

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Consolidated Docket Nos.
BCD-WB-CV-09-54 and
BCD-WB-AP-09-31

PIKE INDUSTRIES, INC.,

Plaintiff/Petitioner

v.

ORDER ON PLAINTIFF/PETITIONER'S
MOTION FOR A TRIAL OF THE FACTS

CITY OF WESTBROOK, ET AL,

Defendants/Respondents

Before the court is the motion of Plaintiff/Petitioner Pike Industries, Inc. ("Plaintiff" or "Pike"), for a trial of the facts pursuant to M.R. Civ. P. 80B(d).

BACKGROUND

On February 27, 2009, Pike filed an administrative appeal with the Westbrook Zoning Board of Appeals ("ZBA") regarding portions of the decision of the Westbrook Code Enforcement Officer ("CEO") 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. ZBA Decision, Findings of Fact ¶ 6. That same day, Westbrook Works¹ 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, held public hearings and, on July 27, 2009, 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) overturn the CEO's decision that Pike has

¹ Westbrook Works is an association of individuals and businesses, including Intervenor Idexx Laboratories, Inc. and Artel, Inc., that own property in the Five Star Industrial Park, the "Bird Land" neighborhood and other locations near the Property. ZBA Decision, Background ¶ 2.

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 August 19, 2009, Pike filed a Complaint for Review of Governmental Action with Independent Claims For Relief pursuant to M.R. Civ. P. 80B. On September 18, 2009 Pike filed a motion for a trial of the facts, and an opportunity to conduct discovery in preparation for such a trial, pursuant to Rule 80B(d).

DISCUSSION

Rule 80B(d) provides, in relevant part:

(d) Motion for Trial; Waiver. If the court finds on motion that a party to a review of governmental action is entitled to a trial of the facts, the court shall order a trial to permit the introduction of evidence that does not appear in the record of governmental action and that is not stipulated. . . . With the motion the moving party shall also file a detailed statement, in the nature of an offer of proof, of the evidence that the party intends to introduce at trial. That statement shall be sufficient to permit the court to make a proper determination as to whether any trial of the facts as presented in the motion and offer of proof is appropriate under this rule and if so to what extent. . . .

Id.

As the Law Court has repeatedly explained:

The purpose of Rule 80B(d) is to allow the parties to an appeal of a governmental action to augment the record presented to the reviewing court with those facts relevant to the court's appellate review of agency action. Rule 80B(d) is not intended to allow the reviewing court to retry the facts that were presented to the governmental decisionmaker, nor does it apply to any independent civil claims contained in the complaint. Rather, it is intended to allow the reviewing court to obtain facts not in the record that are necessary to the appeal before the court.

Baker's Table, Inc. v. City of Portland, 2000 ME 7, ¶ 9, 952 A.2D 218, 221 (citations omitted).

In keeping with the limited purpose of Rule 80B(d), the Law Court has further explained that “the complainant may augment the record if there are claims of ex parte communication or bias alleged, with sufficient particularity, to have had an effect on the fairness of the governmental proceedings.” *Id.* (citations omitted). Similarly, “[t]he record may also be supplemented if the government took action, reviewable by the court, in circumstances that did not allow for the making of a record.” *Id.* (citations omitted).

In support of its motion, Plaintiff contends that a trial of the facts is necessary in order that it may present evidence “that it has so far been unable to obtain, but that would be directly relevant to the issues before this Court.” Pl.’s Mot for Trial at ¶ 4. Specifically, Pike seeks the contents of a box of documents including “newspaper clippings, City Council minutes, planning board agendas, letters to and from city councilors, and the mayor, and other documents produced relating to the dispute surrounding the Spring Street Quarry before the Westbrook ZBA in 1968.” *Id.* at ¶ 5. According to Pike, that dispute, and the ZBA’s 1968 approval, “is at the heart of several of Pike’s 80B Appeal claims.” *Id.*

Plaintiff also seeks files maintained by Attorney Hugh MacMahon, an “Of Counsel” attorney at Drummond Woodsum. According to Plaintiff, “[i]n 1968, Mr. MacMahon was the attorney for the ‘Birdland’ neighbors in connection with proceedings before the ZBA which led to the 1968 ZBA Approval.” *Id.* ¶ 6. Plaintiff seeks non-privileged materials relating to those proceedings and asks to be permitted to introduce them at a trial of the facts.

In opposition, the City argues that Pike’s motion represents an impermissible attempt to retry the merits of its claim that the quarry it operates on the Property is lawful. According to the City, Pike’s efforts in that regard essentially ask “this Court to retry the issues already decided by the [ZBA] at its hearing,” something the City contends is not permitted under Rule 80B(d). The

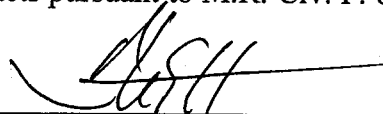
City also contends that Pike has failed to sufficiently demonstrate the admissibility and relevance of the documents it seeks to discover and present. On these points, the court agrees with the City.

As noted above, a trial of the facts pursuant to Rule 80B(d) may only be had on matters related to an administrative appeal. A trial of the facts may not be had on independent claims not previously considered by an administrative board. As such, a trial of the facts may be necessary to shine light on a flaw in the administrative proceedings – due, for example, to bias or lack of jurisdiction – so that the court may fully appreciate the bases for the administrative decision and conduct a meaningful review. It is not, however, an opportunity to retry the merits. After a review of Pike’s Motion and its “Statement of the Evidence,” the court concludes that Pike does not aspire to introduce evidence to expose an impermissible basis for the ZBA’s decision not otherwise evident in the record nor does it otherwise seek to supplement the record with respect to facts that were not or could not have been considered by the Board. Rather, Pike seeks an opportunity to re-try the merits of its claims by presenting additional, seemingly cumulative evidence, on issues raised to and considered by the ZBA in its decision. That is not the purpose of Rule 80B(d).

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

Petitioner’s Motion For A Trial Of The Facts pursuant to M.R. Civ. P. 80B(d) is DENIED.

Date: November 10, 2009



Chief Justice, Superior Court