



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

Automatic Sprinkler Appeals Board

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Docket # 2008-12
52 Long Pond Road
Plymouth, Massachusetts

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 26G½ and the informal rules of hearing procedures, 801 CMR 1.02, relative to a determination of the Plymouth Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building owned and operated by the Plymouth Lodge, No. 1476 B.P.O Elks (hereinafter referred to as the Appellant). The building, which is the subject of the Order, is located at 52 Long Pond Road, Plymouth, Massachusetts.

B) Procedural History

By written notice dated August 11, 2008 and received by the Appellant on August 13, 2008, the Plymouth Fire Department issued a determination to the Appellant requiring the installation of an adequate system of automatic sprinklers in the Appellant's building pursuant to the provisions of M.G.L c. 148, s. 26G½. The Appellant filed an appeal of said determination with this Board on September 23, 2008. The Board held a hearing relative to this matter on November 12, 2008, at the Department of Fire Services, Stow, Massachusetts.

Appearing at the hearing on behalf of the Appellant were Tom McTigue, Treasurer; Arthur B. Powers, Jr., President; Warren Mott, Architect; and Richard Gilman, Trustee. Appearing on behalf of the Plymouth Fire Department were Brian Winner, Esq. and Lt. Robert MacKinnon.

Present for the Board at the hearing were: Maurice M. Pilette, Chairman; Roderick J. Fraser, Jr.; Thomas Coulombe; Alexander MacLeod; Peter Gibbons; John Mahan; 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/determination of the Plymouth Fire Department relative to the subject building in accordance with the provisions of M.G.L. c. 148, § 26G½?

D) Evidence Received

1. Application for Appeal filed by the Appellant
2. Appellant's Statement in support of Appeal
3. Designation of the Representative of the Lodge of Elks
4. Order of Notice of the Plymouth Fire Department
5. Notice from the Plymouth Fire Dept. regarding requirements of Chapter 304
6. Draft, unsigned Memorandum of Agreement from Plymouth Fire Department
7. Certificate of Inspection (expiration 7-31-08)
8. Fire and Life Safety Certificate of Inspection – Plymouth Fire Dept. (dated 11-08)
9. Purchase and Sale Agreement – property of the Plymouth Lodge of Elks
10. Invoice – Alarm Concepts, Inc. (fire alarm panel, detectors, etc.)
11. Copies of Rental Contracts
12. Drawing of 2nd Floor Function Hall
13. Photographs of Exterior of Facility (labeled A and B)
14. Photographs of Interior of Facility (labeled pages 1-10)
15. Notice of Hearing to Appellant
16. Notice of Hearing to Plymouth Fire Department
17. Copies of two Memoranda that accompany Hearing Notices

E) Subsidiary Findings of Fact

- 1) By written notice dated August 11, 2008 and received by the Appellant on August 13, 2008, the Plymouth Fire Department issued an Order to the Appellant requiring the installation of an adequate system of automatic sprinklers in a building located at 52 Long Pond Road, Plymouth, MA, in accordance with the provisions of M.G.L. c. 148, s. 26G½. The building at issue is owned and operated by the Plymouth Lodge No. 1476, B.P.O Elks, a private non-profit organization. The Appellants filed their appeal of the Order with this Board on September 23, 2008.
- 2) The Certificate of Inspection issued by the Town of Plymouth (expiration date of July 31, 2008) indicates that the facility was inspected on November 30, 2007. Said Certificate indicated a use group classification of "A-3" for the entire building with a total capacity of 225 persons. The specific occupancy limits were as follows:

First floor TV Room	25 persons
First floor Game Room	20 persons
First floor Bar	20 persons
Second floor Lodge Room	110 persons

Second floor Meeting Room 25 persons
Second floor Bar 25 persons

- 3) The Appellant organization owns and operates a two-story, steel framed and metal sided building with facilities for public assembly. The first floor of the facility contains two racquetball courts measuring 20 x 40 x 20 (the establishment was previously a health club/racquetball facility). The remainder of the first floor contains a members' lounge/bar, a game room, two private offices, two storage rooms, three restrooms, and locker/shower facilities, which are no longer used. The overall floor area of the first floor is 8,826 sq. ft.
- 4) The second floor of the building houses the "Lodge Room" which is used as a function hall. It features a small, elevated platform, dance floor, service bar, adjoining meeting room, rest rooms, a commercial style kitchen, and storage/mechanical rooms. The second floor consists of approximately 7,200 sq. ft of total floor area. The dance floor area does not feature special lighting arrangements, which require low room lighting. The total area available for functions consists of approximately 2,860 sq. ft. The combined (lodge room, meeting room, and bar area) occupant capacity for this second floor function area is 160 persons. Based upon the available floor area and the listed occupant load, the function hall is deemed "un-concentrated." The function area is now used approximately two to three times per month. During the previous three years, the facility held approximately 30-35 functions per year, an average of approximately 3 functions per month. Included in this number are Elks Lodge functions, which are usually limited to members and their families.
- 5) According to testimony, the facility holds a "club" liquor license, which allows the service of all kinds of alcoholic beverages until 1:00 a.m.
- 6) The Appellant testified that in late 2005 or early 2006, the Elks lodge had signed a purchase and sale agreement to sell the facility and property. Due to the pending sale, the Plymouth Fire Department decided not to issue an Order to install sprinklers. However, upon subsequently learning that the sale of the building/property was not going to occur and that the Appellant was conducting significant renovations to the building, the Plymouth Fire Department issued the Order to install sprinklers. There was evidence and testimony that the Appellant had negotiated a memorandum of understanding with the fire department that was apparently never finalized and signed. Under said agreement, a sprinkler system would not be required as long as the Appellant met certain conditions regarding the operation of the facility and installed certain updates to the fire protection system.
- 7) Based upon the testimony of the representatives of the Appellant, most of the functions, which feature music for dancing purposes, are dining events that feature a meal as the primary attraction. Such events include, but are not limited to: weddings, christenings, holiday and birthday parties. The Appellants testified that at such events, the guests are present as the result of written invitation or limited advanced ticket purchase. Tickets are not available to the general public for purchase at the door. Attendance, seating and the number of meals are determined by prearrangement. The agreed upon number of guests is not exceeded. They testified that the events have fixed starting and ending times (not beyond midnight) and do not have later than average operating hours. Meals are usually served buffet style or served at the tables. The tables

and chairs are neatly arranged and not positioned in such a manner to create ill-defined aisles. When dancing occurs at such events, it is limited to those persons who are attending for the purposes of eating a meal. Each guest has a seat at a table. The dance floor does not feature any special or multi-colored lighting affects. Although the hall has light switches, there was no evidence to suggest the recent utilization of low lighting levels. According to the testimony, the characteristics of such events are within the control of an on-site steward or manager and are established by a written agreement, which contains the details about the events. The representative of the fire department did not produce any evidence of significance that would tend to contradict the testimony of the Appellants regarding the characteristics of such events.

- 8) According to testimony received from both the Appellant and the Plymouth Fire Department, there is a physical separation (stairwell and door) between the first floor bar area and the second floor function hall. The Appellant also indicated that there is an exterior entrance directly into the second floor function hall, as well as an exterior elevator lift to the second floor. The first floor bar and the second floor function areas provide separate bars, bar service and rest rooms. These features allow the function hall and the bar to operate separately and independently. Both the function hall area and the bar area have separate occupant capacities and routes of egress. During function events, function hall patrons acquire their beverages at a separate bar dedicated to serve the function activity. Patrons are not generally allowed to purchase beverages from the first floor members' bar and game room area. Appellant testified that there is a separate on-site steward who manages the events on the second floor. The Appellant indicated that on rare occasions, Elk members, especially Elk lodge dignitaries may, in preparation for special lodge events, visit the bar and other first floor areas prior to entering a special lodge function on the second floor. However, this is not a routine occurrence.
- 9) The Appellant did receive an estimate, which indicated that the cost for the installation of an adequate sprinkler system was approximately \$85, 000.00. This cost did not include the installation of a new, larger water main, which will probably cost an additional \$20,000.00.
- 10) The Appellant contends that the second floor function hall is not subject to the law since the activities, which occur within the hall, feature a meal as the primary attraction. They indicated that the operation and configuration of said hall meets all seven characteristics established by this Board, to justify determinations that sprinklers were not required in previous cases classified as "privately organized dining events."
- 11) The fire department testified that their determination to require a sprinkler system under s. 26G½, was based upon the current overall occupant capacity, which is over 100 persons, the existence of an all alcohol liquor license, and the presence of a bar, bar activities and dancehall/nightclub-like features in certain portions of the building. The representative of the Fire Department does not believe that this facility meets all of the characteristics necessary to determine that sprinklers are not required based upon previous decisions of this Board for "privately organized dining events." The fire department acknowledged that it did not originally enforce the sprinkler law, since it was understood that the building was going to be sold. There was a tentative, yet not formally executed agreement, that a sprinkler system would not be necessary if certain conditions were met. Such conditions included, among other items: an updated fire protection system, an agreement that the Appellant would comply with certain conditions regarding the use and operation of the establishment and notification to the fire department of certain changes to the

facility. The representative of the Fire Department indicated that the Appellant did not provide sufficient information or documentation to establish that all the requirements of the tentative agreement were met. However, at the hearing, the fire department did acknowledge that the Appellant is now largely in compliance with the agreement, except for several outstanding documents. It was also the opinion of the fire department representative that substantial renovations have occurred since the original tentative agreement. It appears that some of these renovations/modifications were made as a result of the tentative agreement.

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) Based upon the most recent Certificate of Inspection and other evidence submitted to this Board, this facility features a combination of uses and activities. Clearly the building contains a bar/lounge area, which features, on a routine basis, bar-like characteristics. However, this facility also features a function hall. Buildings that feature combined characteristics such as bar, function or restaurant are fairly common throughout the Commonwealth and present unique challenges in implementing the provisions of section 26G½. In an attempt to interpret the legislative intent of this law, as applied to such establishments, the Board will look to the plain language of the statute in rendering a determination. The Board notes that section 26G½, in pertinent part, requires the installation of an adequate system of automatic sprinklers in: “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 ...nightclub, dancehall discotheque, bar or similar entertainment purposes...”. In determining whether the sprinkler requirement will apply in this case and other similar cases that involve a building, which features a combination of characteristics, the Legislature’s use of the words “portions thereof” in describing the areas of the building subject to the sprinkler installation is significant. This language clearly envisions an analysis of the building’s characteristics and floor plan to determine if a reasonable separation exists between that portion of the building used or designed for bar or entertainment purposes and the other portion of the building which may not be subject to the law. In determining if a sprinkler system is required in such “combination” establishments this Board has established the following two-part analysis:
 1. Is that portion of the building used or designed as a bar, reasonably apportioned and separate from the other areas of the building? In determining this question there must be a sufficient physical separation that exists between the entertainment or bar portion from the rest of the building, which prevents the occupants or activities of the bar from expanding into the dining area. Such separation can include a permanent wall or closed door. Additionally, there must be a separation in an operational or

business context that exists, which assures that the activities that occur in the bar, or entertainment area do not overflow or expand into the other areas.

2. If the separation exists, as described in question #1, does that portion used or designed for bar or entertainment purposes legally exceed a capacity of 100 persons or more?
- 3) The characteristics of this establishment, as applied to the above analysis, indicates the existence of a physical separation between the first floor bar area and the other portions of the building, including the second floor banquet function hall, which prevents the bar activities to expand into the other areas of the building. This separation includes a stairway with a door that is capable of closing. The bar area also has a separate and independent means of egress and separate restrooms. Additionally, there was testimony that a separation, in an operational and business context, exists which assures that the activities that occur in the bar area, do not overflow or expand into the function hall or other areas. Those first floor portions of the building that have the characteristics of a bar have a total capacity of sixty (60) persons as indicated on the Certificate of Inspection. This capacity is less than the statutory capacity of 100 persons or more, which would require the installation of sprinklers in this particular first floor “bar” portion of the building.
- 4) With respect to the second floor, there are essentially three areas used in combination during function/ banquet type events. These areas (second floor bar, hall and meeting room) have a combined listed capacity of 160 persons as evidenced by the current certificate of occupancy. This second floor area used for functions is physically and operationally separate from the other portions of the building as described above. This separation includes a stairway with a door that is capable of closing. Additionally, there was testimony that a separation, in an operational and business context, exists which ensures that the activities that occur in the function area do not overflow or expand into the first floor bar areas. The function area has a separate bar area and restrooms.
- 5) It is clear that the capacity of the second floor function area is over 100 persons. However it appears that it is used and/or rented out on an occasional basis for a variety of different events, some of which feature music by a DJ for dancing purposes. However, based upon the evidence, it appears that these events also feature a meal as the primary attraction. Notwithstanding the incidental appearance of live or recorded music for dancing purposes, this Board has concluded, in prior decisions, that under certain circumstances, a portion of a place of assembly which provides facilities for “organized private dining events” may not necessarily be subject to the retroactive sprinkler installation requirements of M.G.L. c.148, s. 26G½. The existence of certain characteristics of such dining events is distinguishable from the “A-2 like use group ” characteristics that this Board concluded were typical of nightclubs, dancehalls and discotheques and within the legislative intent of this law. The factors that this Board considers in such situations are as follows:
 - a. The facility is used for events that feature a meal as the primary attraction;

- b. The facility is used for events that are organized for the purpose of a private function. Attendance for each specific event is limited and pre-arranged between the facility operator and the private event organizers. The number of guests is limited by written invitation or limited ticket availability and does not exceed the agreed upon attendance limit;
- c. Each event has a definite starting and ending time;
- d. Tables and chairs are arranged in well-defined aisles and in such a manner to not impede easy egress;
- e. There are no significantly low lighting levels;
- f. The maximum documented legal capacity, based upon the available floor space, is not less than 15 feet (net) per occupant. The Board notes that this formula is consistent with the definition of the “unconcentrated” Assembly Occupancy found in 780 CMR, The State Building Code (6th Edition), table: 780 CMR 1008.1.2; and
- g. The characteristics of the event, as referenced above, are strictly controlled by an on-site manager and are made part of a written function event contract.

Examples of organized private dining events may include organized banquets, private parties, fundraisers, wedding receptions and ceremonial banquet events, as long as all of the aforementioned characteristics exist. This determination does not preclude such a facility from ever hosting an event that features music by a live band or recording, dancing or similar entertainment as the main attraction. Under the provisions of M.G.L. c.148, s. 26G½, 4th paragraph, such a facility may be used as a nightclub, dance hall, discotheque or similar entertainment purposes on a temporary basis without the need to install an adequate system of automatic sprinklers under said section. However, such temporary use is allowed only if a permit is issued for such use by the head of the fire department in consultation with the local building inspector. The issuance of such a permit is a matter within the sole discretion of the head of the fire department who may set the terms and conditions to protect against fire and preserve public safety.

- 6) The Board concludes that the majority of social activities within the function hall that feature “A-2 like” activities, such as music and dancing, are considered “privately organized dining events” which feature a meal as the primary attraction. Additionally, the Board finds that said area, as currently used, meets the seven (7) characteristics as stated above. Accordingly, this function area, as currently used, is not subject to the sprinkler requirements of s. 26G½ as long as the characteristics stated in section F, paragraph (5), items (a) through (g) are met for all events that feature music or entertainment. The current classification of this building as an “A-3” and not “A-2,” is also a factor in this determination. The “A-2” classification is typical for those buildings used for dancehall, or nightclub activities.

G) Decision and Order

Although a bar area exists in this building, it is sufficiently apportioned and separated, both physically and operationally from the second floor function hall and other areas of this building. This first floor portion of the building, used or designed as a bar, does not have a legal capacity of 100 persons or more as required by s. 26G½ sprinkler mandate. Therefore, it is not subject to the sprinkler requirements of s. 26G½.

The function hall, as currently operated, is not used or designed as a nightclub, dancehall, discotheque, bar or for similar entertainment purpose, since it does not present the characteristics typical of an “A-2 like” assembly use group. Additionally, this function hall area is sufficiently apportioned and separate from the remaining areas of the building. This function hall is also operationally separate from the remaining portions of the building including the bar area and club quarters.

For the foregoing reasons, this Board unanimously **reverses** the Order of the Plymouth Fire Department to install sprinkler protection in the subject building in accordance with the provisions of M.G.L. c.148, s. 26G½.¹ This determination is conditioned upon:

1. The continued use and operation of the establishment in a manner consistent with the findings herein, including, the continual maintenance of the physical and operational separation of the activities of the function hall and the bar areas.
2. The establishment assures that the seven characteristics stated in Section (F) paragraph (5), (a) through (g), are consistently met for all events that feature music, dancing or similar entertainment activities, unless such events are of a temporary nature and conducted pursuant to a permit issued by the head of the Fire Department.

H) Vote of the Board

Maurice Pilette, Chairman	In Favor
Roderick J. Fraser, Jr., Commissioner	In Favor
Thomas Coulombe,	In Favor
Alexander MacLeod	In Favor
Peter Gibbons	In Favor
John Mahan	In Favor
George Duhamel	In Favor

¹ The Board notes that certain buildings designed or used for occupancy as a nightclub, dancehall, discotheque, bar or for similar entertainment purposes, with a capacity of 100 persons or more, which are constructed or substantially altered pursuant to an approved by building permit on or after December 1, 2004, may be subject to separate provisions of the State Building Code. (see St. 204, Ch. 304, s. 4A; G.L. c. 143, s. 97A). However, this Board is without jurisdiction to make such determinations relative to the requirements of the Building Code.

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 M. Pilette, Chairman

Dated: February 11, 2009

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

Arthur B. Powers, Jr.
Plymouth Lodge of Elks # 1476
52 Long Pond Road
Plymouth, Massachusetts 02362

Lt. Robert MacKinnon
Battalion Chief Michael A. Young
Plymouth Fire Department
114 Sandwich Street
Plymouth, Massachusetts 02360