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

Automatic Sprinkler Appeals Board

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CHAIRMAN

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VICE CHAIR

Docket # 2006-194
19 Weed Street
Marlborough, 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 26G½ and Chapter 6, section 201, relative to a determination of the City of Marlboro Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building owned and/or operated by Norman Shaheen of Speakers Inc. d/b/a Speakers (hereinafter referred to as the Appellant). The building, which is the subject of the appeal, is located at 19 Weed Street, Marlborough, MA.

B) Procedural History

By written notice dated November 7, 2006 and received by the Appellant on the same date, the City of Marlborough Fire Department issued an Order of Notice to the Appellant informing it of the provisions of M.G.L c. 148, s. 26G½, which requires the installation of an adequate system of automatic sprinklers in certain existing buildings or structures. The building subject to the Order is located at 19 Weed Street, Marlborough, MA. The Appellant filed an appeal of said Order on December 20, 2006. The Board held a hearing on this matter on November 16, 2007.

Appearing on behalf of the Appellant was: Norman M. Shaheen, owner/operator of the Establishment. Appearing on behalf of the Marlboro Fire Department was Deputy Chief Frederick F. Flynn.

Present for the Board were: Maurice Pilette, Chairman; Stephen D. Coan, State Fire Marshal; Peter Gibbons; John J. Mahan, and; Aime 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 Marlborough 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. Statement in Support of Appeal
3. Order of Notice of Marlboro Fire Department
4. Letter to Fire Department regarding intent to file an appeal
5. Notice of Pre-Hearing Status Conference to Parties
6. 2nd Notice of Pre-Hearing Status Conference to Parties
7. Notice of Hearing to Appellant
8. Notice of Hearing to the Marlboro Fire Department
9. Appellant submission packet items, 1-13
10. Fire Department submission packet, items 1-6

E) Subsidiary Findings of Fact

- 1) By written notice dated November 7, 2006 and received by the Appellant on the same date, the City of Marlboro Fire Department issued an Order of Notice to the Appellant requiring the installation of a system of automatic sprinklers in a building located at 19 Weed Street, Marlborough, MA, in accordance with the provisions of M.G.L. c. 148, s. 26G½. The Appellant filed a timely appeal on December 20, 2007. The Appellant operates a facility known as “Speakers”, a for profit business. The Appellant indicated that he leases the building and that he has been authorized to represent the interest of the owner of the building, who, as per Mr. Shaheen, is aware of the situation at issue and of the hearing.
- 2) This facility consists of a single level building consisting of approximately 4,500 s.f., constructed of concrete block exterior walls with steel truss roof. There is no attic or basement.
- 3) According to the Appellant, the facility is used for restaurant, function and nightclub activities. The facility has been issued a liquor license, which allows it sell “all kinds of alcoholic beverages to be drunk on the premises”. The sale of liquor is allowed 7 days per week, until 1:45 a.m. (consumption time 2:15 a.m.). The Appellant also possesses a “Food” permit”, which allows it to operate, as a food establishment and, among other things ”catering”. According to the establishment’s most recent Certificate of Inspection (exp.11-1-07) the building has been assigned an “A-2” Use Group Classification and has an allowable occupant load of 250 persons. Additionally, the establishment has been issued a license that allows “full” entertainment, including: TV, Radio, Juke Box, and Live entertainment.

- 4) According to Appellant's application for appeal, the Appellant initially contended that the subject building should not be subject to the provisions of s. 26G½, since it is his contention the building is "basically fire proof", that the building has an occupancy of over 100 persons on a limited basis and that the establishment has 6 exits. He indicated that he did not think that the building is subject to the law, since food is usually available to patrons.
- 5) The interior of the building, accessible to patrons, is a wide-open area that hosts a variety of activities relating to function and nightclub. Appellant indicates that when the establishment is open as a nightclub to the public, attendance is usually as follows: Friday nights, 60 persons; Saturdays, 90 persons; Sunday, 190 persons. He thus argues that the facility only has over 99 persons or more on a limited basis (several hours on Sundays). The facility is also routinely used for private functions such as informal wedding receptions, anniversaries, birthday parties and reunions. In 2007, it was indicated that the facility has had or is planning a total of 22 such functions. Appellant indicated that the largest function consists of 99 persons.
- 6) During such private functions and when the facility is open to the general public as a nightclub, the facility routinely features live entertainment, including recorded and live musical entertainment for dancing and viewing purposes.
- 7) Appellant indicated that he leases the building and that his lease is expiring in June, 2008. During the hearing, the Appellant conceded that the building, as currently used, occupied and designed, is probably subject to the law. Appellant requested that if the Board determines that this building is subject to the law, it gives him a reasonable extension to comply. He indicated that a six-month period would be reasonable.
- 8) The Fire Department representative provided testimony and documentation supporting the City's determination that this facility should be classified as a nightclub and bar facility. However, the representative indicated that the Fire Department would not provide opposition to the Appellant's request for a reasonable extension to comply with the law. The Fire Department did submit a copy of a recent newspaper advertisement, dated October 12, 2007, which clearly advertises the type of entertainment and activities typical of a nightclub. The caption reads: "Speakers....Nightclub... Marlboro" and describes the featured entertainment for the upcoming weekend including: Thursday: Slow Dance Night, couples/singles and DJ; Friday: Ladies Night, Top 40 Dance Party; and Saturday: Live band, Summer Street and a free buffet. A photograph of the front of the establishment features multiple posters indicating a wide variety of live musical entertainment every Saturday Night during the months of September, October and November 2007.
- 9) Submitted photographs of the interior of the facility feature a décor and atmosphere typical of a nightclub. The areas within the establishment consist of a variety of seating arrangements including a fully stocked bar with bar stools, tables with upholstered chairs scattered throughout. It features a substantial dance floor and special lighting. There are several signs, ornaments, and banners displayed within the establishment that promote nightclub activities and the consumption of various types of alcoholic beverages. Additionally, it is noted that the establishment offers a free buffet on a regular basis.

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 legal classification of this establishment as an “A-2” assembly occupancy by the City of Marlboro 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 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”. However, it is noted that 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**...”.

- 4) Based upon the use group classification and the legal occupant capacity, this establishment is clearly an assembly use occupancy with an occupant load of 100 persons or over in the establishment at any given time. Although plaintiff indicates that the establishment usually has less than 100 persons in the establishment at any given time, this Board has consistently relied upon the legal occupancy and capacity limits, as indicated on the current Certificate of Occupancy, rather than the whim of the facility operator or business activity level to determine the “capacity” for s. 26G½ purposes. In this case, the occupant load is clearly 250 persons.
- 5) According to testimony and documentation presented at the hearing, this establishment is clearly regularly used and designed, both physically and legally, for nightclub and/or bar activity. This finding is based upon:
 - a) The current classification of this building as an A-2 use group.
 - b) The existence of an entertainment license that allows, among other things, musical entertainment.
 - c) The issuance of a liquor license and the ability to serve liquor into the late night hours.
 - d) The routine and regular appearance of live bands for entertainment and dance purposes as evidence by the testimony of the parties and the copies of numerous advertisements.
 - e) A décor and atmosphere, typical of a nightclub. This establishment features a substantial dance floor, special lighting and several signs, ornaments, and banners displayed within the establishment that promote nightclub activities and the consumption of various types of alcoholic beverages.

- f) Additionally, it is noted that the establishment offers a free buffet on a regular basis. The motive for such complimentary food items is usually to encourage patrons to enter the establishment for the purposes of consuming alcoholic beverages.
- 6) With respect to Appellant's request for an extension, the Board notes that an extension issued under the circumstances of a case, which has been timely filed and properly before it, is different from an appeal that is filed solely for the purpose of seeking a stay or extension of compliance or time to file an appeal. This is particularly true if such enforcement activity, which is the basis for the appeal, is related to a Fire Department Order that was issued months or years earlier. In such instances the 45-day period within which to file an appeal from the original Order has, in most instances, long since passed and the issue is not properly before the Board.

Additionally, pursuant to M.G.L. c. 148, s.26G½, the legislature has specifically left the determination of the issuance of an extension to the statutory compliance deadline (November 15, 2007) to the head of the fire department. With regard to an extension under the circumstances of this case, this Board notes that the provisions of M.G.L. c. 6 § 201, allows this Board, in exercising its powers in a case properly before it, to grant an extension of time for compliance. Such an extension is often necessary since, in general, the filing of a timely appeal stays all proceedings in furtherance of such compliance activity (see M.G.L. c. 6 § 201, (4th paragraph)). It would be unfair to expect an appellant to install an expensive sprinkler system while waiting for a hearing and a future Board decision, which could determine that the installation was unnecessary.

G) Decision and Order

For the foregoing reasons, this Board unanimously **upholds** the Order of the Marlboro Fire Department to install an adequate sprinkler protection in the subject building in accordance with the provisions of M.G.L. c.148, s. 26G½. Said installation shall be performed 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 60 days from the date of this decision.

Installation shall be completed within six months of said decision date.

H) Vote of the Board

Maurice Pilette, (Chairperson)	In Favor
Stephen D. Coan, State Fire Marshal	In Favor
Peter E. Gibbons	In Favor
John J. Mahan	In Favor
Aime R. DeNault	In Favor

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: December 19, 2007

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

Norman Shaheen
Speakers Night Club
19 Weed Street
Marlborough, Massachusetts 01752

Deputy Chief Fred Flynn
Marlborough Fire Department
215 Maple Street
Marlborough, Massachusetts 01752