 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," nor shall any of the following industries or uses be permitted without Appeal Board approval: . . . (2) Asphalt manufacture and refining; . . .(4) Cement . . . manufacture . . .." R. at 19.

The ZBA found as a fact that "[i]n 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." R. at 5 (emphasis added).[11] The ZBA further found that "Wildland contacted the Code Enforcement Officer seeking a permit for a quarry operation on the Pike Property," and that Wildland's application was denied following a finding by the CEO that the emissions from the proposed quarry would be "substantially injurious." *Id.* Further, the record contains evidence tending to show that the so-called "old quarry," which was located on property owned by C Company, had been abandoned as early as 1955. This fact would support a finding that quarrying was not an existing, and therefore would have been a "new" use at the time Blue Rock submitted its occupancy permit application in 1968. *See e.g.* R. at 5, 2885 & 3336. Indeed, the ZBA expressly found that use of the C Company property for quarrying had ceased at some point prior to 1964. R. at 5. After a review of the record, the court concludes that the ZBA's findings of fact, outlined above, are sufficient to support the Board's conclusion that quarrying is not grandfathered and to regard that conclusion as having extended to the issue of whether approval under that Ordinance was necessary in 1968, whether under the provision relating to "new uses," the section relating to "substantially injurious" uses in the Industrial Zone, or both.

Further, Pike contends that the operation of a quarry did not require approval because it is not a nuisance per se and because quarrying (as distinct from cement and asphalt manufacture) is not one of the enumerated industrial uses that expressly require approval under the Ordinance in effect in 1968. Therefore, Pike contends that the Board erred when it concluded that quarrying is not a grandfathered nonconforming use. Again, the court disagrees.

[11] The court notes that although the initial application purported to seek approval to operate "the existing Spring Street Quarry," the application also explained that the "intended use" would take place on land owned by the Wildland Company. R. at 391. The "existing quarry" was not located on property owned by the Wildland Company but, rather, on property owned by C Company. Accordingly, the Board's finding that the application sought a permit to operate a quarry at a "new location," at least with respect to Wildland's application is supported by substantial evidence on the record.

As noted above, the 1968 applications to the Code Enforcement Officer for building/occupancy permits listed quarrying as one of the proposed uses. Even if quarrying did not require prior approval as a "new use" or one that was "substantially injurious," the fact remains that it was a proposed use that was submitted to, considered by, and ultimately rejected by the CEO. It was also a use that was included in the ZAB's eventual decision on appeal. The court has not been directed to any evidence in the record demonstrating that Blue Rock or the Wildland Company challenged the ZAB's inclusion of the quarry in the appeal nor that they appealed the CEO's or ZAB's decision based on a claim that the quarry operation did not require approval. As evidenced by the initial application, the 1968 Approval issued by the ZAB and the lack of any appeal of that Approval, Blue Rock's ability to operate the quarry - and the extent to which that operation would be "substantially injurious" - was an issue presented to and considered by the ZAB alongside the issues relating to asphalt and concrete manufacture. R. at 394-95. In the court's view, the submission of that issue and its inclusion in the ultimate, unappealed decision, forecloses Pike's argument in this appeal that the CEO and ZAB determinations in 1968 were not binding on the quarry operation in the same way that they were binding on the proposed operation of a cement and asphalt manufacturing facility. Whether the basis of this bar is in the nature of collateral estoppel, waiver, or is simply analogous to the concept of "trial by consent" as outlined in the civil rules, Pike may not now seek to carve out a matter that was the subject of a prior administrative order by arguing that that issue should not have been considered or was not properly presented to the ZAB. This is particularly so given that Pike's predecessors never appealed that decision. *See* : *Steinberg v. Elbthal*, 463 A.2d 731, 734 (Me. 1983) (discussing "trial by consent" pursuant to M.R. Civ. P. 15(b))

Accordingly, the court concludes that the Board did not err when it concluded that the quarry operation is not a grandfathered nonconforming use.

IV. The 1968 Approval

As noted above, 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 Property. R. at 7. Therefore, in light of the court's conclusion that the Board did not err when it concluded that Pike's use of the Property is not grandfathered under the 1968 Ordinance, to the extent Pike has any rights to quarry at the Property, those rights must flow from the 1968 Approval.[12]

In this case, the ZBA concluded that, "[b]ecause 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." R. at 8, ¶ 1. In its appeal, Pike argues that the Board's conclusion is in error because (1) the conditions set forth in the 1968 Approval were either satisfied or were rendered inoperative because the City prevented Blue Rock from fulfilling them; (2) the Board should have considered Pike's "prevention doctrine" defense; (3) the appropriate remedy for any failure to comply with the conditions of the 1968 Approval is not the invalidation of the Approval but, rather, is set forth in the liquidated damages section of the Approval; and (4) the City waived the conditions contained in the 1968 Approval or considered them fulfilled. The court will address each of these arguments in turn.

A. The Conditions and the "Prevention Doctrine"

The 1968 Approval was expressly conditioned on the following:

(1) The City was to convey its interest in Parcel 11-A (which, pending the Law Court's decision in *C Company*, the City claimed it owned) to Blue Rock and certain protective covenants would be included in the deed or would "otherwise become legally binding on the Quarry operators";

[12] The Court notes that Pike also argues that its use of the Property is grandfathered pursuant to the 1969 Ordinance. The court will consider this additional argument below.

(2) An agreement would be "consummated between the City of Westbrook and the Blue Rock Quarry to extend the" protective covenants "and bind them to all abutting properties now owned, or acquired in the future by Blue Rock Company;

(3) "Blue Rock Quarry, together with its associated corporations, will cease to maintain and operate it[]s quarry and attendant plant at Main Street in Westbrook, and all of it[]s functions will be transferred to the Spring Street location within a three (3) year period. This period will commence with the passing of papers by the parties . . .;" and

(4) "Blue Rock Quarry will conduct or have conducted tests of vibration levels while blasting, during the first phase of quarry operations on Spring Street, to insure the limits for vibration specified in the covenant items, will not be exceeded. Copies of test results will be forwarded to the Westbrook City Engineer, and become public record."

R. at 480.

Following the public hearings on the parties' appeals in this matter, the Board determined that Pike had not met all of these conditions. Contrary to Pike's assertions, the court concludes that the Board's findings on this point are supported by substantial evidence in the record. First, Pike does not appear to dispute the fact that there is no evidence that Blue Rock conducted tests of vibration levels while blasting and provided the results of those tests to the city. As the appellant, Pike bears the burden of proof on that issue. Pike also does not argue that Blue Rock took any steps to make the covenants relating to noise, vibration, emissions, etc. "otherwise legally binding" as required under the 1968 Approval. R. at 480. Under the language of the 1968 Approval, Blue Rock was responsible for fulfilling the testing obligations and for making the covenants "otherwise legally binding" irrespective of whether the City conveyed the C Company property.[13]

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[13] The conditions relating to the covenants and testing read:

. . .

1. The attached "Items" on pages a, b, c, and d will 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.*

. . .

Further, the court is not persuaded that the Board erred when it declined to consider Pike's arguments under the so-called "prevention doctrine." As the City correctly points out, the 1968 Approval was the product of quasi-judicial action that, barring an appeal, is binding and has preclusive effect. *See* City's Br. at 27-28 (citing, *inter alia*, 14 M.R.S. § 8111(1); and *Sold, Inc. v. Town of Gorham*, 2005 ME 24, ¶ 13, 868 A.2d 172, 175-76). Accordingly, the court does not regard the 1968 Approval as a contract to which the "prevention doctrine" would be applicable. Accordingly, the court concludes that the Board did not err when it concluded that Blue Rock/Pike did not comply with the conditions outlined in the 1968 Approval or when it declined to consider Pike's "prevention doctrine" arguments.

B. The Proper Remedy

Pike contends that the Board erred when it concluded that Pike was not operating lawfully under the 1968 Approval rather than simply enforcing the liquidated damages provisions contained in the Approval. However, the 1968 Approval expressly provides that it is *conditioned* on the covenants enumerated therein being fulfilled. R. at 395 (explaining that the ZAB voted unanimously "to grant Blue Rock Quarry . . . permission to operate a quarry, rock

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> 4. A further condition of this Agreement will be that Blue Rock Quarry will conduct or have conducted tests of vibration levels while blasting, during the first phase of quarry operations on Spring Street, to insure the limits for vibration specified in the covenant items, will not be exceeded. Copies of the test results will be forwarded to the Westbrook City Engineer, and become public record.

R. at 480 (emphasis added).

In the court's view, it is reasonable to interpret these conditions to require Blue Rock to make the restricted covenants appended to the 1968 Approval "otherwise legally binding" if they were not included in the deed contemplated by the 1968 Approval. Similarly, the condition relating to testing does not purport to condition Blue Rock's performance on the conveyance of the C Company property. Therefore, the fact that the City did not in fact convey property it ultimately did not own did not obviate Blue Rock's obligation to make the restrictive covenants appended to the 1968 Approval "otherwise legally binding" on Blue Rock or to conduct the testing contemplated by the Approval.

crushing plant, Readi-Mix Concrete Plant, Bituminous Concrete plant, and related facilities . . . on the westerly side of Spring Street *provided* that the following safeguards are effected . . .”). Therefore, barring the satisfaction of each of the conditions contained in the 1968 Approval, the Approval, and thus the liquidated damages provisions, are without effect. Moreover, the liquidated damages provision outlined at page 480 of the Record appears to apply only to the transfer of Blue Rock’s operations to Spring Street, not the other conditions,[14] while the provision outlined at page 483 of the Record expressly provides that it applies to the restrictive covenants that were to be incorporated in the deed to the C Company property or made “otherwise legally binding.” As discussed above, those restrictive covenants were never made “otherwise legally binding.” In the court’s view, barring any action by Blue Rock to render the covenants binding on it, the liquidated damages clause was also of no effect. Accordingly, the Board did not err when it concluded that Pike’s use of the Property was not rendered lawful by the 1968 Approval because the conditions for that Approval had not been satisfied.

C. Waiver

Pike’s final argument regarding the 1968 Approval is that the City waived the conditions contained in that Approval either by virtue of its failure to enforce them or because Blue Rock and Pike were issued various blasting permits over the years. In this argument, Pike acknowledges that “waiver” is pled as an independent claim in this action. Therefore, it submits waiver as an “alternative argument” that, in effect, “the City’s conduct also is relevant to the issue of whether Blue Rock was obligated to fulfill each of the conditions in the 1968 Approval.” Pike Br. at 34 fn. 9.

[14] And, again, those restrictive covenants were never included in any deed from the City nor made “otherwise legally binding” on Blue Rock’s property.

As a threshold matter, and based in part on Pike's comment at footnote 9 of its brief, it is not clear whether the issue of "waiver" was in fact argued to the Board or whether the issue of the City's issuance of permits and/or alleged lack of enforcement was presented in the context of Pike's equitable estoppel claim. To the extent that waiver was not affirmatively argued to the Board, Pike may not raise it for the first time in the context of its 80B appeal. Instead, waiver will be considered in connection with Pike's independent, bifurcated claims.

To the extent that Pike did in fact raise its "waiver" argument, the court concludes that the Board's implicit rejection of that argument was not erroneous.

Under Maine law, "waiver is a matter of fact." *Interstate Industrial Uniform Rental Serv., Inc. v. Couri Pontiac, Inc*., 355 A.2d 913 (Me. 1976). Although the Board did not make an express finding that the City had not waived the conditions outlined in the 1968 Approval, such a finding can be implied based on its findings relating to Blue Rock/Pike's failure to comply with the conditions and its conclusion that the lack of compliance with the conditions deprived Pike of any rights under the Approval. *See Bodack v. Town of Ogunquit*, 2006 ME 127, ¶ 14 n.7, 909 A.2d 620, 625; and *Forester v. City of Westbrook*, 604 A.2d 31, 33 (Me. 1992) (explaining that in some situations, "[i]f there is sufficient evidence on the record, the Board's decision will be deemed supported by implicit findings").

As the City correctly notes, the evidence in the record demonstrates that Blue Rock's and Pike's operation of the quarry has historically been based on a claim of "grandfathered status" rather than on the 1968 Approval. According to the City, absent a claim by Blue Rock/Pike that it was operating pursuant to the 1968 Approval, the City could not, and did not, voluntarily or intentionally waive the conditions. City's Br. at 38 (citing *Kirkham v. Hansen*, 583 A.2d 1026, 1027 (Me. 1990). The court agrees.

The Law Court has previously explained the concept of "waiver" as follows:

> A waiver is a voluntary or intentional relinquishment of a known right and may be inferred from the acts of the waiving party. Thus, if one in knowing possession of a right does something inconsistent with the right or of his intention to rely upon it, he is deemed to have waived that right and is estopped from asserting that right if renunciation of the waiver would prejudice the party who has relied upon it. *To bar enforcement of a known contractual right, the waiver, however established, must have induced a belief in the party who is claiming reliance on that waiver that the waiving party intended voluntarily to relinquish his rights.* In determining the question of waiver, the Court must therefore look not only to the conduct of [the party alleged to have waived its right] but also to the effect of those acts on [the other party] who now claims it was thereby lulled into a false security.

Interstate Industrial Uniform Rental Serv., Inc., 355 A.2d at 919 (internal citations and quotation marks omitted).

In this case, the record evidence amply supports the implicit finding by the Board that neither the City nor Blue Rock/Pike considered the quarry to be operating under the 1968 Approval such that the City could have knowingly waived the conditions contained in that Approval. Similarly, given the evidence in the record that Blue Rock and Pike were operating under a claimed "grandfathered right" rather than on the rights conferred by the 1968 Approval,[15] the Board could have found that Blue Rock/Pike did not rely on any alleged waiver by the City of the conditions in the Approval. Accordingly, the Board's findings in that regard are supported by substantial evidence on the record and its conclusion that the quarry is not a lawful use pursuant to the 1968 Approval was not erroneous.

V. Whether the Rights Were Vested

Pike next argues that the ZBA's conclusion that quarrying is not grandfathered was erroneous because a provision in the Ordinance enacted in 1969 expressly excepted Parcels 11-A

[15] Although Pike points to evidence in the record tending to show that Blue Rock may have also claimed to be operating under the terms of the 1968 approval (*see* Pike Br. at 6 and R. at 753), the standard under the 80B is not whether there is evidence to support a contrary conclusion or even whether the court would have found the facts differently, the standard is whether the evidence on the record supports the Board's findings. *See e.g.* R. at 773 & 838

and 11-B from new permitting requirements and provided that there was a vested right to quarry on that land.

Under the 1969 Ordinance, quarrying became a use that required approval. However, that ordinance also included the following provision:

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

R. at 40.

According to Pike, this provision granted it vested rights to quarry and the ZBA erred in failing to so conclude. The court disagrees. First, this provision is expressly applicable to the "C. Company" parcel, or Parcel 11-A. There does not appear to be any dispute that the quarrying activity established in December 1968 and that is at issue in this case does not take place on Parcel 11-A. Moreover, the provision only applies to "any lawful rights as to the use of said premises." As outlined above, in the absence of approval under the 1968 Approval or of a lawful use under the Ordinance in effect in 1968, quarrying was not a lawful use of the Property. Therefore, the 1969 Ordinance did not serve to vest Pike's predecessors-in-interest with the right to quarry on the Property and the Board did not err when it reached this conclusion.

VI. Whether the Quarry is a "Grandfathered Special Exception."

Finally, Pike contends that the quarry is a grandfathered special exception that does not require approval by the ZBA. According to Pike, "[u]nder Westbrook's most recent land use ordinance, the 2004 Land Use Ordinance, . . . Pike's Quarry continues to be located in the Industrial Zone. In that zone, Extractive Industry (which includes quarrying) is allowed as a

Special Exception. A Special Exception use is defined as a type of *permitted* use by Ordinance § 201.88." Pike Br. at 17.

Under Section 201.88, a Special Exception is "[a] use which is by policy permitted in a particular zoning district and consistent with the City's most recently adopted comprehensive plan; is neither a nonconforming use nor subject to a variance under customary circumstances . . . ." R. at 3627 (emphasis added). According to Pike, "as defined, Special Exception uses are a type of 'conforming' use [and] the ZBA [therefore] erred in finding that the Quarry is a nonconforming use." The court disagrees. As discussed above, in light of the fact that the CEO's 1968 decision and the 1968 Approval expressly addressed the use of the Property and placed limits on its use, the operation of the quarry was effectively deemed subject to approval in 1968. The Board did not err when it concluded that, in the absence of compliance with the 1968 Approval or operation that is otherwise lawful, the use is therefore unlawful.

Based on the foregoing, and 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

> The decision of Defendant City of Westbrook's Zoning Board of Appeals is AFFIRMED.

Date: April 5, 2010

s/Thomas E. Humphrey
Chief Justice, Superior Court