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In Memoriam

C. Wesley Crowell
1955-2015

April 3, 2017

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VIA E-MAIL

Town of Cape Elizabeth Ordinance Committee
Attn: Maureen O'Meara, Town Planner
320 Ocean House Road
Cape Elizabeth, ME 04107

Re: Proposed Changes to Shooting Range Ordinance

Dear Members of the Ordinance Committee:

The Town of Cape Elizabeth (the "Town") is considering changes to its Shooting Range Ordinance (the "Ordinance"), and in particular, changes to the licensing procedure for new and existing shooting ranges. In that light, this letter addresses the scope and purpose of the Ordinance, as amended, and how it fits within the regulatory scheme for gun clubs and shooting ranges created under Maine law. Ultimately, this letter suggests that the Ordinance is legally valid, but cautions the Town regarding further regulation in this area.

In general, Maine municipalities possess substantial power to pass ordinances that protect the health, safety, and welfare of their citizens. However, this power can be limited by the express act of the Legislature.¹ The regulation of shooting ranges and gun clubs is one such area where the State has saw fit to step in.² Thus, any ordinance adopted by the Town that regulates such facilities *must* comply with all of the precepts enacted under 30-A M.R.S.A. § 3011, or else risk being invalidated following what can often be expensive litigation.

From our review, it appears that the Ordinance attempts to regulate both new and existing gun ranges within the Town by way of a licensing program, not unlike the type of

¹ See 30-A M.R.S.A. § 3001 (2016) ("Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has to confer upon it, which is not denied either expressly or by clear implication . . .").

² 30-A M.R.S.A. § 3011 (2016).

regulation that restaurants and bars must undergo before operating.³ Any applicant for a shooting range license must pass a background check and then submit an application for review by the Police Chief and the Town Council that covers topics ranging from access, to hours of operation, to most importantly, measures to ensure safety of the range's users as well as adjoining neighbors and other members of the public.

Generally speaking, enacting a licensing requirement such as that proposed by the Town is well within the *home rule* authority granted by Maine law. However, given the specific requirements of § 3011, we want to highlight a number of areas within the Ordinance where the Town will want to express additional caution in the future.

First, the Ordinance requires that all new license applications include a plan from a professional noise expert showing that noise levels at the property line will not exceed 65 dBA, and that all existing shooting ranges will not add new firearms or ammunition that will exceed this limit.⁴ Although municipalities are *expressly prohibited* from enacting regulations that would "limit or eliminate"⁵ shooting activities at existing gun clubs, the Ordinance appears to effectively grandfather existing shooting ranges, while only restricting activities of *new* ranges, or *new* activities within existing ranges. As drafted, this system *does* seem to comply with state law, as it does not have the potential to curtail existing shooting range activities. However, we would caution the Town against enacting any *additional* noise regulations beyond those in the proposed amendments as they relate to shooting ranges as doing so may effectively "limit or eliminate" some preexisting shooting activities.

Second, the Ordinance requires that a license applicant submit materials relating to ongoing maintenance, safety design, and shot containment. Given Section 3011's emphasis on promoting the safety of existing and new shooting ranges, these provisions are likely valid. Not only does Section 3011(2) implicitly allow municipalities to curtail existing activities that do not conform to "generally accepted gun safety" regulations. The Ordinance's use of the NRA Range Source Book to provide the applicable safety standards also helps comply with this criterion, as the Source Book is considered to be the prevailing authority on "generally accepted gun safety." However, the Town should be aware that Section 3011(4) prohibits municipal interference with shooting ranges that wish to expand their safety mechanisms and procedures. Although the Town does not have any incentive to prevent shooting ranges from becoming *safer*, it is clear that the Legislature wanted to protect shooting ranges' ability to undertake generally-accepted safety measures without fear of municipal interference. The Town would do well to remember this should future issues arise.

³ However, it should also be noted that there is only one existing shooting range within the Town, and that the establishment of future ranges is likely impossible due the preclusion of such facilities from the Town's land use table.

⁴ Ordinance Sec. 24-5-3.

⁵ 30-A M.R.S.A. § 3011(2).

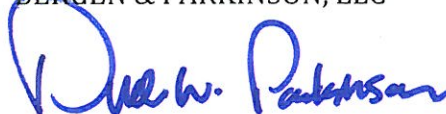
Finally, notwithstanding our general analysis, the Town would do well to consider this scenario before moving forward. Even if the licensing scheme is legal as drafted, problems could arise if an existing shooting range is *denied* a license at some point in the future. Section 3011(2) explicitly states that a municipal ordinance *may not* be applied so as to limit or eliminate existing shooting activities, so long as those activities are conducted in a safe manner. Ideally, the Ordinance would act as a means to ensure that any shooting range within the Town is operated safely. However, if a new or existing shooting range could not meet the Town's requirements, particularly in regards to condition not related to safety, it appears problematic for the Town to deny the application, which would likely violate Section 3011(2). This, of course, leaves the Town with a licensing scheme that has no means of enforcement. Again, this scenario may never occur, but the Town should consider these ramifications before enacting the Ordinance.

In conclusion, the Ordinance **does** appear to comply with all the requirements of 30-A M.R.S.A. § 3011. Nonetheless, as noted above, this area of municipal regulation can present numerous challenges, meaning that litigation related to the current Ordinance, as well as to any future amendments, is always a possibility – and predicting the outcome of any such litigation is difficult.

We appreciate the opportunity to review the Ordinance. Please let us know if we can be of more assistance in this matter.

Very truly yours,

BERGEN & PARKINSON, LLC



Durward W. Parkinson