

Town of Cape Elizabeth
Ordinance Committee DRAFT Minutes

January 10, 2014

8:00 a.m., Town Hall

Present: Kathy Ray, Chair
Jim Walsh
Jessica Sullivan

Staff: Ken Cole, Special Legal Counsel
Neil Williams, Police Chief
Ben McDougal, Code Enforcement Officer
Maureen O'Meara, Town Planner

The minutes of the October 10, 2013 meeting were approved.

Public Comment

Mark Mayone, liaison for the Spurwink Rod and Gun Club, said the club has reviewed the initial ordinance and identified several concerns. He said they are concerned the town is not doing an end run around prohibiting their operation and do not want the town to limit what they already do. He also said that he would prefer more notice of future meetings.

Under Sec. 13-a-4, there is concern about a hardship not being self created. Under Sec. 14-d, Enforcement , item 4, he would like a noticed public hearing as part of the approval. He also has a concern with Sec. 12.

Bobby Manson, 1 Cardinal Lane - She would like the ordinance to require the license to include a statement of what activity is currently occurring so that what is potentially an expansion of activity could be determined in the future. Under Sec. 23-8-1, Site Plan, she would like to include what the state allows as acceptable ammunition, and exclude tracers, armor piercing and other also prohibited by the state. She referenced the NSSF [National Safe Shooting Foundation] website and noted that activities exceeding the design of a gun club are not safe. Under Sec. 23-13-1, Exception, she was surprised to see this provision. You do not find it in other town ordinances, such as with issuance of an occupancy permit. She would like safety referenced more often in the ordinance and noted that the Sign Ordinance references safety 3 times.

Review ordinance draft

The committee agreed to review the draft ordinance section by section. Ms. O'Meara noted that she had provided Mr. Cole with information to label this Chapter 23, when it needs to be labeled Chapter 24.

The committee discussed the purpose statement. In response to a question about adding uses, Mr. Cole advised that the Spurwink Rod and Gun Club would become a grandfathered existing use with this ordinance, but that you should not write an ordinance for just one property. The committee agreed to leave the purpose statement as is.

Under Sec. 23-2-1, Permitting, Registration and Compliance, Mr. Walsh questioned the 180 days timeframe and wanted the time frame shortened for relicensing. Mr. Cole confirmed that once a facility acquires its initial license, there is a shorter period to apply for relicense. This is more of a transition provision.

Mr. Walsh wants it clear that the renewal will not take 180 days and Mr. Cole said that is addressed later in the ordinance.

Mrs. Sullivan is concerned that 180 days is not sufficient time. Mrs. Ray noted that the Town Council can grant an extension.

Mr. Walsh noted the emails received objecting to the waiver provision. Exceptions are not allowed in the Sign Ordinance. We need to act appropriately and, if more time is needed, request it from the Town Council.

Under Sec. 23-2-2, Shot Containment, Mrs. Sullivan asked if this is the "No blue sky" provision. Mr. Cole said this provision allows you to consider "No blue sky." but does not require it. He clarified this applies to existing and new facilities.

Under Sec. 23-2-3, Noise, in response to a question, Mr. Cole clarified that the 65 dba level is from the NRA (National Rifle Association) Source Book. Mrs. Sullivan noted we are prohibited by law from noise regulation of gun clubs.

The committee found the definition section acceptable.

Under Sec. 23-5-1, Shot Containment, Mrs. Ray asked how much is up to the committee? Mr. Cole said the committee decides if a design can meet the standards. In other words, can you have a design that is sufficient even if the design is not a "No blue sky" design. Mrs. Sullivan noted that the gun club, during the public hearing, said their intention is to eventually have a "No blue sky" design.

Under Sec. 23-5-2, Noise, Mr. Cole explained that under state law, you can estimate the baseline of activity and if what is happening exceeds the baseline, you can regulate. This provision documents the baseline and addresses the issue raised during the public hearing. Are you exceeding what is grandfathered?

Mrs. Sullivan asked that, if we produce an estimated baseline, do we risk federal violation? Mr. Cole said that it depends on how we approach enforcement. This ordinance applies to new and existing facilities.

Mr. Walsh asked about the state law. Mr. Cole explained that state law precludes local regulation of gun clubs unless there is “substantial expansion” of the use. The committee asked how noise expansion can be determined.

Mr. Cole explained that there are sound engineers that can measure sound levels. It is not impossible to measure. For example, in the permitting of quarries, sound limits and measurements are not uncommon. Mrs. Sullivan wanted to confirm that measurement can be done relatively easily and Mr. Cole responded that you would have to hire someone qualified and measure at the property line. Under state limits, you cannot charge a licensing fee but you can be reimbursed for administrative costs such as hiring an expert.

Ms. O’Meara noted that the town has had experience with setting sound limits that need to be measured as part of the Inn by the Sea outdoor events review by the Planning Board.

Under Sec. 23-6-2, Setbacks, Mrs. Sullivan asked if the gun club was compliant. Staff noted that the firing range was probably 50’ away from the nearest property line. Mr. Cole said that the existing facilities were grandfathered similar to an existing building as it relates to setbacks in the Zoning Ordinance. Mr. McDougal asked if this is reviewed under a hardship. There was general agreement that language would be added to the draft to clarify that existing facilities that do not meet the setbacks are grandfathered.

Under Sec. 23-6-4, Distance from Occupied Dwelling, Mr. Walsh asked if the 1/2 mile distance is arbitrary and Mr. Cole replied that it is from the NRA Source Book.

Under 23-7-1, Maintenance, Mr. Cole said that, based on his meeting with the gun club and the NRA standards, the existing range appears to be in compliance. This ordinance does not put them in an impossible position. Mr. Walsh suggested that if our standards exceed the NRA standards, then they may claim

we are being arbitrary. The NRA has been establishing standards for decades and they are very specific.

Mr. McDougal asked how you could be grandfathered from management standards? Mr. Cole said that when you move from use to operation, the operation must comply and is not grandfathered. You can require that operations change.

The committee discussed grandfathering. Mr. Cole will add clarifying language on what is grandfathered into the ordinance. He also suggested that the Town may want to prepare a guidance document. In response to a question of who determines grandfathering, Mr. Cole said the adoption of this ordinance will trigger grandfathering because you will have standards and there will be compliance or grandfathering.

Under Sec. 23-7-4, Liability Insurance, Mrs. Ray asked if the 3 million dollar amount is typical and Mr. Cole said it is typical to have insurance but the amount is included to address neighbor concerns. Mr. Walsh asks if this holds the town harmless and Mr. Cole responded that the town is immune, but you can still be in a lawsuit and have to pay legal fees. In response to a question on the amount, Mr. Mayone said that the gun club currently carries that amount of insurance. Staff noted that the current policy may not cover the town, and the gun club should check with their insurer.

Under Sec. 23-8-1, License Application, Mr. Cole clarified that there can be no application fee, but the town can charge for the cost of review, such as engineering fees.

Under Sec. 23-8-4, Site Plan, the committee asked Ms. O'Meara for comments. She noted most of the information typically required for Planning Board site plan review is here because a plan drawn to scale is required. She suggested you may want to specify a maximum scale. Mr. McDougal asked if the plan should be certified by a surveyor in order to confirm that information presented is accurate. Mr. Walsh noted that the same requirement has recently been added to building permits to improve accuracy. The committee agreed to require a registered surveyor to stamp the plan.

Under Sec. 23-8-5, Action, Mr. Walsh asked how the committee worked? For example, does staff make a determination of completeness or other actions prior to the process. Mr. Cole said it depends on how the committee structures itself, but the final decision comes from the committee. Mrs. Ray said that she is fine with the draft and Ben can advise the committee along the way about

completeness. Mr. Cole noted that the draft does not say this explicitly, but under Maine law, the committee meeting must be a public meeting.

Under Sec. 23-9-1, Registration, the committee discussed the 90 days to submit a plan. Mrs. Sullivan had concerns that the gun club might not be able to comply with shot containment in the 90 day period.

Mrs. Ray said we heard from the gun club that they have a 5 year plan and 90 days will not be enough time, but she does not want this to stretch out. Mr. Walsh commented that this has been an issue for 20 years, so 180 days is still better. We want a quality outcome. The committee agreed to change the time allowed to 180 days and Mr. Cole will change the other time frames for consistency.

The committee discussed the gun club's stated goal of achieving "No blue sky," the gold standard of shot containment per NRA standards. The gun club's timeline will not have this in place before they apply for a license. The committee talked about the gun club receiving a conditional approval and the need to be reasonable and not overstep state and federal law limits on local regulation. Mr. Cole clarified that the shot containment standard does not require that "No blue sky" is the only way to meet the shot containment standard. Mr. McDougal asked if a conditional approval or exception would be an option. Mr. Cole said that the committee will need to determine that the current structure is safe and send that recommendation to the Town Council. The town could condition the license on future installation of "No blue sky" design features.

Mr. McDougal asked if issuing a license without "No blue sky" design eliminates that as a goal for the future. Mr. Cole said the town can find the facility is safe now and issue the license but the possibility of future problems supports a condition to install "No blue sky" design. Mr. Cole further suggested that even if the committee determines the facility is safe, there is no guarantee of perfection and it would be safer with "No blue sky" design.

Mr. Walsh supported the conditional component to set the ultimate standard and stay with 90 days. The committee concurred.

Under Sec. 23-9-2, Compliance, the committee discussed adjusting the deadline to 1 year, but agreed to stay at 180 day.

Under Sec. 23-9-3, Abandonment and Discontinuance, it was confirmed that 3 years is per state statute.

Under Sec. 23-10-1, Firing Range Committee, Mrs. Ray asked if it was appropriate to specifically reference the Spurwink Rod and Gun Club. Mr. Cole said he found this typical in his review of local ordinances, such as in Scarborough.

The committee discussed committee membership. Should there be 2 members of the Town Council when the full Town Council will make the final decision? Mr. Cole suggested this will increase the odds that at least one Town Councilor will attend. The committee discussed adding a certified NRA gun operation instructor, which is required in Scarborough. In response to a question, Chief Williams confirmed that there are residents who are certified gun instructors. He noted, however, that these folks are experts in how to operate a gun, not necessarily experts in how to design a safe shooting range facility. The Town of Falmouth uses a range instructor to review the gun club design. Mr. McDougal asked the committee to rethink the code enforcement officer as a member, due to time constraints and workload. The committee was sympathetic but felt there would be less time demand once the first application was approved. Mr. McDougal also noted that it is awkward for a code enforcement officer to be voting with town councilors. The committee agreed to make the code enforcement officer an ex-officio member and to increase the public members to 2, one of whom will be an NRA certified gun instructor. This was done to increase the expertise on the committee which improves safety and to protect the gun club from efforts to shut it down.

The committee agreed to stop at Sec. 23-10-4 until the next meeting. They will continue their review at the January 17, 2104 meeting. The committee encouraged Mr. Mayone to provide comments in writing and in advance of the meeting so committee members could review them before the meeting.

Public Meeting

Cathy Kline, 66 Cross Hill Rd - She is concerned with safety. How will you determine that the design is sufficient to protect the public? Five years is too long. Is the current design safe? Is the committee qualified to determine that? There should be an independent evaluation of the club to determine safety issues. She is also concerned with the hours of operation tied to sunrise and sundown. There were calls to the police with confusion on when to start on Sunday. In the summer, shooting could occur very early. She also asked if the questions raised by Eric Frehme on the pre-existing noise regulation have been answered.

Mr. Cole noted that he is not general counsel for the town, but he reviewed the ordinance and there is an exception in it for shooting ranges. In addition, that

ordinance has been recodified by the town several times. If you haven't enforced an ordinance for 50 years, you can't start now.

Mrs. Kline supported having expertise on the committee and adding another citizen.

Next Meeting

The next meeting of the committee will be Friday, January 17th, beginning at 8:00 a.m. Meeting materials will be provided as soon as they are ready. The meeting was adjourned.