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*The Commonwealth of Massachusetts
Executive Office of Public Safety
Fire Safety Commission*

Automatic Sprinkler Appeals Board

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VICE CHAIR

**Docket # 2006-42
194 Front Street
Scituate, MA**

**AUTOMATIC SPRINKLER APPEALS BOARD
DECISION AND ORDER**

A) Statutory and Regulatory Framework

This is an administrative appeal held in accordance with Massachusetts General Laws Chapter 30A; Chapter 148, section 26G½ and Chapter 6, section 201, relative to a determination of the Scituate Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building owned and/or operated by TK O'Malley's (hereinafter referred to as the Appellant). The building, which is the subject of the order, is located at 194 Front Street, Scituate, MA.

B) Procedural History

By written notice received by the Appellant on January 1, 2006, the Town of Scituate Fire Department issued an Order of Notice to the Appellant informing it of the provisions of M.G.L c. 148, s.26G½, 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 194 Front Street, Scituate, MA. The Appellant filed an appeal of said order on February 10, 2006. The Board held a hearing relative to this appeal on October 12, 2006, at the Department of Fire Services, Stow, Massachusetts.

Appearing on behalf of the Appellant was Walter Collins, Owner of TK O'Malley's and Michael Mason, Esq., attorney for the Appellant. Chief Edward J. Hurley and Captain Richard A. Judge appeared on behalf of the Scituate Fire Department.

Present for the Board were: Maurice M. Pilette, Chairperson, Paul Donga, Vice Chair, Stephen D. Coan, Chief Thomas Coulombe, Peter Gibbons, John J. Mahan, and Aime R. DeNault. 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 Scituate 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 by Appellant
2. Order of the Scituate Fire Department
3. Letter from Scituate Fire Department to Appellant
4. Notice of Pre-Hearing Status Conference to Appellant
5. Notice of Pre-Hearing Status Conference to Fire Department
6. Notice of Hearing to Appellant
7. Notice of Hearing to Fire Department
8. Certificate of Inspection (issued 11/30/2005)
9. Floor Plan of Facility
10. Menu
11. Restaurant Reviews (A, B, C)
12. Liquor License
13. Photos (A-L)
14. Fire Department Photos (A-G)
15. Entertainment License
16. Plot Plan

E) Subsidiary Findings of Fact

- 1) By notice received by the Appellant on January 1, 2006, the Scituate 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 194 Front Street, Scituate, MA in accordance with the provisions of M.G.L. c. 148, s.26G1/2. This building is used by an establishment that operates under the name of TK O'Malley's, a private, for profit organization.
- 2) According to the current Certificate of Inspection issued on 11/30/2005, the building department listed the facility's capacity as 150 persons throughout the facility. The Certificate does not list separate capacity limits for either the bar, lounge area or the dining room. Said Certificate of Inspection classifies the establishment as "A-2".
- 3) Photographs and floor plans submitted depict a bar area with a long bar surrounded by at least 25 bar stools. This area adjoins a lounge area that seats at least 25 persons. The bar and lounge areas contain numerous signs, ornaments, artwork and flags displayed within the establishment that promote various types of alcoholic beverages. Sports memorabilia is displayed on the walls throughout the establishment. Exterior photographs depict the front of the building which consist of stone and wooden facing with several large windows and several signs advertising the name of the establishment: "T.K. O'Malley's Harbor Front Sports Café."

- 4) Several written restaurant reviews describe the facility as having “ a sports theme combined with a pub and family style setting”. The establishment features “ a large horse-shoe shaped bar with an adjoining pub area... this is great for meeting with friends, munching on appetizers and enjoying the games on many televisions scattered throughout.”
- 5) The Appellant contends that the establishment is principally used as a restaurant and is therefore specifically exempt from the sprinkler provisions of M.G.L. c.148, s.26G1/2. Furthermore, he indicated that the ratio of food sales compared to liquor sales is 2 to 1. The establishment serves full meals on a daily basis. The business features the availability of a wide assortment of full course dinner meals available until 10:00 p.m. Appellant indicated that a modified and somewhat reduced menu is available until midnight. The “bar area” is also used for the service of meals. However, a customer can patronize this bar area and other areas of the establishment for the purchase of liquor only at any time during the hours of operation.
- 6) The restaurant holds an entertainment license and occasionally has a 3-piece band for special occasions such as St. Patrick’s Day, but indicated that the music is not usually amplified. There is currently no dance floor. The Appellant indicated that live entertainment is offered on a routine basis on most weekends (usually Fridays). The current entertainment is generally in the form of a single guitar player. The current entertainment license issued by the Town allows the establishment to feature live entertainment Thursdays through Sundays and includes: “Up to 4 pieces in the band, vocals and instruments amplified, D.J. and equipment, karaoke, inside restaurant only, not patio”.
- 7) The establishment holds a full liquor license, which allows “all forms of alcoholic beverages to be drunk on the premises” until 1:00 a.m., seven days a week.
- 8) The fire department issued the Order to install sprinklers based upon the overall building capacity, the existence of a full bar and lounge areas, liquor sales and an entertainment license. The representative of the fire department further indicated the establishment’s “bar/ pub ” like atmosphere, low light levels, classification of the building as an “A-2” establishment and the existence of an entertainment license indicates that this is the type of establishment within the scope of M.G.L. c. 148, s.26G1/2.
- 9) The fire department’s representative expressed concerns regarding the quite large (1,600 s.q. foot) outdoor patio that is used during the warm weather. Apparently this patio has a capacity of an additional 100 persons. It was pointed out that persons who are out on the patio may crowd into the facility in the event of inclement weather. The Appellant indicated that there are three exits from the outdoor patio, which are separate from those exits from the building.
- 10) The Chief indicated that the entire occupant load of the building (150 persons) is allowed to flow throughout the entire establishment. There is no separate capacity specified for each individual room. This allows for persons to congregate at the same time in one room creating instances of concentrated occupancy. The Chief also indicated his concerns about the apartment located above the restaurant. The Appellant testified that the apartment is not presently used for tenants, but is rather used for storage by the establishment.

- 11) With respect to the current use group classification A-2, which legally allows nightclub activities, Appellant believes that the facility is a restaurant and that the classification was never properly changed. However, there was testimony that patrons may enter the establishment for the purpose of purchasing alcoholic beverages, snacks and to watch sporting events or listening to musical entertainment in addition to patronizing the establishment for the purposes of dining.
- 12) The appellant indicated that he has received an informal estimate to install sprinklers (approximately \$100,000). He indicated that this cost would create an unreasonable hardship on the business. Upon inquiry by the Board, appellant could not explain the basis for the stated installation estimate and did not submit documentation to support the stated cost estimate. Appellant did not request the board to consider any modified or limited technical installation options.

F) Ultimate Findings of Fact and Conclusions of Law

- 1) The provisions of the 2nd paragraph of M.G.L. c. 148, s. 26G1/2, 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) The Inspection Certificate issued for this establishment on 11-30 -05 indicates that the occupancy is classified as an “A-2” assembly occupancy with a legal capacity of 150 persons. Therefore the subject building is considered a public assembly with a capacity of 100 persons or more. Additionally, the establishment holds an entertainment license, which legally allows the facility to feature live entertainment (up to 4 piece bands with amplified volume), Fridays through Sunday. Currently, Appellant has indicated that such entertainment is limited to special events such as St. Patrick’s Day and live guitar music on many Friday nights.
- 4) The legal classification of this establishment as an “A-2” assembly occupancy by the Town of Scituate Building Department is significant. Under the provision of the State Building Code, 780 CMR, such a classification includes establishments that are “ designed for occupancy as dance halls, nightclubs and for similar purposes” (see 780 CMR 303.3). Under 780 CMR, restaurants other than nightclubs, are classified within the A-3 use group (see 780 CMR 303.4). The A-2 classification is an important factor in determining whether this establishment is subject to the sprinkler requirements of M.G.L. c. 148, s. 26G1/2. However, this classification alone is not the sole factor that this Board will look at in making a determination. In a memorandum dated 1-10-05, this Board issued an interpretive guidance document relative to the provisions of this new law, c.148, s.26G1/2. 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 noted that the statute did not contain a definition of the words “nightclub, dance hall, discotheque, bar or similar entertainment purposes”. This Board reviewed the legislative intent and background of the statute and concluded that there were certain characteristics typical of nightclubs, dancehalls and discotheques. The board indicated that such occupancies are characterized, but not limited to, 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 the type of factors that heads of fire departments should consider in enforcing the sprinkler mandates of M.G.L. c.148, s.26G1/2. It was noted that the list of characteristics was not necessarily all-inclusive. Additionally, 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. Some of these 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**...”.

5) In its 1-10-05 memorandum the Board 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.26G1/2 this Board looked 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 bar tender 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?
- 6) Based upon the evidence provided at the hearing, this establishment currently serves meals on a daily basis. However, in looking at the factors as a whole, it also features substantial characteristics typical of both a bar and a nightclub, including:
- a. The current building classification as an A-2 occupancy and the existence of an entertainment license allows the establishment to legally feature live entertainment. Such live entertainment, although usually somewhat limited, occurs on a regular and routine basis.
 - b. The establishment features later than average operating hours (approximately 1:00 am)
 - c. The establishment holds a full liquor license and features 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 available to customers at all times whether or not they choose to eat a meal or not.
 - d. The bar remains routinely open for a significant time (12:45 am) after the kitchen stops serving full menu items (10:00pm).
 - e. Based upon the establishment's name and presentation to the general public, a customer can reasonably expect a sports bar type establishment. The interior features a décor and atmosphere typical of a bar or sports pub. The areas within the establishment consist of a variety of seating arrangements including a fully stocked bar with bar stools, high tables with high stools in addition to several wooden tables and booths with chairs and benches. There are numerous signs, ornaments, and flags displayed within the establishment that promote various types of alcoholic beverages. There are numerous televisions including 11 19" color televisions and 3 large screen televisions throughout the establishment, including the dining area. The walls are adorned with a variety of memorabilia which promote sports viewing and recreational activities. Additionally, the establishment features dart boards and dart tournaments. Such entertainment activities are typical of those establishments that seek to encourage patrons to purchase alcoholic beverages while they engage in such entertainment or sports viewing activities.
 - f. The establishment derives a significant portion of its revenue (at least 33%) from the sale of alcoholic beverages.

- 7) Appellant’s position that this establishment is “principally a restaurant” and therefore exempt from the provisions of M.G.L., s. 26G1/2 is without merit. Although the facility currently provides a wide assortment of food items typical of a restaurant, this facility, as currently operated, is clearly designed, used and marketed as an establishment that features a significant number of characteristics that are typical of a nightclub or bar and is therefore within the scope of M.G.L. c. 148, s. 26G1/2 as interpreted by this Board.
- 8) The Appellants indicated that this board, in prior decisions, has determined that sprinklers were not required pursuant to s. 26G1/2 in certain establishments that featured combined characteristics of a restaurant, bar or entertainment venue. However, in such limited cases, the Board determined that the facility had either: (1) a clear physical and operational separation between the restaurant and bar or entertainment portions of the facility with separate, legally enforceable capacity limits stated on the Certificate of Inspection for such portions which were under 100 persons (and therefore not subject to s. 26G1/2) or (2) the frequency of the entertainment was not regular or routine but temporary in nature and, therefore, specifically allowed by the law by a special permit issued by the fire department. However, such factors do not currently exist in this establishment.

G) Decision and Order

For the foregoing reasons, this Board unanimously **upholds** the Order of the Scituate Fire Department to install sprinkler protection in the subject building in accordance with the provisions of M.G.L. c.148, s.26G1/2 in accordance with the following timetable:

Plans for the installation of an adequate sprinkler system shall be submitted to the Head of the Fire department not later than 90 days from the date of this hearing (January 12, 2007).

Installation shall be completed in accordance with the time specified in the statute (section 11, c. 304 of the Acts of 2004) November 15, 2007

H) Vote of the Board

Maurice Pilette, (Chairperson)	In Favor
Paul Donga (Vice Chair)	In Favor
Stephen D. Coan, State Fire Marshal	In Favor
Thomas Coulombe	In Favor
Peter E. Gibbons	In Favor
John J. Mahan	In Favor
Aime R. DeNault	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,



Maurice Pilette, P.E., Chairman
Chairperson

Dated: November 22, 2006

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

Walter Collins
TK O'Malley's
194 Front Street
Scituate, Massachusetts 02066

1st Class Mail, Postage Pre-paid to:

Chief Edward J. Hurley
Scituate Fire Department
149 First Parish Road
Scituate, Massachusetts 02066-4045