



The Commonwealth of Massachusetts
Executive Office of Public Safety and Security
Fire Safety Commission

Automatic Sprinkler Appeals Board

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Docket # 2005-145
50 Pleasant Street
Norton, MA

AUTOMATIC SPRINKLER APPEALS BOARD DECISION

A) Statutory and Regulatory Framework

This is an administrative appeal held in accordance with Massachusetts General Laws Chapter 30A; Chapter 148, section 26G $\frac{1}{2}$ and Chapter 6, section 201, relative to a determination of the Norton Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building owned and/or operated by City Oasis, Inc. d/b/a City Oasis (hereinafter referred to as the Appellant). The building, which is the subject of the order, is located at 50 Pleasant Street, Norton, MA.

B) Procedural History

By written notice of the Norton Fire Department dated October 4, 2005 and received by the Appellant on November 7, 2005, the Appellant was informed about the provisions of M.G.L c. 148, s.26G $\frac{1}{2}$, which requires the installation of an adequate system of automatic sprinklers in certain existing buildings or structures. The building subject to the order is located at 50 Pleasant Street, Norton, MA. The Appellant filed an appeal of said order on November 8, 2005. After multiple continuances and correspondence between the parties and the Board, a hearing relative to this appeal was held on October 9, 2008, at the Department of Fire Services, Stow, Massachusetts.

Appearing on behalf of the Appellant was: Michael Clarke, President and Owner, City Oasis.
Appearing on behalf of the Norton Fire Department were Chief Richard J. Gomes and Deputy Chief Paul J. Schleicher.

Present for the Board were: Paul Donga, Vice Chairman and Presiding member, Alexander McLeod; Thomas Coulombe; Peter Gibbons; Aime DeNault; and George Duhamel. Peter A. Senopoulos, Esquire, was the Attorney for the Board.

C) Issue(s) to be Decided

Whether the Board should affirm, reverse or modify the enforcement action of the Norton Fire

Department relative to the subject building in accordance with the provisions of M.G.L. c.148, s. 26G½?

D) Evidence Received

1. Application for Appeal filed by the Appellant
2. Resignation of Trustee – Old Colony Trust
3. Board of Health Certificate to Sell Food
4. Proposal from Rustic Fire Protection, Inc. for Sprinkler System
5. Order of Notice of the Norton Fire Department
6. Notice of Hearing to Appellant
7. Notice of Hearing to Norton Fire Department
8. Letter from both parties requesting 5/10/06 hearing be cancelled – Agreement reached
9. 2nd Notice of Hearing to Parties
10. Letter to Appellant from Board requesting Status Update
11. Letter to the Board from Appellant attaching copies of license
 - a. Alcohol License Renewal Application – 2007
 - b. Copy of M.G.L. c. 140 § 6 – Innholders / Common Victualer’s Licenses
 - c. License of Alcoholic Beverages (2007-04) Town of Norton
 - d. Permit to Operate a Food Establishment (Permit No. 2007-05) Town of Norton
12. 3rd Notice of Hearing to the Parties
13. Letter to Board from Norton Fire Department regarding continuance
14. Letter to Board from Appellant requesting 1 year extension to install sprinkler system
15. Letter to Board from Norton Fire Dept. requesting emergency hearing
16. 4th Notice of Hearing to the Appellant
17. 4th Notice of Hearing to the Norton Fire Department
18. Copies of two Memoranda from the ASAB that accompany Hearing Notices
19. Appellant’s Submissions (1-14)
20. Sprinkler Plan for Facility
21. Submissions of Norton Fire Department (1-22)

E) Subsidiary Findings of Fact

- 1) By written notice of the Norton Fire Department dated October 4, 2005 and received by the Appellant on November 7, 2005, the Norton Fire Department issued an Order of Notice to the Appellant requiring the installation of an adequate system of automatic sprinklers in a building located at 50 Pleasant Street, Norton, MA in accordance with the provisions of M.G.L. c. 148, s. 26G½. The Appellant filed an appeal of said order on November 8, 2005. Following numerous scheduled and postponed hearings, the Board held a hearing relative to this appeal on October 9, 2008, at the Department of Fire Services, Stow, Massachusetts.
- 2) The subject building is a one-story structure with a full basement. The ground floor houses the City Oasis, a private, for profit business and consists of 5,996 s.f. of floor area. The business has

been owned and operated by the Appellant for the last 11 years. The current Certificate of Inspection issued by the Town of Norton on 5/30/08, indicates that the subject establishment, City Oasis, Inc., has a legal capacity of 385 persons throughout the facility and has been classified as an "A-2" use group by the Town of Norton Building Department. The Certificate is characterized as "Temporary", which apparently allows for temporary use of the facility pending the previously planned installation of the sprinkler system. The Appellant indicated that he did not agree with the Town's determination that his establishment is classified as an "A-2". However, the Board notes that the Appellant did not file an appeal of this determination. The Certificate does not establish any separate occupant load for any portions of the building.

- 3) The facility has been issued a license to expose, keep for sale and to sell "all kinds of Alcoholic Beverages" to be consumed on the premises. The license indicates that hours of operation are from 8:00 a.m. to 1:00 a.m. on weekdays and Saturdays and 12:00 noon to 1:00 a.m. on Sundays. It is noted that there are no restrictions or conditions on the license.
- 4) According to Town documents and the testimony of the parties, the Appellant has been issued a Common Victualer's License and an Entertainment License, which legally allows the appearance of Live Entertainment, Dancing, D.J. and Jukebox. The Appellant has also been issued an Automatic Amusement License, which allows the facility to feature video games, pinball machines and three coin operated pool tables. The Appellant testified that there are eight televisions, including one large screen, which are positioned throughout the establishment, and that the facility routinely features recorded music and dancing. Although licensed to feature live bands, it has done so on only three occasions this past year in connection with benefit fundraisers. The establishment has installed special effect lighting, in the form of multi-colored flood, strobe and disco ball in the dance floor area.
- 5) The Appellant testified that the interior of the establishment, which is essentially one large, rambling room, features several neon signs, pictures and other miscellaneous paraphernalia that promote the purchase of alcoholic beverages. In addition, exterior signage on the property advertises: "POOL DARTS MUSIC OPEN NIGHTS 7PM 1AM" and another sign states: "WED THUR POOL DARTS, FRI-SAT DANCE MUSIC, MUSIC, BADA BING".
- 6) The Appellant contends that the establishment is "principally" a restaurant as indicated on the license from the Alcoholic Beverages Control Commission. He indicated that the Town of Norton will only issue a liquor license to establishments so classified. Based upon this classification on the liquor license, the Appellant believes that his establishment is therefore specifically exempt from the sprinkler provisions of M.G.L. c.148, s. 26G½.
- 7) The Appellant testified that the food served at his establishment mainly consists of pizza, hot dogs, chips, and other snack type foods. He also admitted that most of the revenue generated at the establishment is from the sale of alcohol and that the food served is to compliment the consumption of alcoholic beverages. The Appellant did not submit a copy of a menu.
- 8) The representatives of the Norton Fire Department testified that the determination and Order to install sprinklers was based upon a number of factors including: the overall capacity limit of well over 100 persons, the existence of an extensive bar area, high liquor sales, existence of significant entertainment activities in the form of video games, television, pool and dart activities, in addition to the bar-like and nightclub activities associated with occasional live and routine recorded

musical entertainment and dancing activities. He indicated that the facility has no commercial kitchen and uses a “deli” area for the preparation of finger foods and snacks. The Fire Department contests the Appellant’s characterization that the establishment is “principally” a restaurant, indicating that the facility clearly holds itself out to be a bar, sports bar /nightclub type establishment.

- 9) The Norton Fire Chief further testified that the characteristics of this building concern him greatly. He detailed the lack of windows throughout the building, the small number of exits relative to the size and capacity of the building, an attached smoker’s porch and a fire alarm system that is outdated. In addition, the Chief emphasized the characteristics of the facility, which includes: loud music, low lighting levels, dancing and the extensive service of alcoholic beverages. He indicated that it was his opinion that these are exactly the type of factors involved in the 2003 Station Nightclub fire in Rhode Island. The Chief was also concerned that the basement is accessed through a small hatch door in the bar area and that storage of potential combustibles, combined with heating equipment, could pose a severe danger to both employees and patrons in the event of a fire in that area. The Chief indicated that he wrote to the Board requesting a hearing as soon as possible, since he is concerned about the life safety of the patrons. He did not feel that his Order to sprinkler should continue to be stayed any further pending the appeal, since it appears that the Appellant has changed his mind to sprinkler this building by November 1, 2008, as previously agreed upon.
- 10) The Appellant testified that he had initially planned to install a complete sprinkler system throughout the facility in accordance with the original Order. He also filed a permit to install said system. However, soon thereafter, Appellant was informed that the town fee charged for the water hook-up was increased dramatically. Due to the high cost of design plans and installation, combined with the high fees that the town was now assessing for a hook-up to the municipal water system and increased interest rates, the costs became prohibitive.

F) Ultimate Findings of Fact and Conclusions of Law

- 1) The provisions of the 2nd paragraph of M.G.L. c. 148, s. 26G½, in pertinent part, states: “every building or structure, or portions thereof, of public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a night club, dance hall, discotheque, bar, or similar entertainment purposes... (a) which is existing or (b) for which an approved building permit was issued before December 1, 2004, shall be protected throughout with an adequate system of automatic sprinklers in accordance with the state building code”. The law was effective as of November 15, 2004.
- 2) The statutory timeline for said sprinkler installation in accordance with the provisions of section 11, St. 2004, c. 304, requires the submission of plans and specifications for the installation of sprinklers within 18 months of the effective date of the act (by May 15, 2006) and complete installation within 3 years of the effective date of the act (by November 15, 2007).
- 3) Upon review of the record, including documents and the described activities that occur within this building, it is clear that this establishment is a public assembly occupancy with a total capacity of 385 persons. Therefore, the subject building is considered a public assembly with a capacity of 100 persons or more.

- 4) The current classification of the establishment as an “A-2 “ use group is significant. Under the provision of the State Building Code, 780 CMR (6th Edition), the “A-2” classification includes those establishments that are “ designed for occupancy as dance halls, nightclubs and for similar purposes” (see 780 CMR 303.3). Under said 780 CMR, restaurants are generally classified within the “A-3” use group (see 780 CMR 303.4). The particular use group classification is an important factor in determining whether this establishment is subject to the sprinkler requirements of M.G.L. c. 148, s. 26G½. However, this classification alone is not the sole factor that this Board will review at in making a determination.
- 5) In a memorandum dated 1-10-05, this Board issued an interpretive guidance document relative to the provisions of this new law found in c.148, s. 26G½. This new law was a portion of a comprehensive legislative initiative undertaken as the result of a tragic Rhode Island nightclub fire, which took place in February 2003. In said memorandum, this Board acknowledged that the statute did not contain a definition of the words “nightclub, dance hall, discotheque, bar or similar entertainment purposes.” However, the board noted that the terms “nightclub” and “dance hall” are used within the A-2 use group classification found in the 6th Edition of the Massachusetts Building Code, 780 CMR 303.3. This use group definition was drafted from nationally recognized model building code language. The commentary documents relating to the A-2 use group definitions used in the nationally recognized model code, indicates that such classification includes occupancies in which people congregate in high densities for social entertainment purposes. Examples given in the commentary are: dancehalls, nightclubs, cabarets, beer gardens, drinking establishments, discotheques and other similar facilities. The commentary concluded that the uniqueness of these occupancies is characterized, but not limited to, by the following factors:
- a) No theatrical stage accessories other than raised platform;
 - b) Low lighting levels;
 - c) Entertainment by a live band or recorded music generating above-normal sound levels;
 - d) Later-than-average operating hours;
 - e) Tables and seating arranged or positioned so as to create ill defined aisles;
 - f) A specific area designated for dancing;
 - g) Service facilities primarily for alcoholic beverages with limited food service; and
 - h) High occupant load density.

It was the interpretation of this Board that such characteristics are typical of the “A-2 like” occupancy (which was a general reference to the A-2 use group referenced in 780 CMR, the State Building Code) and that these are some of the types of factors that heads of fire departments should consider in enforcing the sprinkler mandates of M.G.L. c.148, s. 26G½. However, it was indicated that the list of characteristics was not necessarily all-inclusive and that the factors may be applied individually or in combination, depending upon the unique characteristics of the building at the discretion of the head of the fire department.

6) It is important to note that some of the particular characteristics, such as entertainment by a live band, recorded music generating above normal sound levels and a specific area designated for dancing, may not necessarily exist in certain establishments that are considered a “bar”. Nevertheless, the provisions of M.G.L. clearly apply to “every building or structure, or portions thereof, of public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a...**bar**...”.

7) With regard to Appellant’s contention that this establishment is a restaurant, the Board is well aware of the language in the statute, which specifically exempts “places of assembly...used principally as a...*restaurant*...or other similar place of assembly from the s. 26G½ enhanced sprinkler requirements. The Board has applied this exemption, in whole or in part, in prior decisions. In its 1-10-05 memorandum the Board also acknowledged the existence of establishments that may feature characteristics of both a restaurant and a bar or nightclub. In determining whether or not such “combination” establishments are subject to the provisions of M.G.L. c. 148 s. 26G½, this Board indicated that it will look at such common sense factors such as:

- a) Does the restaurant establishment regularly and routinely serve meals on a daily basis?
- b) Does the establishment provide a bar, bar seating, bar standing and a bartender for the purposes of serving alcoholic beverages directly to alcohol consuming customers?
- c) Does the bar and bar seating area have the ability to expand into the dining area to accommodate special entertainment activities or increased capacity/density?
- d) If the establishment provides a bar and bar seating, are alcoholic beverages continuously served to customers more than one hour after full kitchen facilities have been closed?
- e) Is live or recorded music provided for dancing purposes or for a viewing audience? (does not include background dinner music)?
- f) Does the establishment provide special entertainment, including but not limited to: musical, theatrical, comedy, or sport viewing activities?
- g) Based upon the establishment’s name, décor, atmosphere, does a customer expect a bar or nightclub type establishment?
- h) Is the establishment or portions thereof routinely or regularly used for private or public functions for dancing, parties, celebrations, entertainment or performance purposes?
- i) Does the establishment have an entertainment license?

These factors are not necessarily all inclusive. However, such factors or combination of factors, may be considered to determine if the occupancy has existing characteristics that are similar to nightclub, dance hall, discotheque, bar, or similar entertainment purposes.

8) Based upon the evidence provided at the hearing, this establishment does provide some food items on a daily basis. However, food items such as pizza, hot dogs, chips, and other “snack foods” in

the context of this establishment, are not typical of the type food items served by establishments that are “principally” a restaurant. They are the kind of food that is often incidentally served in the types of businesses that seek to attract customers to consume alcoholic beverages.

- 9) Additionally, this facility features substantial bar service, bar seating and a bartender during all hours of operation for the purposes of serving alcoholic beverages directly to alcohol consuming customers. Alcoholic beverages are legally available to customers at all times of operation, whether they choose to eat a “snack” or not. As admitted by the Appellant, most of the business income is derived from the service of alcoholic beverages.
- 10) The establishment features later than average operating hours. The facility has been issued a license to expose, keep for sale and to sell “all kinds of alcoholic beverages” to be consumed on the premises. Under the terms of said license, patrons are allowed to stay in the premises until 1:00 a.m. and alcoholic beverages are served until 1:00 a.m. This late hour is well beyond the usual hours of operation of an establishment that is typically operated “principally” as a restaurant.
- 11) Based upon multiple characteristics relating to décor, atmosphere and its presentation to the general public, a customer can reasonably expect significant “bar” or nightclub activities. The Board finds substantial evidence that this establishment is clearly marketed as a bar and/or nightclub. Based upon testimony and photographs, the exterior advertisements clearly are designed to target customers who seek “bar- like” and related entertainment activities. The interior of the establishment features a décor and atmosphere typical of a bar or pub. There are neon signs, photographs and pictures displayed within the establishment that promote various types of alcoholic beverages. Signs displayed on the front of the building advertise “POOL DARTS MUSIC OPEN NIGHTS 7PM 1AM” and also states “WED THUR POOL DARTS, FRI-SAT DANCE MUSIC, MUSIC, BADA BING”. Video games, pool tables, dart games, multiple and big screen televisions combined with routine and regular music for dancing purposes in a night club environment, as evidence by loud music and special effects lighting, are exactly the type of characteristics envisioned by the legislature in requiring the enhances sprinkler protection.
- 12) The Appellant’s contention that this establishment is “principally a restaurant” and therefore exempt under the provisions of M.G.L. c. 148 s. 26G½ is without merit. As pointed out by the Appellant, the liquor license does classify the establishment as a “restaurant”. However, in this case, as in other past cases, this Board will look at a variety of factors in rendering its determination. The liquor license’s designation as a restaurant is not consistent with other considerations, including: the Town’s designation of this facility as an “A-2” use group; the issuance of an entertainment license for live entertainment, dancing and a juke box; and the issuance of an amusement license for video games, pinball machines and pool tables. These legal documents, combined with the actual characteristics and factors previously described, are typical of a bar and/or nightclub and clearly provide significant evidence to support a conclusion that this facility is not principally a restaurant. In conclusion, this establishment is clearly and legally a public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a nightclub or bar or similar entertainment purposes and is within the legislative intent and scope of the sprinkler provisions of section 26G½.

G) Decision and Order

For the foregoing reasons, this Board unanimously **upholds** the Order of the Norton Fire

Department to install sprinkler protection in the subject building in accordance with the provisions of M.G.L. c.148, s.26G½. Sprinkler installation shall be completed within sixty (60) days of the date of hearing (by December 10, 2008).

H) Vote of the Board

Paul Donga, Acting Chairman	In Favor
Alexander MacLeod	In Favor
Thomas Coulombe	In Favor
Peter Gibbons	In Favor
Aime DeNault	In Favor
George Duhamel	In Favor

I) Right of Appeal

You are hereby advised that you have the right, pursuant to section 14 of chapter 30A of the General Laws, to appeal this decision, in whole or in part, within thirty (30) days from the date of receipt of this order.

SO ORDERED,



Paul Donga, Acting Chairman

Dated: October 22, 2008

A COPY OF THIS DECISION AND ORDER WAS FORWARDED BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED TO:

Michael E. Clarke
50 Pleasant Street
Norton, Massachusetts 02766

Chief Richard J. Gomes
Norton Fire Department
70 East Main Street
Norton, Massachusetts 02766