

## FALMOUTH ZONING BOARD OF APPEALS

### FINDINGS AND DECISION

**APPEAL NO:** 068-17

**APPELLANTS:** GEORGE BAGLEY, ELIZABETH BAGLEY & OTHERS of E. Falmouth, MA

**SUBJECT PROPERTY:** 284 Old Meeting House Road, East Falmouth, Massachusetts  
**Assessor's Map:** Map 28 Section 05, Parcel 001 Lot 000

**DEED/CERTIFICATE:** Book 1080 / Page 324

**SUMMARY:** Appeal of the Building Commissioner's determination that a zoning violation and Cease and Desist order issued should extend to Midway's Rifle Range - **DENIED**

### PROCEDURAL HISTORY

1. Under a date of August 7, 2017, the appellant filed an Appeal pursuant to M.G.L. c. 40A §§ 8 and 15 and Section 240-202 of the Code of Falmouth, appealing the Building Commissioner's determination of violation and that a cease and desist order issued (Pistol Range) should extend to Midway's [Trap & Skeet Club) Rifle range on subject property known as 284 Old Meeting House Road, East Falmouth, Massachusetts.
2. Notice was duly given as required by Section 11 of Chapter 40A, M.G.L., as well as notices sent to all persons deemed to be affected thereby as they appear on the tax list, and at which hearing, at the Board's discretion, relevant and appropriate testimony was heard.
3. A duly advertised public hearing was opened on September 28, 2017.
4. The record notes that on August 7, 2017 an Appeal was filed by Attorney Edward George on behalf of Midway Trap & Skeet Club of Falmouth, Inc. regarding the determination made by the Building Commissioner to Cease and Desist the Pistol Range on subject property; also filed same day by Attorney Ament was the Appeal noted and determined herein by George and Elizabeth Bagley and others. The Board determined at the first hearing held on September 28, 2017 to hear both appeals at the same time as both affect subject property and property owner, Midway Trap & Skeet Club. The records of both appeals have substantially the same information submitted.
5. The public hearing was closed on November 16, 2017.
6. The file contains waivers signed by representative(s) of parties of the Appeal herein to extend the timeframe of the one-hundred (100) day appeal process.
7. At a duly posted open meeting of the Board of Appeals held on December 14, 2017 the Board consisting of Acting Chairman Terrence J. Hurrie, Acting Clerk Robert Dugan, Member Ed Van

Keuren and Member Gerald Potamis, made a determination to Deny the Appeal. Minutes of the hearing(s) and open meeting(s) are on file in the Board of Appeals.

8. The appellants were represented at the hearing by Attorney Robert H. Ament of Ament Klauer LLP who reviewed and discussed the appeal with the Board. The representative on behalf of Midway Trap & Skeet Club (subject property) was Attorney Edward George and Attorney Susan Chu.
9. The Board received documents and information prior to and during the public hearing(s) that are on file in the office of the Board of Appeals at Town Hall. The Board received a substantial amount of emails and letters from abutters and members of Midway Trap & Skeet in support of the Appeal and in opposition of the Appeal, which were all submitted to the file(s) and located in the Board of Appeals office.

#### **Letters/Referrals/E-mails from Town Departments**

08/16/2017 Referral submitted to the file from the Planning Department staff with no comment.

09/07/2017 The ZBA staff researched the building department's file for copies related to the subject property and subject issue and submitted to the file – information includes a submission of a letter to Building Commissioner Palmer from Attorney Edward George dated May 15, 2017, with attachments, regarding: Response of Midway Trap & Skeet Club of Falmouth, Inc. to enforce zoning bylaw against rifle and pistol ranges of Midway Trap and Skeet Club; and a letter from Attorney Robert H. Ament, with attachments (exhibits) regarding noise issues, maps, copy of *Charles A. Powers & others vs. Building Inspector of Barnstable* -363 Mass.648, and affidavits by three (3) individuals (appellants).

Note: ZBA sent Referral requests to: Building Department, Planning Department and Board of Selectmen

#### **Information/Letters/Aerial Photos submitted by Appellants Representative**

08/07/2017 Attorney Robert Ament (on behalf of Appellants – George and Elizabeth Bagley and others) filed an Appeal with Falmouth Town Clerk and the Board of Appeals with a copy of a July 10, 2017 to Midway Trap and Skeet Club of Falmouth, Inc. from Rod Palmer, Building Commissioner – Appeal with attached letter submitted to the Board on 8/7/2017

09/22/2017 Two (2) letters submitted to the file from Attorney Robert H. Ament (on behalf of appellants) to Chair of Zoning Board of Appeals both dated September 21, 2017 regarding Appeals (No's. 67-17 and No. 68-17) and Rifle Range at subject property with an attachment of a copy of 'Notice of Prevention of Easement' dated June 26, 1984 for Falmouth Rod and Gun Club; and a copy of a 'Notice of Prevention of Easement' dated February 1, 1985.

09/22/2017 Letter submitted to the file from Attorney Robert H. Ament to Chair of Zoning Board of Appeals dated September 22, 2017 with attachments:

- List of complainants in this appeal represented by Attorney Ament (no signatures);
- a GIS map;
- a letter from Brian J. Rabesa of 295 Old Meeting House Road dated August 16, 2017 with comments on 'recently installed pistol range';
- a notarized Affidavit from George N. Bagley dated May 17, 2017;
- a notarized Affidavit from Andrew W. Zimmerman dated May 18, 2017;
- a notarized Affidavit from Stephen P. Huban dated May 18, 2017; and
- a notarized Affidavit from Robert M. Dutra dated May 17, 2017.

Note: the above four (4) affidavits state shooting of guns and its effect on these individuals.

09/25/2017 Letter submitted to the file from Attorney Robert H. Ament to Chairman of Zoning Board of Appeals dated September 25, 2017 containing information and explanation relative to the appeal. The following exhibits were attached:

- Exhibit A – 'Massachusetts Zoning Manual' §6.6.1 *Powers Test*;
- Exhibit B – copy of a certified USDA 'Aerial Image Identification from 10/6/1970;
- Exhibit C1 – 1970 aerial photo;
- Exhibit C2 – 2014 aerial photo;
- Exhibit C2 – 1970 aerial with 2016 structures superimposed;
- Exhibit D – Technical Notes on Images – Information and analysis from Greg Fiske, Senior Geospatial Analyst at Woods Hole Research Center;
- Exhibit E – Notes taken from conversation regarding common firearms with Scott Bowker ;
- Exhibit F – Copy of letter to George and Beth Bagley from Rand Atlantic Cape Cod Realty dated June 4, 2017 'Re: Property evaluation for homes abutting the Midway Trap and Skeet Club'; and
- *Bridgewater v. John Chuckran* – 351 Mass 20, 24.

11/08/2017 Letter submitted to the file from Attorney Ament to Acting Chair Hurrie (Board) dated November 8, 2017 regarding comments from September 28, 2017 hearing

11/16/2017 Attorney Ament submitted (at hearing) a photo from 1970 with a plastic overview of 2014 showing consistency of reference line (300 ft.) of range, along with Town GIS map and property photos

#### **Information/Letters/Aerial Photos submitted by Others**

09/20/2017 Letter submitted to the file from Charles WorriLOW, Treasurer of the Midway Trap and Skeet Club of Falmouth, Inc. dated September 20, 2017 regarding 'filing of supplemental document' – attached to the letter is a biography of Mr. WorriLOW who through the years took photos of agricultural areas such as the aerial photos from 1960's through 2014 showing range(s) on subject property also attached to the letter

09/24/2017 Letter from Attorney Edward George to Zoning Administrator dated September 22, 2017 regarding 'Substantive Issue' and 'Procedural Issues'

- 09/28/2017 Letter submitted to the file from Attorney Edward George & Associates (on behalf of Midway Trap & Skeet Club) to the Zoning Administrator, dated September 27, 2017 containing information and attachments:
- a copy of Massachusetts Department of Environmental Protection's 'Outdoor Shooting Range Information Checklist' dated February 15, 2000;
  - Comments from Charles WorriLOW regarding Attorney Ament's 9/25/17 letter;
  - Minutes of Mid-way Trap & Skeet Club Inc. dated 10/19/1960, 08/28/1961, 10/23/1961, 10/21/1962, 11/24/1963, 01/17/1965, 12/12/1984 and 03/06/1985;
  - Copies of Falmouth Enterprise ads from 10/21/1960, 11/17/1961, 12/15/1961 and 11/06/1962 regarding a Turkey Shoot at Midway Skeet and Trap Club open to the public and an ad dated 11/28/1961 noting of contest for a 12-gauge Browning; and
  - Two aerials of subject property noting rifle range area (see letter for explanation).
- 11/09/2017 Letter submitted to the file from Attorney Edward George to Zoning Administrator dated November 8, 2017 with attached affidavits from Roland E. Beliveau dated October 2, 2017, Scott Bowker dated November 7, 2017 and Gary Botelho dated November 7, 2017 - all signed under pains and penalties of perjury. Also attached were nine (9) photos of Midway Trap & Skeet Club areas.
- 11/09/2017 Letter submitted to the file from Attorney Edward George to Zoning Administrator dated November 9, 2017 with attached affidavit of Michael Rabesa dated November 8, 2017
- 11/16/2017 Attorney Edward George submitted to the file (at hearing) seven (7) photos showing trap and skeet range, rifle range and pistol range setups on subject property

### **Hearing Process -**

The Board heard testimony from the following parties:

Attorney Edward George and his associate Susan Chu represented Midway Trap and Skeet Club and spoke on the issue of the pistol and rifle range being a part of the gun club prior to a zoning change in 1971 (Annual Town Meeting, Article 49 passed March 1, 1971). The club was established in 1959 and the club/range was built in 1960. Aerial photos from 1960 show that there were no houses adjacent to subject property. In 1991 houses were constructed adjacent to the club. The affidavits submitted by Attorney Ament do not substantiate the issue of the cease and desist extending to the rifle range. The affidavits state they bought their houses in 2010, 2012 and 2014. The affidavits we submitted were signed under the 'pains and penalties of perjury' and state the rifle range (as well as the pistol range) existed prior to 1971. There are 125 members in this club and hours of shooting at the club are from 9:00 AM to 3:00 PM Sunday through Saturday. The rifle range existed prior to 1971 and has not been relocated or changed in its use. The aerial photos submitted by Mr. WorriLOW from the 1960's through 2014 show the rifle and pistol ranges existence, except that of 1960 at its beginning. Attorney George stated that it is a trap club with incidental use to rifles and pistols – trap is the only activity that is organized.

Attorney Ament represents the appellants (Mr. /Mrs. Bagley and others) and spoke on the issue of the appeal to extend the cease and desist of the pistol range that was issued by the Building Commissioner to the rifle range. Attorney Ament submitted photos (aerials), a 2014 plan of subject property, information on noise and affidavits by effected individuals. He suggests that the rifle range has been altered/lengthened, which is a violation of the zoning code and any alteration required a special permit. He compared aerial photos in 1968, which he believes to be inconclusive, with aerials from 1971. He spoke of the 'Powers Test' and noted that one of the test is if there is a change that results in a change to the degree of impact on the neighbors or if it results in a difference in quality or character then you would need a special permit. The neighbors understand this is a trap club, however, the pistol/rifle shooting were not a scheduled activity like trap shooting. An incidental use of a property is not a prevailing use and it doesn't have the benefit of a pre-existing nonconforming use. The rifle range appears to have been lengthened and if it was lengthened after 1971 it required a special permit.

Rod Palmer, Building Commissioner spoke on the issuance of the cease and desist. He noted that there are three (3) separate areas at Midway – trap and skeet area, a pistol range and a rifle range. He discussed the cease and desist order for the pistol range. Regarding the rifle range, Mr. Palmer said that there was clearly a rifle range in the photos from 1970 – it could have been lengthened. He said in good conscience he could not include the rifle range in the cease and desist order.

Charles Worriow reviewed aerial photos he submitted on behalf of Midway Trap and Skeet Club that he had taken through the years during his tenure with the Soil Conservation Service.

Public Comment: Support of Appeal by Bagley, et al., or concern with Midway Trap & Skeet Club

- Erin McCormack of 71 Southview Way since 1996 spoke in opposition to appeal citing noise and interruption of life style.
- Shelley DaWicki of 329 Old Meeting House Road since 1985 spoke about concern of noise and asking for club to obey zoning laws.
- Diane Huban of 62 Southview Way since 2001 stated that since 2014 noise from club has become deafening and could be heard during the week as opposed to previously just on Sundays.
- Karen Hargreaves of 31 Southview Way since 2007 stated that recently shooting has been more frequent and the noise has been loud with rapid fire – they avoid the playground and don't feel they can enjoy their home.
- George Bagley of 46 Southview Way since 2014 stated he is an appellant in this appeal. He was aware of a gun club when he purchased the property.

Elizabeth Bagley of 46 Southview Way stated her husband George (appellant) has a business and office in the home and the shooting causes him stress as he has a nervous disorder and his case is progressive and debilitating with varying degrees of tremors. Stress increases the tremors which creates anxiety. She further stated that she cannot enjoy her home on the weekends due to the shooting and noise. She stated later in the hearing that closing the pistol range has done nothing because it banned only the use

of the range and not use of pistols – they continue to be shot on the rifle range. Closing of the pistol range has had no affect and that is why we are asking for the cease and desist to extend to the rifle range.

Public Comment: Opposition of Bagley et al. Appeal

- Brent Putnam of 97 John Parker Road stated he was a neighbor, the noise is not excessive and on most days nothing is heard. He stated when he was a Selectmen he heard no complaints on this club. He submitted photos and suggested some photos taken may not accurately show the range due to foliage (time of year taken).
- Nason Swain of 149 Percival Road suggested information submitted about individuals opposed to the gun club is incorrect. He further stated that on the plot plan Attorney Ament submitted there are no bathrooms next to the rifle range that have been there since 1960 – the plan was done by a professional and does not show the existing structure(s) or pistol range.
- Eric Debliea of 8 Elizabeth Island Road in Mashpee stated he is on the Board of Directors for Midway Trap & Skeet club and records the log book of individuals who come in to shoot: in January 21.25 hours, 19.2 hours shot in February and in March 10.30 hours. (she noted that January and March they could have shot 186 hours and February 168 hours.) He said this is a ‘working man’s club’ and a travesty to close it.
- Rebecca Putnam of 97 John Parker Road since 2001 and during summertime hear very little activity. She stated she is a realtor and would like to speak against a letter from another broker that was submitted about property values. Realtors should inform buyers of the general area in which they are showing a home.
- Mike DeSouza of 39 Crocker Road who stated he is Vice President of the club and the range officer. He was president in 1985 when a letter of intent was signed. The hours of the club are 9:00 AM to 3:00 PM Sunday through Saturday. He stated they installed a gate and cameras and they video all activity and it is mandatory to sign in. He submitted minutes of a meeting of the club held in 1960. Later in hearing he stated that in 1976 he was voted into the club, but in 1970 he shot at the rifle range in the location it currently is – only change was the bunker that was added due to DEP’s recommendation.
- Mike Rabesa of 29 Milton Street stated he is the president and reiterated the hours. He noted that during hunting season there is activity on Tony Andrews Farm and Pond 14; this club gets the backlash. He stated there has never been any cannons fired from the club property. All ranges shoot away from the residences around the club – always have. He stated later in the hearing that once or twice a year they cut down dead trees and cleanup – the rifle range has always been the same length and in the same spot.
- Mike Gavin of 158 Old Meetinghouse Road stated he does not shoot or own a gun but supports the gun club. Has lived here nine (9) years and have heard no difference in

the firing. He suggested that the photos submitted by Attorney Ament note time of year taken.

- Mike McCarthy of 18 Deolinda Place stated he is not a member but has been residing near since 2011 and has seen no increase in the firearm shooting or any noise difference. He stated he is active duty and familiar with firearms.
- Eric Peterson of 32 Bonnie Lane stated that the plan submitted by Attorney Ament (2014 plan) was for the cell tower on subject property and does not show any of the gun club ranges. He stated approximately in 1970 he was there as a kid for turkey shoots and the building was always there; the right side was always vegetated and on the left there was always gravel/earth coming down.

Attorney Ament's closing statement: The statements that the rifle range hasn't changed are not true, the range has increased 80% according to photos submitted. The Board has heard from abutters about how there has been a change in the noise over the years. The zoning bylaws are in place to protect everyone. Some abutters may be affected more than others and some affected less, but we believe there has been significant expansion of the club as well as the rifle range since 1970 without a special permit and believe that the rifle range should also have a cease and desist.

Attorney George's closing statement: He cited the definition of a gun that includes rifles and pistols. This is a gun club – Midway Trap and Skeet Club is a name, the use is a gun club. He suggested there is no evidence from the opposition as to what noise they are hearing, whether it is pistol or rifle, and none of the affidavits submitted by Attorney Ament state what type of gun is being fired. They (abutters) don't like noise from a gun club but they moved in next to a gun club. Under Chapter 214 Section 7B of Massachusetts General Law a gun club is protected.

Member Dugan made a motion to close the hearing. Member Van Keuren seconded the motion. Motion carried 4 - 0.

Chairman Hurrie closed the hearing.

The Board discussed the appeal at a duly posted open meeting of the Board on December 14, 2017.

### **FINDINGS**

The Board of Appeals, after carefully considering all of the facts and evidence submitted at the hearing, makes the following findings:

The subject property located at 284 Old Meeting House Road in East Falmouth contains 19.31 Acres of Agricultural A zoned land. The subject property is owned by Midway Trap & Skeet Club of Falmouth, Inc. and is used as a gun club. An appeal of the Building Commissioner's determination of a zoning violation and that an issued cease and desist order (for pistol range on subject property) should extend to the Midway's rifle range on subject property.

The Board finds through testimony, affidavits signed under 'pains and penalties of perjury' that were submitted to the file and aerial photographs by C. Worrilow that the rifle range existed on subject

property prior to a zoning change voted by the Town in March of 1971 (Article 49). The Board further finds through testimony by officers of the subject club that the rifle range and other activity locations on subject property are periodically manicured and cleaned up (i.e. dead trees/plants removed), but that the location of the rifle range has not changed since the 1960's.

The Board finds that the 2014 plan submitted by Attorney Ament under Exhibit D-1 052417 attached to a May 24, 2017 letter to Rod Palmer with the project title of 'Proposed Communications Facility' at 284 Old Meeting House Road (subject property) was created for Industrial Tower and Wireless LLC a corporation that leases a portion of subject property for a cell tower; and that the plan was not created to reference or identify the issue before this Board regarding Midway Trap & Skeet Club. The Board further finds that the letter, with attached tabs 1a through 14, submitted to the file from Midway Trap and Skeet Club of Falmouth, Inc., dated September 20, 2017 and penned by Charles WorriLOW to the Zoning Board of Appeals has aerial photos from 1960 (prior to construction of gun club), 1968, 1971, 1975, 1980, 1984, 1991, 1993, 1995, 2000, 2007, 2010, 2012 and 2014 that shows a consistency on subject property of the rifle range and its location, with the exception of 1960. Furthermore, the Board finds that other aerial photos from google maps and other maps submitted to the file are blurry and inconsistent for identification purposes of the ranges on subject property.

The Board finds through Minutes of the Midway Trap and Skeet Club from April 27, 1960, submitted by Mike DeSouza (club member) at the hearing that the minutes reflect 'the plotting committee' who will be responsible to get the layout for the proposed 'building and ranges' for the club. The Board further finds that there were several sets of minutes for different years in the 1960's, as well as advertisements in the Falmouth Enterprise that reflect 'turkey shoots' to be held on subject property almost every year.

The Board finds through testimony at the hearing from Building Commissioner Rod Palmer, he stated that there was clearly a rifle range in the photos from 1970 – he noted that it may have been changed as he didn't know what the length of said range was. He further stated that in good conscience he could not include the rifle range in his cease and desist order of the pistol range.

Member Dugan made a motion to Deny the Appeal to extend the Cease and Desist Order to the Rifle Range. Member Van Keuren seconded the motion.

#### **NOW THEREFORE**

**BE IT RESOLVED**, that the Board of Appeals (herein referred to as Board) being of the opinion aforesaid and acting under the provisions of the Code of Falmouth voted **4 – 0 to Deny the Appeal** of George and Elizabeth Bagley & others that the Building Commissioner's determination of a zoning violation and said cease and desist order issued should extend to Midway's rifle range on subject property known as 284 Old Meeting House Road, East Falmouth, Massachusetts.



Appeal Number: 068-17

Appellant: GEORGE and ELIZABETH BAGLEY & OTHERS of East Falmouth, MA

Subject Property: 284 Old Meeting House Road, East Falmouth, Massachusetts  
Map 28 Section 05 Parcel 001 Lot 000  
(Owner Midway Trap & Skeet Club of Falmouth, LLC)

Action: The Board of Appeals, by the signature below, being present, certifies the vote of the Board as follows for the above referenced:

Vote: 4 – 0 to Deny the Appeal of George and Elizabeth Bagley & others as represented to the Board based on the Findings stated above.



Terrence J. Hurrie, Acting Chairman, Board of Appeals

RECEIVED

JAN - 8 2018

FALMOUTH TOWN CLERK

*12:30 pm*

Date Filed With Town Clerk

Notice is hereby given that any appeal from this Decision shall be made pursuant to Section 17 of Massachusetts General Laws, Chapter 40A, and shall be filed within twenty (20) days after the date of filing of this Decision in the office of the Falmouth Town Clerk.