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The Commonwealth of Massachusetts
Executive Office of Public Safety
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Automatic Sprinkler Appeals Board

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CHAIRMAN

PAUL DONGA
VICE CHAIR

Docket # 2006-180
45 Belmont Street
Northborough, 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 Northborough Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building owned and/or operated by Ken Koury, hereinafter referred to as the Appellant. The building, which is the subject of the order, is located at 45 Belmont Street, Northborough, MA., and houses an establishment that is operated under the name of the West Side Grille.

B) Procedural History

By written notice received by the Appellant on September 1, 2006, the Town of Northborough Fire Department issued an Order of Notice to the Appellant informing him 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 45 Belmont Street, Northborough, MA. The Appellant filed an appeal of said order on October 6, 2006. The Board held a hearing relative to this appeal on April 11, 2007, at the Department of Fire Services, Stow, Massachusetts.

Appearing on behalf of the Appellant were: Ken Koury, Louis DeMichele, and Richard Qualey, owners of the facility. Chief David Durgin appeared on behalf of the Northborough Fire Department and William S. Farnsworth, Jr. appeared on behalf of the Northborough Building Department.

Present for the Board were: Maurice M. Pilette, Chairperson, Chief Thomas Coulombe, Alexander MacLeod, Peter Gibbons, and Aime R. DeNault. Peter A. Senopoulos, Esquire, was the Attorney

for the Board.

C) Issue(s) to be Decided

Whether the Board should affirm, reverse or modify the enforcement action of the Northborough Fire Department relative to the subject building in accordance with the provisions of M.G.L. c.148, s. 26G½?

D) Evidence Received

1. Application for Appeal by Appellant
2. Order of the Northborough Fire Department
3. Notice of Pre-Hearing Status Conference to Appellant
4. Notice of Pre-Hearing Status Conference to Fire Department
5. Notice of Hearing to Appellant
6. Notice of Hearing to Fire Department
- 7A. Certificate of Inspection (issued 1/1/2007)
- 7B. Certificate of Inspection (issued 9/21/2006)
- 7C. Floor Plan
- 7D. Copy of Law
- 7E. Hours of Operation
- 7F. Alcohol License
- 7G. Entertainment License
- 7H. Property Record Card
- 7I. Letter from Appellant to Town of Northborough

E) Subsidiary Findings of Fact

- 1) By notice received by the Appellant on September 1, 2006, the Northborough 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 45 Belmont Street, Northborough, MA in accordance with the provisions of M.G.L. c. 148, s. 26G½. This building is used by an establishment that operates under the name of West Side Grille, a private, for profit, organization.
- 2) According to the current Certificate of Inspection issued on January 1, 2007, the Building Department listed the facility's capacity as 188 persons throughout the facility, with the following breakdown: outer porch – 22 persons, main dining room – 60 persons, bar/lounge – 40 persons, inner porch – 20 persons, and Bostonian room – 46 persons. Said Certificate of Inspection classifies the establishment as an "A-2" establishment.
- 3) This building is a one-story structure. A floor plan depicts a large long bar in the center of the establishment located in an area described as the "lounge". The bar is surrounded by at least 34 bar stools. This lounge area adjoins three other areas described by the Appellant as "dining areas". One of these areas was described as a function area. According to the floor plan, two of these dining areas are partially separated from the lounge area by glass partitions and two separate

entry points for each dining area to the lounge area. However, the floor plan does not indicate the existence of any doors at said entry points. The Appellant testified that the bar area contains hand painted wine pictures, but does not contain beer signs, flags, or other paraphernalia that promote various types of alcoholic beverages. The Appellant also indicated that there are no exterior signs promoting alcoholic beverages.

- 4) The Appellant contends that the establishment is principally used as a restaurant and is therefore specifically exempt from the sprinkler provisions of M.G.L. c.148, s. 26G½. Furthermore, he indicated that the ratio of food sales compared to liquor sales is 70% to 30% respectively. The business features the availability of a wide assortment of full course dinner meals generally available until 10:00 p.m., Monday through Thursday and until 11:00 p.m. on Fridays and Saturdays. The establishment usually opens at approximately 11:30 a.m. and usually closes by 11: 00 p.m. Appellant indicated that the lounge often does not remain open for more than one hour after kitchen service is shut-down, but may do so on weekends. There was testimony indicating that a customer can patronize this bar area and other areas of the establishment for the purchase of liquor at any time during the hours of operation.
- 5) The establishment has been issued an entertainment license which authorizes it to feature a wide range of live entertainment activities authorized under the provisions of M.G.L. c. 140, s. 183A(2). The Appellant testified that entertainment such as dancing and live music is not currently featured in the facility nor would he allow it. The Appellant indicated the entertainment license also covers the TV's and KENO machines within the facility.
- 6) The establishment holds a full liquor license, which allows "*all forms of alcoholic beverages to be drunk on the premises*" from 11:00 a.m. to 2:00 a.m. Monday through Saturday and from 12:00 p.m. to 1:00 a.m. on Sundays. However, the Appellant indicated that currently the establishment is never open until 2:00 a.m.
- 7) The facility also holds private functions such as bridal showers, rehearsal dinners, birthday parties, golf league events and Lions Club events. These events are hosted in the several dining rooms located adjacent to the lounge area. Patrons at such events may obtain alcoholic beverages from the lounge area or through wait staff.
- 8) The fire department issued the Order to install sprinklers based upon the overall building capacity, the existence of a full bar and lounge areas, liquor sales, the issuance of an entertainment license, and the lack of adequate separation between rooms within the facility. The representative of the fire department further indicated the patrons are allowed to move freely from one area of the establishment to another and noted that persons in one dining room must travel through the lounge area and another dining room to access the KENO game machine. Additionally, wait staff routinely travel from one area to the other during hours of operation. He indicated that during function events alcoholic beverages are provided to event patrons directly from the bar or by wait staff. The Chief indicated that during such events the lights are often subdued to create a lounge or bar-like atmosphere.
- 9) The Chief further indicated that based upon the entertainment license, current liquor license and the current "A-2" use group classification, the establishment is legally authorized and designed to feature live entertainment and serve liquor into the late night hours (2:00 a.m.) and that these

are features typical of a nightclub or lounge and that in his opinion, this is the type of establishment clearly within the scope of M.G.L. c. 148, s. 26G½ and is consistent with other Board determinations which required the installation of an automatic sprinkler system. The Board notes that prior certificates of inspection indicate that the establishment was classified as an A-3 use group. The town building official testified that the Town re-evaluated the use group classification as a result of the new law. The change in use group was based upon a variety of building code factors, the existence of the entertainment license and the liquor license, which allows late night service. The fire department representatives testified that it was their opinion that the establishment is currently legally allowed to conduct nightclub or dancehall activities. The Appellant indicated that he was just recently made aware of the reclassification of the establishment as an A-2 use group. At the hearing, the Board, through its chairman, indicated the possible option of continuing the hearing to a future date in order to give the Appellant additional time to explore options relative to said reclassification. The Appellant failed to request such a continuance, however.

- 10) The Fire Chief expressed concerns in the event of an emergency. He noted the lack of any type of fire alarm device to give warning to occupants in the event of a fire. Additionally, he noted that the egress routes lead directly to the parking lot rather than areas of refuge. Based upon the current occupant load, the chief concluded that there is a potential for concentrated occupancy.
- 11) The Appellant indicated that he has received informal estimates to install sprinklers for approximately \$40-\$50,000. He indicated that this cost would create an unreasonable hardship on the business. Upon inquiry by the Board, the Appellant could not explain the basis for the stated installation estimate and did not submit documentation to support the stated cost estimate. Appellant did not request the board to consider any modified or limited technical installation options. The Fire Chief noted that the previous owner, in anticipation of the new sprinkler requirements, installed, in cooperation with the town, a new 8" water main to accommodate the new sprinkler system.

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 purpose... (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 most recent Inspection Certificate issued for this establishment on 1-1-07 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. The legal classification of this establishment as an “A-2” assembly occupancy by the Town of Northborough 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).

It is the interpretation of this board that the “A-2 like” occupancy, which was a general reference to the A-2 use group referenced in 780 CMR, The State Building Code, is the type of buildings subject to the provisions of M.G.L. c.148, s.26G1/2.

This establishment’s current classification as an A-2 use group and its ability to legally serve liquor until 2:00 a.m. combined with a valid license to feature a wide variety of live entertainment or cabaret activities, clearly indicates that this establishment is legally “designed” to accommodate nightclub or dance hall activities notwithstanding the current management’s decision not to do so at this time.

- 4) In addition to the current legal ability to operate as a nightclub or dance hall, this establishment also features many characteristics of a bar. The provisions of M.G.L., clearly also 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 a memorandum dated 1-10-2005, the Board acknowledged the existence of establishments that may feature characteristics of both a restaurant and a bar or nightclub. In determining whether or not such “combination” establishments are subject to the provisions of M.G.L. c.26G1/2, this Board will look 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 designed and legally authorized to feature nightclub or dancehall activities. Additionally the establishment features significant characteristics typical of a bar:

- a. The current building classification as an A-2 occupancy and the existence of an entertainment license allows the establishment to legally feature live entertainment.
- b. The establishment holds a full liquor license to serve all types of alcoholic beverages and features bar service, significant 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. Such bar activities and the service of alcoholic beverages are legally allowed to occur until 2:00 a.m. at the Appellant/operator's option. There was testimony that food service usually ceases at approximately 9:00 p.m. However, on weekends bar service may remain open for 1 ½ to two hours after kitchen service has been discontinued.
- c. Bar service and related activities are not limited to the lounge area after dining activities are concluded. Appellant indicated that patrons who are drinking alcoholic beverages are allowed to remain in all areas of the establishment and are allowed to move freely from one area to the other.
- d. Based upon the establishment's presentation to the general public, a customer can reasonably expect a bar type establishment. The interior features a décor and atmosphere typical of a bar. The areas within the establishment consist of a variety of seating arrangements including a fully stocked bar with bar stools, high tables with high stools in addition to several wooden tables and booths with chairs and benches. There are six televisions, including five wide screen televisions for viewing entertainment. There is also a KENO machine. The walls have several murals featuring wine products. The existence of KENO activities and five wide screen televisions are an additional indication of features designed to encourage patrons to purchase alcoholic beverages while they engage in such KENO or sports viewing activities.
- e. The establishment derives a significant portion of its revenue (at least 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 used and

marketed as an establishment that features a significant number of characteristics that are typical of a bar and legally authorized and designed to conduct nightclub or dance hall activities, all within the scope of M.G.L. c. 148, s. 26G½ as interpreted by this Board.

- 8) The Appellant 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 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. These factors do not apply to this establishment. Although separate capacity limits have been established on the most recent Certificate of Inspection, the Appellant failed to establish the existence of adequate physical or operational separation between said rooms to allow the board to clearly establish that certain portions of the establishment are not subject to adequate sprinkler installation. Although there is a separate bar or lounge area, activities from said bar area are routinely allowed to flow into other dining or function areas at all times of operation.

G) Decision and Order

For the foregoing reasons and based upon the current characteristics, legal classification and licensing documents, this Board, by a majority vote **upholds** the Order of the Northborough Fire Department to install sprinkler protection in the subject building in accordance with the provisions of M.G.L. c.148, s. 26G½ in accordance with the following timetable:

Plans for the installation of an adequate sprinkler system shall be submitted to the Head of the Fire department not later than 90 days from the date of this decision.

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, or as otherwise extended pursuant to said law.

H) Vote of the Board

Maurice Pilette, (Chairperson)	In Favor
Thomas Coulombe	In Favor
Alexander MacLeod	Not In Favor
Peter E. Gibbons	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,

A handwritten signature in black ink, appearing to read "Maurice Pilette", written over a horizontal line.

Maurice Pilette, P.E., Chairman
Chairperson

Dated: June 12, 2007

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

Kenneth Koury
West Side Grille
45 Belmont Street
Northborough, Massachusetts 01532

Chief David M. Durgin
Northborough Fire Department
11 Pierce Street
Northborough, Massachusetts 01532-1907