

JUDGMENT		Trial Court of Massachusetts The Superior Court
DOCKET NUMBER	1780CV00174	Harry Jekanowski, Jr., Clerk of Courts
CASE NAME	Hodgkins, Thomas C. et al vs. Osa Flory As member of Zoning Board of Appeals et al	COURT NAME & ADDRESS Hampshire County Superior Court 15 Gothic Street P.O. Box 1119 Northampton, MA 01061

This action came before the Court, Hon. John A Agostini, presiding, and upon consideration thereof,

It is ORDERED and ADJUDGED:

The October 27, 2017 decision of the ZBA is REVERSED in part and REMANDED. The first seven conditions in the decision concerning noise reduction are unlawful and unenforceable. The case is remanded to the ZBA for further action consistent with this decision.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

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DATE JUDGMENT ENTERED
12/03/2019

CLERK OF COURTS/ ASST. CLERK
X *Harry Jekanowski, Jr.*

COMMONWEALTH OF MASSACHUSETTS
HAMPSHIRE, ss. **SUPERIOR COURT**
DOC. NO. 17-0174

THOMAS C. HODGKINS & others¹

v.

OSA FLORY AS MEMBER OF ZONING BOARD OF APPEALS & others²

MEMORANDUM OF DECISION AND ORDER AFTER JURY-WAIVED TRIAL

1. Introduction

This controversy arises out of the use of a shooting range on the plaintiffs' property in Williamsburg. For many years the owners of the property have used a portion of the land to fire an assortment of weapons for recreational purposes. Beginning in 2010-2011, certain neighbors began to make complaints to the town's Building Inspector about the noise coming from the property. At that time, the Building Inspector determined that the plaintiffs' use of their property did not violate the town's bylaws, and took no action. The neighbors appealed that decision to the town's Zoning Board of Appeals ("ZBA"), which overruled the Building Inspector, found a violation of the town's zoning bylaws, and established several conditions the plaintiffs were required to meet to continue using a section of the property as a shooting range. That 2011 ZBA decision was not appealed by the plaintiffs.

In 2015, neighbors made new complaints concerning safety and noise concerns, and the Building Inspector declined to find any violations of the town's bylaws or the 2011 ZBA decision. The neighbors appealed to the ZBA once again, and the ZBA determined that there had been a violation of the town's bylaws and the 2011 decision. At that time the ZBA inserted additional conditions the plaintiffs were required to meet in order to continue to use the section of the property as a shooting range. The plaintiffs then appealed the 2015 decision to this Court, which remanded the case back to the ZBA. In 2017, the ZBA issued a new decision, once again finding a violation of the town's bylaws and the 2011 decision. In that 2017 decision the ZBA inserted fourteen conditions on the use of the plaintiffs' property as a shooting range. The ZBA intended those conditions to clarify the conditions included in the 2011 decision. The plaintiffs then appealed that decision again to this Court, and that appeal is before me.³

The two remaining counts of the plaintiffs' complaint contain a variety of claims. Both counts are an appeal of the ZBA's 2017 decision pursuant G. L. c. 40A, § 17. In Count I, the

¹ Robert C. Hodgkins III, Merry Hodgkins-Birch, and Knowlton J. Hodgkins.

² Charles Dudek, Marcianna Caplis, and Gerald Mann, as members of the Williamsburg Zoning Board of Appeals.

³ Before trial, the defendants removed the case to the United States District Court in Springfield. The District Court dismissed several of the plaintiffs' claims and then remanded the case back to this Court.

plaintiffs allege that the ZBA did not have the authority to impose several of the conditions enumerated in the 2017 decision, and that otherwise the decision was arbitrary and capricious or based on legally untenable ground. The plaintiffs also claim a violation of their Second Amendment rights and a violation of due process. In Count II of the complaint, the plaintiffs reassert their arguments that the ZBA did not have the authority to impose certain conditions in the 2017 decision and that their due process was violated. In both counts I and II, the plaintiffs argue that Federal and State law preempt the conditions set by the ZBA.

Following a jury-waived trial before me over the course of one day, and based on the credible evidence and the inferences drawn from them, I make the following findings of fact and rulings of law. I conclude that the Williamsburg ZBA unlawfully overstepped its authority in imposing several of the conditions in the 2017 decision, and that a remand is required for further clarification on other conditions.

2. Findings of Fact

When reviewing the decision of a zoning board of appeals pursuant to G. L. c. 40A, § 17, the Court hears evidence afresh and is not limited to the facts heard by the board. See *Bicknell v. Board of Appeal of Boston*, 330 Mass. 676, 679 (1953). “The trial judge makes his own findings of facts and need not give weight to those the board has found.” *Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley*, 461 Mass. 469, 474 (2012). During the course of trial, six witnesses testified and thirteen exhibits were introduced. Based on the evidence admitted at trial, I make the following findings of fact, with some facts reserved for the legal discussion.

The property at issue is 74 Village Hill Road in Williamsburg. The property has been owned by the Hodgkins family since the 1930s or 1940s. A large portion of the property is designated as recreational land under G. L. c. 61B, which affords the plaintiffs a tax benefit in exchange for allowing the public to use the land for limited purposes. At some point in the twentieth century, ownership of the property passed in equal shares to Thomas Hodgkins and his brother, Robert Hodgkins Sr.⁴

The shooting of firearms has taken place on the property since at least the early 1940s. The shooting occurs in an open field where tables have been set up as a shooting stand. From that stand shooters aim slightly downwards towards targets. Behind the target area is a berm constructed of clay and other materials which acts as an “impact zone” or backstop for fired bullets. The berm was built when the field was originally converted into a shooting range and is approximately twelve feet high. There is a copse of trees behind the berm, and behind the trees flows a section of the Mill River. Along one side of the shooting range is part of a trail which is open to the public. There are posted signs warning the public of potential shooting occurring on the property.

The first use of the shooting range was for firing shotguns at clay targets. After that, the types of shooting and the firearms used varied over time. Shooting occurred intermittently and

⁴ For the sake of clarity, Thomas Hodgkin’s brother will be referred to as Robert Hodgkins Sr. His son, one of the named plaintiffs, will be referred to as Robert Hodgkins Jr.

without a set schedule. Shooting almost always occurred on Sundays and during holidays. Shooting rarely occurred before nine o'clock in the morning or after five o'clock at night. In 1961, Robert Hodgkins Sr. began purchasing automatic weapons and shooting them at the range. These automatic weapons were manufactured prior to the end of the Korean War. Robert Hodgkins Sr. would also invite friends to bring their automatic weapons to the range and shoot approximately six times a year. Different organizations would use the range for firearms testing or instruction. This included local and state police departments, the National Guard, and members of the Camp Howe group. Additionally, antique or replica cannons were infrequently fired on the range by members of historic groups. The range was never used for commercial purposes, and there was never an intention to use the range for commercial purposes.

Prior to 2003 there had been complaints made to Thomas Hodgkins about the noise created by shooting on the property. These complaints were handled in a neighborly fashion, and the Hodgkins family would refrain from shooting on particular days when neighbors requested. The Hodgkins family has never considered the range to be open to the public, however, they have never required anybody shooting to notify them before they use the range. This allows members of the public to freely access the range.

In 2003, the town enacted zoning bylaws which controlled the uses of property within the town. The bylaws contained a table of permitted uses, which determines which type of uses are permitted in different zoning districts. Shooting ranges are not included as a permitted use in any of the zoning districts, therefore the use of the property as a shooting range is nonconforming. However, the bylaws allow nonconforming uses to continue at the same level as they had prior to the bylaws' enactment.

After 2003 the amount of shooting taking place on the range began to increase. Automatic weapons were used more frequently and made more noise than in previous years. Neighbors also heard an increase in the sounds of explosions coming from the property. In 2011, Robert Hodgkins Sr. passed away, and his two sons and daughter inherited his 50% share of the property. Around the same time neighbors began to come together and voice their complaints over the noise coming from the property. This led to a formal complaint to the town's Building Inspector. The Building Inspector declined to find the Hodgkin property in violation of the town's bylaws. The neighbors appealed that decision to the town ZBA, which issued a decision overturning the Building Inspector's determination. This 2011 decision determined that, based on the testimony of neighbors, the use of the property as a shooting range had markedly changed in character from the usage prior to 2003. In order to return the use of the shooting range to pre-2003 levels, the ZBA established five conditions on continued use of the property as a shooting range:

- 1) The shooting range will return to pre November 2003 patterns of usage and scale.
- 2) Use of automatic weapons shall return to pre November 2003 levels.
- 3) No organized shooting groups will have access to the shooting range.
- 4) Use of the shooting range, to test firearms, to instruct or train in the use of automatic weapons is prohibited.
- 5) All commercial activity, including activity related to commercial interests, such as gun dealers, is prohibited.

The plaintiffs did not appeal the ZBA's 2011 decision.

Despite the decision, the Building Inspector continued to receive complaints about the shooting range. A second formal complaint was made to him. After considerable investigation, the Building Inspector declined to find a violation of the town's zoning bylaws or the 2011 ZBA decision. He stated in his decision that he had difficulty enforcing the first condition of the 2011 ZBA decision because it did not provide an objective way to determine compliance. The neighbors appealed again, and the ZBA issued a 2015 decision finding that the Hodgkins' use of the property was in violation of the town's bylaws and the 2011 ZBA decision. In its decision the ZBA implemented five conditions meant to make enforcement easier for the building inspector. They were as follows:

- 1) Use of the property for shooting shall only take place during daylight hours, but not before 9:00 AM and not after 6:00 PM. Duration of shooting is limited to 4 hours total on any given day.
- 2) An owner shall be present for any shooting, as defined above.
- 3) A red flag and visible red sign indicating shooting is currently occurring shall be posted at 100 feet from each end of the shooting area whenever shooters are present.
- 4) Permanent, highly visible signs indicating that shooting may be taking place shall be posted at each entrance to the parcel.
- 5) Use of military style weapons, semi-automatic weapons, or assault weapons capable of rapid firing is prohibited unless said weapons were manufactured prior to 1953.

The Hodgkins family appealed that decision to this Court, which remanded the case back to the ZBA, at the town's request, with the express notification that any further decision by the ZBA would supersede the 2015 decision. The ZBA then issued its third decision in 2017. In this decision the ZBA once again found a violation of the town's bylaws and the 2011 ZBA decision. The ZBA then implemented fourteen conditions on the use of the property as a shooting range:

- 1) Shooting on the property will return to pre-November 2003 patterns of usage and scale which limit the shooting on the property to the following:
 - a. Shooting may occur only one afternoon per week, on Wednesday, between the hours of 11:00 AM and 4:00 PM.
 - b. Shooting may occur only on Sundays between the hours of 11:00 AM – 4:00 PM.
 - c. Shooting may occur on the property on July 4th.
- 2) No organized shooting groups of a commercial nature.
- 3) No automatic weapons or weapons that sound like the rapid fire of automatic weapons. No semi-automatic weapons that have been modified to resemble an automatic weapon shall be used. Any device which attaches to a firearm designed to increase the rate of discharge or any modification of a firearm intended to increase its rate of discharge is prohibited.
- 4) Magazines with a capacity in excess of 10 rounds shall not be used.
- 5) No testing or instruction of firearms.
- 6) No commercial activity is allowed.
- 7) No use of Tannerite or other forms of explosive targets.

Due to safety concerns raised by the shooting on property the surrounding area of which is open to and used by citizens for recreational use, the following conditions are imposed:

- 8) Individuals shooting on the property must be in the presence of either a property owner or a designee of the property owners who shall have the responsibility of insuring safe use of the property.
- 9) The name of said designee shall be transmitted to the Chief of Police and the Building Inspector at least 24 hours before the shooting takes place. The transmittal may be in electronic form.
- 10) Post permanent signs at all entrances to the property of potential shooting including entrances from the street and from Town-owned land and entrances to the shooting area from the walking trails. Signs shall be maintained and replaced as wear and tear may require.
- 11) Post red warning flags and signs within 200 feet of the shooting area to notify the public that they are approaching the area of potential shooting. The posting would be required to be on all four sides of the delineated area of shooting near the points of entry to the shooting area. In addition, red flags shall be posted at these same locations when active shooting is occurring on the Property.
- 12) Raise the height of the earthen berm backstop behind the shooting target to 20 feet above the range surface.
- 13) Construct a shed from which those firing guns shoot, or construct a baffle at least 6 feet in height between the shooting area and the path capable of stopping any misdirected bullet.
- 14) Post sign with safety rules at entrance to shooting area.

The plaintiffs appealed that decision. Counts I and II of the complaint remain after remand from the Federal District Court.

3. Discussion

I. Standard of Review

“Review of a board’s decision in the Superior Court pursuant to G. L. c. 40A, § 17 involves a ‘peculiar’ combination of de novo and deferential analyses.” *Wendy’s Old Fashioned Hamburgers of New York, Inc. v. Board of Appeals of Billerica*, 454 Mass. 374, 381 (2009), quoting *Pendergast v. Board of Appeals of Barnstable*, 331 Mass. 555, 558 (1954). “Although fact finding in the Superior Court is de novo, a judge must review with deference legal conclusions within the authority of the board.” *Id.* “The reasonable construction that a zoning board of appeals gives to the by-laws it is charged with implementing is entitled to deference.” *Cameron v. Divitigilio*, 55 Mass. App. Ct. 24, 29 (2002). “After determining the facts and clarifying the appropriate legal standards, the judge determines whether the board has applied those standards in an unreasonable, whimsical, capricious or arbitrary manner.” *Shirley Wayside*, 461 Mass. at 469. In determining whether the decision was “unreasonable, whimsical, capricious, or arbitrary,” the question is “whether, on the facts the judge has found, any rational

board” could come to the same conclusion. *Britton v. Zoning Bd. Of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 74 (2003). Where reasonable minds may differ in drawing conclusions from the evidence, the Court must defer to the board unless the board’s judgment is based on a legally untenable ground. See *ACW Realty Mgmt., Inc. v. Planning Bd. Of Westfield*, 40 Mass. App. Ct. 242, 246 (1996).

II. Noise Conditions

The plaintiffs did not appeal the 2011 ZBA decision. They are bound by that decision. Nevertheless, that decision is unenforceable.

G. L. c. 214, § 7B provides certain shooting ranges protection from civil lawsuits and criminal prosecution related to noise generated by the range. The relevant language reads:

Notwithstanding the provisions of any general or special law, rule or regulation to the contrary, no owner of a rifle, pistol, silhouette, skeet, trap, blackpowder, or other similar range shall be liable in any civil action or criminal prosecution in any matter relating to noise or noise pollution resulting from use of the range, provided said owner of the range was in compliance with any applicable noise control law, ordinance or by-laws in existence at the time of the construction of such range.

No owner shall be liable in any action for nuisance, and no court shall enjoin the use or operation of said range on the basis of noise or noise pollution, provided said owner was in compliance with any noise control law, ordinance or by-laws in existence at the time of the construction of the range.

Various forms of shooting have taken place on the property for more than fifty years. A berm was constructed to act as a backstop for fired rounds, and targets have been placed in the shooting area. This statute unmistakably exempts the plaintiffs from any civil action or criminal prosecution relating to the town of Williamsburg’s noise bylaw. Consequently, the ZBA did not have the authority to find that the noise emanating from the property violated the 2011 decision or the town’s bylaws. Nor could the ZBA impose conditions one through seven in the 2017 decision, all of which were explicitly intended to regulate the noise coming from the property. Even though the 2011 decision was not appealed, it is unenforceable because the plaintiffs cannot be held liable for violating it. This Court cannot enforce conditions which conflict with state law. The parts of the decision concerned with noise from the property must be annulled as they are based on legally untenable ground.⁵ See *Shirley Wayside*, 461 Mass. at 469.⁶

III. Safety Conditions

⁵ The ZBA’s 2011 and 2017 decisions attempting to regulate the noise from the property are particularly remarkable in light of the original 2010 letter from the Building Inspector refusing to enforce the noise bylaw against the property. In his letter, the Building Inspector cited to G.L. c. 214, § 7B in his reasoning for not finding a violation of the bylaw. The ZBA wrestled with the statute in its 2015 decision, but did not mention it in the 2017 decision. I note that the 2011 and 2015 ZBA decisions refer to the property at issue as a “shooting range,” but that this term is notably absent --and in some cases clearly removed-- from the 2017 decision.

⁶ Because the conditions relating to the noise on the property are invalid, the plaintiffs’ claims alleging violations of their Second Amendment rights and preemption of the zoning regulations need not be considered. The plaintiffs’ due process claims are without merit as they have supplied no evidence supporting those claims.

General Laws c. 214, § 7B does not shield shooting ranges from regulations relating to safety. The town bylaws include a provision preventing property from being used for any purpose harmful to public safety, and conditions eight through fourteen of the 2017 decision explicitly relate to safety issues on the property.

General Laws c. 40A, § 6 provides grandfathering protection from newly enacted zoning ordinances and bylaws to previously established lawful uses of property. There is no disagreement that the property qualifies as a prior nonconforming use. The town's bylaws were enacted in 2003, and the plaintiffs have the right to continue using the shooting range in the same manner as they did prior to 2003 without becoming subject to the bylaws. As a prior nonconforming use, the use of the property as a shooting range is exempt from the safety bylaw. However, a nonconforming use will lose its protection against subsequently enacted zoning ordinances or bylaws when there is "any change or substantial extension of use." G. L. c. 40A, § 6. To determine whether there has been "any change or substantial extension of use" of the nonconforming use, the Court must determine 1) whether the proposed use reflects the nature and purpose of the use prevailing when the zoning ordinance took effect, 2) whether there is a difference in the quality or character, as well as degree, of use, and 3) whether the proposed use is different in kind in its effect on the neighborhood. See *Powers v. Building Inspector of Barnstable*, 363 Mass. 648, 653 (1978). If there has been a change or substantial extension of use, the current use must comply with current zoning laws. See *Oakham Sand & Gravel Corp. v. Town of Oakham*, 54 Mass. App. Ct. 80, 84 (2002).

Based on the evidence presented to me and the deference given to the ZBA's decision, I find that the current use of the property fails the third prong of the *Powers* test. Two witnesses testified that the amount of shooting and the noise created by that shooting had demonstrably increased from pre-2003 levels. Both witnesses resided near the shooting range before and after 2003. Both witnesses also testified that the increase in usage has negatively affected how they use their own property. Both appeared to bear no ill will towards the plaintiffs beyond the increased noise at the range, and I find their statements credible.

The 2011 ZBA decision also reflects that the ZBA heard testimony from thirty three members of the community along with thirty seven written submissions describing how the noise coming from the property had increased in the years after 2003. The decision states that many neighbors felt that they had to leave their homes to achieve peace and quiet. Similar testimony was given at the hearings before the 2017 ZBA decision describing the continued increase in the use of the shooting range.⁷ There is also evidence that one of the plaintiffs was using the range for commercial purposes. Because there has been a "change or substantial extension of use," the current use of the range is not granted protection as a prior nonconforming use. This makes it subject to the town bylaws, including the provision regulating safety.⁸

Unfortunately, based on this record, I believe that a remand to the ZBA is necessary. See *Roberts-Haverhill Assocs. v. City Council of Haverhill*, 2 Mass. App. Ct. 715,

⁷ In discussing the prior hearings and decisions I do not adopt any facts found by the board in their decision. I do make a finding that based on the ZBA decisions entered into evidence and the testimony of Mann that a significant number of people testified at the various hearings concerning increased noise from the property after 2003.

⁸ As stated prior, G. L. c. 214, § 7B wholly exempts the range from noise regulations, even if the current shooting does not qualify as a prior nonconforming use.

717 (1974). It is abundantly clear that the driving purpose behind the ZBA's imposed conditions was to respond to neighbor's complaints regarding the noise coming from the property. As stated above, this is improper and a violation of law. However, I do agree with the ZBA that there are potentially significant safety issues with the property that the ZBA could address through their bylaws. But due to the lurking issue of the noise complaints, the lack of specific reasoning or factual basis for each of the safety conditions imposed in the ZBA's 2017 decision, and the lack of specific reasoning given for each safety condition at trial, I am constrained to remand the case back to the ZBA, once more, in order for the ZBA to hold additional hearings for the limited purpose of receiving evidence pertinent to safety concerns with the property. After such a hearing, the ZBA is to issue a decision clearly explaining how any imposed conditions specifically relate to evidence of conditions on the range, how such conditions are reasonable, and how such conditions promote public safety under the town's bylaw.⁹

In doing so, the ZBA should note that this Court will not hesitate to strike down conditions that are merely a pretext to reduce the amount of noise created by shooting on the property. See *Shirley Wayside*, 461 Mass. at 475. Any conditions must be supported by specific evidence and not generated in an arbitrary fashion.

4. Conclusion

Pursuant G. L. c. 214, § 7B, the town of Williamsburg's ZBA does not have the legal authority to enforce its noise bylaws against the plaintiffs' shooting range. The shooting range would also be exempt from the town's zoning regulation regarding safety as a prior nonconforming use. However, I find that there has been a "change or substantial extension of use" of the property since 2003, meaning that the shooting range has lost the protection afforded it as a nonconforming use and therefore making it subject to the town's other bylaws, including the bylaw concerning safety. See *Powers*, 363 Mass. at 653. Due to insufficient support of the imposed safety conditions in the 2017 decision, the case is remanded to the ZBA for the purpose of holding hearings concerning safety issues on the property and for reconsideration of the safety conditions set forth in that decision.

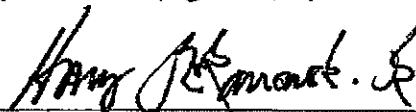
ORDER

For all of the reasons set forth above, it is hereby ORDERED that the October 27, 2017 decision of the ZBA is *REVERSED* in part and *REMANDED*. The first seven conditions in the decision concerning noise reduction are unlawful and unenforceable. The case is remanded to the ZBA for further action consistent with this decision.

SO ORDERED.

⁹ This decision does not prevent the town from bringing a new action to enforce any other zoning restrictions or bylaws if the range continues to be used in a manner different from how it was used prior to 2003.

By the Court (Agostini, J.)

A handwritten signature in black ink, appearing to read "Harry Jekanowski, Jr.", written over a horizontal line.

Harry Jekanowski, Jr.
Clerk Magistrate

DATED: December 3, 2019