



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

*Automatic Sprinkler Appeals Board*

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**Docket # 2006-112**  
**88 Sleeper Street**  
**Boston, 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 Boston Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building owned and/or operated by Poseidon Enterprises, Inc d/b/a The Barking Crab, hereinafter referred to as the Appellant.

**B) Procedural History**

By written notice dated February 8, 2006 and received by the Appellant on February 22, 2006, the Boston 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 88 Sleeper Street, Boston, MA. The Appellant filed an appeal of said order. The Board held a hearing on this matter on November 16, 2007, at the Department of Fire Services, Stow, Massachusetts.

Appearing on behalf of the Appellant were Attorney Joseph P. Hanley and Scott Garvey, President and Owner of The Barking Crab. Captain David Cushing and Engineer Richard Baldowski appeared on behalf of the Boston Fire Department. The Appellant and his attorney indicated on the record that they were also representing the legal interest of the owner of the building.

Present for the Board were: Maurice Pilette, Chairman; Stephen D. Coan, State Fire Marshal; Peter Gibbons; John Mahan; Aime R. DeNault; and George A. 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 Boston 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 Appellant
2. Statement in Support of Appeal
3. Letter from the Boston Fire Department to the Appellant
4. Letter to the Boston Fire Department from the Appellant re: RW Sullivan Letter
5. Order of Notice of the Boston Fire Department
6. Application for Employment
7. 1<sup>st</sup> Notice of Pre-Hearing Status Conference to the Parties
8. 2<sup>nd</sup> Notice of Pre-Hearing Status Conference to the Parties
9. Notice of Hearing to the Appellant
10. Notice of Hearing to the Boston Fire Department
11. Appellant's Submissions (A-G)
12. Restaurant Menu
13. Letter from Consultant Paul Christian
14. Letter from Lt. Mike McLean, Boston Fire Department
15. BFD Pictures (1-10)
16. Fire Report (10/21/2007)
17. BFD – copy of facility's website

**E) Subsidiary Findings of Fact**

- 1) By written notice dated February 8, 2006 and received by the Appellant on February 22, 2006, the Boston 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 88 Sleeper Street, Boston, MA in accordance with the provisions of M.G.L. c. 148, s.26G½. The building is used by an establishment that operates under the name of "The Barking Crab", a private, for profit business.
- 2) Photographs and floor plans submitted by the parties depict a single level establishment located on the Fort Point Channel in the seaport area of the City of Boston. The wooden structure features two general areas consisting of an indoor, year-round portion and an outdoor (seasonal) portion covered by a vinyl tent material (with drop down vinyl windows) that has apparently been certified as fire retardant. The interior portion of the facility features tables and chairs and a wooden bar.
- 3) According to the current Certificate of Inspection issued for the year 2007-2008, the City of Boston Inspectional Services Department listed the facility's capacity as 228 persons throughout the facility. Said capacity is broken down as follows: 170 persons for the outer area and 58 persons for the inside area. Said Certificate of Inspection classifies the establishment as a "restaurant/clubhouse."

- 4) According to Appellant's testimony, for many years the establishment had a license to serve beer and wine only. However, due to recent changes in the law, the establishment was allowed to apply for and last summer was issued a license to serve "all alcoholic beverages". The license contains a condition that closing hours are 1:00 a.m. and that patrons must be "out by 1:30 a.m."
- 5) Submitted photographs depict an establishment with an informal waterfront setting. The smaller year-round, interior area features a sit down bar with approximately 14 bar stools. The floor plan submitted by the Appellant indicates the existence of approximately 21 tables with chairs. Upon questioning about the existence of more seats (78) than the allowed occupancy load, the representative of the Appellant indicated that the tables can be moved around and/or remain unfilled. There is also an area for limited standing in the bar area. The outdoor seasonal area also features a sit down bar with approximately 17 bar stools and approximately 10 two to three seat tables along the walls. There are approximately 20 long, informal picnic style tables with benches.
- 6) The establishment has been issued an entertainment license, which allows the performance of live instrumental music not to exceed five (5) instruments. It also allows the use of a cassette/ CD player and one widescreen TV. According to the certificate, which expired on December 31, 2007, dancing is not allowed and the entertainment must cease by 12:00 a.m. Live musical entertainment, in the form of bands of up to five persons is regularly featured, usually on Tuesdays, Thursdays and Sundays. Said entertainment is featured outdoors during the warmer season and indoors during the off-season. The Appellant indicated that the entertainment is to supplement the dining experience. The establishment features a small television inside the bar area, but also has a large wide screen projection type television that can be used outdoors for viewing sporting events. There is no dance floor.
- 7) The Appellant indicated that City records revealed that there has been no information relative to the establishment ever being cited or disciplined for overcrowding.
- 8) The representative for the Appellant indicated that quite often people must wait for seating, particularly during the summer months. People wait either outside the establishment or wait at the bar after ordering drinks.
- 9) The Appellant contends that this establishment is principally used, operated and is well known as a seafood restaurant and is therefore specifically exempt from the sprinkler provisions of M.G.L. c.148, s. 26G½. He indicated that it is not a "fine dining" restaurant, but that it is along the waterfront and is a "fun spot". He also indicated that the "indoor" area of the establishment has a capacity of only 58 persons which is less than the 100 person capacity that triggers the law and that only the outside tent area, has an established capacity of 170 persons. However, Appellant's testimony indicated that when both areas are in operation, there is a free flow of activities between both areas and that there is no physical or operational separation between the two areas. It is the Appellant's position that the bar, consumption of alcohol and entertainment activities are incidental to the principle use of the facility as a restaurant. He also testified that the food to alcoholic beverage ratio is approximately 70% to 30%, respectively. This breakdown was also stated in a written document attested to by a certified public accountant.
- 10) The Appellant submitted a letter from a Fire Protection Consultant indicating that based upon said consultant's observations during a site visit, the establishment featured characteristics of a restaurant.

- 11) The Appellant submitted a copy of the current menu, which features a wide variety of food items including seafood entrees, as well as many appetizers and sandwiches. It was noted that there was a “kids” portion of the menu. Full course dinner meals are available until the kitchen closes at approximately 11:00 p.m. on most evenings.
- 12) The Appellant did not present any technical issues relative to sprinkler installation, partial system or modifications thereto, for the board’s review.
- 13) Captain David Cushman, Boston Fire Department, indicated that the Order to install sprinklers was based upon the overall building capacity of over 100 persons, the existence of two substantial bar and/or lounge areas, significant liquor sales, evidence of concentrated occupancy load, an entertainment license and the routine appearance of live musical entertainment. He further indicated the establishment, although serving significant meals on a regular basis, transforms into a “bar-like ” atmosphere after dinnertime, particularly during comfortable outdoor weather months. Contrary to the Appellant’s assertion that there have been no issues of overcrowding, Captain Cushing testified that an inspection of the facility was conducted on July 12, 2007 by the city’s nightclub inspector, Lt. McLean. Lt. McLean’s written statement indicated that the facility is a continuous problem. He noted that the establishment on said date, was overcrowded by 120 persons during the appearance of a live band and that 100-150 persons were standing and drinking, not eating. It indicated that they did not shut down the establishment since many patrons were also eating at the time.
- 14) After receiving the above referenced information from Lt. McLean, Captain Cushing visited the establishment on two occasions, a Sunday night and a Wednesday night, in August, 2007 at approximately 9-9:30 p.m. Captain Cushing testified that on the two nights he visited the facility, he witnessed a busy and crowded establishment. Facility staff were directing patrons to two separate entrances and areas for either “dining” or “drinking.” In addition, he indicated that several employees stationed at the doors had their mechanical customer “counters” in their pockets or hanging up on a fence and not being utilized. He testified that many of the customers were standing and drinking alcoholic beverages and not eating. Captain Cushing indicated that he is concerned about the crowding and lack of physical/operational separation between the bar and dining areas, which allows for easy movement of the patrons throughout the establishment.
- 15) Photographs submitted by the Fire Department confirm Captain Cushman’s observations. They depict features clearly indicating a significantly concentrated occupancy. Many standees are depicted in and around the bar areas, standup counter areas and essentially throughout the entire facility. Many appear to be holding bottles of beer. One photograph depicts several persons sitting at a table that features two pitchers of beer and no food items. It is noted that very few of the people depicted in the photographs are eating food. Captain Cushing testified that he is familiar with this establishment and that these photographs are typical of existing characteristics on a warm/fair weather weekend evening. Captain Cushing also submitted a copy of an advertisement of the Barking Crab found on the internet which states that “the beer flows like water, making every night feel like Oktoberfest”.
- 16) The representatives for the Fire department indicated that this establishment does have many features of a restaurant, but that it also features significant activities consistent with an A-2 like occupancy and a bar.

- 17) Testimony indicated that it is the policy of the facility to position staff at all entrances for the purposes of checking customer identification and keeping head counts by mechanical counters.

**F) Ultimate Findings of Fact and Conclusions of Law**

- 1) The provisions of the 2<sup>nd</sup> 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) 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. 26G½. This law was a portion of a comprehensive legislative initiative (The Fire Safety Act of 2004) 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 6<sup>th</sup> 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 the type of factors that heads of fire departments should consider in enforcing the sprinkler mandates of M.G.L. c.148, s. 26G½. It was noted that the list of characteristics were not necessarily all-inclusive. 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. Additionally, the board notes that independent from the A-2 like characteristics typical of a nightclub, dancehall or discotheque, the statute also clearly applies 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**...”.

- 4) Based upon the evidence presented at the hearing, this facility is clearly presented as an assembly use occupancy with a capacity of 228 persons. Additionally, although this facility has many features of a restaurant, it also includes significant characteristics of a bar and a nightclub, as those terms are used in MGL c. 148, s. 26G1/2. 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. 26G½, 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 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?
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- 5) In looking at these factors as applied to this building, the Board finds that the establishment does routinely serve meals on a daily basis. However, in looking at the establishment as a whole, it also features substantial characteristics typical of both a bar and a nightclub. The factors are as follows:

The establishment possesses a full liquor license and provides two separate bars, one located in the year-round portion and another located within the seasonal tent structure, used for the purposes of serving alcoholic beverages directly to the public. Both bars feature a bartender, substantial bar seating and areas for standees. Although the parties presented conflicting testimony, the Board finds, more credible evidence, in the form of photographs, which indicates that the establishment serves alcoholic beverages to customers, regardless of whether the customer is eating a meal or not. Both bars, bar seating areas and bar activities have the ability to expand into the dining area to accommodate special entertainment activities or increased capacity/density. Additionally, the establishment derives a significant portion of its revenue from the service of alcohol: approximately 30%.
  - 6) The establishment continuously provides bar seating and alcoholic beverages to customers more than one hour after full kitchen facilities have been closed. According to testimony, the kitchen closes down at 11:00 p.m. The liquor license indicates that the establishment may serve alcoholic beverages until 1:00 a.m. and that patrons must leave by 1:30 a.m.
  - 7) Although there is no dance floor, as dancing is not allowed under the terms of the entertainment license, live music, in the form of bands of up to five persons is allowed and is featured on a routine and regular basis for the purposes of entertainment of patrons. During the warm weather months, such entertainment appears usually three times per week. In addition to the appearance of live bands, the establishment features a television in the interior bar and a large wide screen that is used on the seasonal portion for sports viewing purposes.
  - 8) Based upon the establishment's décor and presentation to the general public, a customer can reasonably expect "bar" like accommodations. In addition to the regular appearance of live bands, the establishment's nautical name, waterfront location, large seasonal outdoor tent covered deck area, variety of seating arrangements, including stand-up tables with high stools in addition to long wooden rustic picnic tables, create an environment that is typical of many water front bars or nightclubs.
  - 9) The Board finds that the Appellant's presentation of this establishment as a seafood restaurant, rather than a nightclub or bar, is not supported by substantial and credible evidence to the contrary submitted by the representatives of the Boston Fire Department. Photographs depict features clearly indicating a significantly concentrated occupancy typical of a bar or nightclub. Many standees, obviously socializing, are depicted in and around the bar areas, standup counter areas and essentially throughout the entire facility. Most patrons appear to be holding bottles of beer or cocktails or sitting at tables drinking beer, some from pitchers. It is noted that very few of the people depicted in the photographs are eating food. These photographs are consistent with a description of the establishment contained in a copy of the Appellant's own internet web site advertisement which states that " "the beer flows like water, making every night feel like

Octoberfest.” Said advertisement also states that the hours of operation are from “11:30 a.m. Til the Crabs Come Home”.

10) Captain Cushing’s testimony about his observations on the two nights he visited the facility is also contrary to the Appellant’s characteristics of this establishment. He witnessed a busy, crowded establishment, with a significant number of customers waiting in line to enter through separate entrances and areas designated for either “dining” or “drinking.” Employees were stationed at the doors, with mechanical head “counters” in their pockets or hanging on a fence and not being utilized. He testified that many of the customers were standing up, drinking alcoholic beverages and flowing freely throughout the establishment. His observations are also consistent with the observations of the city Nightclub Inspector, Lt. McLean, who also observed concentrated occupancy, overcrowding and blocked egress. He also indicated that 100-150 persons were “standing, drinking...no eating.” The Board notes that the observations and conclusions of the Appellant’s fire protection consultant were made on a Wednesday evening, a day that live entertainment is apparently not featured. Finally, the Board finds it very unusual that a facility claiming to be “principally a restaurant” would post personnel at entrances for the purpose of keeping head counts and checking the identification of patrons upon entry. Such protocols are usually only employed in the nightclub environment.

**G) Decision**

For the foregoing reasons, this Board **unanimously upholds** the Order of the Boston Fire Department to install an adequate system of sprinkler protection in the subject building/structure in accordance with the provisions of M.G.L. c.148, s. 26G½.

Plans for such installation shall be submitted to the fire department within 60 days from date of this decision. Installation of said system shall commence by June 1, 2008 and be completed by November 15, 2008.

**H) Vote of the Board**

Maurice M. Pilette	In Favor
Stephen D. Coan, State Fire Marshal	In Favor
Peter E. Gibbons	In Favor
John J. Mahan	In Favor
Aime R. DeNault	In Favor
George A. 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,



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Maurice Pilette, P.E., Chairman

Dated: January 30, 2008

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

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