

MONAGHAN LEAHY, LLP

ATTORNEYS AT LAW

THOMAS G. LEAHY
KEVIN G. LIBBY
CHRISTOPHER C. DINAN
JOHN J. WALL, III
KENNETH D. PIERCE
CORNELIA S. FUCHS
NICHOLAS R. LOUKES
MATTHEW K. LIBBY

95 EXCHANGE STREET
P.O. BOX 7046
PORTLAND, MAINE
04112-7046

THOMAS F. MONAGHAN
RETIRED

TEL 207-774-3906
FAX 207-774-3833

[tleahy@monaghanleahy.com](mailto:t Leahy@monaghanleahy.com)

April 21, 2016

Cape Elizabeth Town Council
Attn: Martha MacAuslan, Chair
320 Ocean House Road
P.O. Box 6260
Cape Elizabeth, ME 04107

Electronic Mail

RE: Shooting Range Ordinance/Recent Amendments to Maine Law

Dear Council Members:

This recent Maine Legislature passed, and Governor LePage approved on April 5, 2016, amendments to the two (2) State of Maine laws relating to Sport Shooting Ranges. We view the amendments in each case as broadening the protections previously afforded by the State to shooting ranges by proscribing the basis for private nuisance actions against ranges, and by restricting a municipality's ability to limit or eliminate shooting activities at existing ranges. A copy of these Amendments is attached.

Cape Elizabeth adopted a Shooting Range Ordinance in 2014 ("the Ordinance"), and last year the Town Council acted upon a license application by the Spurwink Rod & Gun Club to continue to operate a range under the Ordinance. The Ordinance regulates both existing and newly proposed ranges, requires a license by the Town and contains various development and operational criteria to be met to obtain such license.

As to a nuisance cause of action brought against a range that was established before a property owner acquired his or her property in its vicinity, Maine law had stated "Except as provided in this subsection, 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." This statute was broadened in its protection of ranges by stating "Except as provided in this subsection, a person may not maintain a nuisance action including for noise..." 17 M.R.S.A. §2806 (1).

Similarly, the following subsection 17 M.R.S.A § 2806(2) relating to nuisance actions by persons who bought property before the establishment of a shooting range, limiting the time frames to bring such actions, was changed to “a nuisance action including for noise...”

Clearly, the Legislature was attempting to broaden the existing protection of ranges from “noise” claims to nuisance claims based on other theories. Where the above amendments relate to private nuisance actions, and not municipal regulation of shooting ranges, we won’t discuss those further, but acknowledge the apparent general intent behind these amendments.

As to municipal regulation of shooting ranges, the next set of amendments by the Legislature relate to 30-A M.R.S.A. § 3011. This is found after the municipal Home Rule provision, among various laws where the State has preempted municipalities from regulating in a manner that runs afoul of the State’s regulation. Here, the existing limitation as to a “municipal noise control ordinance” was expanded to a “municipal noise control or other ordinance may not require or be applied so as to require a sport shooting range to limit or eliminate shooting activities that have occurred on a regular basis at the range prior to the enactment date of the ordinance, as long as the range conforms to generally accepted gun safety and shooting range operation practices or is constructed in a manner not reasonably expected to allow a projectile to cross the boundary of the range.” 30-A M.R.S.A § 3011 (2). (Subsection 3 then goes on to allow regulation of newly proposed ranges or substantial changes to existing ranges. Subsection 4 limits a municipality’s ability to restrict maintenance and improvement projects at existing ranges.)

We see these above amendments to 30-A M.R.S.A. 3011 first, as carrying over the same broadening as in the nuisance actions amendment from “noise control” to “noise control or other ordinance”, and second, as providing an exemption for ranges that conform to generally accepted gun safety and shooting range operation practices or are constructed in a manner not reasonably expected to allow a projectile to cross the boundary of the range. So while a municipality reserves the right to regulate in a manner to protect public safety, as Cape Elizabeth has, that right is limited if an existing range (that is existing as of September 1, 2016), can show it meets the gun safety and operation practices of the statute, or, is constructed in a manner not reasonably expected to allow projectiles to leave the range.

If the Ordinance provisions simply reflect “generally accepted gun safety and shooting range operation practices,” we would hope Cape’s Ordinance provisions would not be found to overstep the broadened limits imposed on municipal regulation. We are concerned with what appears to be an alternative “safe harbor” which states “or is constructed in a manner not reasonably expected to allow projectile to cross the boundary of the range.” Therefore, an existing range in Maine could argue if it met either standard, a) conforming to generally accepted gun safety or shooting range operation practices or b) constructed in a manner where it would be unlikely a projectile would cross the range boundary, that no Ordinance provision could be applied to it to limit its historical activities predating the Ordinance. I don’t know if this raises concerns as to the Ordinance’s specific development or operational restrictions (such as Noise

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Mitigation under § 24-2-3, House of Operation under § 24-7-3 or Liability Insurance under § 24-7-4), if a range could establish those operational limitations would limit its historical activities.

Please advise if we may assist the Council further regarding this matter.

Best regards,

Monaghan Leahy, LLP

Thomas G. Leahy

By Thomas G. Leahy, Esq.

TGL/kmd

Cc: Michael K. McGovern, Town Manager

STATE OF MAINE

—
IN THE YEAR OF OUR LORD
TWO THOUSAND AND SIXTEEN

—
H.P. 1023 - L.D. 1500

An Act To Protect and Promote Access to Sport Shooting Ranges

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 17 MRSA §2806, sub-§§1 and 2, as enacted by PL 1995, c. 231, §1, are amended to read:

1. Acquisition of property near existing range. Except as provided in this subsection, a person may not maintain a nuisance action, including 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. If there is a substantial change in use of the range after the person acquires the property, the person may maintain a nuisance action if the action is brought within 3 years from the beginning of the substantial change.

2. Establishment of shooting range near existing property. A person who owns property in the vicinity of a shooting range that was established after the person acquired the property may maintain a nuisance action, including for noise, against that shooting range only if the action is brought within 5 years after establishment of the range or 3 years after a substantial change in use of the range.

Sec. 2. 17 MRSA §2806, sub-§4, as enacted by PL 1995, c. 231, §1, is amended to read:

4. Application. This section does not limit nuisance actions against shooting ranges established on or after the effective date of this section September 1, 2016.

Sec. 3. 30-A MRSA §3011, sub-§§2 and 3, as enacted by PL 1995, c. 231, §2, are amended to read:

2. Limitation. A municipal noise control or other ordinance may not require or be applied so as to require a sport shooting range to limit or eliminate shooting activities that have occurred on a regular basis at the range prior to the enactment date of the ordinance, as long as the range conforms to generally accepted gun safety and shooting range

operation practices or is constructed in a manner not reasonably expected to allow a projectile to cross the boundary of the range.

3. Expansion of activity. Nothing in this section limits the ability of a municipality to regulate ~~noise produced by the expansion of activity at a~~ the location and construction of a new sport shooting range or a substantial change in use of an existing range on or after September 1, 2016.

Sec. 4. 30-A MRSA §3011, sub-§4 is enacted to read:

4. Maintenance and improvements. A municipality may not restrict a sport shooting range established prior to September 1, 2016 from performing maintenance or otherwise making improvements to the sport shooting range and its buildings, structures and grounds with regard to:

A. Enhancing public safety and shot containment;

B. Providing access for persons with disabilities and providing rest room facilities;

C. Otherwise maintaining or improving the habitability of buildings and grounds, if such maintenance or improvements are otherwise in compliance with the municipality's generally applicable building codes and zoning ordinances; and

D. Repairing or rebuilding a building or structure damaged by fire, collapse, explosion or an act of God, if such repairs or rebuilding is otherwise in compliance with the municipality's generally applicable building codes and is completed within 2 years of the loss or damage.