

**BEFORE THE STATE OF DELAWARE  
FIRE PREVENTION COMMISSION**

**In Re:**

**S & D Hospitality, LLC  
T/A The Flying Fish Saloon**

**Present:**

Marvin C. Sharp, , Chairman  
Bob Ricker, Vice-Chairman  
W. (Bill) Betts, Jr.  
Ron Marvel  
Kenneth H. McMahon  
Douglas S. Murray, Sr.  
David J. Roberts

Steven E. Wilson  
Grover P. Ingle, State Fire Marshal  
Dwayne Fox, Office of the State Fire Marshal  
Thomas Haslam, Office of the State Fire Marshal  
Allison E. Reardon, Deputy Attorney General  
Sherry Lambertson, Executive Secretary

**SUMMARY OF EVIDENCE**

On March 17, 2009 in the Fire Commission Chambers, Delaware State Fire School, Delaware Service Center, Chestnut Grove Road, Dover, Delaware, after proper notice to all parties, the State Fire Prevention Commission met to consider the appeal by S & D Hospitality, LLC, trading as the Flying Fish Saloon, from a decision by the State Fire Marshal requiring that the Flying Fish Saloon install an automatic sprinkler system in accordance with Section 12.3.5.1 of the 2006 Life Safety Code requiring a bar with live entertainment to have an automatic sprinkler system. The 2006 Life Safety Code is adopted by the Delaware State Fire Prevention Commission pursuant to Regulation Part 1, Chapter 1, Section 1-3.5.1.

1. **Steven Wilson** was sworn and testified that he an owner and director of S & D Hospitality, LLC. He is seeking an exception from the Commission's regulations requiring him to install a sprinkler system in the Flying Fish Saloon in order to have live entertainment. He stated that the Fire Marshal determined that the business is a bar and not a restaurant and, therefore, requires an automatic sprinkler system in order to have any type of live entertainment. Mr. Wilson stated that installing a sprinkler system creates a heavy burden because the construction is now complete. It would now cost about \$60,000 to install the system versus the \$16,000 it would have cost if he had been told it was required during the construction process.

Mr. Wilson stated that the first reason for the exception request is that he were not told by anyone in the Office of the Fire Marshal that the sprinkler was required. If he had been told initially, he would have installed it and would be asking for a waiver from the requirement. Mr. Wilson stated that the second reason for the appeal is that he has a 1000 square foot kitchen and one-third of the premises is dedicated to dining. Although he has a license to operate a taproom issued by the State of Delaware and is not required to have a kitchen or to serve food, he stated that he does serve food and that he is classified as a restaurant by the State Board of Health.

Mr. Wilson asked the Commission to review his exhibits including the floor plan he submitted and his menu (admitted collectively as Applicant's Exhibit 1). Mr. Wilson also brought with him a copy of the original public assembly license that the business was granted. He stated that after it was granted and on the day of his grand opening the Fire Marshal's office came in and said they gave him the wrong one and had to change it to one that had no entertainment on it. Mr. Wilson added that, as stated in his letter of appeal, the inability to have live entertainment is a huge burden. If he cannot have live entertainment he won't be able to complete and will not be able to stay in business. The live entertainment his is planning only

refers to acoustic guitarists or a disc jockey; he is not planning on having live bands or anything that would draw big crowds. Mr. Wilson stated that not having entertainment is a hardship. He has been open now for the first quarter and his revenues are down 25 percent from his projections because everyone is leaving after dinner to go see live entertainment at other establishments.

On examination by the Commission members, Mr. Wilson stated that his kitchen permit issued by the health department classifies the business as a restaurant. The restaurant license is hanging on the wall next to the other license. Mr. Wilson questioned who was better qualified to say whether the business was a restaurant, the Alcoholic Beverage Control (ABC) or the health department. He stated that the ABC doesn't deal with food. His business license also says that he is a restaurant. He agreed that as a taproom no one under the age of 21 is allowed in the establishment. He agreed that children are allowed in restaurants.

Mr. Wilson stated that the fact that he was going to have live entertainment was contained in the business plan he submitted to the Fire Marshal's office along with the blueprints. They did not actually discuss it but it was in his plan. Mr. Wilson stated that it was always his intent to have live entertainment. The issue arose when someone from the Fire Marshal's office heard his advertising for live entertainment at the grand opening. That is when the Fire Marshal told them they got the wrong license. The soft opening for the business was on December 18, 2008 and the grand opening was on January 10, 2009.

Mr. Wilson stated that the total square footage of the business is 3025 square feet. He did submit plans for permits to the county. His architect never told him he had to have sprinklers if he was going to have live entertainment. The first he heard of it was on the day of the grand opening. He argued that if he is classified as a restaurant the 2006 law requiring sprinklers for

establishments having live entertainment does not apply to him, or in the alternative he should be granted an exception because he wasn't told he needed sprinklers. He is not eligible for the grandfathering provision for bars because he opened after the 2006 law change.

Mr. Wilson stated that he has had live entertainment on two occasions. The first was on the night of the grand opening and the second time was another night that had already been scheduled. The Fire Marshal's office gave him permits for those events. He has only had, and only ever intends to have, easy listening entertainment consisting of acoustic performances. Mr. Wilson stated that his original intention when he sat down with the ABC was to get a restaurant license. They looked at his plans and told him he would have to get rid of 15 bar stools, have additional dining space and 60 percent of his sales would have to be in food. They told him it would be much easier if he got a taproom license. He stated that he was not from Delaware at the time and followed the suggestion of the ABC. The taproom is open from 3:00 p.m. to 1:00 a.m. Monday through Friday and 11:30 a.m. to 1:00 a.m. on Saturday and Sunday. In the summer he hopes to be open for lunch every day.

Mr. Wilson stated that he had hoped to ask Tim McClanahan questions but did not ask to have him subpoenaed.

2. **Duane Fox** was sworn and testified that the plans for the Flying Fish Saloon were submitted in July of 2008. He signed them in and assigned the assessment to specialist Tim McClanahan. He and Mr. McClanahan reviewed the plans and sent them back for some modifications without meeting with anyone from the business. Mr. Fox reviewed his file and was unable to find anything that indicated one way or another whether the business was going to have live entertainment. He noted that there was no area designated on the plans for entertainment. There were sizable dining and bar areas and a large kitchen. Based on the size and layout of the

business they concluded that it was a restaurant. Mr. McClanahan did go out to the site the day before the plans were resubmitted. The resubmitted plans were approved for a restaurant. There was nothing in any of the plans about live entertainment.

Mr. Fox stated that the 2006 Life Safety Code applicable to this project provides that bars have to be sprinklered (Fire Marshal Exhibit 1). After several failed inspections for reasons unrelated to the appeal, Tom Haslam went out to do the final inspection for Mr. McClanahan. At the final inspection, Mr. Wilson brought up the issue about whether he should be classified as a bar or a restaurant.

Mr. Fox noted that the application dated July 10, 2008 and contained in Fire Marshal Exhibit 1, does have language that advises the applicant that an approval does not relieve the owner from complying with the Commission's regulations. Mr. Fox stated that they heard about the grand opening on a Thursday and went to the business on Friday to tell them they could not have live entertainment. They did give Mr. Wilson permits for the two days he mentioned in his testimony but told him he could not have a permit for every time they wanted to have music.

Mr. Fox stated he did some research on the definition of a restaurant and a taproom. According to the information on the website, ABC Rule 19 defines a taproom is an establishment operated primarily for the sale of alcohol; food is secondary. Although the Commission's regulations do not define a restaurant, a restaurant is defined under Title 4, Rule 19, as a facility under the charge of a chef or cook. It also provides that the service of sandwiches and salads is not the service of meals. A restaurant serves lunch and food is required to be available all hours that the establishment is open. Mr. Fox added that the nearby Town of Rehoboth Beach uses essentially the same language to define a restaurant. Restaurants have specific minimum hours that they must be open for lunch and dinner and alcohol is secondary to the food service. He

noted that Mr. Wilson's menu is salads and sandwiches.

Mr. Fox stated that as a reviewer he is looking to see if the building is code compliant. He relies on the owner to tell them certain things and assumptions are made based on the plans submitted. The 1000 square foot kitchen led them to believe the establishment was a restaurant. In retrospect they probably should have asked more questions but they considered that the kitchen was about one-third of the size of the establishment.

On cross-examination, Mr. Fox stated that he did not know how the department of public health defined a restaurant. He agreed neither the 2006 Life Safety Code nor the Commission's regulations define a restaurant. The Life Safety Code requires bars with entertainment to be sprinklered. He agreed that it does not say anything about restaurants with entertainment.

On examination by the Commission, Mr. Fox said that he never saw a business plan in the file that said there would be live entertainment. The building is an end unit and there was no requirement for the builder to sprinkler the unit when it was built.

3. **Thomas Haslam** was sworn and testified that he did the final inspection. Mr. Wilson talked to him and said he was going to have live entertainment. Mr. Haslam said there was no indication on the plans of where he was going to have live entertainment so he Mr. Wilson where he was going to put the live entertainment and Mr. Wilson stated that he was probably going to move tables and set it up in the corner of the room.

Mr. Haslam told Mr. Wilson that he would have to contact the Fire Marshal's office to make sure he had the right kind of permits before he did anything to have live entertainment; he said that he would.

On examination by the Commission, Mr. Haslam stated that he was at the establishment on December 4<sup>th</sup> prior to the soft opening.

4. **Grover P. Ingle**, Fire Marshal, provided closing comments. Fire Marshal Ingle stated that his office probably did make a mistake in determining that the establishment was a restaurant in the first instance. By way of history he noted that the National Fire Prevention Association (NFPA) Code was revised after the club fire in Maine. The 2006 Life Safety Code requires certain places of public assembly to have automatic sprinklers; bars with entertainment, dance halls, discotheques and nightclubs. All such new establishments are required to comply with the 2006 law. His people looked at Mr. Wilson's establishment as a restaurant. The Fire Marshal does not normally enforce other entities regulations or look at the license another entity is going to issue but they do work with the ABC from time to time to set occupancies. It wasn't until January that he became aware of the issue when he was asked to sign a special permit to allow live entertainment. He explained that the issue was the use of the premises, i.e., whether the primary purpose is as a bar serving food or whether the primary purpose was the service of food with the bar being ancillary. In his experience, health and social services classifies any area that serves food as a restaurant.

Fire Marshal Ingle determined that the establishment was a bar with live entertainment. He advised Mr. Wilson that he did not have authority to grant an exception and that he would have to seek a variance from the Commission. He did not dispute that it would have been less expensive for Mr. Wilson to do if he had known from the beginning. However, it was ultimately his responsibility to meet the regulations and even though the plan reviewer may have also made an error, that error was not intentional or meant to cause harm. It is up to the Commission to decide if Mr. Wilson has established hardship.

**THE LAW**

**§ 6608. Appeals to the State Fire Prevention Commission Procedure.**

(b) Appeals by any person aggrieved by an order or decision of the State Fire Marshal, the Marshal's Deputy or Deputies, or Assistant State Fire Marshals based upon or made in the course of the administration or enforcement of this chapter or local regulations incorporating the State Fire Prevention Commission Regulations shall be taken to the State Fire Prevention Commission. Appeals by any officer, department, board or bureau of the State and the seven counties, cities and political subdivisions thereof affected by an order or decision of the State Fire Marshal, or the Marshal's Deputy or Deputies or Assistant Fire Marshals, in the course of the administration or enforcement of this chapter or local regulations incorporating the State Fire Prevention Commission Regulations shall be taken to the State Fire Prevention Commission.

**§ 6609. Appeals to the State Fire Prevention Commission – Powers upon appeals.**

Upon appeals the State Fire Prevention Commissions shall have the following powers:

. . .

(3) To authorize a variance from particular provisions of the regulations duly promulgated under § 6603 of this title where strict compliance with such provisions would entail practical difficulties or unnecessary hardships, provided such relief may be granted without substantial detriment to the public safety and without substantially impairing the intent and purpose of the regulations promulgated under § 6603 of this title.

**Regulation, Part I, Chapter 1, Section 1-3.5 Codes and Adopted Standards.**

**1-3.5.1** Technical details regarding processes, methods, specifications, equipment testing and maintenance, design standards, performance, installation, or other pertinent criteria as contained in those standards and codes published by the National Fire Protection Association, and listed in Annex A of these Regulations and with any changes, additions, or deletions listed in Annex B of these Regulations shall be considered a part of these Regulations.

**2006 Life Safety Code**

**Section 12.3.5 Extinguishment Requirements**

**12.3.5.1** The following assembly occupancies shall be protected throughout by an approved supervised automatic sprinkler system in accordance with 9.7.1.1(1):

(1) Bars with live entertainment.

**FINDINGS OF FACT**

The Commission finds the following facts to be true based on a review of the evidence, both testimony and documents received.

1. Mr. Steven Wilson submitted an Application for Fire Protection Plan Review in July of 2008 on behalf of S & D Hospitality, LLC, trading as Flying Fish Saloon. The application indicated that the building would be utilized for a “BAR/RESTAURANT” (See Fire Marshal Exhibit 1, page 2).

2. The application form does not have a question asking about live entertainment.

3. Mr. Wilson testified that he submitted a business plan with his construction plans in which he stated that he was going to have live entertainment. The witnesses from the Office of the State Fire Marshal stated that there was no business plan in the file for the project. Mr. Wilson did not produce a copy of the business plan.

4. The building does not have an automatic sprinkler system. Installing a sprinkler system post construction could cost as much as \$60,000.

5. The Office of the State Fire Marshal initially determined that the Flying Fish Saloon was a restaurant based on the plans that showed a 1000 square foot kitchen and no designated entertainment area. The plans did not reference that the establishment would have live entertainment.

6. At the final inspection of the premises Mr. Wilson brought up the issue of entertainment with Mr. Haslam who advised him to contact the Office of the Fire Marshal to make sure he had the correct permit to have entertainment before he did so.

7. The Flying Fish Saloon has a taproom license issued by Alcoholic Beverage Control (ABC). The taproom license prohibits anyone under the age of 21 from entering the establishment.

8. Mr. Wilson testified that his business license and his license from public health state the Flying Fish Saloon is a restaurant.

9. The Flying Fish Saloon has a limited menu and limited lunch service. It is open until 1:00 a.m. each day. Based on the license issued by the ABC, the hours of operation, the limited menu and the inability to admit anyone under the age of 21, the Commission finds that the Flying Fish Saloon is a bar.

10. The Fire Marshal became aware that the Flying Fish Saloon was advertising live entertainment in connection with its grand opening. The establishment was given a special permit for the opening and for one other date to have live entertainment on the premises.

11. The Fire Marshal determined that the establishment is a bar and not a restaurant and is, therefore, required to have an automatic sprinkler installed in order to have a live entertainment.

12. Mr. Wilson would like to have live acoustical performances in his establishment

in order to compete with other businesses.

13. Mr. Wilson has the option of changing his license status with the ABC. He would be required to remove seats at his bar, increase his food service to 60% and change his lunch and dinner hours and menu.

14. The Flying Fish Saloon was constructed after the 2006 change in the law.

15. Errors occurred on the part of both the applicant and the Fire Marshal's Office in not ascertaining or making clear the intended use of the establishment until after it was constructed.

### **CONCLUSIONS OF LAW**

The State Fire Marshal advised the Flying Fish Saloon that it was required to install an automatic sprinkler system in accordance with Section 12.3.5.1 of the 2006 Life Safety Code requiring a bar with live entertainment to have an automatic sprinkler system. The 2006 Life Safety Code is adopted by the Delaware State Fire Prevention Commission pursuant to Regulation Part 1, Chapter 1, Section 1-3.5.1. The Flying Fish Saloon is a bar that was constructed after the change in the law and is, therefore, required to have an automatic sprinkler system installed unless the Commission grants an exception or variance.

The Commission concludes that a variance granted to the S & D Hospitality, LLC, trading as the Flying Fish Saloon to relieve it from any practical difficulty or unnecessary hardship cannot be granted "without substantial detriment to the public safety and without substantially impairing the intent and purpose of the regulations." The changes to the 2006 Life Safety Code resulted from a tragic fire in a bar in Maine in which there were numerous fatalities during a performance involving live entertainment. Although Mr. Wilson has indicated that he does not intend to have the type live entertainment that would cause large crowds to gather, the

purpose of the regulations is to ensure the safety of bar patrons where live entertainment is performed. The regulations do except certain types of live entertainment.

The Commission finds that S & D Hospitality, LLC, trading as the Flying Fish Saloon has an alternative to the variance granted by the Commission.. Mr. Wilson has the option of changing his license status with the ABC. He would be required to remove seats at his bar, increase his food service to 60% and change his lunch and dinner hours and menu.

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**[This section intentionally left blank.]**

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<sup>1</sup> The initial motion to grant a variance failed. The majority of the Commission members determined not to grant the variance for the reasons stated herin.

**DECISION AND ORDER**

It is this 21<sup>st</sup> day of April 2009, the Decision of the State Fire Prevention Commission that the Appeal of S & D Hospitality, LLC, trading as the Flying Fish Saloon, is denied by a vote of 4 to 3 of the undersigned Commission members.

**IT IS SO ORDERED.**

**STATE FIRE PREVENTION COMMISSION**

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Marvin C. Sharp, Jr., Vice-Chairman

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Bob Ricker, Vice-Chairman

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Willard (Bill) Betts

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Ron Marvel

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Kenneth H. McMahon

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Douglas S. Murray, Sr.

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David Roberts