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July 15, 2013

Michael K. McGovern, Town Manager
Town of Cape Elizabeth
320 Ocean House
P.O. Box 6260
Cape Elizabeth, ME 04107

Re: Spurwink Rod and Gun Club

Dear Mike:

Enclosed please find a memorandum analyzing the various statutes, ordinances and cases relating to the regulation of shooting ranges and specifically how it impacts the Spurwink Rod and Gun Club. I hope this fully addresses the concerns raised by you in our conversations in June.

If you have any questions, please feel free to contact me at your convenience. Otherwise, I look forward to discussing this with you and the Town Council at their workshop on September 5, 2013.

Very truly yours,


Kenneth M. Cole III

KMC/lts
Enclosures



Attorneys at Law

MEMORANDUM

ATTORNEY-CLIENT PRIVILEGED

TO: Cape Elizabeth Town Council

FROM: Kenneth M. Cole III, Esq.

RE: Regulation of Shooting Ranges

DATE: July 15, 2013

Maine – State Legal Analysis

From a state constitutional perspective, the right to bear arms is protected by Section 16 of Article I of the Maine Constitution.¹ Accordingly, any regulation of firearms must reasonably relate to the promotion of public health, safety, welfare, and morality.²

In addition to the constitutional protections noted above, shooting ranges in particular have been afforded extra protection by the legislature to the extent that a given shooting range has been in operation for an extended period of time. Indeed, Maine law provides that “a person may not maintain a nuisance action for noise against a shooting range located in the vicinity of that person's property if the shooting range was established as of the date the person acquired the property.”³ The same statute also provides a five (5) year statute of limitations for new shooting ranges, and a three (3) year statute of limitations for shooting ranges which undergo substantial changes.⁴ Additionally, Maine law prohibits municipalities from using noise control ordinances to limit or eliminate activities which have been occurring on a regular basis at a given shooting range prior to the effective date of the ordinance.⁵ Thus, such facilities are essentially grandfathered in for the purposes of noise control – both from a private (nuisance) and public (regulatory) perspective.

¹ “Every citizen has a right to keep and bear arms and this right shall never be questioned.”

² See *Hilly v. City of Portland*, 582 A.2d 1213 (Me. 1990) (holding that the scope of that right to bear arms is not absolute and is subject to “reasonable regulation consistent with the State's police power to promote public health, welfare, safety, and morality.”)

³ 17 M.R.S.A. § 2806.

⁴ *Id.* Note that dormant shooting ranges (i.e. a shooting range which has been dormant for three years) desiring to operate once again will be treated as new shooting ranges for the purposes of the statute.

⁵ 30-AN M.R.S.A. § 3011.

United States – Federal Legal Analysis.

From a federal constitutional perspective, the right to bear arms is protected by the Second Amendment. While the Maine constitution permits the reasonable regulation of shooting ranges, the United States Constitution likely⁶ requires something more – that municipalities provide a more meaningful justification for the regulation (i.e. a showing that the subject regulation is closely tailored to a substantial public-interest). For instance, the Seventh Circuit has held that this heightened standard prevents municipalities from banning shooting ranges altogether.⁷

Municipal Regulation

Municipalities may impose time, place, and manner restrictions on shooting ranges so long as the municipality shows some strong public-interest justification for the regulation (and that the regulation is closely tailored to the given public interest). In addition, Maine law elevates existing shooting ranges to “grandfathered” status with respect to noise control by protecting such ranges from both public regulation and private nuisance lawsuits. That being said, the extra protection afforded to shooting ranges under Maine law is limited specifically to noise control (and not, for instance, spent shell casings). Furthermore, there is no state law limiting a municipality’s ability to regulate new shooting ranges or new or expanded activity at existing shooting ranges, so long as the regulation passes federal and state constitutional muster.

Sample Ordinances

Enclosed are three sample municipal ordinances regulating the operation of shooting ranges in Maine. The Falmouth ordinance provides the most basic regulation, requiring that a permit be obtained from the chief of police on an annual basis and that, aside from any specific restrictions contained in the permit, the chief of police shall refuse to issue a permit only when its issuance would pose a possibility of danger to life or property. *See Exhibit A.* The Brunswick ordinance falls somewhere in the middle in terms of regulatory complexity and accordingly (i) limits the hours of operation of approved shooting ranges, (ii) provides certain operational standards (i.e. satisfactory backstop, size of shotgun pellets, etc.), and (iii) requiring that a permit be obtained on an annual basis from the police chief or designee. *See Exhibit B.* Finally, the Scarborough ordinance is the most comprehensive and provides for a five-member Firing Range Committee, providing for an annual inspection by said committee, and empowering the committee with the power to create rules and regulations to govern firing ranges, which rules and regulations must be approved by the Scarborough Town Council. *See Exhibit C.*

⁶ The word “likely” must be used because the United States Supreme Court has not yet elaborated on what standard should apply to constitutional challenges based on the Second Amendment. Indeed, Second Amendment jurisprudence is limited and federal gun rights are an ever-evolving legal field.

⁷ *See Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

Conclusion

The Spurwink Rod and Gun Club is a legal, non-residential use in the Town's RB zone. See Section 19-6-2 (C)(2)(d) of the municipal zoning ordinance. It dates back to at least 1961, so that even if found non-conforming, would be grandfathered and thus protected by Maine law. A review of the CEO's files indicates that the Club has all proper permits and approvals required to operate and that a formal ruling by the CEO regarding its status was made in 1995, as well as an earlier decision in 1987 by the Board of Zoning Appeals. Based on the above legal analysis and these facts, the Cape Elizabeth Town Council may adopt an ordinance regulating and licensing the Club, but any such ordinance will need to be based on specific findings that it is required to enhance and promote the public's safety, health and welfare.

FALMOUTH

EXHIBIT A**Sec. 10-1. - Use of firearms.**

This section is enacted pursuant to 30-A M.R.S.A. § 3001 and the home rule authority of the town in order to provide for the safety of residents of the town; to eliminate a threat to the peaceable enjoyment and use of property; and to maintain an appropriate educational environment on public school property.

- (a) *Trespass with a firearm.* A person in possession of a firearm who is not a duly authorized law enforcement officer engaged in the proper exercise of his duties, shall not enter upon private property for any purpose without the permission of the property owner.
- (b) *Discharge of firearms.* The discharge of firearms, including without limitation handguns, rifles, shotguns and gas-operated weapons, for any purpose in the town is hereby prohibited with the following exceptions:
 - (1) The discharge of shotguns in connection with lawful hunting is allowed, where prior permission of the property owner has been obtained, in the following areas of the town:
 - a. The area within fifty (50) feet inland from the high-water mark along the Presumpscot River estuary from Interstate 295 on the northerly shore of the estuary to a point where the easterly sideline of Greenway Drive extended northerly would intersect the high-water mark;
 - b. The shoreline of Casco Bay from the Martin Point Bridge to the Town of Cumberland, except the area designated as part of the Back Cove Sanctuary as described in 12 M.R.S.A. § 7651; and
 - c. The entire area lying westerly of Middle Road except the following school and residential zones:
 - (i) The area bounded by Middle Road, Falmouth Road, Allen Avenue Extension and that portion of the Presumpscot River that runs between Allen Avenue Extension and the Middle Road, which area also includes the Plummer-Motz School and the Lunt School;
 - (ii) The area surrounding the Falmouth Middle/High School and bounded by Woodville Road, Falmouth Road, the East Branch of the Piscataqua River (except the area fifty (50) feet from the easterly shore thereof) and Field Road, provided, however, that this prohibition shall not apply within such area if, before October 1, each year, the police chief reports to the town council that (i) a line five hundred (500) feet from the school property line is posted with signs including the language "No Hunting" and at intervals not less than one hundred (100) feet and (ii) hunting is allowed only with the written permission of the landowner, which permission must be kept in the possession of the hunter. The erection of signs as provided herein shall be at the option of the landowner and at the expense of the town. Such signs must be maintained throughout the hunting season.

(2)

For those areas in which the discharge of firearms is permitted, when the discharge of a firearm is within five hundred (500) feet of any dwelling, the permission of an adult residing at the dwelling unit must be obtained prior to any discharge.

- (3) The discharge of .22 caliber pistols at night in conformity with state regulation for the purpose of hunting raccoons is allowed in those areas designated for the discharge of shotguns under paragraph (1).
 - (4) Target practicing is allowed, but only in those areas of the town designated for discharge of shotguns under paragraph (1) and only within the confines of areas for which a permit as a range has been obtained from the chief of police and only with such types and calibers of firearms and under such conditions as shall be specifically enumerated by the chief of police in such permit. Such permit shall be valid for any period of time as shall be designated thereon by the chief of police but in no event shall any such permit be valid without renewal for more than one (1) year. The chief of police shall refuse to issue a permit only when he finds that the issuance of such permit will pose a danger or possibility of danger to life or property.
 - (5) The discharge of firearms is allowed on their own property by those property owners and their permittees described in, and for all purposes listed in, 12 M.R.S.A. §§ 7501, 7502, and 7504, and all other Maine statutes regulating hunting.
- (c) The permission required by subsections (a) and (b) of this section may be evidenced either by a writing from the owner or dwelling resident as the case may be, kept on the person of the permittee or, implicitly, if the owner does not post signs at approximately eye level at reasonable intervals around the perimeter of the property indicating that trespassing is prohibited, except that written permission must be obtained to discharge a firearm with five hundred (500) feet of any dwelling.
- (d) *Possession of firearms on school property.* The possession of firearms on school property is prohibited except in connection with supervised educational programs.
- (e) *No hunting at Falmouth Community Park.* Hunting within Falmouth Community Park, with either firearms or bow and arrow, is prohibited within three hundred (300) feet of any playing field, parking area or established walking paths.
- (f) *Protection of life and property.* Nothing in this section shall be construed to prohibit the use of firearms when justified for the protection of human life or property or by duly authorized police officers in the proper exercise of their duties.
- (g) *Enforcement and penalty.*
- (1) Police officers of the town shall have the authority and power to enforce this section.
 - (2) Any person violating this section shall be subject to the maximum fine allowable under the Town Charter for the Town of Falmouth and/or confiscation of the firearm used in such violation.

(Ord. of 5-30-91; Ord. of 12-20-93; Ord. of 7-24-95; Ord. of 10-23-2000; Ord. of 12-19-00)

EXHIBIT B**Sec. 17-1. - Definitions.**

The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Commercial means the use of the target practice site for the production of income.

Firearm means any weapon, whether loaded or unloaded, that is designed to expel a projectile by the action of an explosive, and includes any such weapon commonly referred to as a pistol, revolver, rifle, gun, machine gun or shotgun. Any weapon that can be made into a firearm by the insertion of a firing pin or other similar object, or by repair, is a firearm.

Shooting gallery means an indoor facility licensed under chapter 10, article 11, section 10-26 where firearms are discharged.

Target practice means the repeated discharge of a firearm at a target practice site for all purposes, including but not limited to increasing the person's proficiency with the firearm and sighting in the firearm.

Target practice site means any site permitted under section 17-5(a) or (b) used for non-commercial or commercial target practice by the owner/renter/lessee of the site or sporadic guests of the owner/renter/lessee of the site.

(Ord. of 10-19-04)

Sec. 17-4. - Discharge of firearms prohibited in certain portions of town.

It shall be unlawful for any person to shoot or discharge a firearm of any kind or description, except a shotgun or black powder gun, within those portions of the Town of Brunswick bounded and described in paragraphs (a), (b) and (c) below and except as allowed in section 17-5 below. Firearms may be discharged in other areas of Town in accordance with law.

- (1) All lands southerly of a line commencing at a point at the head of Maquoit Bay where Maquoit Road is closest to the bay; thence along Maquoit Road in a general northerly direction to the intersection of Rossmore Road; thence along Rossmore Road in a southwesterly direction to the intersection of Mere Point Road; thence along Mere Point Road in a general northerly direction to the intersection of Middle Bay Road; thence along Middle Bay Road crossing the intersection of Middle Bay Road and Harpswell Road to a point intersecting fenced land being part of Naval Air Station Brunswick; thence south/southeast on the fence line of Naval property to Harpswell Cove; thence southerly to the Brunswick/Harpswell town line.
- (2) All lands easterly of a line commencing at the Brunswick/Harpswell town line at the Gurnet Bridge and along Route 24 in a general northerly direction to the intersection of Route 1; thence in an easterly direction along Route 1 to the Brunswick/West Bath town line at the New Meadows River.
- (3) All lands inclusively bordered by the Brunswick Naval Air Station property line to the east; Harpswell Cove on the south; the New Meadows River to the east; and Route 1 on the north.

(Ord. of 10-19-04)

Sec. 17-5. - Target practice in any area of town.

- (a) The discharge of a firearm for the purpose of non-commercial target practice shall be allowed only under the following conditions:
- (1) The owner/renter/lessee of the property shall have obtained a one-year permit from the police department indicating that the proposed target practice site has been inspected and approved. The site must have an adequate backstop which may be:
 - a. A natural pit, gully or depression of sufficient depth and density so as to prevent the escape of any bullet or ricocheted bullet from the immediate area with consideration for the caliber of firearm being discharged; or
 - b. A manmade structure constructed of appropriate materials with sufficient height and density so as to prevent the escape of any bullet or ricocheted bullet from the immediate area with consideration for the caliber of firearm being discharged.

Target practice into the air with a shotgun must use a pellet size no greater than six (6) in an open area owned by the applicant or that the applicant utilizes with written permission and large enough for the pellets to remain within the open area after firing. Target practice with a shotgun using a pellet size greater than six (6) must comply with a. and b. above.

The police chief or designee shall inspect the proposed site within five (5) working days after receipt of an application and shall act on the application within five (5) working days of the inspection. Appropriate action is to approve the site, recommend site improvements or deny use of the site. When recommended site improvements are made, the application must be re-submitted and will be treated as a new application. If approval is denied, the applicant may appeal the decision to the town manager within five (5) working days of receipt of the denial by stating in writing the basis for the appeal. The town manager shall respond in a timely manner and base his/her decision to grant an appeal on the provisions of this section. Permits shall expire one year from date of issue. A new permit will be required for continued use of the target practice site.
 - (2) Hours of operation during which target practice takes place are from 8:00 a.m. to 8:00 p.m. or sunset, if earlier.
- (b) The discharge of a firearm at a commercial target practice site in any area of town shall be allowed only under the following conditions:
- (1) The owner/renter/lessee of the property shall have obtained a target practice site permit under section 17-5(a).
 - (2) The use must be in compliance with all land use and building code requirements for recreational facilities, or the owner/renter/lessee of the property shall have obtained a special permit under section 701 of the Town of Brunswick Zoning Ordinance, and all other necessary permits must be obtained.
 - (3) Hours of operation during which commercial target practice takes place shall be from 8:00 a.m. to 8:00 p.m. or sunset, if earlier.
- (c) Any person violating this section shall be punished by a fine of not more than five hundred dollars (\$500.00).

(Ord. of 10-19-04)

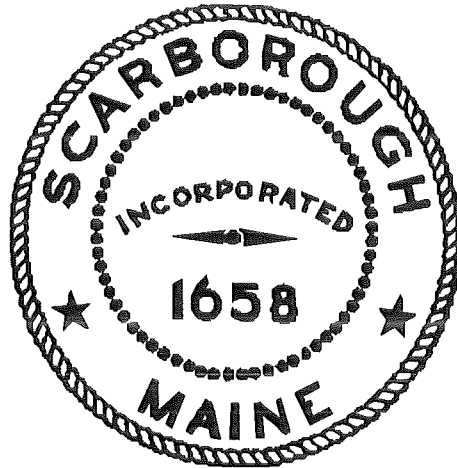
SCARBOROUGH

EXHIBIT C

CHAPTER 603

TOWN OF SCARBOROUGH

FIREARMS ORDINANCE



Adopted 03/16/68
Amended 12/17/75
Amended 09/15/93
Amended 11/06/02

**CHAPTER 603
TOWN OF SCARBOROUGH
FIREARMS ORDINANCE**

Definition:

“Firearm” means any weapon which is designed to expel a projectile by the action of an explosive and includes any such weapon commonly referred to as a pistol, revolver, rifle, gun, machine gun or shotgun. Any weapon which can be made into a firearm by the insertion of a firing pin, or other similar thing, or by repair, is a firearm. (11/06/02)

Section 1.

It shall be unlawful for any person to shoot or discharge any firearm on land owned by the Town of Scarborough. (Amended 11/06/02)

Section 2.

It shall be unlawful for any person to shoot or discharge any firearm in the Town of Scarborough within 100 yards of a dwelling or occupied building or structure without having received the prior consent of the owner or the occupants of said dwelling or occupied building or structure. (Amended 11/06/02)

Section 3.

It shall be unlawful for any person to shoot or discharge any firearm in the Town of Scarborough which causes or permits the bullet or projectiles from such firearm to pass or results in the bullet or projectile from such firearm passing within 100 yards of a dwelling or occupied building or structure without having received the prior consent of the owner or occupants of said dwelling or occupied building or structure. (Amended 11/06/02)

Section 4.

It shall be unlawful for any person to shoot or discharge any firearm except for shotguns, muzzle loader/black powder guns, revolvers, or pistols within the Town of Scarborough. (Amended 11/06/02)

- (a) This section shall not apply to any person who has prior consent from the owner of the premises upon which said firearms are to be discharged.

Section 5.

The provisions of Section 2, Section 3 and Section 4 shall not apply on an approved firing range. An approved firing range is defined as an area set up for the safe discharge of firearms with adequate protection in the form of a backstop and/or a proper field of fire and so arranged as to prevent any danger to neighboring property or persons, which has been approved under Sections 8 through 11 or under Section 12 below. (Amended 11/06/02)

Section 6.

A firing range committee is hereby established to consist of the following: (Amended 11/06/02)

- one member of the Scarborough Gun Club who is certified by the National Rifle Association, to be designated by the Gun Club;
- one member of the Scarborough Fish and Game Association who is certified by the National Rifle Association, to be designated by the Scarborough Fish and Game Association;
- one member at large, who is a certified National Rifle Association Firearms Instructor to be appointed by the Town Council;
- the Chief of Scarborough Police;
- and one member of the Scarborough Town Council to be appointed by the Scarborough Town Council and who will serve as Chairman of this Committee.

In the event that any organization fails to designate a member of their organization within 30 days after having received a written request to do so, the Scarborough Town Council shall have the right to make such designation. All members shall be residents of the Town of Scarborough. (Amended 11/06/02)

Section 7.

The above Committee shall present rules and regulations for the establishment and operation of approved firing ranges to the Scarborough Town Council. Upon approval of these rules and regulations by the Scarborough Town Council, such rules and regulations shall become effective and shall be placed on file in the office of the Scarborough Town Clerk. (Amended 11/06/02)

Section 8.

No person shall establish or operate a firing range in the Town of Scarborough, unless the firing range has been approved by the Firing Range Committee under this Ordinance. Initial application for an approved firing range shall be made on forms provided by the Scarborough Police Department. The owner of the property on which the firing range is to be located shall return the completed application along with proof that the owner or the person who will operate the firing range, if different from the owner, has completed an approved firearms safety course. (11/06/02)

Section 9.

Upon receipt of an application for a firing range, the Scarborough Police Department will conduct a criminal records check on the owner of the property on which the firing range is to be located and on the person designated by the owner to operate the firing range, if different from the owner. (11/06/02)

Section 10.

Upon completion of the criminal records check, the Police Department will forward the application and certification of firearms course to the Firing Range Committee. (11/06/02)

Section 11.

Upon receipt of the materials forwarded from the Police Department, the Firing Range Committee will inspect the proposed firing range. The Committee shall issue a certificate of approval if the firing range meets the rules and regulations approved by the Scarborough Town Council under Section 7 above. Such certificate will be valid until June 15th of the following year. Prior to June 15th of every year thereafter, the firing range will be re-inspected by the Firing Range Committee. (11/06/02)

Section 12.

Within 30 days of November 6, 2002, the Firing Range Committee will inspect each existing firing range. The Committee shall issue a certificate of approval if the firing range meets the rules and regulations approved by the Scarborough Town Council under Section 7 above. Such certificate will be valid until June 15th of the following year. Prior to June 15th of every year thereafter, the firing range will be re-inspected by the Firing Range Committee. A firing range existing on November 6, 2002 may continue to operate without a certificate of approval only until inspected by the Firing Range Committee under this paragraph. (11/06/02)

Section 13.

In the event that any firing range, either new or existing, is found to be in noncompliance with the rules and regulations or deemed by the Firing Range Committee to be unsafe, no new certificate of approval will be issued and any existing certificate of approval will be declared void. (11/06/02)

Section 14.

In the event that the Firing Range Committee determines not to issue or to void a certificate of approval, the property owner or operator of the firing range may appeal that determination to the Scarborough Town Council. Such appeal must be filed in the office of the Town Clerk no later than 30 days after the date on which the Firing Range Committee makes its determination. (11/06/02)

Section 15.

Any person violating any part of the preceding sections shall be subject to a fine of not less than \$50.00 and not more than \$5,000.00 plus costs. The said fine on the complaint shall be recovered for the use of the Town of Scarborough. (11/06/02)

Section 16.

A list of certified firing ranges, including the location and authorized contact personnel for each, will be kept at the Town Hall and at the Scarborough Police Station from this date forward. (11/06/02)

Section 17.

Issuance of a certificate of approval by the Firing Range Committee constitutes a determination that the firing range is in compliance with the requirements of this Ordinance at the time of issuance. It does not constitute a determination of compliance with the requirements of any other applicable town ordinance, and any firing range approved under this Ordinance must also comply with all other applicable town ordinances, including, without limitation, the Scarborough Zoning Ordinance. (11/06/02)

Town of Scarborough

Firing Range Rules

Adopted June 5, 2002

The Firing Range Committee, as established by the Scarborough Town Council, in accordance with Chapter 603 (Firearms Ordinance) of the Town Ordinances, does hereby present the following rules and regulations for the establishment of approved firing ranges within the Town of Scarborough:

1. The backstop area of all approved ranges will be constructed of either:
 - Logs or timbers of at least 12" (twelve inches) in diameter with an earth barrier behind.
 - An earth barrier of suitable materials with no less than a 45 degree slope.
2. In addition to the backstop there shall also be a natural obstruction of trees or terrain to the rear of the backstop.
3. The target area will be placed no less than 3' (three feet) from the top and sides of the backstop.
4. The width of the range, at all points from the firing point to the target, shall be no less than:
 - 15' (fifteen feet) for a range of 50 yards in length.
 - 25' (twenty-five feet) for a range of 100 yards in length.
 - 50' (fifty feet) for a range of 200 yards in length.
5. No shooting will be permitted except between the hours of 8:00 a.m. and 9:00 p.m.
6. All approved ranges shall have warning signs as deemed adequate by the Firing Range Committee, will be approved.
7. Ranges, which are constructed in accordance with these rules and regulations **and** are deemed safe by the Firing Range Committee, will be approved.
8. The Firing Range Committee may revoke such approval as a result of a change of conditions, which, in the opinion of the Committee, makes the range unsafe.

Town of Scarborough - FIRING RANGE COMMITTEE

5 members

Firearms Ordinance (Chapter 603)

NAME

Jessica Holbrook, Chair (Council Liaison)

Roger M. Delaware (Scarborough Gun Club)

Ronald E. Nelsen (Scarborough Fish and Game Association)

Mark Jackson (NRA Firearms Instructor)

Robert Moulton (Chief of Police)

Updated: April 2013