

STATE OF RHODE ISLAND  
PROVIDENCE/BRISTOL, S.C.

SUPERIOR COURT

ROBERT and DIANE NICHOLS, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 TOWN OF WARREN, )  
 ZONING BOARD OF REVIEW, and )  
 CHERYL SILVA in her official )  
 Capacity as Treasurer of the Town of )  
 Warren )  
 Defendant )

CIVIL ACTION NO. PC-2011-1915

**FIRST AMENDED COMPLAINT FOR JUDICIAL REVIEW**

1. Plaintiffs are individuals whose legal residence is located at 68 Orchard Avenue, Barrington Rhode Island, 02806. Plaintiffs are husband and wife.
2. Defendant Town of Warren Zoning Board of Review is the Municipal Zoning Board for the Town of Warren of the State of Rhode Island with a mailing address of 514 Main Street, Warren, Rhode Island, 02885.
3. Defendant Cheryl Silva is the Town Treasurer for the Town of Warren of the State of Rhode Island with a mailing address of 514 Main Street, Warren, Rhode Island, 02885.
4. Plaintiffs are owners of property located in the Town of Warren, Rhode Island at 249 Child Street, (the "Property") which Property is identified as tax assessor's Plat 10, Lots 171, 174, and 181.

5. Plaintiffs wish to operate a business assembling and selling guns at retail the Property.
6. Plaintiffs have been attempting to secure approval of a special use permit for such a business since April of 2009.
7. On or about October 21, 2010, Plaintiffs filed a Petition for Special Use with the Town of Warren Zoning Board of Review. The purpose of the Special Use Permit was to “To allow for light assembly of firearms in a manufacturing zone.” A true and correct copy of said Petition is attached hereto as Exhibit A.
8. On January 19, 2011, The Town of Warren Zoning Board of Review, after hearing the matter, voted to deny Plaintiffs request for a Special Use Permit.
9. On or about March 23, 2011 the decision to deny was recorded with the Town Clerk (the “Decision”) and recorded in the Town Records at Book 773, Page 64. A true and correct copy of said Decision is attached hereto as Exhibit B.
10. Plaintiffs, for reasons stated herein, hereby appeal the decision of the Town of Warren Zoning Board of Review as permitted under the Zoning Ordinance of the Town of Warren, Section 32-24, and as provided under the General Laws of the State of Rhode Island 1956, Title 45, Chapter 24, Section 20.
11. The Decision provided no valid justifications for denial of the Plaintiffs request. Plaintiff’s claims are structured with reference to the town’s standards for approval of this type of permit, as well as further arguments relating to the Plaintiffs constitutionally protected rights and the underlying authority of the Defendant, and are detailed in Counts I through VII below.
12. Accordingly, substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are: (1) In violation of constitutional, statutory, or ordinance provisions; (2) In excess of the authority granted to the zoning board of review by statute or ordinance; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; and (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

**COUNT I: COMPATIBILITY WITH NEIGHBORING USES**

13. Plaintiff incorporates the allegations contained in paragraphs 1 through 12 hereof as though set forth fully herein.
14. Plaintiff presented evidence at hearing relating to the compatibility with neighboring uses of the proposed use, which evidence was not contradicted by relevant testimony or by the findings of the Board.
15. Plaintiff's application requested a retail use appurtenant to light assembly as permitted under town ordinance.
16. Plaintiff presented undisputed evidence at hearing that the Zoning Board of the Town of Warren had previously approved a retail use appurtenant to light assembly, which did and does continue to operate on the subject property, was compatible with neighboring uses.
17. The Decision makes no distinction between, nor for that matter reference to, the Plaintiffs application and the previously approved application for the same use at the same property.
18. The Decision alleges a failure to meet the statutory standard of compatibility with neighboring uses. No specific justifications are provided relating to a possible conflict with neighboring uses, nor are any facts supporting such an allegation referenced.
19. No justification for a finding of incompatibility is supported by substantial evidence given in the testimony at hearing, nor otherwise indicated in the findings presented in the Decision.<sup>1</sup>
20. No justification for the finding of incompatibility is based on any presented evidence of direct or indirect impact on neighboring properties or neighboring land uses.
21. No standard for compatibility has been established or presented by the Defendant, either in the Code of Ordinance, the General Laws of the State, or in the Decision itself, and therefore even if there was a sustainable finding of incompatibility is without merit and/or arbitrary and capricious.
22. No standard for what constitutes a "proximate" use has been established or presented by the Defendant, either in the Code of Ordinance, the General Laws of the State, or in the Decision itself, and therefore any finding of incompatibility would be without merit and/or arbitrary and capricious.

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<sup>1</sup> Kilduff Bros. Bldrs v. Town Council, 447 A.2d 1142 (R.I. 1982); Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646 (R.I. 1981).

23. The Decision appears to allege that as a component of the requirement that the use not “create a nuisance or a hazard in the neighborhood” (Caption of Decision Section “II.”), the applicant “failed to meet the burden that the proposed use constitutes ‘light assembly.’” (Decision, Section II.)
24. A finding that the proposed use constitutes “light assembly” is not a component of the nuisance or hazard provisions of the regulations relating to Special Use Permits, and so any such finding, even if made by the Board, would be inapplicable to the stated standard.
25. Even if a finding that the proposed use constitutes “light assembly” had been proper made, neither the town ordinance nor state law contains any objective standard as to what might constitute light assembly, and therefore any finding of failure to meet that standard would be without merit and/or arbitrary and capricious.
26. The Decision presents purported facts not found in the record, and specifically not found in the Boards findings supporting the decision, and provides no assertion of the relevance of the limited facts presented to the standard.
27. Accordingly, substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are: (1) In violation of constitutional, statutory, or ordinance provisions; (2) In excess of the authority granted to the zoning board of review by statute or ordinance; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; and (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

### **COUNT II: CLAIMS OF NUISANCE OR HAZARD**

28. Plaintiff incorporates the allegations contained in paragraphs 1 through 27 hereof as though set forth fully herein.
29. Plaintiff presented evidence at hearing relating to the absence of nuisance or hazard relative to the proposed use, which evidence was not contradicted by relevant testimony or by the findings of the Board.
30. No specific evidence is presented or referenced as to how the storage of ammunition would cause a nuisance.

31. No standard for what constitutes a nuisance has been established or presented by the Defendant, ether in the Code of Ordinance, the General Laws of the State, or in the Decision itself, and therefore any finding of hazard or nuisance is without merit and/or arbitrary and capricious.
32. No standard for what distance is considered “close to [a] proposed store” (the test found in the ordinance) has been established or presented by the Defendant, ether in the Code of Ordinance, the General Laws of the State, or in the Decision itself, and therefore any finding of hazard or nuisance is without merit and/or arbitrary and capricious.
33. No standard for what constitutes an “explosive” has been established or presented by the Defendant, ether in the Code of Ordinance, the General Laws of the State, or in the Decision itself, and therefore any finding of hazard or nuisance is without merit and/or arbitrary and capricious.
34. No standard for what specific types or quantities of explosives constitutes a hazard or nuisance has been established or presented by the Defendant, ether in the Code of Ordinance, the General Laws of the State, or in the Decision itself, and therefore any finding of hazard or nuisance is without merit and/or arbitrary and capricious.
35. The proposed use and in particular, the transport and storage of firearms and ammunition, is regulated by the federal government through the Department of Transportation and the Bureau of Alcohol, Tobacco, and Firearms.
36. Any reference to the safety of stored ammunition is preempted by federal law and regulation relating to the same, and is not an appropriate matter for the consideration of the Board, nor an appropriate basis for any finding of the Board.
37. Plaintiff presented for the record the complete 242 page “Federal Firearms Reference Guide” (ATF Publication 5300.4, Revised September 2005) which outlines in detail the federal regulation and licensing of firearms and ammunition sellers.
38. Legal counsel for the Board provided an unequivocal explanation of federal pre-emption doctrine during the hearing in response to a question regarding the safe transportation of weapons.
39. Despite clear, convincing, and uncontroverted evidence of federal preemption as to the regulation of the storage of ammunition, and ignoring their own Attorney’s counsel, the Board cited a conflict with their local ordinance relating to storage of explosives as the primary reason to deny the application.

40. The reference in testimony by certain members of the public to similar sales or the history of such sales within the town bears no relevance or relation to the standard of establishing a finding of hazard or nuisance.
41. The Decision presents purported facts not found in the record, and specifically not found in the Boards findings supporting the decision, and provides no assertion of the relevance of the limited facts presented to the standard.
42. Accordingly, substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are: (1) In violation of constitutional, statutory, or ordinance provisions; (2) In excess of the authority granted to the zoning board of review by statute or ordinance; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; and (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

### **COUNT III: COMPATIBILITY WITH COMPREHENSVE PLAN**

43. Plaintiff incorporates the allegations contained in paragraphs 1 through 42 hereof as though set forth fully herein.
44. Plaintiff presented evidence at hearing relating to the compatibility of the proposed use with the Comprehensive Plan of the Town of Warren, which evidence was not contradicted by testimony or by findings of the Board.
45. The Decision references a failure to meet the statutory standard of conformity with the municipal comprehensive plan. No specific justifications are provided relating to such a possible conflict with the Town of Warren comprehensive plan, nor are any facts supporting such a claim referenced in the transcript or the decision.
46. No justification for a finding of incompatibility is supported by substantial evidence given in the testimony at hearing, nor otherwise indicated in the findings presented in the Decision.<sup>2</sup>
47. No justification for the finding of incompatibility is based on any presented evidence of direct or indirect impact on neighboring properties or neighboring land uses.

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<sup>2</sup> Id.

48. No standard for compatibility has been established or presented by the Defendant, either in the Code of Ordinance, the General Laws of the State, or in the Decision itself, and therefore even if their was a sustainable finding of incompatibility is without merit and/or arbitrary and capricious.
49. The Decision presents purported facts not found in the record, and specifically not found in the Boards findings supporting the decision, and provides no assertion of the relevance of the limited facts presented to the standard.
50. Accordingly, substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are: (1) In violation of constitutional, statutory, or ordinance provisions; (2) In excess of the authority granted to the zoning board of review by statute or ordinance; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; and (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

#### **COUNT IV: PUBLIC CONVENIENCE AND WELFARE**

51. Plaintiff incorporates the allegations contained in paragraphs 1 through 50 hereof as though set forth fully herein.
52. Plaintiff presented evidence at hearing relating to the manner in which the proposed use would serve the public convenience and welfare of the residents of the Town of Warren, which evidence was not contradicted by testimony or by findings of the Board.
53. The Decision fails to make any substantive claim of a finding of the Zoning Board of Review that the public convenience and welfare will not be served by granting the application.
54. The Decision presents purported facts not found in the record, and specifically not found in the Boards findings supporting the decision, and provides no assertion of the relevance of the limited facts presented to the standard.
55. Accordingly, substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are: (1) In violation of constitutional, statutory, or ordinance provisions; (2) In excess of the authority granted to the zoning board of review by statute or ordinance; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record;

and (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

**COUNT V: CONSTITUTIONAL LIMITATION TO AUTHORITY / PREEMPTION**

56. Plaintiff incorporates the allegations contained in paragraphs 1 through 55 hereof as though set forth fully herein.
57. Plaintiff further contends that the actions of the Zoning Board of Review constructively amounted to an attempt to exercise authority reserved to the state and/or federal government, and inappropriately regulate gun ownership in violation of the 2<sup>nd</sup> amendment of the United State Constitution and Article I, Section 22 of the Rhode Island Constitution.
58. The record shows that the Board was advised by their own counsel as to the function and effect of federal pre-emption upon their ability to regulate certain components of the proposed use, and the record further shows that they were apprised, without contradiction, that the Federal Bureau of Alcohol Tobacco and Firearms (ATF) has regulatory authority and clear requirements governing the storage of ammunition in a safe manner.
59. If the Decision was based in any part upon findings relating to governing the storage of ammunition in a safe manner, such finding would be improper.
60. Requirements for safe manufacturing, assembly, or sales of firearms are not properly within the jurisdiction of the Zoning Board of Review.
61. Plaintiff further contends that the Actions of the Zoning Board of Review were influenced by testimony which was allowed at hearing but not relevant to the decision at hand. The allowance of this testimony amounted to an attempt to test the strength of conflicting personal desires and interests and a poll of the neighborhood rather than a hearing on the merits.<sup>3</sup>
62. Accordingly, substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are: (1) In violation of constitutional, statutory, or ordinance provisions; (2) In excess of the authority granted to the zoning board of review by statute or ordinance; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; and (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

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<sup>3</sup> Jacques v. Zoning Bd. Of Review, 64 R.I. 284, 12 A.2d 222 (1940).



**COUNT VI: ABUSE OF PROCESS**

63. Plaintiff incorporates the allegations contained in paragraphs 1 through 62 hereof as though set forth fully herein.
64. Pursuant to Warren Code section 32-59 the “Manufacture or Bulk Storage of Explosives” are specifically prohibited in the Town of Warren.
65. The Town of Warren fails to define “Bulk Storage” of explosives in their ordinance. Without any fixed standard Plaintiff was denied the opportunity to agree to reduce the amount of ammunition stored to meet that standard, or otherwise comply with the requirement imposed by the Decision.
66. The fact that the written decision includes purported justifications for the denial of the requested permit that were not raised by the board itself, as is clear from the transcript, must be construed as an attempt by the Town of Warren to improperly place additional roadblocks on the fair consideration of this matter.
67. The hearing record contains four specific objections presented in support of the decision to reject the application. However, the decision arbitrarily and ex post facto adds objections in its referenced sections (I), (II)(A.), (III.), and (IV.)
68. Such arbitrary and ex post facto modifications to the oral decision of the Board represents a violation of due process which, if recognized as valid components of the decision, would directly harm the applicant.
69. Accordingly, substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are: (1) In violation of constitutional, statutory, or ordinance provisions; (2) In excess of the authority granted to the zoning board of review by statute or ordinance; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; and (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

**COUNT VII – CLAIM FOR ATTORNEYS’ FEES**

70. Plaintiff incorporates the allegations contained in paragraphs 1 through 70 hereof as though set forth fully herein.

71. Plaintiff asserts that their net worth is not in excess of \$500,000 and has been below that threshold at all times relative to the subject proceedings.
72. Plaintiff asserts that the decision of the Warren Zoning Board was arbitrary and capricious and was without substantial justification.
73. Plaintiff asserts that the Warren Zoning Board willingly, blatantly, and (having had the legal basis and impact of such doctrine explained clearly by their own counsel) with full knowledge, ignored issues of federal preemption and based their findings on matters of fact and law not properly within their purview.
74. Plaintiff is therefore entitled to reimbursement of reasonable litigation expenses pursuant to the Equal Access to Justice Act, R.I. Gen. Laws § 42-92-1 *et seq.* (1985, as amended 1994.)
75. Plaintiff further asserts that this complaint is necessitated in part by actions which constitute violations of their civil rights.
76. Defendant has presented no valid basis in fact or law to support the Decision.
77. Plaintiffs reserve their right under state and federal law to claim that the costs of this litigation be borne by Defendant.

### **RELIEF**

WHEREFORE Plaintiff is entitled to relief and requests that this court grant judgment in his favor as follows:

- 1) Strike those components of the written Decision that were not proffered by the Board when they moved their decision at hearing;
- 2) Reverse those components of the Decision of the Board that reference improper standards for such an application;
- 3) Reverse those components of the Decision of the Board that are based on matters to which federal preemption applies;

- 4) Reverse the remaining components of the decision of the Warren Zoning Board of Appeal;
- 5) Order the issuance of the Special Use Permit that was the subject of the Decision;
- 6) Order Appellate to pay Plaintiffs attorneys' fees for the prosecution of this action; and/or
- 7) Award any and all further remedy as this Court sees appropriate.

RESPECTFULLY SUBMITTED,  
THIS 7<sup>th</sup> DAY OF April, 2011  
ROBERT AND DIANE NICHOLS,  
By their counsel,

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Giovanni D. Cicione (#6072)  
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282 County Road, Suite 2  
Barrington, RI 02806  
Tel. (401) 289-2380  
Fax (401) 289-2377

#### **CERTIFICATION**

I, Giovanni D. Cicione Esq., do hereby certify that a copy of the above Complaint was delivered by hand to the clerk for the Plaintiff Town of Warren Zoning Board of Review, 514 Main Street, Warren, RI 02885 and to Cheryl Silva Warren Town Treasurer's Office, 514 Main Street, First Floor Warren, RI 02885 and that copies were today sent by electronic mail and first class U.S. mail to Attorney Paul Ryan, counsel for Defendants.

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Giovanni D. Cicione, Esq.

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Date