



MITT ROMNEY
GOVERNOR

KERRY HEALEY
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 # 2006-64
43 Church Street
Salem, Massachusetts

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 26G1/2 and Chapter 6, section 201, relative to a determination of the Salem Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building owned by the Salem Church Street Realty Trust which contains the Lyceum Restaurant which is operated by Salem Restaurant, Inc. (hereinafter referred to as the Appellant). The building, which is the subject of the order, is located at 43 Church Street, Salem, MA.

B) Procedural History

The City of Salem Fire Department issued an Order of Notice, received by the Appellant on January 17, 2006, informing it of the provisions of M.G.L c. 148, s.26G1/2, which requires the installation of an adequate system of automatic sprinklers in certain existing buildings or structures. The subject building is located at 43 Church Street, Salem, MA. The Appellant filed an appeal of said order on March 3, 2006. The Board held a hearing relative to this appeal on November 8, 2006, at the Department of Fire Services, Stow, Massachusetts.

Appearing on behalf of the Appellant was: George Harrington, Proprietor, and attorneys George W. Atkins, III and Paige K. Hintlian. Appearing on behalf of the Salem Fire Department was Chief David W. Cody, and Charles R. Holloran, Jr., Fire Inspector.

Present for the Board were: Paul Donga, Acting Chairperson, Alexander MacLeod, Peter Gibbons, and John J. Mahan. 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 Salem Fire Department relative to the subject building in accordance with the provisions of M.G.L. c.148, s. 26G1/2?

D) Evidence Received

1. Application for Appeal by Appellant
2. Written Statement in Support of Application for Appeal
3. Order of Notice of Salem Fire Department
4. Certificate of Inspection
5. Floor plan of Facility
6. Notice of Pre-Hearing Status Conference to the Appellant
7. Notice of Pre-Hearing Status Conference to Salem Fire Department
8. Notice of Hearing to Appellant
9. Notice of Hearing to Salem Fire Department
10. Appellant's Submissions (1-16)
 1. Application for Appeal
 2. Order of Notice
 3. Notice of Hearing to Appellant
 4. Appellant's Proposed Stipulation of Facts
 5. Certificates of Inspection 2004-2006
 6. Liquor License
 7. Entertainment License
 8. Floor Plan
 9. Photographs (1-10)
 10. Food/Liquor Sales for three (3) years
 11. Sample Menus
 12. Examples of Restaurant Reviews
 13. Rental Agreement
 14. List of Functions
 15. Lyceum Website
 16. Appellant's Memorandum
11. A&B: Salem Fire Department submissions of Lyceum Website

E) Subsidiary Findings of Fact

- 1) The City of Salem Fire Department issued an Order of Notice, received by the Appellant on January 17, 2006 informing it of the provisions of M.G.L c. 148, s.26G1/2, which requires the installation of an adequate system of automatic sprinklers in certain existing buildings or structures. The Appellant filed an application for an appeal with this Board on March 3, 2006. The subject building is located at 43 Church Street, Salem, MA.
- 2) The Appellant, The Lyceum, operates a two-story facility. According to a Certificate of Inspection issued by the Salem Building Department on December 7, 2005, the entire facility is classified as an "A-3" use group. The certificate indicates that the first floor dining room

occupancy is 110 persons and the bar area on the first floor has a capacity of 40 persons. The first floor has three areas characterized as “dining” areas on a floor plan submitted by the Appellant. One such dining area, located directly off the bar area, consists of 347 s.f. The other areas consist of 474 s.f. and 746 s.f. each. There is no separate occupant capacity established for each dining area. The bar area has a total of s.f. of 460 S.F. The second floor area consists of two separate rooms described on the Appellant’s floor plan as “meeting” areas. One area consists of 1,100 S.F. and the other area consists of 522 S.F. In accordance with the Certificate of Inspection, the second floor area has a total occupancy of 108 persons, and the mezzanine or “third floor” (as indicated on the Certificate of Inspection), has occupancy of 16 persons.

- 3) It is the Appellant’s position that the facility, although it features a bar in the first floor should be deemed principally a restaurant and, as such, is specifically not subject to the provisions of M.G.L. c. 148, s. 26G1/2. The Appellant testified that the breakdown of food to alcohol, is approximately 70% food to approximately 30% alcohol. Appellant contends that if the Board determines that the facility has characteristics typical of both a restaurant and a bar, the facility has sufficient “separation” between those dining portions and the “bar” portions to eliminate the need for compliance with said s. 26. under previous Board decisions if the capacity of the bar area is less than 100 persons. With respect to the second floor, Appellant contends that this area is mainly used for food service and function and does not feature characteristics typical of a nightclub or bar as determined in previous Board decisions.
- 4) The Board notes that a copy of the restaurant’s menu which is posted on the front of the building and also on the business website, advertises the establishment’s name as the “ Lyceum Bar & Grill”. It also indicates that the facility has “rooms for Private Functions upstairs, both with large attractive windows, the first equipped with a small, fully-stocked bar and a lovely working fireplace, with wide plank floors and exposed beams, the second a bit more formal with carpeting and a dance floor”.
- 5) The Appellant indicated that the facility, particularly on the first floor, offers a wide selection of full course meals. The kitchen closes at approximately 10:00 p.m. The Appellant indicated that the bar area on the first floor is open until 12:30 a.m. The facility holds a full service liquor license that allows the establishment to serve “all kinds of alcoholic beverages” seven days a week from 11:00 a.m. to 1:00 a.m. The facility also has an entertainment/amusement license issued by the City which legally allows the establishment to feature “radio, television, and live music limited to 6 musicians”. The Appellant indicated that piano music is offered on weekdays and that on many Friday and Saturday nights, there is usually a piano or guitar player or, on occasion, a 3-4-piece band. The musical entertainment is usually provided from 9 p.m. to 12 a.m. Appellant indicated that this musical entertainment is provided for the diner’s pleasure and for bar patrons who may not be eating a meal. The entertainment sets up in the front portion of the bar area. There is no dance floor or special lighting effects.
- 6) Although there was inconsistent testimony, the board finds that diners are allowed to continue eating their meals and may remain in all first floor dining areas well after the kitchen is closed and only bar service is provided.
- 7) Although separate areas are described on Appellant’s floor plan, there appears to be no significant physical separation that separates these dining areas from the bar area. There are no doors which

separate the bar area from the dining areas to facilitate the operational ability to control the flow of patrons after dining activities cease and bar service remains open and entertainment is ongoing.

- 8) With respect to the second floor meeting/functions area, the Appellant indicated that the second floor is used for function events that may involve entertainment in the form of music for dancing purposes, but invariably involves privately organized dining events that feature a meal as the primary attraction. This area is served by a separate service bar used for the service of a variety of alcoholic and non-alcoholic beverages. The establishment indicates that it does not allow patrons who are attending a function on the second floor to the first floor bar area, thus avoiding any uncontrolled or concentrated occupancy to gather on one floor or the other. The service bar on the second floor is only open during function events. Examples of such functions include: anniversaries, bridal showers, weddings, christenings, rehearsal dinners, charity events and business organization dinners. During all times that music is offered for dancing or entertainment purposes, such entertainment is offered merely incidental to the service of a meal, which is the primary attraction. At the hearing, the Appellant indicated that such function events met the criteria of a privately organized dining event, including the “unconcentrated” occupancy load of the second floor based upon the existing floor space. The Appellant stated that all functions are arranged by contract and that each event has a definite start time and end time. A manager is always present during events.
- 9) The Salem Fire Department, through Chief Cody, stated that he had concerns with the “free flowing” characteristics of the first floor dining and bar areas and that inadequate physical and operational separation exists between the dining areas and the bar to consider the bar area as a truly separate portion of establishment. Chief Cody stated that once an individual enters the facility, the whole first floor is accessible. There are no doors or other separation between the various dining rooms and bar. He indicated that in his experience with the facility he has not seen any indications that the establishment shuts down dining areas or limits capacity to only 40 persons in the bar area.
- 10) The fire department did not present evidence of significance which contradicted the characteristics conducted in the second floor function area as presented by the Appellant. But, Chief Cody indicated that he had concerns with sufficient egress in the event of an emergency, since two of the three egress routes require patrons to pass through a small bar area (lifting a swinging bar top) or a preparation area to gain exit. The Salem Fire Department also submitted into evidence, a copy of the Lyceum website from September 19, 2006, which indicated that the establishment held itself out as having the ability to accommodate up to 150 persons for a cocktail & hors d’oeuvres or cocktail & food station reception notwithstanding the 108 (plus 16 in the mezzanine) person occupant load. After discussions with the Fire Department, who was concerned over potential overcrowding situations, the establishment has modified the advertisement.
- 11) The Appellant did not submit any cost estimates for the installation of an adequate sprinkler system. Additionally, the appellant did not present plans or a technical basis to support a request for a modified or partial sprinkler system in any portions of the establishment.

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) 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.26G1/2. This 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, 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.

- 4) The subject building has been classified as a place of assembly with a capacity of 100 persons or more. Additionally, the record clearly indicates that there are significant characteristics that this facility features, particular in the first floor areas, that are typical of a “bar” or “nightclub” as those are used in M.G.L. c. 148, s.26G½.
- 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. 26G½, this Board looks 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 which is consistent with its “A-3” building use classification. However, in looking at the characteristics as a whole, it also features substantial characteristics typical of a bar and nightclub.
 1. The establishment features later than average operating hours (12:30 a.m.).
 2. 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.

3. The bar remains routinely open for several hours after the kitchen is either completely closed or only limited food service is available.
 4. Based upon the establishment's name and presentation to the general public, a customer can reasonably expect a bar, pub or nightclub type establishment. The Board notes that a copy of the menu is displayed to passersby indicating that the establishment holds itself out as the "Lyceum Bar & Grill".
 5. The interior of the establishment features a décor and atmosphere typical of a bar or pub. The bar area consists of a variety of seating arrangements including a fully stocked bar with high-back bar stools in addition to wooden tables and a fireplace/hearth.
 6. Piano music is offered routinely during weekdays. On many Friday and Saturday nights, there is usually a piano or guitar player or, on occasion, a 3-4-piece band. The entertainment is usually offered from 9 p.m. to 12 a.m. and is offered for customers in both the bar and dining areas which remain open during such entertainment appearances.
 7. This establishment derives a significant portion of its revenue (30%) 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. 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 designed, used and marketed as an establishment that features a significant number of characteristics that are also typical of a nightclub or bar and is therefore within the scope of M.G.L. c. 148, s. 26G½, 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. 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. 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.

Such factors do not currently exist in this establishment. The establishment failed to establish the existence of sufficient physical separation between the first floor bar area and the adjoining first floor dining areas to allow this board to apportion the bar area from any dining area. There was inadequate testimony to support a finding that the establishment maintains an operational separation that assures that the activities, characteristics or capacity of the first floor bar area do not expand into the first floor dining areas. Additionally, the routine and regular entertainment features that exist in this establishment several times per week is clearly not the type of "temporary" entertainment activities that are within the scope the temporary permit allowance of said s. 26G1/2.

- 9) The second floor function hall portion of this building is likewise used for a wide variety of events. However, the record indicates that the majority of these events consist of private functions ranging from dinners to wedding receptions. Additionally, there are a significant number of events in this room that feature musical entertainment for dancing purposes. However, it appears that many of these events are classified as organized private dining events that feature a meal as the main attraction. Such “organized private dining events”, by their very nature, have pre-arranged limitations on attendance and seating because a meal is being prepared and served. They tend to have a fixed starting and ending time and do not have later than average operating hours. Whether the meal is buffet style or sit-down, each guest has a chair and a table to sit down and eat. Although there may be dancing to live or recorded music during some portion of the event, the entertainment is not the main feature of the event. The dancing activity is limited to those persons who are attending for the purposes of eating a meal. In such situations the occupant load is not typically concentrated or crowded.
- 10) 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 the certain characteristics of such dining events is distinguishable from the “A-2 like” characteristics that this Board concluded were typical of nightclubs, dancehalls and discotheques and within the legislative intent of this law. The characteristics are as follows:
1. The facility is used for events that feature a meal as the primary attraction.
 2. 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.
 3. Each event has a definite starting and ending time.
 4. Tables and chairs are arranged in well-defined aisles in such a manner to not impede easy egress, and
 5. There are no significantly low lighting levels, and
 6. 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.
 7. 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 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.26G1/2, 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.

- 11) The board concludes that the majority of social activities within this second floor function area 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. Accordingly, this second floor function area, as currently used is not subject to the sprinkler requirements of s. 26G1/2, as long as the characteristics stated in Section F (# 10), 1 through 7 are met for all events that feature music or entertainment. With respect to the remaining rare occasions that occur in this larger hall that feature “A-2 like” characteristics but do not feature a meal as the main attraction, a temporary permit shall be required, after 11-15-07, from the head of the fire department who may set the terms and conditions of said permit.

G) Decision and Order

Based upon the aforementioned findings and reasoning, the Board hereby **modifies** the Order of the Salem Fire Department to install sprinkler protection in the subject building in accordance with the provisions of M.G.L. c.148, s.26G1/2. The Appellant shall install an “adequate system of automatic sprinklers” as defined in said s.26G1/2 in the first floor level restaurant/bar area, including all rooms, lobbies and other spaces connected thereto and in all kitchen areas. Additionally, the basement area of this establishment is subject to this determination if, in the discretion of the head of the fire department, such adequate protection is required in the basement area to protect the occupants.

Such installation shall be completed in accordance with the following schedule:

- a. The submission of plans and specifications for the installation of an adequate system of automatic sprinklers shall be submitted to the head of the fire department within 60 days of the date of this decision.
- b. Completed installation within 3 years of the effective date of M.G.L. c.148, s.26G1/2 (November 15, 2007)

Such a sprinkler system is not required in the second floor function room area or in the adjoining meeting room or mezzanine level. This determination is conditioned upon the Appellant’s continued use of this portion of the building in accordance with the conditions stated in section F (# 10), 1 through 7 whenever “A-2 like” activities take place in said larger function area or unless a permit is acquired from the head of the Fire Department.

H) Vote of the Board

Paul Donga (Vice Chair)	In favor
Alexander MacLeod	In favor
Peter E. Gibbons	In favor
John J. Mahan	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: November 30, 2006

A COPY OF THIS DECISION AND ORDER WAS FORWARDED BY CERTIFIED MAIL, RETURN RECEIPT TO: George W. Atkins, III, Esq., Ronan, Segal & Harrington, 59 Federal Street, Salem, Massachusetts 01970-3470 **and 1st Class Mail, Postage Pre-paid to:** Chief David W. Cody, Salem Fire Department, 48 Lafayette Street, Salem, Massachusetts 01970.