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LT. GOVERNOR

ROBERT C. HAAS
SECRETARY

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

Automatic Sprinkler Appeals Board

P.O. Box 1025 ~ State Road
Stow, Massachusetts 01775
(978) 567-3181 Fax: (978) 567-3121

MAURICE M. PILETTE
CHAIRMAN

PAUL DONGA
VICE CHAIR

Docket # 2006-135
486 Concord Street
Framingham, MA.

AUTOMATIC SPRINKLER APPEALS BOARD
DECISION AND ORDER

A) Statutory and Regulatory Framework

This is an administrative proceeding held in accordance with Massachusetts General Laws Chapter 30A; Chapter 148, section 26G½ and Chapter 6, section 201, relative to a determination by the Framingham Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building owned by the Hartford Concord Trust which houses Pepperoncini's Restaurant owned by Vincent Loscerbo (hereinafter referred to as the Appellants). The building, which is the subject of the order, is located at 486 Concord Street, Framingham, MA.

B) Procedural History

The Framingham Fire Department issued an Order of Notice to the Appellant-operator of the business located at 486 Concord Street, Framingham, Massachusetts, informing him about the provisions of a new law, M.G.L c. 148, s.26G½, which requires the installation of an adequate system of automatic sprinklers in certain buildings or structures. The Appellant-owner of the building filed an appeal of said order on May 11, 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 both the owner of the subject building and the owner of the business was Attorney Paul D. DeCenzo, Esquire and the business operator Vincent Loscerbo. Appearing on behalf of the Framingham Fire Department was Brian C. Mauro, Framingham Fire Marshal; Lt. Randy Smith, Framingham Fire Inspector and Michael Foley the Framingham Building Commissioner.

Present for the Board were: Maurice M. Pilette, Chairperson, Paul Donga, Vice Chairman, Stephen D. Coan, State Fire Marshal, Chief Thomas Coulombe, Peter E. Gibbons, John J. Mahan, and Aime R. DeNault. Peter A. Senopoulos, Esquire, was the Legal Counsel for the Board.

C) Issue(s) to be Decided

Whether the Board should affirm, reverse or modify the enforcement action of the Framingham 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. Written Statement in Support of Appeal
3. Affidavit of Vincent Loscerbo, Owner/Operator of Restaurant
4. Affidavit of Sarah J. DeCenzo, Owner of Building
5. Menu/Kids Fun Page from Restaurant
6. Commercial Lines Policy for Facility
7. Detailed Floor Plan
8. Certificate of Inspection
9. Order of Framingham Fire Department
10. Letter from Framingham Fire Dept. to Owners/Operators regarding Appeals Process
11. Notice of Pre-Hearing Status Conference to Appellant
12. Notice of Pre-Hearing Status Conference to Fire Dept.
13. Notice of Hearing to Appellant
14. Notice of Hearing to Fire Dept.
15. Liquor License
16. Common Victualer's License
17. Photos (A-V)
18. Application for Entertainment
19. Exterior Photograph of Facility

E) Subsidiary Findings of Fact

- 1) By notice dated January 6, 2006, but apparently not received by the building owner until May 10, 2006, the Framingham Fire Department issued an Order to the Appellants requiring the installation of an adequate system of automatic sprinklers in a building located at 486 Concord Street, Framingham, in accordance with the provisions of M.G.L. c. 148, s.26G½. On May 11, 2006, the Appellant-owner of the building filed an appeal of said order with this Board. The fire department did not contest the date of the receipt of the order as stated by the owner in the appeal application and by sworn affidavit. This building is leased by Vincent Loscerbo who owns the establishment that operates under the name of "Pepperoncini's Restaurant," a private, for profit business. As stated by their attorney, Paul D. DeCenzo, the interests of both Appellants (business and building owners) were represented at the hearing before this Board.
- 2) According to the Certificate of Inspection, expiration date: 10-27-06, the Town of Framingham Building Department indicated that the business location has a maximum allowable occupancy load of 188 persons and is currently classified as a use group classification of A-2. The owner

and operator of the establishment indicated that while the Certificate of Inspection indicates an occupancy load of 188, the facility holds much less than that, with seats for 88 persons including 24 seats in the bar. The Appellant indicated that the dining area and bar area are separated by a “half wall” that provides a physical separation between the two areas. However, the Certificate of Inspection does not list a separate occupancy load for either of these two areas. It appears that patrons may congregate in either area during most hours of operation.

- 3) The Appellant contends that the establishment is principally a restaurant and is therefore specifically exempt from the sprinkler provisions of M.G.L. c.148, s.26G^{1/2}. He testified that 75% of the patrons attend the establishment to dine and approximately 25% attend for the sole purpose of consuming alcohol.
- 4) The establishment serves full meals on a daily basis from 11:30 a.m. to 1:00 a.m. Tuesday through Sunday. The facility has a full service bar with 24 bar stools, which is used to sell alcoholic beverage and is also used for the service of food. The Appellant stated that there is no prolonged period of time that the bar is open without service of food. However, there was testimony indicating that customers may purchase alcohol only.
- 5) The establishment has been issued an entertainment license (a copy of which was not provided at the hearing). The parties indicated that the entertainment license allows: “stereo, juke box, TV’s, computer quiz games at the bar and live entertainment” such as bands. The facility features live musical entertainment approximately three times a week usually on Thursdays and Fridays and occasionally on Saturdays, beginning around 10:00 p.m. and ending around 12:30 a.m. The entertainment typically consists of a guitarist and the occasional appearance of multiple person “classic rock and roll” type bands. The facility also offers Karaoke on Wednesday nights. The Appellant indicated that live entertainment is held in the bar area, and that during such performances, no tables or chairs are removed. There is currently no stage, raised platform, dance floor or special lighting in the facility. The Appellant indicated that the sports viewing activities, pool table, and musical entertainment activities are an important aspect of the business and are a “draw” for potential customers in addition to the food offerings.
- 6) The Appellant indicated that sports viewing activities are a common attraction by patrons to the facility. Accordingly, discounted food items are offered during such sports viewing events that feature large screen televisions and alcoholic beverages in addition to the service of full meals.
- 7) Full meals are available in the “bar” area in addition to the dining area. The restaurant remains open until 1:00 a.m. In addition to a Common Victualer’s license, the establishment holds a full liquor license, which allows “all kinds of liquor” to be drunk on the premises. Liquor may be legally sold from 11:00 a.m. until 1:00 a.m. A customer may enter the premises for the purpose of ordering an alcoholic beverage and to listen and watch the musical entertainment without ordering food. The Appellant also indicated that there are 6 televisions located around the bar.
- 8) The representatives for the Fire Department stated that the Order to install a sprinkler system was based upon the classification of the building as an “A-2” occupancy, the legal capacity, the existence of liquor sales, a bar area, routine musical entertainment, and the potential for high occupant load. They indicated that the establishment combines bar, restaurant and entertainment features and that there is no separate occupancy capacity for the dining and bar areas. They testified that the establishment is not merely a restaurant since it routinely provides musical

entertainment for its patrons who may or may not attend the establishment for dining purposes. They submitted a picture of an outdoor sign for the facility advertising karaoke on Wednesdays and live music on Thursdays and Fridays. Such evidence was submitted to support their contention that the business conducts activities beyond mere dining. The Town indicated that the appellant has not requested a review or a change of the current building classification.

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) The Inspection Certificate issued for this establishment on December 5, 2005, indicates that the occupancy is classified as an “A-2” assembly occupancy with a legal capacity of 188 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. Currently, live entertainment is offered on a routine basis three times per week.
- 4) The legal classification of this establishment as an “A-2” assembly occupancy by the Town of Framingham 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. 26G½. 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.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 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.26G½. 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 and/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?
- 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 legally allows the establishment to feature a variety of live entertainment activities.
 - b. Live entertainment is offered on a routine and usual basis at least three times per week. The appellant indicated that the sports activities and the entertainment activities are an important aspect of the business.
 - c. The establishment features later than average operating hours (approximately 1:00 a.m.).
 - d. 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.
 - e. Based upon the establishment’s name and presentation to the general public, a customer can reasonably expect a lounge or bar type establishment. The interior features a décor and atmosphere typical of a bar or sports pub in addition to a restaurant. The areas within the establishment consist of a variety of seating arrangements including a fully stocked bar with bar stools, in addition to several wooden tables and booths with chairs and benches. There are several signs and banners within the establishment that promote the service of alcoholic beverages. An example includes a banner, which promotes “Budweiser Beer” and includes the Patriots game schedule. There are six televisions sets in the establishment including several large screen sets, at the bar for sports and entertainment viewing purposes. Additionally, an exterior sign clearly indicates the existence of “lounge” accommodations and includes the logos of four Boston area sports teams in addition to the availability of pizza and steak tips. The sign also features “free pool” and discounted food items. Featuring entertainment activities such as sports viewing, a pool table, karaoke, and live music are typical of those types of establishments that seek to encourage patrons to purchase alcoholic beverages while they engage in entertainment or sports viewing activities.
 - f. Based upon the establishment’s seating capacity (88) in comparison to the establishment’s overall occupant capacity of 188 creates the establishment’s ability to legally accommodate up to 100 persons on a “standing room” only basis. This tends to indicate the clear potential for concentrated occupant load and is contrary to the appellant’s position that the establishment is used or designed for dining purposes.

- 7) Appellant's position that this establishment is "principally a restaurant" and therefore exempt from the provisions of M.G.L., s. 26G½ 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 legally 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.

The Appellants indicated that this board, in prior decisions, has determined that sprinklers were not required pursuant to s. 26G½ 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. 26G½) 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 Framingham Fire Department to install sprinkler protection in the subject building in accordance with the provisions of M.G.L. c.148, s.26G½ according to 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 (due by 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	In Favor
Stephen D. Coan, State Fire Marshal	In Favor
Chief 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 28, 2006

A COPY OF THIS DECISION AND ORDER WAS FORWARDED BY CERTIFIED MAIL, POSTAGE PREPAID TO:

Paul D. DeCenzo, Esq.
P.O. Box 796
Osterville, Massachusetts 02655-0796

AND FORWARDED VIA 1st CLASS MAIL, POSTAGE PRE-PAID, TO:

Chief Ollie D. Gadson
Fire Marshal Brian Mauro
Framingham Fire Department
10 Loring Drive
Framingham, Massachusetts 01702