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Investigative Report To The Governor

Beverly Hills Supper Club Fire May 28, 1977



**Submitted
September 19, 1977**

INTRODUCTION

This report on the tragic Beverly Hills Supper Club fire of May 28, 1977 is the product of a massive effort undertaken by several state and national level agencies over the past three and one-half months. Developed in an administrative context, not privileged or encumbered with access to formal processes of the law such as rules of evidence, it represents the best collective assessment of the participating professionals, of factors which directly contributed to the loss of life and injury during the fire itself and a wide range of legal issues including, but not limited to, assessment of compliance with applicable laws, regulations and codes. By design, it focuses on major clear-cut facts and issues and does not attempt to resolve many peripheral or conjectural issues.

The release of the report should not be taken to signal the end of the investigation, but rather the beginning of a process of thorough public and official scrutiny of the pertinent facts. Indeed, the release signals the time when the evidence itself is made available for study and use by judicial, legislative and executive interests. No attempt has been made to report all of the evidence in this document. Such a report would not be meaningful because of the sheer magnitude of the evidence - more than 15,000 pages or pieces. Of course, the report does contain numerous references to and citations of many pieces of the evidence.

ORGANIZATION OF THE REPORT

METHODOLOGY

Section C

This section identifies agencies which have been involved in the development of the report, describes the processes used to gather or generate data and evidence, and outlines the analysis and report writing phases.

BASIC DATA REPORT

Section D

Beginning with a historical account of the Beverly Hills facility, this section includes very detailed and sometimes technical information regarding the configuration and condition of the Beverly Hills Supper Club on May 28, 1977. Also discussed are relevant aspects of the operation of state and local agencies with responsibilities for oversight, inspection and/or code enforcement at Beverly Hills.

FIRE REPORT

Section E

This section of the report includes a detailed description of the physical phenomena associated with the fire itself from its very early stages until it had consumed the entire structure. Also included in this section is a chronology of human actions during and immediately following the fire, both by occupants of the structure and by personnel of the emergency agencies who responded to the fire.

INVESTIGATIVE CONCLUSIONS

Section F

Based upon the evidence outlined and reported in the two previous sections of the report, this section identifies direct contributing factors to the loss of life and injury. Each factor is discussed in detail and evidence on which the conclusions are based is identified.

LEGAL ANALYSIS - GENERAL CONSIDERATIONS

Section G

Federal, state and local fire safety requirements are outlined as expressed in statutory, regulatory and code sources.

ASSESSMENT OF COMPLIANCE WITH APPLICABLE LAW

Section H

Based upon the outline developed in the previous section, compliance with the law is assessed on the following dimensions - the structure itself, operational procedures of the Beverly Hills Supper Club and the adequacy of governmental oversight, regulation and enforcement.

THEORIES AND ISSUES OF COMPENSATION

Section I

Alternative theories regarding compensation to victims of the fire are examined both in statutory and case law contexts.

METHODOLOGY

With a radio transmission from the Fort Thomas, Kentucky Police Department, at 10:22 p.m., EDT, on Saturday, May 28, 1977, the Dry Ridge Post of the Kentucky State Police became the first agency of the Commonwealth of Kentucky to receive recorded notification of the Beverly Hills Supper Club fire. In turn, through the communications network of the State Police, and other state agencies, information was disseminated which resulted in the deployment of personnel of the State Police and the State Fire Marshal's office. The initial function of the State Police personnel called to the scene was to secure the area so as to protect the remains of the structure, protect the hundreds of automobiles which were parked with keys in ignition switches and to facilitate the efforts of fire fighting personnel actually engaged in the attempt to control the fire. This security function was maintained from the time of arrival until 8:00 a.m. Saturday, June 11, 1977.

Commencing with the arrival of the Commissioner of State Police at approximately midnight, communications were established with the Mayor of the City of Southgate and the Southgate Fire Chief to determine the role of state agencies. The Governor of Kentucky arrived at the fire scene at approximately 3:30 a.m. and immediately began consultations with the Mayor and the Fire Chief. At the request of the Mayor of Southgate, and after conferring with his staff, the State Fire Marshal and the Commissioner of State Police, the Governor directed that a thorough investigation be made and reported to him. He designated the Chief Executive Officer of his staff, the Commissioner of State Police, and the State Fire Marshal to coordinate the investigation.

Several days later the Governor appointed a Professor of Law from the Chase School of Law, at Northern Kentucky University, as Special Counsel to the Governor in the matter of the fire. This group of four officials continues to coordinate the investigation of the fire to this date.

Search and inspection functions which commenced on the morning of Sunday, May 29, 1977, following the extinguishment of the fire, were initially conducted under the direction of the Southgate Fire Chief. The search for missing victims of the fire did require the removal of walls and collapsed roof sections. This operation was not commenced until photographs had been taken of the structure and arrangements made to coordinate the removal of these materials with the activities of an On-Site Team, which will be discussed in a later section. On Wednesday, June 1, 1977, the Southgate Fire Chief concluded operations by his department at the scene of the fire and turned the scene over to the control of officials of the Commonwealth. From that date, until Saturday, June 11, 1977, when control of the property was returned to its owners, the search for possible missing victims was continued, using heavy equipment and personnel of the State Police. These continuing search functions were also coordinated with the activities of the On-Site Team.

Immediately following the issuance of the Governor's directive mandating the Commonwealth's investigation of the fire, an On-Site Team was formed, consisting of personnel from the State Police and State Fire Marshal's office and of representatives of the National Fire Protection Association, the National Fire Prevention and Control Administration and the National Bureau of Standards who had come to Kentucky at the request of the State Fire Marshal.

The On-Site Team members collected physical evidence for various test purposes. These items were turned over to a representative of the State Police

Crime Laboratory for proper packaging and delivery to the various state and federal laboratories that would be making specific laboratory analyses.

Initial activity involved gathering data that would be lost as the building was being demolished in the search for victims. Photos were taken and dimensions were made of building construction features, exit locations, and other pertinent details.

As soon as heavy construction equipment could be made available from the search for victims at the rear of the complex, the front wall of the Zebra Room was opened to allow examination of that area, the Interview Team having earlier determined that fire was first seen in the Zebra Room.

Numerous theories of the fire cause and origin were explored, and two full weeks were involved in an effort to sort through the debris, to reconstruct door assemblies, and construct features in the Zebra Room.

The On-Site Team collected the exhibits for evidence listed as Appendix A-10 to aid in the determination of the origin, contributing causes, and spread of the fire and factors relevant to the loss of human life in the Beverly Hills fire.

Exhibits 1, 3, 4, 5, 6, 7, 9, 10, 12, 23 and 24 (see Appendix A-10) were collected and forwarded to the State Police Crime Laboratory for analysis to determine if accelerants were present.

The National Bureau of Standards assisted in the collection of various exhibits. Some of these items they have requested be collected and sent to the National Bureau of Standards Laboratory for analysis of flame spread, chemical composition, and identification. Exhibits 2, 11, 15, 16, 59, 63, 69, 71, 72, 73, 78, 79, 80, 81, 83, 87, 88 and 90 (see Appendix A-10) were collected and forwarded as requested. Examples of these exhibits included items such as carpets, curtains, paneling, chairs, etc. Exhibits 20, 22, 24,

35, 68, 74, 75, 76, 82, 84, 85, 86, and 89 (see Appendix A-10) were collected and maintained at the State Police Crime Laboratory should further testing be deemed necessary.

Exhibits 18, 60, 61, and 91 (see Appendix A-10) were collected and sent to the FBI Laboratory in Washington, D. C. Exhibits 18, two jackets taken from Beverly Hills personnel, was to be analyzed for the presence of chemical residue from the smoke and fire.

Exhibits 60, 61, and 91 (see Appendix A-10), samples of steel taken from the support beams in the basement, were to be tested for heat exposure and stress analysis.

Throughout the investigation by the On-Site Team, all fire extinguishers, charged and discharged, were collected to determine the number of extinguishers in the building, their location, and possible usage on the night of the fire. There was a total of seventeen fire extinguishers throughout the building, including the basement. Pressurized water, soda acid, dry chemical, and CO₂ were the types found. Most extinguishers were either full and showed discharged on the pressure gauge or had been discharged. Only two extinguishers could be found which were full and charged; these two were located in the basement.

Three CO₂ fire extinguishers were found in the hallway at the entrance to the Zebra Room. Each extinguisher had the pin pulled, and each appeared to have been used.

Two fire extinguishers were found in the oven area behind the main kitchen. One was discharged with the pin still in; it showed a 1976 service tag.

A total of seven extinguishers were found in the basement. Five of these were discharged. The remaining extinguishers were found throughout the building.

Investigation at the fire scene revealed that the building and premises had been treated by a pest control company from Cincinnati. Samples of the chemicals (see Appendix A-10, Exhibit 14) that were used were collected and forwarded to the laboratory. This evidence will be analyzed to determine if these chemicals could be a contributing factor to the spread of the fire.

Exhibit 53, Appendix A-10, a small water pump, was collected from the pool beneath the spiral staircase. Independent investigation made mention that this item was a possible origin of the fire. The On-Site Team tested the pump to determine if it was in working order (see Exhibit A-18-1).

There were two overhead doors on the north end of the kitchen. One of these door openings also had, in addition to an overhead door, an eight foot wide swing-out door that appeared to have been forced open. The eyehook (Appendix A-10, Exhibit 29) which had been attached to the door appeared to have been pulled from the door. This suggests that the door was forced open rather than unlatching the hook.

The east doorway on the north end of the kitchen appeared to have had a lock on the screen door. The bolt near the door; the hasp on the screen door suggests that the door may have been forced from the inside.

The Viennese Room had a double door on the east wall. A chain with a padlock (see Appendix A-10, Exhibit 38) was recovered at this door. Exhibits 39, 40, 41, and 42 along with Exhibit 38 (see Appendix A-10), were collected for evaluation and determination as to the accessibility of this exit to patrons in the Viennese Room. Two doors (see Appendix A-10, Exhibits 33 and 34) from the northeast end of the Cabaret Room were collected for determination of their working condition.

Building plans, personal files, and records of the Beverly Hills Supper Club (see Appendix A-10, Exhibits 64, 92, and 93) were collected to be used as an aid in the investigation with reference to the construction of the

building, personnel employed, and information relating to the operation of the Supper Club.

The On-Site Team collected various electrical fixtures and components (see Appendix A-10, Exhibits 31, 32, 34, 54, 66, 70, and 77) for examination and evaluation concerning possible contributing factors as to the origin of the fire. Miscellaneous items (see Appendix A-10, Exhibits 13, 17, 19, 23, 26, 27, 55, 56, and 57) were collected for identification and evaluation.

The On-Site Team finished its scene investigation and collection of evidence on Friday, June 10, 1977.

Coincident with the formation of the On-Site Team, an Interview Team of approximately thirty detectives and arson investigators of the State Police was formed for the purpose of conducting interviews with individuals having some knowledge of the Beverly Hills fire. From Sunday, May 29, 1977 through Friday, June 10, 1977, the members of the Interview Team worked in pairs, conducting recorded interviews with individuals who came forward offering information and with individuals who were identified through such means as employee records recovered from the structure or media accounts as having information about the fire. Members of the Interview Team met frequently with members of the On-Site Team in order to test theories and develop conclusions which were being formulated independently from the interview evidence and the physical evidence being observed and collected at the scene. This consultation process made it possible to reach certain conclusions as to the origin, source and cause of the fire on June 10, 1977. These conclusions were released in a statement by the State Fire Marshal.

The Interview Team continued to operate for several weeks following the release of the initial report by the State Fire Marshal and ultimately interviewed a total of approximately 630 individuals. Each of these interviews

was transcribed; the total number of pages of the transcribed statements resulting from interviews exceeds 10,000.

Individuals who were interviewed during the later stages of the interview process were identified systematically to assure an adequate sample of statements from individuals seated in all areas of the club on the night of the fire. Statements were taken from patrons and employees of the club, as well as from the owner, architects, contractors, and officials of various government agencies.

After releasing the site of the fire to the owners, the base of operations for the investigation was moved from the Campbell County area to the State Police Headquarters at Frankfort. Operating out of a secure area, an Investigating Team composed of four professional members of the Criminal Investigation Division at the State Police, two professional members of the State Fire Marshal's office and a clerical employee of the State Police were charged with the responsibility of compiling and indexing all evidence as submitted, and drafting this report. This team had frequent and continuing contact with the officials coordinating the overall investigation and the representatives of the national agencies who had participated in the on-site investigation processes.

After each statement was transcribed, it was read by at least two members of the Investigating Team. During this reading, the statements were classified and coded as to whether or not they contained information on various factors related to the fire, such as time of notification of the fire, presence of impediments to egress, and adequacy of directions or assistance in egress. Statements were also coded in order to establish a cross-reference system between topics covered in statements and the individual's name.

After reviewing a considerable number of the statements, members of the Investigating Team developed a questionnaire containing twenty-two questions which was sent to 917 persons. Recipients of the questionnaire were individuals

who had not been interviewed in person by members of the Interview Team. Records which were kept regarding the release of automobiles, post cards which were submitted by occupants of the building in response to a media appeal, and records of the Beverly Hills Club which were retrieved from the ruins, were used to identify individuals who should receive the questionnaire. Included with the questionnaire was a schematic diagram of the structure on which recipients were asked to trace their route of egress from the building. When the questionnaires were returned, they were coded by the Data Processing Section of the State Police in order to facilitate a compilation of responses on each question for the various areas of the club. A total of 1,117 usable responses were received because many of the recipients of the questionnaire duplicated it for use by family members or friends who were at Beverly Hills on May 28, but who did not receive questionnaires.

During the time interviews were being conducted and questionnaires were being distributed, professional staff members of the State Fire Marshal's office and the State Police were engaged in various searches for documents and records to establish the history of the Beverly Hills facility and to document the actions of various governmental agencies with oversight, inspection and enforcement responsibilities at the Beverly Hills Club. Included in these functions, was the drafting of detailed plans which were required to determine occupancy figures. This drafting effort was based on incomplete plans which were available to the Investigation Team from various sources and on measurements which were taken at the Beverly Hills Club following the fire.

Early in August, 1977, transcription of interview statements, processing of questionnaire responses, and search for, and development of documents, file materials and records was completed. At that time the Investigating Team began the analysis of evidence and the drafting of this report. Their findings are reported in the sections entitled Basic Data Report, Fire Report and Investi-

gative Conclusions.

Since shortly after his appointment, the Special Counsel to the Governor in this matter has been involved in an exhaustive review of federal, state and local fire safety requirements, as expressed in statutory, regulatory and code sources. The early stages of this evaluation were coordinated with members of the Interview Team. Specifically, the Special Counsel furnished lists of questions which were included in the interviews with various government officials, architects and the owner, in order to assure that data would be available upon which conclusions could be made as to compliance with fire safety requirements.

As the report of the Investigating Team was developed, the Special Counsel was apprised of the facts of the situation and the conclusions of the Investigating Team as to direct contributing factors to the loss of life and injury. The Special Counsel has also had complete access to documentation and interview evidence presented by officials of various governmental agencies regarding the actions of those agencies in fulfilling their responsibilities for oversight, inspection and enforcement of fire safety requirements. Additional documentation upon which the Special Counsel has based his assessment of compliance is in the form of Specific Technical Reports submitted by professional personnel of the State Fire Marshal's office, the National Bureau of Standards, and the National Fire Protection Association, regarding specific violations of various codes such as the National Electrical Code, the National Life Safety Code, the National Building Code. For the most part, these technical reports were not received by the Investigating Team or the Special Counsel until the first week of September, 1977.

BASIC DATA REPORT

The Beverly Hills Supper Club was located on a seventeen plus acre tract of land on the west side of U.S. 27, also known as Alexandria Pike, in the north city limits of the City of Southgate, Campbell County, Kentucky. This is just south of Newport, Covington and Cincinnati, well within the greater Cincinnati area. The club was regionally well known and was billed as the showplace of the nation. The building was located on a hill some 940 feet off the highway, accessed by a narrow driveway approximately twenty feet wide. This driveway served both as entrance and exit to the club (see Figure 1).

Ownership - The building was built by Pete Schmidt in 1937 at a cost of \$150,000 (see Exhibit A-20-1, Cincinnati Enquirer). This building was deeded on September 28, 1943, from Pete Schmidt and wife to Samuel Tucker. On April 7, 1951, Samuel Tucker and Louise Tucker conveyed said property to Boulevard Enterprises, Inc., a Nevada corporation. The property was involved in several other corporate holdings until it was closed in 1961.

In 1969, the property was leased by Hyman Ullner to Milas Hamza of Atlanta, Georgia. The club opened for business on October 11, 1969, as a supper club. The property was deeded to the 4-R Corporation, the present owner, on December 30, 1969 (see Appendix A). The 4-R Corporation is owned and managed by Richard J. Schilling, Richard J. Schilling, Jr., Ronald Schilling and Raymond Schilling (see Appendix A-6, corporation papers).

Insurance - Insurance on the physical plant of the Beverly Hills Supper Club, at the time of the fire, amounted to approximately \$853,000 with an additional amount of \$400,000 on the contents. The 4-R Corporation carried liability insurance of approximately \$300,000 per occurrence, \$300,000 aggregate; property damage liability of \$50,000 occurrence, \$100,000 aggregate; medical

payments of \$250 per person, \$10,000 per accident; and an umbrella liability policy with a maximum limit of \$1,000,000 (see Appendix A-7).

History - In April, 1970, building permit #1365 was issued for substantial remodeling of this structure in the amount of \$170,000 (see Appendix A-1). The Beverly Hills club had been closed for the above remodeling when the building caught fire on June 21, 1970 (see Figure 2 through 6).

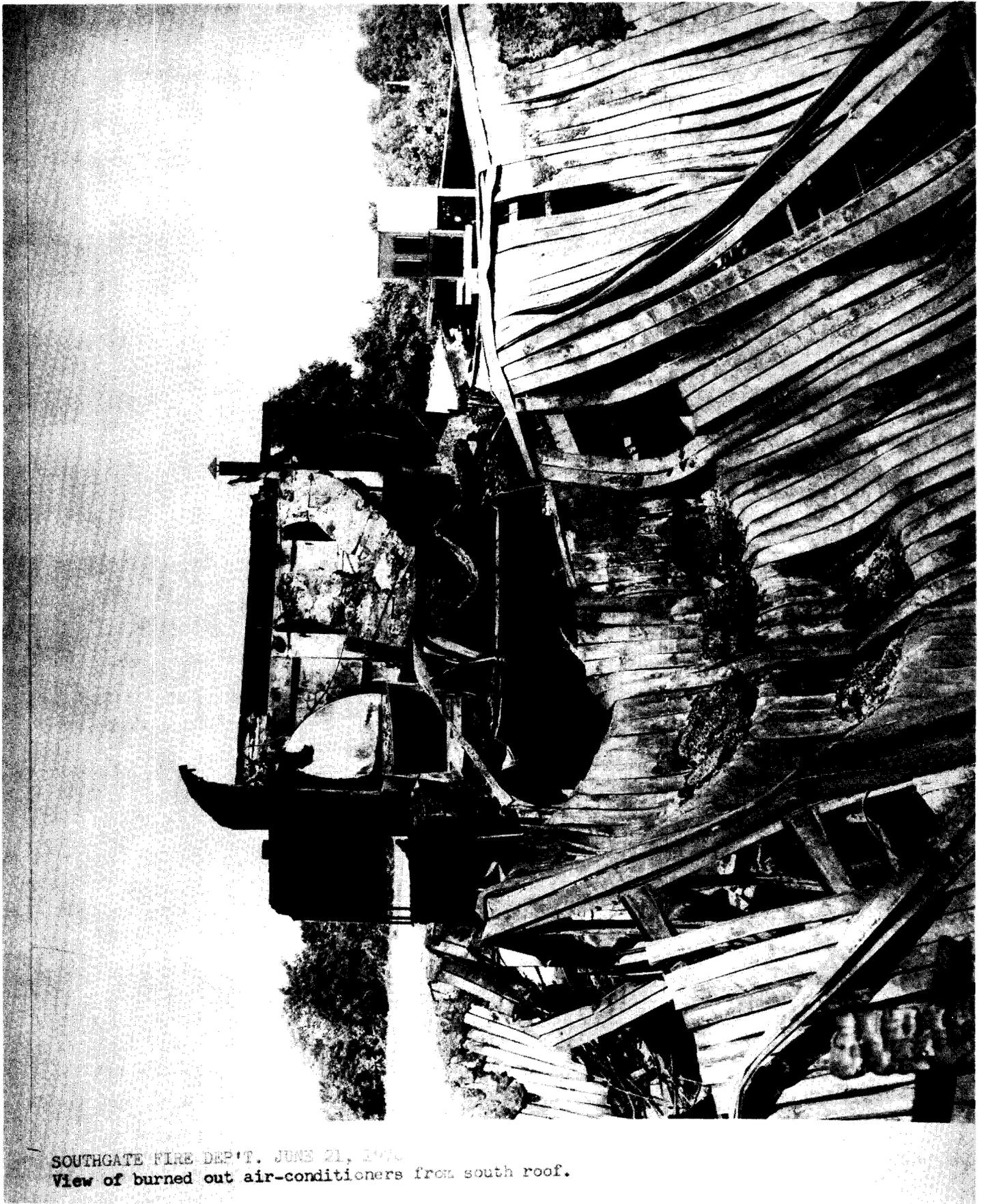
This fire was investigated by the Kentucky State Police, but the case was closed without having been able to determine the specific cause of the fire. No petroleum hydrocarbons were present in any physical evidence submitted to the Kentucky State Police Laboratory during that investigation.

The 4-R Corporation was the owner of the business at that time, and the building was under construction. The fire was reported to the Southgate Fire Department at 0317 hours (see Appendix A-1 for cost of repair).

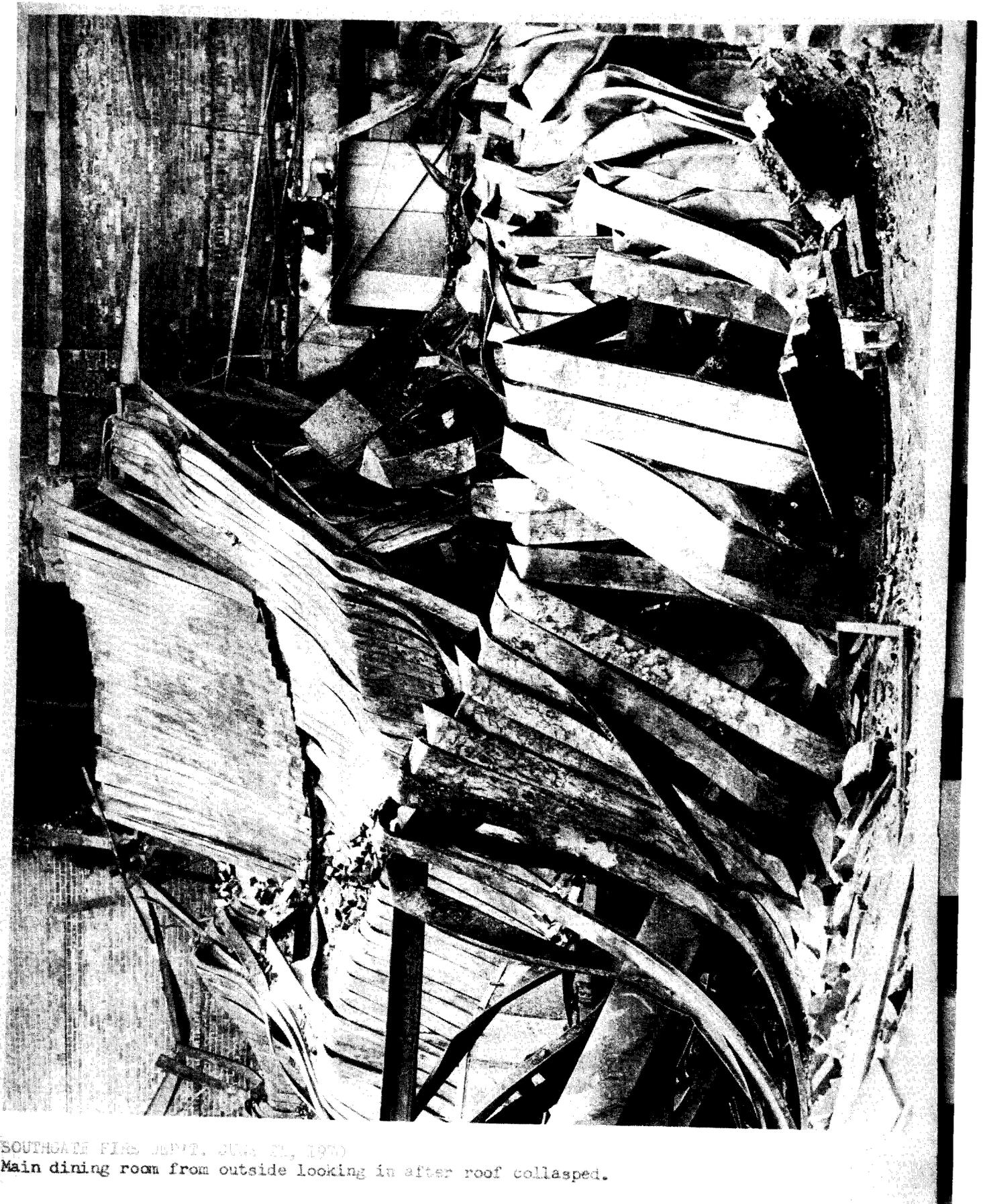
On December 10, 1970, building permit #1392 in the amount of \$187,000 for fire remodeling (see Appendix A-1) was issued by the Southgate building inspector. After this remodeling, the club opened for business again in February 1971.

At the time of opening, there was considerable publicity about the failure of the club to comply with state safety codes. We have found records indicating concern for the existence of at least ten major Standards of Safety violations at or just prior to the opening of the club (see Appendix A-1-2, letter from Fire Marshall's Office). We have been unable to find any official records indicating that these were corrected. However, in a 1971 news article, the State Fire Marshall and the Southgate Fire Chief were quoted as having been assured that the corrections had been made (see Appendix A-1-9). The facts indicate that certain of these violations were never corrected (see Appendix A-17).

The remodeling work after the 1970 fire was completed in March 1971 after the club reopened. In July 1972, building permit #1460 was issued by the City



SOUTHGATE FIRE DEP'T. JUNE 21, 1968
View of burned out air-conditioners from south roof.

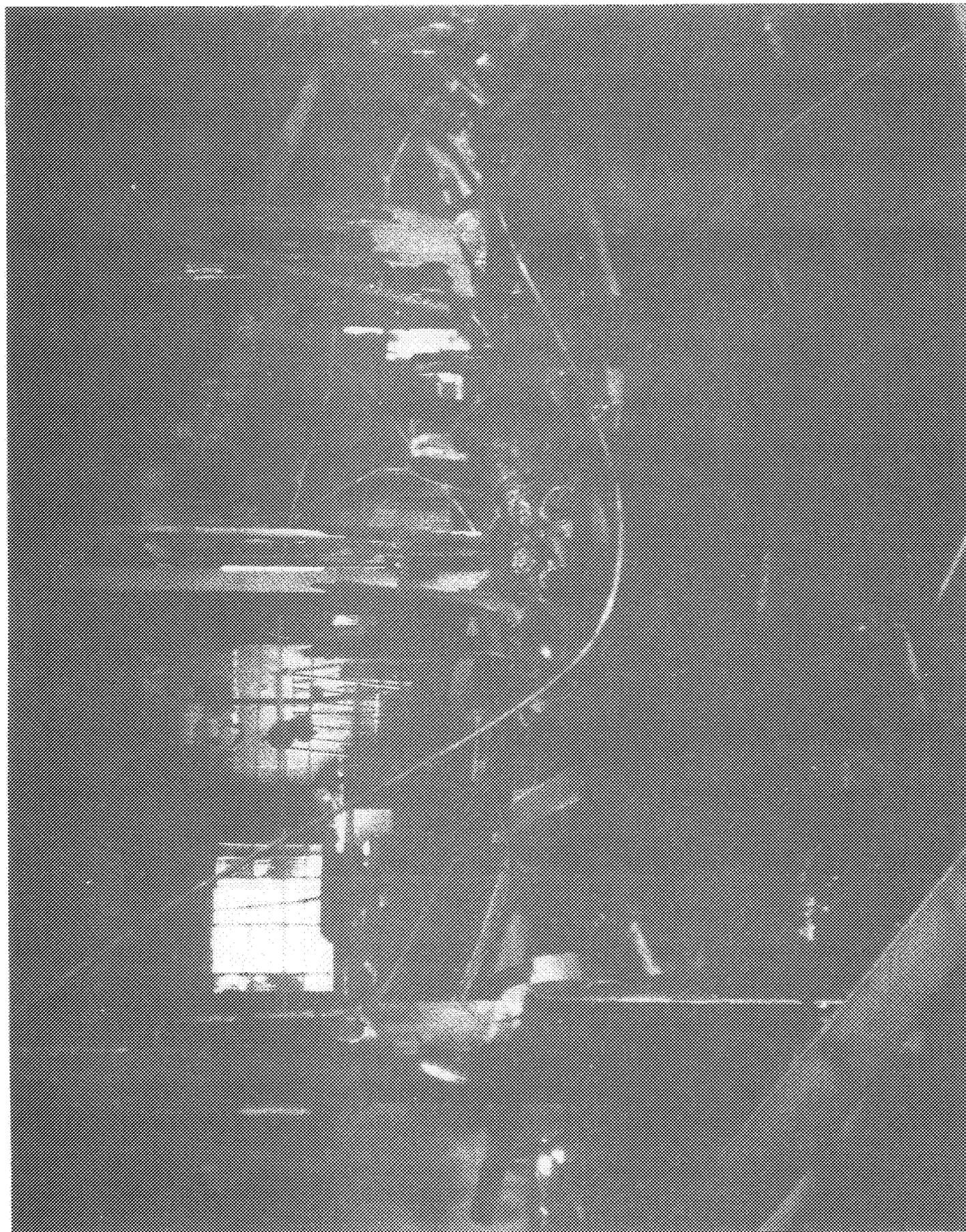


SOUTHCREE FIRS UNIT, JULY 21, 1970
Main dining room from outside looking in after roof collapsed.



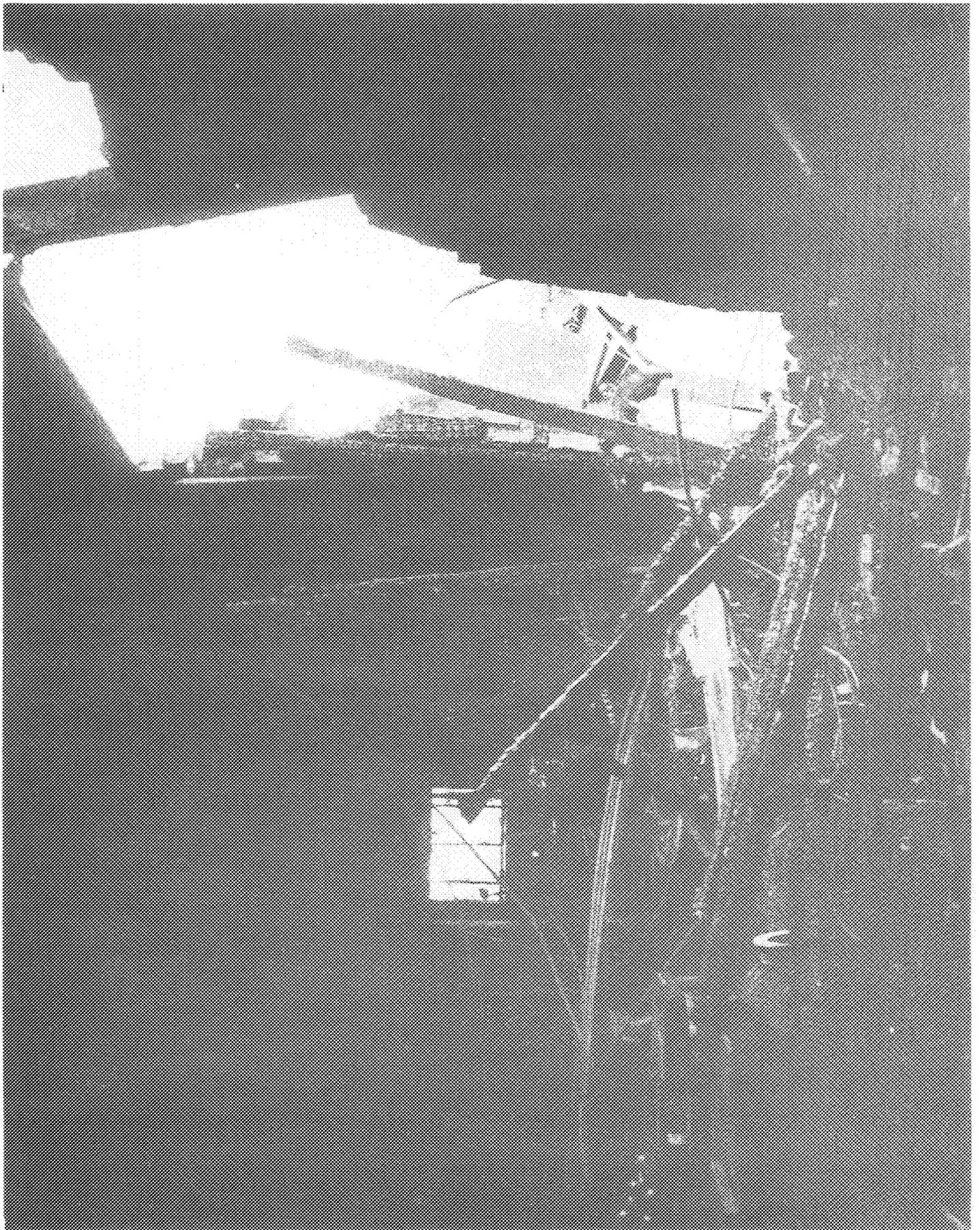
Exterior View June 21, 1970

Figure 4



Interior View June 21, 1970

Figure 5



Interior View June 21, 1977

Figure 6

of Southgate in the amount of \$13,400 (see Appendix A-1) for remodeling of Fascia Foyer (see Appendix A-2, plans found in club after 1977 fire).

In July 1974, building permit #1550 was issued by the City of Southgate in the amount of \$84,000 (see Appendix A-1) for new or additional construction (see Appendix A-3, Cabaret Room, plans found in club after 1977 fire).

A record was found of an electrical fire at the Beverly Hills Supper Club on August 10, 1974. This fire originated in the main electrical control panel apparently from a short circuit.

The owner, Mr. Schilling, reported he was summoned by one of the assistant managers who reported the lights in one of the rear dining rooms went out. They went to the main control panel and found it on fire. The wiring and panel were both burning. Mr. Schilling extinguished the blaze with a fire extinguisher and then called the Southgate Fire Department just to be certain. Schilling explained he had to extinguish the flame with the current on because he could not pull the switches due to customers in the building.

An insurance claim of \$1,635.00 was paid on this fire. The switch panel was repaired by an electrician. For further details, refer to Appendix A-32.

In December 1975, the Zebra Room was paneled, and a suspended ceiling with recessed lighting fixtures was installed. No permit was issued for this work, nor was an electrical inspection made (see Appendix B, Statement S-44). In June 1976, a building permit #1658 was issued for a new addition to the Garden Room (see Appendix A-1).

Investigation of the fire scene revealed new construction on the south side of the existing kitchen for which no record of a building permit could be found. Also, evidence was found of an addition to the Chapel for which no record of a building permit could be found (see Appendix C, photos).

A structural change has also been made to the entrance way and canopy. The canopy was extended with restyled supports. The exit steps were altered

from a straight-line exit to two ninety-degree turn exits. No record of a permit could be found for this change. This alteration was discovered by comparing the existing building at the time of the fire to Appendix A-4.

Configuration - Interior and Exterior - At the time of the May 1977 fire, this building consisted of approximately 54,000 square feet separated into nineteen rooms commonly known as the Main Bar; Cafe, Main Dining Room; Kitchen; Zebra Room; Empire Room; Viennese Room 1, 2, 3, 4; Garden Room 1, 2, 3, 4; Cabaret Room; and Crystal Room 1, 2, 3, 4, 5, 6, with the common appurtenances thereto; i.e., storage rooms, rest rooms, hallways, stairways, offices, check room, etc.

The Beverly Hills Supper Club was irregularly shaped, approximately 230 feet by 240 feet, one story in height except for a basement area under approximately one-half of the building (the front portion of south side), and a small second floor area over the main bar at the south side of the building (see Figure 7).

Figure 7 was compiled by personnel in the State Fire Marshall's Office in consultation with personnel of the National Fire Protection Association. In addition to being a schematic diagram of the overall layout of the Beverly Hills Supper Club, it depicts the several stages of construction of the facility. Outlined below is the key to the color coding on the schematic diagram.

1. Area in red represents the club as it was in December, 1969.
2. The area in green represents the Kitchen, Cabaret Room, Garden Room, and Coatroom expansion covered by building permit numbers 1365 and 1380 issued in April 1970.
3. Fire destroyed the building June 21, 1970 and permit number 1392 was issued to rebuild as proposed in permit numbers 1365 and 1380.
4. The area in blue represents an outside decorative improvement and a 12 ft. by 95 ft. addition to the Cabaret Room, covered by permit number 1460.

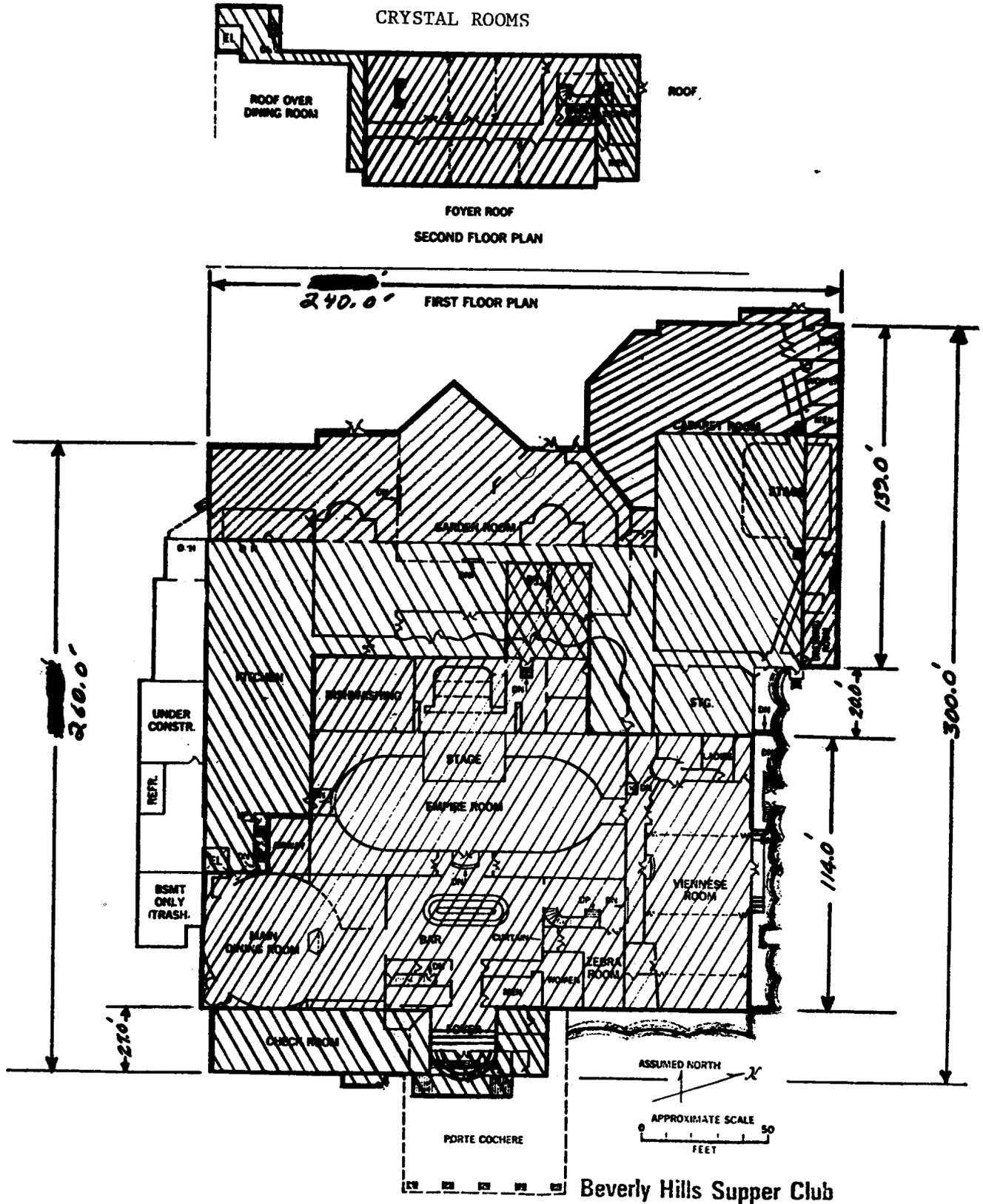


Figure 7

5. Area as shown in brown is a Cabaret Room expansion covered by permit number 1550 issued in July 1974.
6. Area in purple is the Garden Room addition and is related to permit number 1658 issued in June 1976. This renovation is the only one that gained approval, according to records of the State Fire Marshall's Office.
7. The clear area represents recent construction, portions of which were not completed at time of fire. No permits issued.

The basic construction type of the building was unprotected non-combustible. The fire resistance rating of the roof-ceiling and floor-ceiling assemblies were not determined, but many areas such as the basement had no suspended ceilings and no protection of the exposed steel columns and beams. Many areas of the complex had recessed high-hat bathroom light fixtures that penetrated the suspended ceilings in numerous places.

The two story and basement section of the building was 121 feet by 160 feet and was the oldest part of the club. It was constructed of steel column and beam framing. Outside walls were brick, concrete block with poured concrete basement walls. First and second floors were poured concrete on steel mesh on steel bar joists. The basement floor was poured concrete. The roof construction was a built-up type on steel deck on steel bar joists. There were suspended ceilings through all areas of the first and second floors consisting of plaster on metal lath, 12-inch-by-12-inch and two-foot-by-four-foot suspended ceiling tiles.

The 1970 expansion or renovation and other expansion projects consisted of a new kitchen, Garden Room, Cabaret Room, and small storage room. All additions except the kitchen and coatroom were one story. All construction was concrete block and brick with a glassed-in area 60 feet long at the rear of the Garden Room. Floors were poured concrete on grade. Roofs were a built-up cover on steel deck on steel bar joists.

The kitchen was one story and basement and was of similar construction to all portions (areas previously described) north of the two story original building. Walls were concrete block and poured concrete. The first floor construction was poured concrete on steel deck on 12-inch steel trusses.

The coatroom addition, 27 feet by 82 feet, was at the southwest corner of the club and was one story with a garage-like storage area underneath. The walls of the storage area were concrete block. The checkroom was of wood-frame construction with wood joist floor supports, interior wood framing, and with aluminum siding on the west outside wall. A newly constructed addition to the kitchen on the west side of the complex had wood floor construction and a crawl space below. The nearly complete destruction of the building made it extremely difficult to determine construction details in all areas. The second floor over the Zebra Room was also of inferior construction for this type of occupancy, with interior wood framing and plywood flooring and a wood roof. Many of these small areas appeared to be ordinary construction (concrete block or brick exterior bearing walls and floors and interior framing wholly or partly of wood).

There were no intermediate roof supports in any of the various rooms at Beverly Hills, with the possible exception of the Garden Room, and those supports are believed to be the walls of older sections that were left in place when the Garden Rooms were expended. The roof spans in the various showrooms and other rooms extended from wall to wall. The piecemeal construction of the club, with rooms and groups of rooms being added at different times, resulted in a structure with no common ceiling space. In other words, the walls between rooms in most cases were outside walls at one time and extended to the roof with no openings between rooms above the suspended ceilings; i.e., the wall between the Zebra Room and the Viennese Room or at the second floor

between the Crystal Rooms and the toilet area over the Zebra Room. Where additions were made to existing buildings, window openings were not sealed with a masonry material to provide some degree of fire cutoff between rooms and no attempt was made to protect door openings or to provide smoke or fire partitions. Likewise, the boiler room and kitchen were not separated from other parts of the building with enclosures having a fire resistance rating and with openings protected by self-closing or automatic closing fire-rated assemblies.

The circular stairway between the first and second floors was of metal construction. A small decorative pool was located under the stairway (see Appendix C, photos). The stairs were open from the first floor to the second floor with no stairway enclosure and with no doors at openings to the stairway from the main bar or Viennese Room on the first floor or from the corridor on the second floor.

The stairway on the west side of the complex from the second floor to the kitchen was 44 inches wide and was concrete block enclosed. Three-foot-wide metal doors opened into the stair enclosure, with the door at the bottom of the stairs opening against the direction of travel of people coming down the stairs. The stair treads and risers were of wood construction.

The Zebra Room was a small function room on the first floor. It was located on the south side of the building between the Viennese Room and the main bar. The room was "L"-shaped with the main area being 15 feet by 30 feet. The smaller alcove area was 8 feet, 9 inches by 9 feet. The basement was underneath the Zebra Room, and there were toilets on the second floor above.

The south and east walls of the 15-foot-by-30-foot rectangular area of the Zebra Room were brick. The east wall was covered with 3/4-inch-by-4-inch

furring boards covered with gypsum board. Hardboard paneling on wood furring strips covered the plaster board. The finish material on the south wall was not determined, except that a factory-built metal fireplace was located in the outside window and was vented a few feet up the outside wall (between the exterior wall and the screen wall) with a metal stack. The fireplace contained ceramic logs and was gas-fired, but reportedly was not used.

The west wall of the Zebra Room was two-by-six wood stud from the floor to a wide-flange steel beam and was brick wall above the beam at the second floor level. The wood stud was covered with plaster on gypsum board, and the plaster was covered with hardboard panel on wood furring.

The north Zebra Room was wood stud covered with plaster on metal lath on both sides. The inside wall was similar to other walls previously described with the plaster covered with wood furring and hardboard paneling. The Zebra Room had two sets of double doors of wood construction, both swinging into the room (see Figure 7). One set was to the west, opening into the reservationist's alcove. This west opening allowed the fire to pass into the main bar area at some later stage in the fire sequence as these doors were in the closed position in the early stages of the fire according to the reservationist. The other doorway, to the north, opened into a small, east-west corridor, approximately 32 feet long and 20 feet wide. This small corridor opened into the main bar on the west and into the main, north-south corridor (to the Cabaret Room) on the east through a fifteen foot wide opening. A curved, steel stairway to the second floor was located in this small corridor, just to the left (west) of the Zebra Room's north doors and against the north wall of the Zebra Room.

The ceiling of the Zebra Room alcove was a plaster on metal lath ceiling suspended from the steel bar joist of the floor above. The ceiling in the main area of the Zebra Room was a double suspended ceiling with a fiberboard

tile adhered to a plaster ceiling that was nearest to the steel bar joist of the floor above.

The floor of the Zebra Room was poured concrete on steel bar joist.

The Beverly Hills Supper Club was decorated throughout the facility and showrooms with huge chandeliers, wood paneling, carpeting, and drapes to give the appearance of an elegant showplace. Wood framing was used in many areas for stage construction and interior wall partitions. The partitions separating the bar and toilet areas from the Cabaret Room were constructed with wood studding. The north wall of the "Hallway of the Mirrors" where the circular stairway was located had a wood-studded wall spaced away from the brick wall. The wood-studded wall was covered with wood panel plywood and mirrors. The floor in this area was carpeted with a short-pile red-and-black print carpet.

The floor of the small corridor was covered by a carpet installed over an underlayment (padding). The carpet was the same as used in the Zebra Room, according to the Kentucky State Police Crime Laboratory. Analysis of the Zebra Room carpet by the National Bureau of Standards (N.B.S.) (Appendix A) indicated it was a nylon carpet with a low-pile height (0.375 inches) and dense construction (58 oz./sq. yd.). The padding has not been identified but probably was of heavy, commercial grade, as this was characteristic of underlayments recovered from other portions of the club.

The ceiling of this small corridor was of concealed, kerf and spline, mineral-type, acoustical tile. Due to its mineral nature, this tile is likely to have had a very low flame spread index* and can be considered to be non-combustible. The walls of this small corridor were covered with a decoratively

*For explanation of flame spread index, see the Handbook of Fire Protection, 14th Edition, page 6-46, published by the National Fire Protection Association, 1976. (Hereinafter referred to as Handbook.)

finished plywood paneling, somewhere between 3/16-inch and 1/4-inch in thickness, applied over wood furring strips.** This plywood was combustible and, although samples were not available to establish a flame spread index, it was probably between 100 and 200 based on ASTM E-84 testing procedures*** and knowledge of the behavior of these materials.****

The hardboard panel in the Zebra Room was a paper-veneered paneling that looked like shiny rosewood paneling.

The main, north-south corridor, leading north from the 15-foot-wide opening within the east portion of the club to the Cabaret Room, was approximately 8 feet wide and about 150 feet long (see Figure 7 or Appendix A-33). In addition to serving doorways to the Viennese Room on the east and the Empire Room on the west, this corridor connected to two cross corridors, one to the east along the south wall of the Cabaret Room, and one to the west between the Garden Room and the employees crossover, service corridor. This main corridor terminated outside of the principal entrance to the Cabaret Room.

The corridor walls were covered with a decoratively finished hardboard paneling applied over wood furring strips. This paneling was combustible and, although its flame spread index could not be determined, our experience indicates that it probably ranged somewhere between 150 and 200. This paneling was applied to both walls of the corridor for its full length except for the curvilinear wall at the west cross corridor, which was of exposed brick.

**The small pieces of paneling remaining in this corridor were swollen and/or delaminated, making accurate measurements difficult.

***Standard Method of Test for Surface Burning Characteristics of Building Materials, ASTM E-84-70, American Society for Testing and Materials.

****See the Underwriters Laboratories Building Materials Director, January 1976, page 204, for representative flame spread indices of similar materials.

The main corridor's ceiling was of concealed, kerf and spline, mineral-type, acoustical tile, again essentially non-combustible in nature. The floor was covered with a carpet applied over an underlayment. Based on National Bureau of Standards (N.B.S.) analysis (Appendix A), the carpet was essentially of woven, wool construction with a small amount (less than 10%) of acrylic fibers blended in. The pile height was 0.25 inches and weight was 78 oz./sq. yd. The underlayment was identified by N.B.S. to be jute with a pad height of 0.5 inches and a weight of 51 oz./sq. yd.

Allowable Occupant Load - Allowable occupant load for structures is determined in a Life Safety Code or Fire Code context by two basic types of calculations. First, allowable occupant loads are calculated by dividing required square footage per individual into total interior area (square footage). The required square footage per individual is specified in the codes according to such factors as fixed or movable seating. Second, allowable occupant load is determined by multiplying exit units (22 inches of exit width) by the allowable number of occupants per exit unit. Again, codes specify the number of occupants per exit unit according to various factors such as whether exits are at grade level or stairs. Both types of calculation have been made during the Beverly Hills investigation.

Occupant load calculations based on square footage have been made independently by the State Fire Marshall and the National Fire Protection Association (N.F.P.A.). These calculations are for the most part parallel with the two exceptions that N.F.P.A. assigned a three square foot per person factor to the bar area while the State Fire Marshall used a fifteen square foot per person factor, and N.F.P.A. calculated interior square footage of the Main Dining Room and related areas to be approximately 3,200 square feet more than that calculated by the State Fire Marshall. These differences in square footages arise because N.F.P.A. includes hallways, bathrooms, and the like in

calculations of allowable occupant load whereas the State Fire Marshall does not. These calculations are reported below.

	State Fire Marshall		N.F.P.A.	
	<u>Area Sq. Ft.</u>	<u>Occupant Load</u>	<u>Area Sq. Ft.</u>	<u>Occupant Load</u>
Bar	421	28	425	142
Main Dining Room, Foyer and Zebra Room	4,040	270	7,210	481
Viennese Rooms	3,472	231	3,840	256
Crystal Rooms (Second Floor)	3,883	258	3,928	262
Empire Room	5,728	395	6,708	447
Garden Rooms	9,468	631	9,536	636
Cabaret Room	8,036	<u>536</u>	7,669	<u>511</u>
TOTALS		2,349		2,735

Another phase of the calculation of allowable occupant load is the assessment of exit units. The Life Safety Code prescribes and calculates according to the following standards:

- (a) No individual unit of exit width shall serve more than 100 persons.
- (b) Doors leading outside the building at grade level, or not more than 3 risers above or below grade, 100 persons per exit unit.
- (c) Stairs or other type of exit not specified in (b) above - 75 persons per exit unit.

The total number of exit units required for the Beverly Hills Supper Club, based on 100 persons per unit of exit width (doors at grade level) and considering the occupant load determined above is 27.5 exit units. The number of exit units required would actually be greater considering the code requires a main exit that will accommodate one-half of the total occupant load, and other exits of sufficient width to accommodate two-thirds of the total occupant load.

The actual number of exit units that was determined to exist at the time of the fire was 16.5 units. Therefore, the total capacity of the Beverly Hills

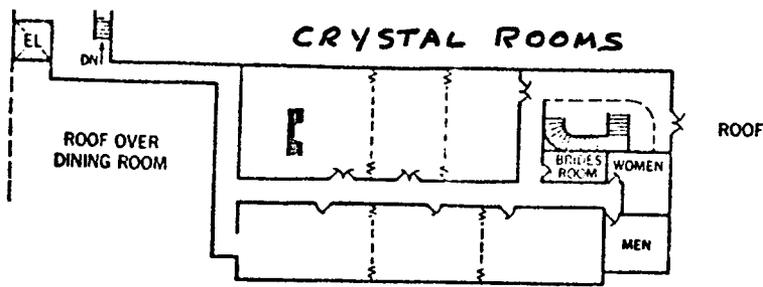
should have been limited to 1,511 people based on the exit unit provisions of the Life Safety Code. Figure 8 identifies the exits which are the subject of the table below.

<u>Exit Letter</u>	<u>Most Restrictive Part</u>	<u>No. of Units</u>	<u>No. of People</u>
A	Inside double doors	2 units (level)	200
B	Outside doors w/stairs	1 1/2 units (stairs)	112
C	Stairs	2 1/2 units (stairs)	187
D	Inside double doors	2 1/2 units (level)	250
E	Stairs	1 1/2 units (stairs)	112
F	Doors	2 1/2 units (level)	250
G	Doors	2 1/2 units (level)	250
H	Doors	1 1/2 units (level)	150
		16 1/2 units	1,511 - Total Building Exit Capacity

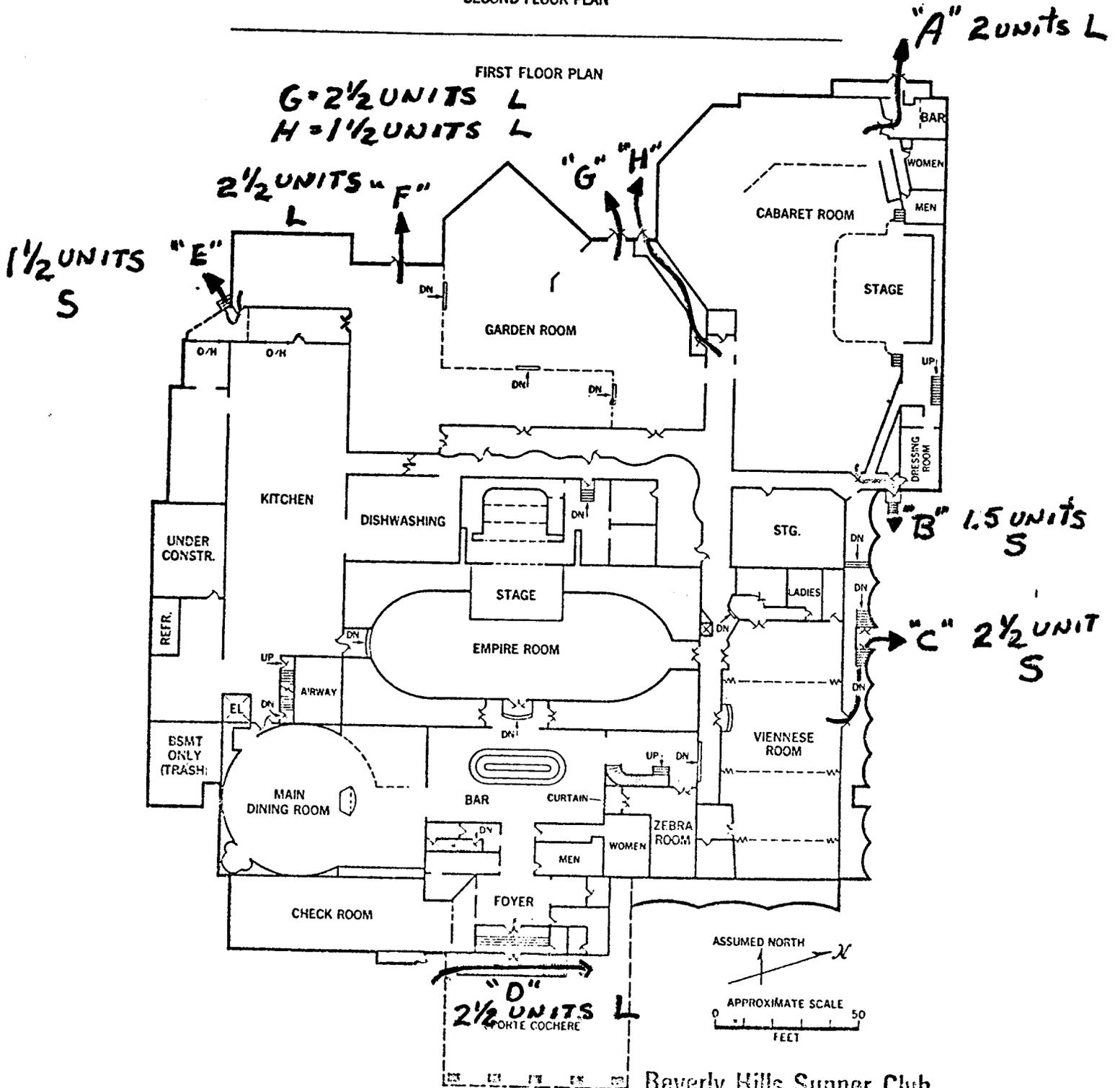
Another requirement of the Life Safety Code for places of assembly is that every assembly occupancy shall be provided with a main exit of sufficient width to accommodate one-half of the total occupant load. The main exits from the Beverly Hills are considered to be the front exit under the canopy "D" and the main north exit from the Garden Rooms "F." The total units of exit width for the two doors are 5 units which would accommodate 500 persons, or 1,000 persons total occupant load.

Governmental Agencies - The Office of the State Fire Marshall operates under the Kentucky Department of Insurance. The office currently consists of the State Fire Marshall, an Administrative Assistant, two Assistant Directors, Chief Inspectors for the offices' seven sections, approximately sixty Field Inspectors and office personnel. The office presently employs 106 individuals.

The creation of a State Fire Marshall is mandated by KRS 227.230. The statute compels the Commissioner of the Department of Insurance to appoint and supervise the Fire Marshall and his assistants and employees. The Fire Marshall is granted authority to appoint additional assistants and employees as he may deem necessary.



SECOND FLOOR PLAN



Beverly Hills Supper Club

Total BLD Exit Capacity = 1,511 people

KRS 227.300 requires that the State Fire Marshall's Office establish by regulation "principles and practices for construction in order to safeguard life and property from the hazards of fire and panic." In accordance with this statute, the office as noted above, proposed the "Standards of Safety" which became effective on April 6, 1977. See 806 KAR 50:015.

The Marshall's administrative assistant assists the Marshall in the administration of office policy, budget, monthly and annual reports. He coordinates the activities of several advisory committees with those of the office. The Education and Training Officer is responsible for training staff, local fire inspectors and building inspectors.

The office is divided into seven sections. Each assistant director is responsible for the activities of three of these sections. One assistant also supervises the head of the State Aid Section of the office.

The State Aid section continues a program of education for the office's field staff and with the cooperation of the other section heads and chief inspectors, it conducts seminars and fire education programs for the public.

One assistant director supervises the chief inspectors of the following sections: (1) New Construction; (2) Boiler Inspection; and (3) Hazardous Materials. The remaining chief inspectors of (4) Manufactured Housing; (5) Federal Inspection; and (6) General Inspections are supervised by the second assistant director.

The New Construction Unit is responsible for the review of plans and specifications for construction of new buildings in the Commonwealth. This section must continue to inspect for noncomplying changes which could be made during construction and it must grant final approval before any new building shall be occupied. The New Construction Section also checks and approves sprinkler systems and heat and smoke detection systems installed in Kentucky. This section is divided into six subsections. They are: (1) Education;

(2) Institutional; (3) Mercantile; (4) Residential; (5) Sprinkler and Alarm; and (6) Field Inspectors.

The Boiler Inspection Section has the responsibility to review plans for new boilers, issue permits and licenses (including high pressure piping) and inspect all existing boilers in the state.

The Hazardous Materials Section is responsible for the inspections of all installations containing flammable liquids and gases, anhydrous ammonia, chemicals and explosives. It must approve plans for new installations of this and license LP gas and anhydrous ammonia dealers. Finally, this section certifies and licenses all types of transports and their operators who carry these products.

The second assistant director supervises the remaining four sections of the office and oversees the Mobile Home Certification and Licensing Board and the Recreational Vehicle Certification and Licensing Board.

The Manufactured Housing Section reviews plans for manufactured housing, issues licenses and seals, inspects manufactured housing and administers the federal mobile home program.

The Federal Inspection Section has the responsibility of regulating and enforcing the Life Safety Code in hospitals and nursing homes that participate in federal funding. It also enforces this code in institutional facilities that are licensed by the Kentucky Department of Human Resources.

The General Inspection Section, the unit with the most field inspectors, is responsible for the inspection of state-owned property, educational facilities, hotels and motels, airports, general mercantile and manufacturing buildings, and all places of assembly within the state.

A principal function of the Office of the State Fire Marshall is to enforce the statutes pertaining to fire prevention and safety. This directive

requires continuous inspection of facilities across the state. Inspections by the office are generally made by Field Inspectors. These personnel are located statewide and operate by using their homes as work stations. Each Field Inspector receives his assignments in weekly work orders which are mailed by the sections' offices each Friday.

The Chief Inspector of each section and his office personnel establish the facilities which each Field Inspector will be responsible to inspect. This office also reviews the weekly reports sent by the Field Inspectors to their supervisors, the Chief Inspectors of the seven sections.

A second review of the Field Inspectors' reports is made by the offices of the assistant directors. Each assistant reviews a book copy of all correspondence received by his three sections. If he observes any unusual or alarming correspondence, he notifies the State Fire Marshall.

The office determines what assignment each Field Inspector will be responsible to fulfill unless the office (at any level) receives a complaint. Complaints may come from private individuals, organizations, or local government officials responsible for routine inspections of buildings. Complaints are relayed to the appropriate Field Inspector by telephone.

The Field Inspectors are not responsible to ascertain facilities in addition to those assigned by their sections. The work orders are designed to fully occupy the Field Inspectors' work time.

There are no provisions within the offices' procedure for inspections after 4:30 p.m., unless a specific complaint is made requiring such an inspection. Further, Field Inspectors are not required to pursue potential violations they may suspect absent a complaint under the direction of their Chief Inspectors. The heart of the problem under this procedure is that the information received by offices of supervision is often tainted or inadequate.

The City of Southgate - Southgate, which has a city council type of government, is a fourth-class city, based on population (see KRS 81.010 (4)), with a population of approximately 3,200 people. Most city officials are part-time in nature. The Beverly Hills Club was one of the major business establishments of Southgate.

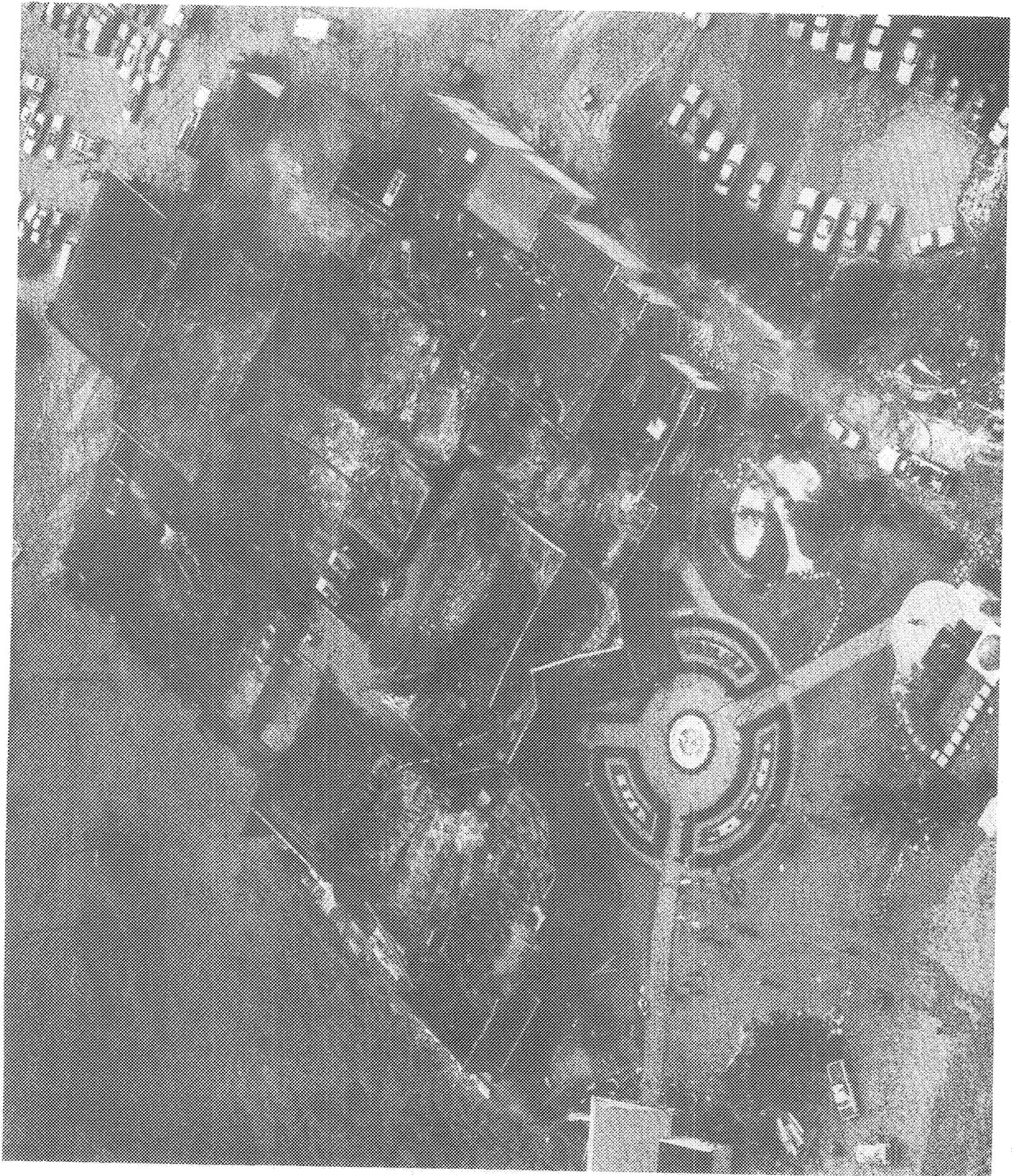
Fire Department - The primary firefighting responsibility for the Beverly Hills Club rests with the City of Southgate. The firefighting capability consists of an all-volunteer department with 83 dues-paying members, of which 55 are actual firefighters. The department has one station equipped with two engines, one light rescue van, and one ambulance. Firefighters are radio dispatched. This capability is supported by a multi-city mutual aid compact. The Southgate Volunteer Fire Department is classified by the Insurance Services Office (I.S.O.) as Grade 6. The Southgate Volunteer Fire Department is located 1.1 miles from the Beverly Hills Supper Club. Water supply used by the Southgate Volunteer Fire Department to fight Beverly Hills Supper Club fire was furnished by two hydrants immediately adjacent to the building which provided 180 gallons per minute at 80psi and 1,640 gallons per minute at 90psi. The next hydrant was 940 feet away at the foot of the Beverly Hills drive on the Alexandria Pike and flowed 2,310 gallons per minute at 110psi.

Inspection Functions - Fire and building inspections for the Beverly Hills Supper Club were the responsibility of the City of Southgate, through its fire department and building inspector. The State Fire Marshal's Office is required by law to cooperate with local officials in enforcing all fire safety laws and ordinances of the state and its political subdivisions (KRS 227.220, 227.230 and KRS 227.320). Building and fire inspection functions are carried out by part-time employees. Both the fire inspector and building inspector hold full-time jobs elsewhere. Neither possess any great expertise in the fields of fire or building inspection.

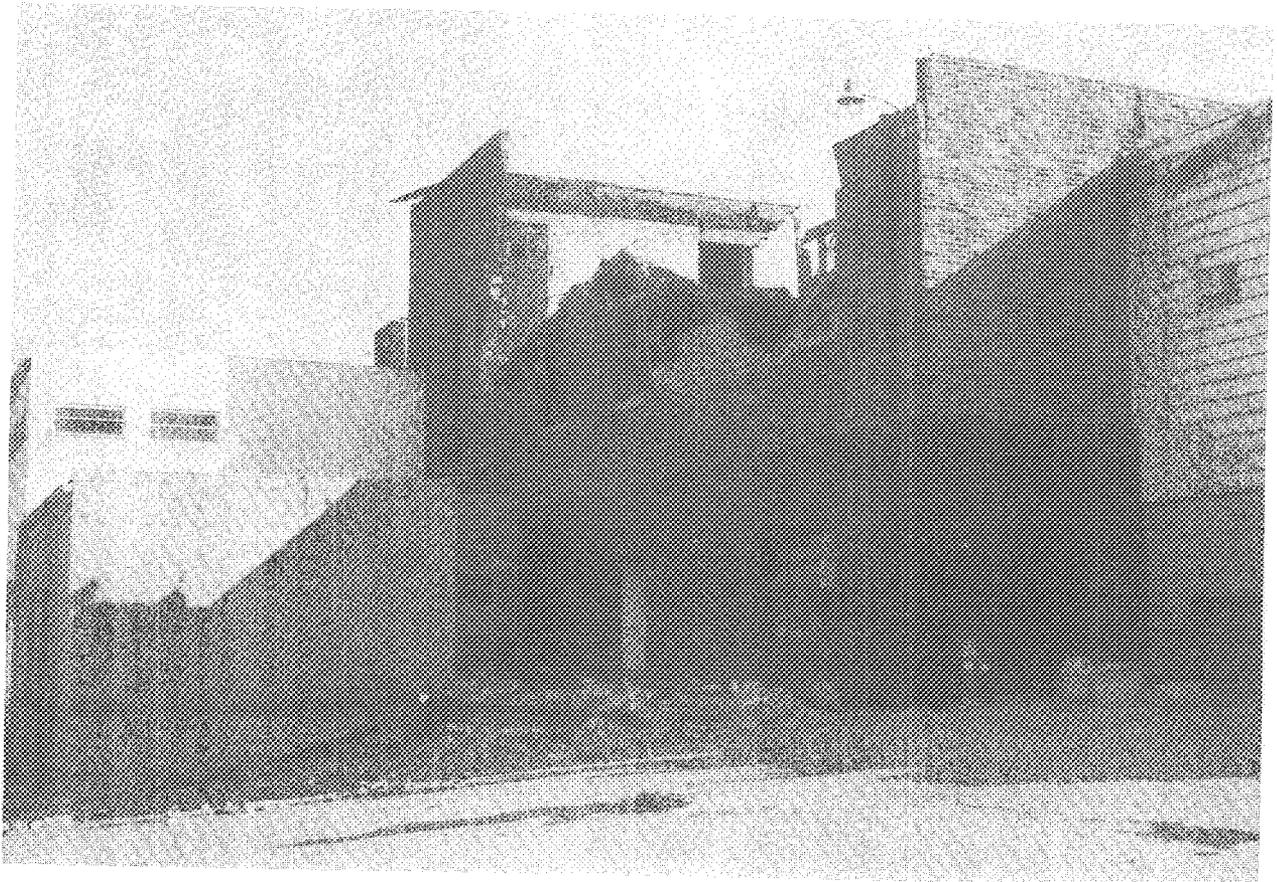
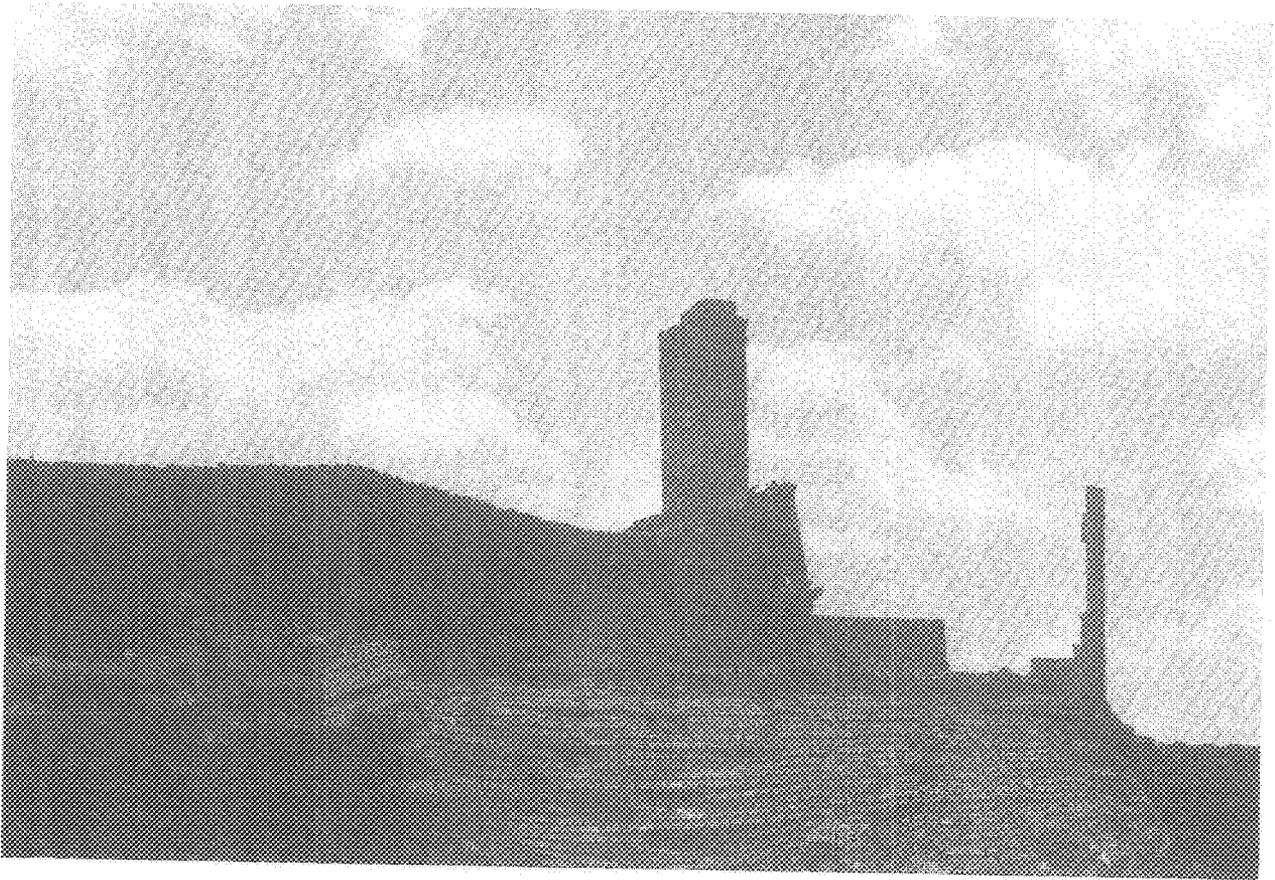
Plans Approved - Although investigation disclosed several renovation projects, no record could be found of their approval by the State Fire Marshal's Office other than for the Garden Room on November 16, 1976 (see Appendix A-31).

Inspections Conducted - Records of the City of Southgate (December 1967 through April 1971) indicate inspections were made at the Beverly Hills Supper Club by the Southgate Volunteer Fire Department. These inspection reports show conditions at the time of the inspection and recommendations for corrections to be made. These records also contain letters and correspondence in regard to State Fire Marshal inspections (see Appendix A-22). On September 7, 1977, the City of Southgate Fire Inspector was contacted for the purpose of being interviewed. It was agreed that the inspector would submit to an interview on September 9, 1977. At that time, the city attorney of Southgate was contacted and stated that the inspector could be interviewed with attorneys present. The city attorney was then advised that an interview time had been set for 7 p.m., September 9, 1977. The city attorney then refused, stating he was busy and that another attorney assisting him was also busy (see Exhibit A-29-1). Therefore, because of the refusal of the Southgate Fire Inspector, at the direction of the Southgate City Attorney, to be interviewed no information has been included as to recent inspections of the Beverly Hills facility.

FIRE REPORT

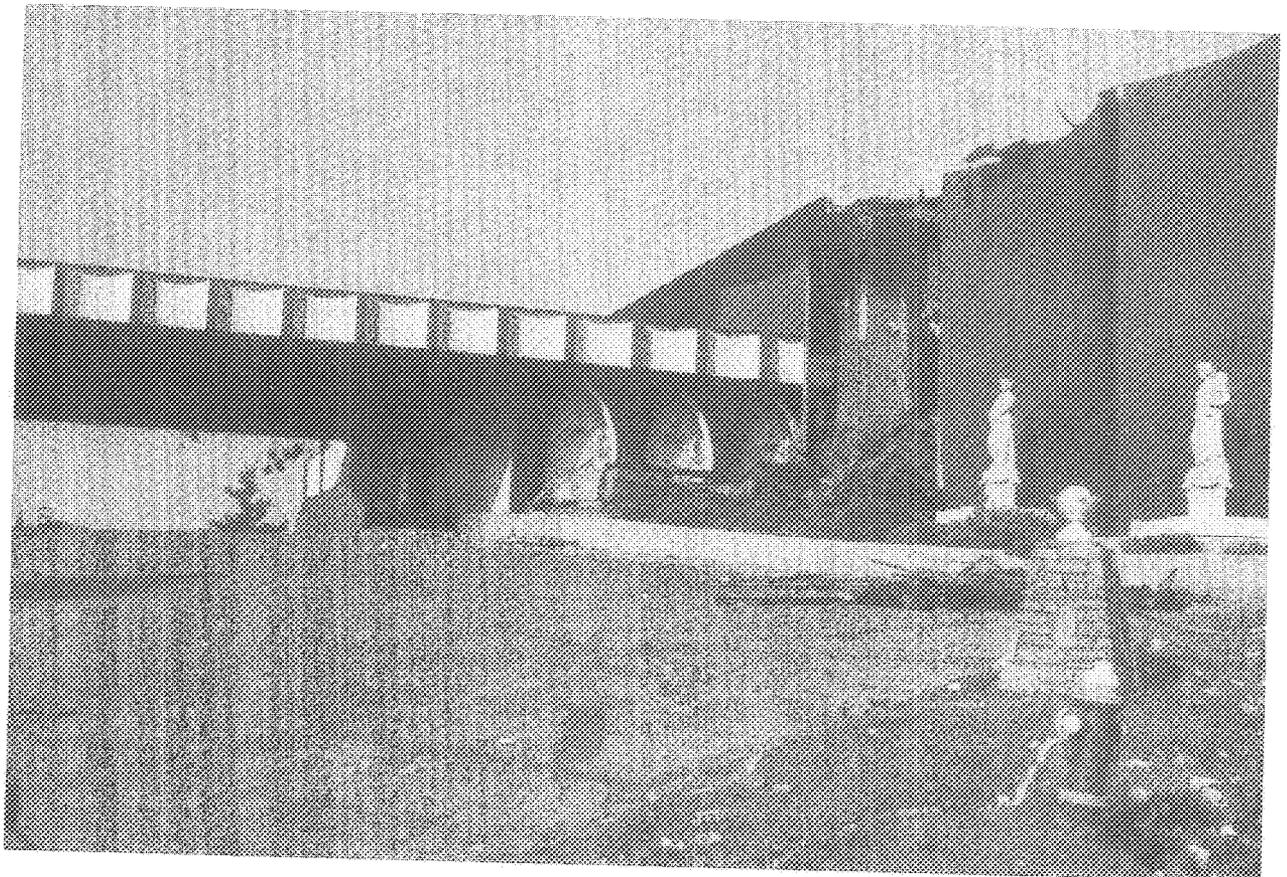
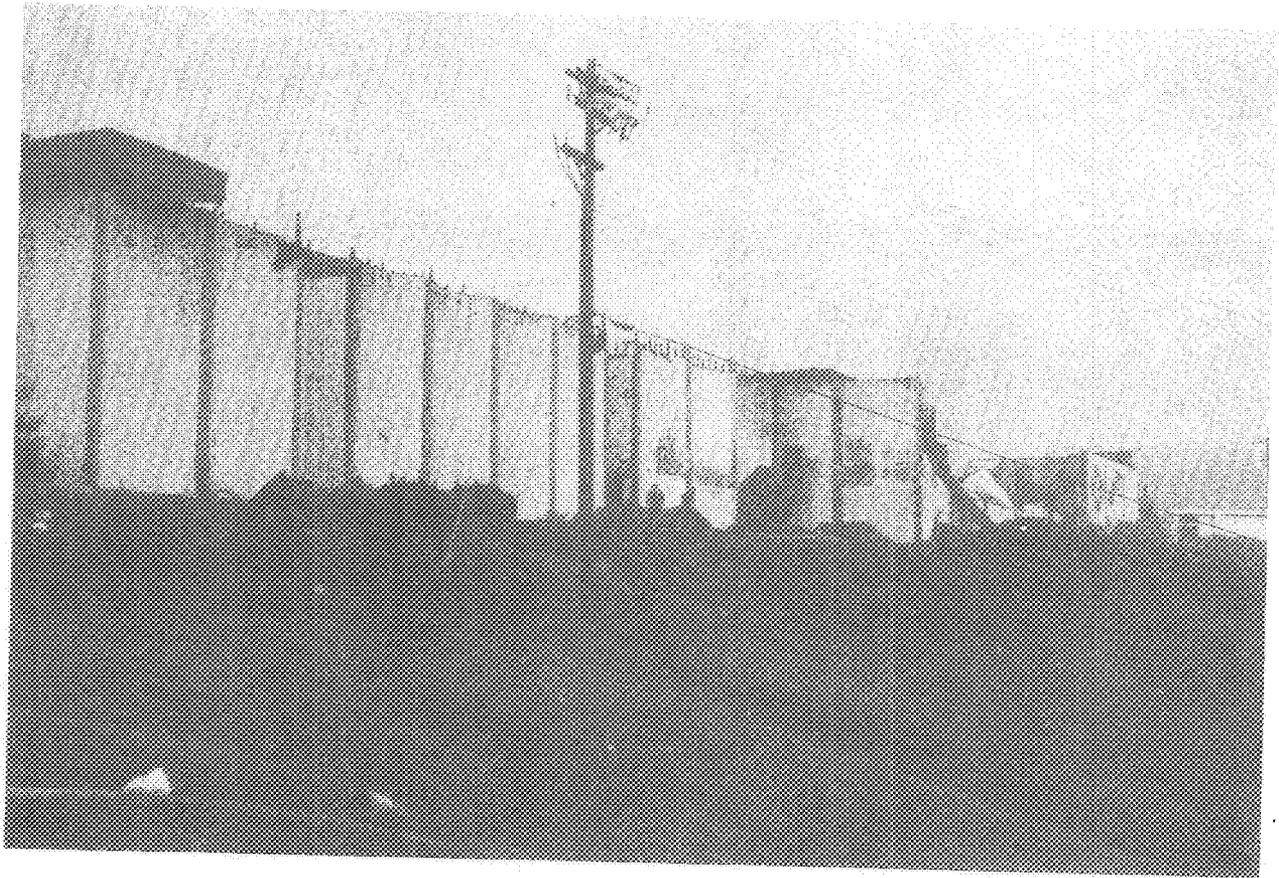


Beverly Hills Supper Club aerial view, Sunday, May 29, 1977. Copyright © 1977, Courier-Journal & Louisville Times Co., reprinted with permission



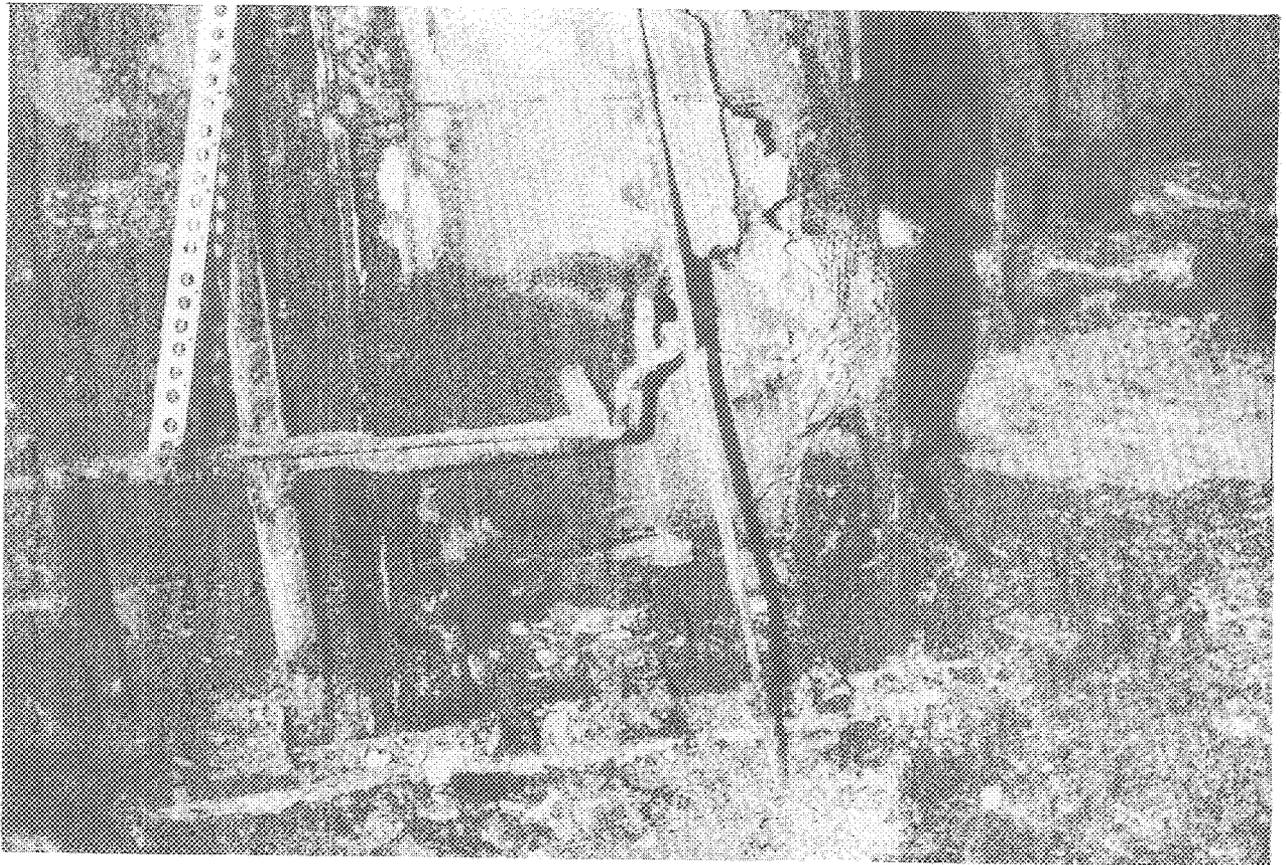
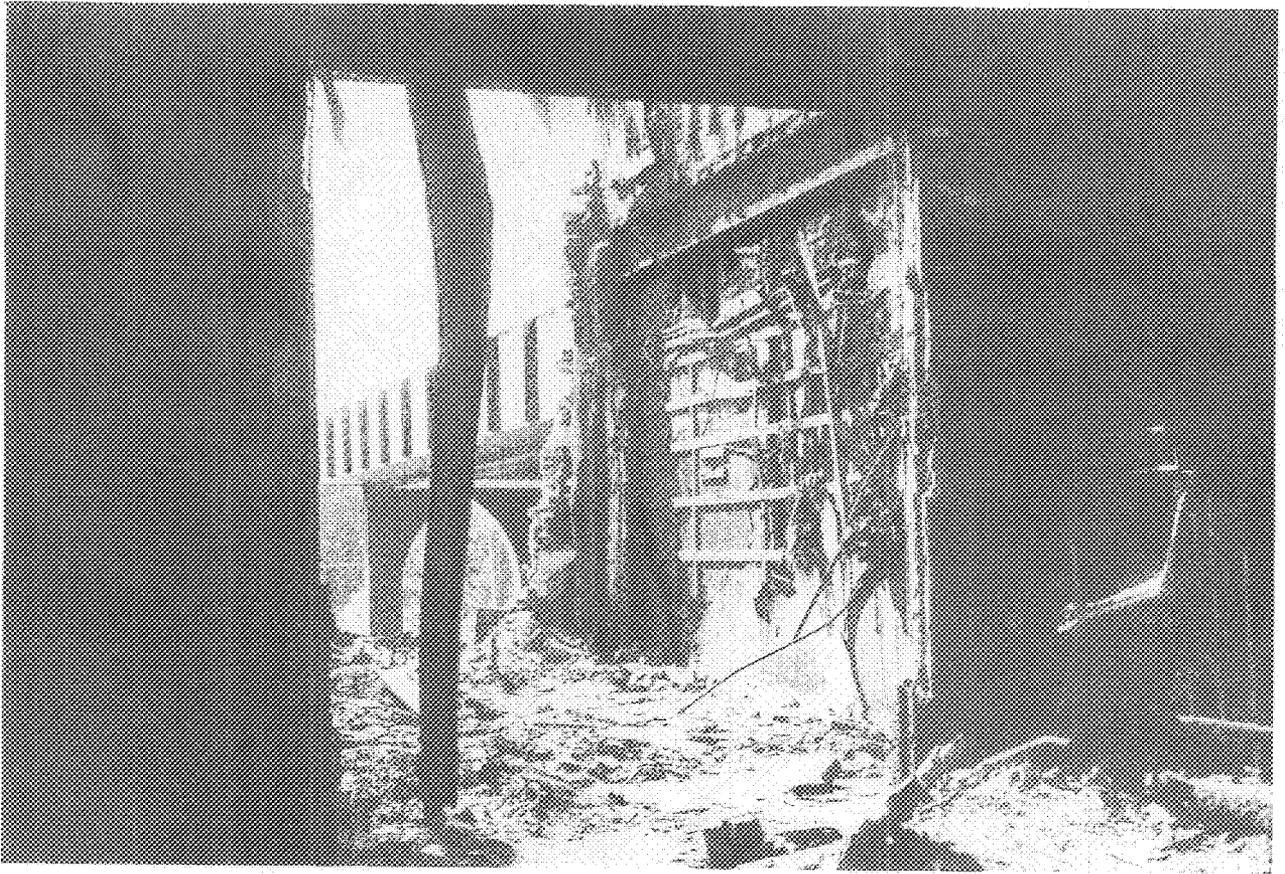
Exterior View of Beverly Hills Supper Club, May 29, 1977

Figure 10



Exterior Views of Beverly Hills Supper Club, May 29, 1977

Figure 11



Interior Views of Beverly Hills Supper Club, May 29, 1977

Figure 12

At the time of the fire, the building was occupied by an undetermined number of people but known to be in excess of 1,600 patrons plus 182 employees. Reports by employees indicate between 3,000 and 3,400 patrons in attendance at the club with the major portion located in or near the Cabaret Room.

Unexplained smoke was reported emitting from the building as early as 6:30 p.m. and at various times by different people from that time until 8:45 p.m.

The Zebra Room had been used May 28, 1977, for a private wedding party. Patrons stated that they started leaving about 8:00 p.m. and were gone by 8:30 p.m. Employees B-4 and D-15 stated that the patrons left the room at 8:45 p.m. B-4 stated that she left the room at 8:50 p.m. She then entered an adjoining restroom. She exited the restroom at 9:05 p.m. and then saw smoke and fire in the north-south hallway. Patron M-4 stated that while in the Zebra Room she detected a "funny odor" like a burning smell. There were lit candles present and she thought they caused the odor. Patron H-2 stated that the room was warm and that patrons requested that the air conditioner be turned up. She stated that it was cooler at the doors than it was at the back of the room.

Between 8:30 p.m. and 9:00 p.m., a reservation clerk reported smelling smoke near the Zebra Room (see Appendix B, Statement D-4). This caused the clerk to look in a wastebasket in an attempt to discover the source of smoke, but no evidence of a fire in the wastebasket could be found by her. She then opened the door to the Zebra Room where she observed gray smoke billowing out which she reported hitting her in the eyes causing them to tear. She then closed the door and ran out to the desk and told an employee there was a fire. This employee was helping the hostess at the desk. The employee then ran back out to the desk and told the hostess to call the fire department -- "We have a fire."

The hostess stated she immediately picked up the telephone and reported the fire (see Appendix B, Statements D-4, S-23).

Central dispatch records at the Campbell County Police Department show that the alarm was received at 9:01 p.m. and dispatched (see Appendix A-5). Records show that Southgate responded with two engines and a light truck and that the Southgate Fire Department light rescue vehicle and ambulance was the first fire unit to arrive on the scene. The time of arrival was 9:04 p.m. The Ft. Thomas and Newport fire departments also responded at the time of the first alarm. As the Southgate chief approached the fire scene, he observed gray smoke coming from the eaves of the building and he radioed to Newport to send their engine as preplanned (see Appendix, B, Statement R-4 and R-4-1).

As the first fire vehicle arrived at the scene, the fire chief observed persons exiting out the front of the building. Information obtained from witnesses indicated that employees inside the building were assisting patrons from certain areas of the building (see Appendix B). Persons interviewed indicated that a large number of patrons exited out the front exit. At one point, employees directing patrons stopped them from exiting out the front exit and redirected them through the kitchen. This redirection was caused by a then-heavy concentration of fire and smoke in the bar area and out to the front exit. Patrons from the Viennese Room were directed by employees through the Empire Room and out through the kitchen exit. Others from the Viennese Room were directed out the Garden Room exits.

During the evacuation of the building, the fire departments ran two hose lines into the front of the building. Almost simultaneously, the chief was notified that people were trapped in the Cabaret Room. Firefighting efforts were temporarily abandoned, and all fire personnel were directed to the rear Cabaret Room exit to rescue trapped patrons.

Persons in the Cabaret Room were in the process of exiting the building when heavy smoke filled the room and overtook those still within the room. Many of these people were trapped and overcome before they could reach safety.

With the exception of the basement area, most of the building was destroyed. There was complete roof collapse in all sections except the small two-story section and parts of the kitchen area.

One hundred thirty-four victims were removed from the Cabaret Room on the night of the fire. The following day, twenty-six victims were removed from the Cabaret Room. Two more victims were found in the Viennese Room two days later (June 1). There were seventy-two known injured, two of whom died later at local hospitals. The total number of fatalities is one hundred sixty-four at the time of this report (see Appendix A-8, A-8-1, A-8-2, A-8-3).

Attempts had been made by employees to fight the fire using portable extinguishers. During the time these attempts were being made, flashover occurred within the Zebra Room. Following occurrence of flashover, the smoke, gases, and fire continued to build until the fire broke out of the Zebra Room through double doors located at the north end of the room. The smoke, gases, and fire then spread rapidly throughout the major portion of the structure.

When flashover occurred in the Zebra Room, the room resembled a furnace in that all of the combustible furnishings in the room were burning simultaneously. These furnishings included several wood tables, about 20 or more chairs (see Appendix C for details on the chairs), and the carpet. Under these circumstances the walls of the room, which were covered with 3/16 inch, combustible hardboard paneling applied over wood furring strips, would also have been burning and contributing to the fire. What follows is a most probable scenario for the action of the fire.

This furnace-like fire had only one immediate flue or vent available to

it, and this was the pair of doors at the north end of the room. From eyewitness accounts, apparently one door, the west leaf, was partially open, perhaps at 45 degrees or so (confirmed by on-site evidence). It was likely the other leaf was open also, and the physical evidence suggested that it may have been fully open. Regardless of whether this leaf was open, partially open, or closed, this would have been of significance only through the first minutes of the fire as the fire's intensity was of such magnitude that the fire would have quickly consumed the top part of this wooden door.

The venting of the fire through this doorway resulted in the passage of smoke, flames, and heat through the upper part of the doorway at relatively high velocities, with an inrush of cold, fresh air, at lower velocities, near the floor. As the smoke, flames, and hot gases left the Zebra Room, they were propelled across the ceiling of the small corridor directly outside the Zebra Room until they hit the far wall, some 20 feet distant. Here, the flames and hot gases split, with part of the flames and hot gases turning down and part turning sideways in both directions. The thin plywood paneling, on the far wall of the small corridor, would have ignited readily under the impact of this flame and hot gas exposure.

In the meantime, the fire on the carpet in the Zebra Room would have spread through the doorway also, slower than the flames and hot gases along the ceiling, but sustained by the thermal radiation down onto the carpet by the smoke and hot gas layer at the ceiling. In examination of the Zebra Room, it was found that the carpet and its padding were completely consumed, down to bare concrete, in the doorway opening, the only location in the Zebra Room with such extensive damage.

The flames and hot gases leaving the Zebra Room, in addition to impinging on the plywood paneling of the small corridor wall, also were probably passing

up the stairway to the west of the lobby, into the main bar to the west, and through the 15-foot opening into the main corridor to the east.

It was apparent, from the on-site investigation, that sufficient heat was present in the stream of hot gases passing through this 15-foot opening into the main corridor to ignite combustibles present in this corridor. These combustibles consisted of the hardboard paneling on the walls and the carpet system on the floor.

As the flames and hot gases entered the main corridor, the carpet and the hardboard paneling began to contribute combustible gases to the fire through the driving off of the combustible volatiles in the carpet and the paneling. This resulted in the extension of the burning down the corridor. At about this period in time, sufficient thermal radiation was being directed down on the carpet surface from the smoke and hot gas layer at the ceiling to cause the spread of the fire on the carpet from the small corridor through the 15-foot doorway, into the main corridor. Once this happened, the fire in the corridor was very nearly a self-sustaining fire, feeding on both the carpet and the paneling, with each contributing to the growth and spread of the other. Even so, energy was still being supplied into the main corridor from the fire in the Zebra Room and the small corridor outside. From this point, fire spread rapidly down the main corridor, with visible fire rolling along underneath the ceiling and a secondary fire traveling along on the carpet face, trailing behind the ceiling fire.

The occupants of the Crystal Rooms were the first persons to observe smoke other than those actually in the immediate area of the Zebra Room. Witnesses stated that smoke entered the second floor hallway from the open circular or spiral stairway from the first floor. There was not a witness found that observed any fire on the second floor. Statements indicate that while the latter portion of the group from the Crystal Rooms was descending the employee stairway to the

kitchen, patrons from the Cafe Main Dining Room were passing through the kitchen at the same time. While the Crystal Room patrons were leaving the building, other areas on the first floor were becoming aware of smoke. They were not notified by anyone from the Crystal Rooms that the investigation could locate.

Smoke was observed escaping from the Zebra Room at two different locations, the doorway near the main hallway (north doorway) and the door near the Main Bar (west doorway). At about the same time, patrons in the Main Bar observed smoke escaping from the ceiling and electrical fixtures. Witness statements agree that a female employee reported to a male bartender that she detected the odor of something burning in the corner of the Main Bar and Zebra Room. The bartender investigated and determined the odor of smoke. He went for a fire extinguisher and, upon his return, smoke in that corner was so intense that he could not get near it. He did not observe any fire. The bartender in question and another bartender then notified the patrons in the Main Bar to vacate via the front door. They assisted the patrons by propping open the front door.

At the same time and unknown to those in the Main Bar, one of the sons of the owner had been notified that there was a fire in the Zebra Room. After being notified by an employee while he was in the kitchen, he then proceeded to the Zebra Room doors near the main hallway (north doorway).

At this time, those patrons in the Cafe Main Dining Room were given warning and started their evacuation. Some exited by the front door as did those from the Main Bar. Others exited through the kitchen and met patrons from the Crystal Rooms who were now in the kitchen area at this time.

Employees began using fire extinguishers at the door of the Zebra Room. Patrons in the Empire Room were notified and escaped by the kitchen route. Some tried to escape through the Main Bar, but others were turned back into the Empire Room because of the intense smoke in the Main Bar. These escaped by the kitchen and main corridor to the north.

Patrons in the Viennese Room were notified and evacuated by employees serving the party there. The first to leave the south end of this room encountered dense smoke in and around the Main Bar. Some stated that the walls surrounding the Main Bar were in flames. Most of the occupants of the Viennese Room escaped through the Empire and Garden Rooms.

As occupants of the other areas of the club were exiting, the Garden Rooms were notified by employees that there was a fire in the building. They vacated the building by moving directly to exits on the north end of the building. Statements of witnesses using the main corridor indicate that the Cabaret Room entertainment stage show was still in progress.

Witnesses vary in their opinion as to the exact time that these incidents occurred. However, their statements do verify what was taking place as to the sequence of events.

The last room notified was the Cabaret Room. Notice was given by an employee from the stage in that room. Patrons used four door exits. Two were into the main corridor, one each at the north-east corner and the south-east corner of that room. Those who left the room by the two doors into the main hallway had to travel north to escape. They could not travel south because they would be entering the heavy smoke and fire area. Other Cabaret Room patrons proceeded to the south-east and north-east exits to escape. Statements from patrons indicated that some did not take the warning seriously. Some climbed over railings to get to exits, others were pushed or fell over tables and chairs which were in aisles. Smoke soon began coming from electrical fixtures and ducts. While in line, many people were knocked down and walked upon. Dense smoke and hot gases then entered the room with high velocity. Those patrons to the rear of the line were overcome by smoke and fell upon those persons already on the floor and others being knocked down. Those among the last to leave this exit under their own power

stated that they observed black smoke belch through the doorway from the corridor and that it was soon followed by fire.

By this time firemen were now on the scene and beginning to pull victims from the Cabaret Room area. They entered this north-east exit door with oxygen masks and removed living patrons who were found at the bottom of stacks or piles of bodies.

The Assistant Fire Chief from Newport, Kentucky, (see Statement B-3) stated that shortly after his arrival he went to the exit door located at the south-east corner of the Cabaret Room. He entered a room thought to be a dressing room. He found four or five bodies in this room. With assistance, the bodies were removed. He entered again and passed this same area into an area he described as a closet. He found approximately 20 bodies "stacked" in this closet; three bodies were dressed in tuxedos. These bodies were removed before the final fire approached this area. He could hear the fire around him. The bodies removed at that time were not burned.

The following is a detailed account describing the manner in which patrons and employees vacated each area of the building and their paths of travel.

Crystal Room

The Crystal Rooms were located on the second floor, consisting of six rooms. They were occupied by two groups that night, the Afghan Hound Club of Southwest Ohio with 93 present, and the Greater Cincinnati Choral Union with number of members present unknown. Employee H-21 stated that there was a total of 240 to 250 patrons present.

Investigation revealed that patrons vacated the second floor in the following manner. There were two avenues of escape from the second floor, both being stairways to the first floor. One led down into the kitchen area and the other was the spiral staircase, not enclosed, that exited south of the Empire Room and

east of the Main Bar. Patrons used both exits to vacate the second floor.

Most of those using the stairway to the kitchen traveled north through the kitchen and exited to the outside of the building through a door in the north wall of the kitchen.

Some of those patrons using the kitchen did not exit by the nearest door. They in fact went out of their way to exit through a door farther away by going through unnecessary hallways and additional rooms. When in the kitchen, the easiest and most direct route would have been due north with the majority of other people. However, when midway through the kitchen, they turned at a right angle due east and entered an east-west hallway which was a service hall used by employees to carry food. The patrons then entered another hallway parallel to the service hall, traveled east through it, passed through two Garden Rooms, and finally exited to the outside on the north end of the building.

All those patrons who used the spiral staircase went through the Main Bar and foyer to exit.

Employee S-39 stated that he was the first on the second floor to discover smoke by odor at 9:00 p.m. It was visible within a few minutes, and it was coming up the spiral staircase. He notified the patrons and directed them down the employee stairway to the kitchen and thence through the kitchen.

Employee D-5 stated that he was in the Crystal Rooms at 9:00 p.m. when a waitress told him there was a fire in the Zebra Room. He then observed a small amount of smoke in the second floor hall near the top of the spiral staircase. Before he could get down the hall to the top of the stairs, "the smoke poured in on us." There was a door from the second floor onto the roof. The employee directed patrons to knock the door down, but they could not. He directed patrons to the service stairs to the kitchen. The lights went out, and they could hardly breathe. He worked his way along a wall to the service stairs.

Employee H-21 stated that she was working the Crystal Rooms and detected the odor of smoke. She did not become alarmed because "things like that happened there, fires here and there, bathrooms on fire and stuff." She noticed that the smoke was getting stronger and she started looking in the bathrooms and dressing rooms for the fire. In the hall, she discussed the smoke with another employee when the patrons started leaving their rooms because of the smoke. Patrons were gagging and choking from the smoke; they were directed to the service stairs. The lights went out two or three times and then they stayed out. She stated that she had detected smoke at 9:00 p.m. and that it was first observed at the top of the spiral staircase.

Main Bar

All patrons from the Main Bar exited through the foyer to the main entrance on the south side of the building. This was the most direct exit.

Employee B-17 was a bartender working behind the bar at the time. He stated that a female employee called his attention to the odor of smoke at the entrance to the Zebra Room from the Main Bar. He himself detected the smoke and went for a fire extinguisher; when he returned, he could not get within 20 feet of the Zebra Room door because of the heavy smoke. He and another employee took the patrons out of the bar and through the main doors to the outside. He stated that once outside they could not re-enter the building because the smoke was too dense and low to the ground.

Employee C-12 stated that she observed smoke coming from the Zebra Room. "I didn't pay any attention. I just says, well, you know because I knew it was being taken care of, because I, you know it's just like something you take for granted, like I, it was so weird it happened so fast."

As one of the managers passed through the Main Bar, he stated there was a fire and to get the patrons out. The doors to the Empire Room were now open,

and the patrons started filing out from that room into the Main Bar and then through the foyer to the front doors.

Cafe Main Dining Room

The patrons in this room exited in two directions. Some entered the kitchen and exited by the door on the north wall to the outside. This is the same door used by some patrons from the Crystal Rooms. Others exited by a more direct route through the Main Bar and out through the foyer.

At least three people contacted by investigators took far longer routes to vacate the premises. They traveled through the kitchen, then east through a service hallway, then north through the Garden Rooms to get outside: Patron L-32 stated that he was led by an employee via the longer route into the Garden Rooms. No explanation was given.

Employee G-59 stated that she observed smoke and led her guests from the building. She was not warned by anyone, nor did she pass the alarm on to anyone else. She exited by a long route through the Garden Rooms.

Employee S-23 was at the hostess desk just inside the front entrance of the Main Bar and near the door to the Main Dining Room. She stated that someone yelled, "Fire, call the fire department." She made the call and told patrons in the bar to leave. She then went into the Main Dining Room and told the customers to leave.

Garden Rooms

The patrons in the room vacated this building by using the exit doors out of the room on the north side.

Patrons S-188 and S-189 stated that a waitress was unable to open the nearest exit door after notification of the fire. She led them to a door farther away.

Garden Room Three and Four were separated by "folding" or "accordion" type doors. Some patrons left Room Three and went through Rooms Two and One to make

their exit. The exit door out of Room Four would have been closer and would have been quicker. Patrons J-36 and J-37 stated that these folding doors were locked from the Room Four side of the curtain, preventing the patrons on the Room Three side from opening them.

Viennese Room

The patrons of the Viennese room used three different routes of egress.

Some left the room by entering the north-south main corridor. They proceeded north down the corridor between Garden Room One and the Cabaret Room, exiting on the north side of the building. Others left the room by entering the north-south main corridor, proceeding south down the corridor, west into the Main Bar, and then south through the foyer, exiting through the main entrance. Still others left the room by entering the north-south main corridor, crossing the hall (westward), and entering the Empire Room. They continued westward and entered the kitchen. There they proceeded north. Some patrons left the building by the kitchen exit on the north side of the building; but some of these patrons when midway through the kitchen turned east into the service hall, then north in Garden Room Three, and exited through the north wall of this room.

Empire Room

This room was occupied by an estimated 387 patrons. When notified of a fire, they vacated the room and building by many different routes.

Investigation reveals that those patrons who arrived at the southern entrance-exit first were able to vacate by going directly through the Main Bar and foyer, then out the front door. At a given point, the smoke and fire became so intense that the remaining patrons trying to exit at the southern door were turned back and had to escape by other exits.

Those patrons who arrived at the eastern entrance-exit door were able to escape by turning south through the north-south main corridor. They then went

through the Main Bar and foyer as had those who exited through the southern door.

through the Main Bar and foyer as had those who exited through the southern door.

Other patrons left the room by using the western door which went into the kitchen. Statements indicate that employees directed the patrons from the kitchen to different exit doors on the north side of the building. These exits were in the kitchen and Garden Rooms Two and Three.

Cabaret Room

The Cabaret Room was located in the northeast corner of the building. There were three exit doors from this room, and all were used by patrons as escape routes.

Another exit was located in the northeast corner of the room. To get to the exit, patrons had to enter a small room containing a service bar. They were then required to make an immediate left turn to exit through the doors. The third exit was located in the southeast corner of this room. To leave the room, patrons had to enter a hallway and travel through the hall and a service bar to the exit door. This exit overlooked U.S. 27. The main exit was located in the north-south main corridor; the patrons then proceeded north through the hall and exited the building near the Garden Rooms.

Patrons used all three doors to vacate the room and building. They were first made aware of the fire by Employee B-3 interrupting the stage show and making a public announcement. Smoke and fire had not been observed in this room prior to the notification.

Patrons L-66 and L-67 stated that they attempted to escape by using the main corridor exit but were prevented due to dense smoke. They had to exit at the south-east corner.

Patrons B-144, B-145, K-39, K-40, and S-155 stated that an exit door at the north end of the main corridor was locked and another door had to be used.

Casualty Report

A need was seen for positive identification of victims, the causes of death or injury, notification of next of kin, release of bodies, and the care and return of personal property. This need was met by a joint effort of the Kentucky State Police, the Federal Bureau of Investigation, the Campbell County Coroner, and area hospital and morgue personnel.

Early in the investigation, the Director of the Division of Criminal Investigations of the Kentucky State Police called for the assistance of the FBI disaster team for the identification of victims. This team responded and, along with the coroner, made positive identification of all fatalities.

Handling and return of personal property was agreed upon by having the person recovering such property release it to the coroner who, in turn, released same to the proper individual.

Release of vehicles impounded at the scene of the fire was taken care of by the State Police who released these vehicles to the proper person or survivor of the victim upon receipt of proper identification.

At the time of this report, there was a total of 164 dead and an undetermined number of injured. The major cause of death in all the casualties was determined to be smoke inhalation and acute carbon monoxide intoxication. Some of the fatally injured managed to escape the building only to collapse and die outside the building. A few others died at local hospitals. We have been unable to determine the exact number of injured due to the fact that local hospitals suspended their normal outpatient treatment requirements due to the severity of this emergency. The methods of handling these casualties and their properties and the exact cause of death of each can be obtained by referring to Appendix A-8-1 through A-8-4.

The writers of this report wish to make note that probably many other people

would have been casualties had it not been for a major effort on the part of the firefighters, local emergency medical technicians, employees, and especially a group of medical personnel who were patrons in the group at the time of the fire. There are many substantiated acts where living people were extracted by firefighters from large stacks of bodies inside the building.

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INVESTIGATIVE CONCLUSIONS

Conclusions contained in this section have been made by members of the Investigating Team. After a thorough review of all evidence collected, factors have been identified which in the opinion of the Investigating Team contributed directly to the loss of life or injury during the May 28, 1977, fire at the Beverly Hills Supper Club. Legal issues of compliance with law or safety requirements prescribed by several codes are not addressed in this section; rather, such issues are reserved for analysis and conclusions in the sections being prepared at the direction of the Special Counsel. Some factors which have been identified as contributing directly to death or injury may not involve violations of law or code requirements. In turn, some of the violations of law or code requirements discussed by the Special Counsel in later sections of this report may not, in the opinion of the Investigating Team, have contributed directly to the death and injury toll.

Contributing factors identified in this section have been classified into two basic categories - operational factors and construction factors. Although each factor is discussed separately, most if not all are inter-related. These contributing factors are outlined below.

OPERATIONAL FACTORS

Notification to Occupants

Occupant Load

Obstruction of Egress

Emergency Training of Employees

CONSTRUCTION FACTORS

Means of Egress

Structural Systems

Electrical System

Interior Finish

Alarm System

Sprinkler System

Notification to Occupants - At the time heavy smoke was discovered in the Zebra Room by the opening of double doors, no direction was given nor process begun for the systematic notification of employees in all areas of the club as to the existence of a fire and the need for evacuation of occupants. Immediately after discovery, several employees secured fire extinguishers and began discharging them into the Zebra Room through the north doorway. During this attempt to fight the fire, several employees working in adjacent areas observed smoke themselves and began to evacuate patrons who they were serving.

After one of the owners joined in the attempt to fight the fire, and at the time flashover occurred, the owner shouted instructions to another employee, "Get these people out of here." This is apparently the point in time when a fire department was notified by telephone. Records of the Campbell County Dispatch Center indicate this call was received at 9:01 p.m.

During the attempt to extinguish the fire in the Zebra Room and while occupants were being evacuated from the Main Bar, Crystal Room, Viennese Room, Empire Room, and Main Dining Room, a busboy from the Cabaret Room came the entire length of the north-south corridor to the area outside the Zebra Room.

After observing the heavy smoke and discharge of fire extinguishers, he proceeded to the kitchen to locate other fire extinguishers. When he returned to the

Zebra Room, he continued to observe the progress of the fire. Leaving there at approximately the time flashover occurred, he returned the entire length of the north-south corridor to the Cabaret Room and went to the stage, took a microphone from a comedian and announced the existence of the fire, the location of Cabaret Room exits, and the need for evacuation.

An analysis of the development of the fire in the Zebra Room and its spread from there through the north-south corridor to the area of the Cabaret Room indicates that hot gases and smoke spread rapidly down the corridor, traversing the entire 150-foot length in five minutes or less. This analysis further indicates that the actual spread of fire down the corridor was somewhat slower. However, the initial blast of hot gases was probably responsible for the majority of the deaths attributed to this fire, because of its high concentration of carbon monoxide due to incomplete combustion which had occurred while the fire was confined to the Zebra Room. Given a very simplistic analysis of the movements of the busboy and much more detailed information contained in statements and questionnaires, it is the opinion of the Investigating Team that as many as twenty minutes may have elapsed from the time heavy smoke was originally discovered in the Zebra Room until the busboy notified occupants of the Cabaret Room to evacuate.

This conclusion is supported by witnesses' statements that "The fire came into the room within three to five minutes after the warning," (see Appendix B). Further support for this conclusion comes from statements of patrons evacuating the club from other areas who observed the stage show in progress in the Cabaret Room as they left the building.

A summary of 518 responses to the questionnaire, from occupants of the Cabaret Room, indicates that 87 percent of those responding estimate that fire or smoke entered the room in less than five minutes after the busboy's notice (see Figure 13.).

FIRE INVESTIGATION STATISTICS

CARARET ROOM NUMBER OF PEOPLE RESPONDING--- 518

13

F : HOW LONG AFTER YOU RECEIVED NOTICE WAS IT BEFORE YOU ACTUALLY OBSERVED FIRE OR SMOKE?

1. LESS THAN ONE MINUTE	8 %
2. WITHIN TWO MINUTES	26 %
3. WITHIN THREE MINUTES	26 %
4. WITHIN FIVE MINUTES	27 %
5. WITHIN SEVEN MINUTES	3 %
6. WITHIN TEN MINUTES	2 %
7. WITHIN FIFTEEN MINUTES	1 %
8. WITHIN TWENTY MINUTES	0 %
T. DID NOT OBSERVE FIRE OR SMOKE	5 %

Figure

Occupant Load - After analysis, the Investigating Team has concluded that excess occupant load was a direct contributing factor to the loss of life or injury only in the Cabaret Room.

Various procedures have been used to estimate actual occupancy of the Cabaret Room at the time of the fire. The final estimate of 1,360 persons is based in large part on a seating diagram developed by a hostess who has worked in the Cabaret Room for several years (see Appendix A-9 and Appendix B, J-6). Supporting evidence for this estimate is based on the interviews and responses to questionnaires which total 848 people who said they were present in the Cabaret Room at the time of the fire. When added to the more than 150 occupants of the Cabaret Room who perished, the Investigating Team has direct knowledge of at least 1,000 people who were present.

According to responses to the questionnaire mailed out by the Investigating Team, 536 people responded. Seventy-seven percent of those people indicated that there was seating in aisles. Another 25 percent indicated that there were people standing because there was no seating available. Eighty-six percent of the people responding indicated that tables were too close together which leads to the conclusion that the room was overcrowded (see Figure 14-1).

As reported in an earlier section, the State Fire Marshal calculated allowable occupant load for the Cabaret Room to be 536. At the same place, calculations of the National Fire Protection Association were reported which indicated a maximum allowable occupant load of 511. Further, seating charts which were recovered from the club indicate normal seating capacity of the Cabaret Room as 614, with maximum seating capacity of 756.

No matter which estimate is used, including the figures of Beverly Hills itself, gross overcrowding was present. This factor, when combined with other factors, is in the opinion of the Investigating Team a direct contributing factor to the loss of life and injury.

FIRE INVESTIGATION STATISTICS

CARARET ROOM

NUMBER OF PEOPLE RESPONDING--- 536

E : DID YOU NOTICE ANY OF THE CONDITIONS BELOW IN THE ROOM YOU WERE IN?

1. SEATING IN THE AISLES	77 %
2. PEOPLE STANDING BECAUSE OF NO AVAILABLE SEATING	25 %
3. TABLES TOO CLOSE TOGETHER	86 %
4. TOO MANY CHAIRS	71 %
5. I DID NOT NOTICE ANY OF THE ABOVE CONDITIONS	5 %
6. OTHER	4 %

Figure 14-1

FIRE INVESTIGATION STATISTICS

MAIN DINING ROOM

NUMBER OF PEOPLE RESPONDING---- 54

E : DID YOU NOTICE ANY OF THE CONDITIONS BELOW IN THE ROOM YOU WERE IN?

1. SEATING IN THE AISLES	0 %
2. PEOPLE STANDING BECAUSE OF NO AVAILABLE SEATING	0 %
3. TABLES TOO CLOSE TOGETHER	11 %
4. TOO MANY CHAIRS	0 %
5. I DID NOT NOTICE ANY OF THE ABOVE CONDITIONS	87 %
6. OTHER	4 %

FIRE INVESTIGATION STATISTICS

WIENESE ROOM

NUMBER OF PEOPLE RESPONDING---- 45

E : DID YOU NOTICE ANY OF THE CONDITIONS BELOW IN THE ROOM YOU WERE IN?
1. SEATING IN THE AISLES 0 %
2. PEOPLE STANDING BECAUSE OF NO AVAILABLE SEATING 4 %
3. TABLES TOO CLOSE TOGETHER 0 %
4. TOO MANY CHAIRS 0 %
5. I DID NOT NOTICE ANY OF THE ABOVE CONDITIONS 82 %
6. OTHER 4 %

Figure 14-3

BEVERLY HILLS SUPPER CLUB
KENTUCKY STATE POLICE

PAGE :

FIRE INVESTIGATION STATISTICS

NUMBER OF PEOPLE RESPONDING--- 188

EMPIRE ROOM

E : DID YOU NOTICE ANY OF THE CONDITIONS BELOW IN THE ROOM YOU WERE IN?

1. SEATING IN THE AISLES	2	2 %
2. PEOPLE STANDING BECAUSE OF NO AVAILABLE SEATING	1	1 %
3. TABLES TOO CLOSE TOGETHER	6	6 %
4. TOO MANY CHAIRS	4	4 %
5. I DID NOT NOTICE ANY OF THE ABOVE CONDITIONS	87	87 %
6. OTHER	3	3 %

Figure 14-4

FIRE INVESTIGATION STATISTICS

GARDEN ROOM

NUMBER OF PEOPLE RESPONDING---- 104

E : DID YOU NOTICE ANY OF THE CONDITIONS BELOW IN THE ROOM YOU WERE IN?

1. SEATING IN THE AISLES	3	%
2. PEOPLE STANDING BECAUSE OF NO AVAILABLE SEATING	1	%
3. TABLES TOO CLOSE TOGETHER	4	%
4. TOO MANY CHAIRS	2	%
5. I DID NOT NOTICE ANY OF THE ABOVE CONDITIONS	88	%
6. OTHER	4	%

CRYSTAL ROOM

FIRE INVESTIGATION STATISTICS

NUMBER OF PEOPLE RESPONDING---- 65

F : DID YOU NOTICE ANY OF THE CONDITIONS BELOW IN THE ROOM YOU WERE IN?

1. SEATING IN THE AISLES	5	%
2. PEOPLE STANDING BECAUSE OF NO AVAILABLE SEATING	8	%
3. TABLES TOO CLOSE TOGETHER	11	%
4. TOO MANY CHAIRS	23	%
5. I DID NOT NOTICE ANY OF THE ABOVE CONDITIONS	62	%
6. OTHER	15	%

BEVERLY HILLS SUPPER CLUB
KENTUCKY STATE POLICE

PAGE :

FIRE INVESTIGATION STATISTICS

MAIN BAR NUMBER OF PEOPLE RESPONDING--- 50

E : DID YOU NOTICE ANY OF THE CONDITIONS BELOW IN THE ROOM YOU WERE IN?

1. SEATING IN THE AISLES	2 %
2. PEOPLE STANDING BECAUSE OF NO AVAILABLE SEATING	38 %
3. TABLES TOO CLOSE TOGETHER	4 %
4. TOO MANY CHAIRS	8 %
5. I DID NOT NOTICE ANY OF THE ABOVE CONDITIONS	42 %
6. OTHER	8 %

Figure 14-7

Obstruction of Egress - As in the previous section, this factor has been assessed primarily in relation to the Cabaret Room. Obviously related to the excessive occupant load, this factor deals with impediments to the egress of occupants of the Cabaret Room, which were primarily in the form of tables and chairs which were placed in aisles and persons who were either seated or standing in aisles. A later section will discuss structural impediment to the egress of occupants from the Cabaret Room.

A striking contrast is observed between the responses of occupants of the Cabaret Room to those of occupants of all other areas of the club to the question "Did you notice any of the conditions below in the room you were in?" The summaries of responses from each area of the club are included in a previous section, Figure 14. While 77 percent of the respondents from the Cabaret Room observed seating in the aisles, no more than five percent of the respondents from any other area observed this phenomenon. Further, while 86 percent of the respondents from the Cabaret Room observed tables too close together, no more than 11 percent of the respondents from any other area of the club observed this phenomenon.

In addition to the evidence contained in the questionnaire, there are many statements from occupants of the Cabaret Room which speak of seating in the aisles and on ramps leading to exits, and to the fact that waitresses had to pass drinks over other patrons because they could not walk to the tables they were serving. Finally photographs which had been taken by two patrons in the Cabaret Room, included in Appendix C, immediately prior to and during the initial stages of the fire, bear stark testimony to the obstruction of egress and excessive occupant load.

The Investigating Team is of the opinion that the operational practice

which was in effect the night of the fire of seating patrons in aisles and on ramps was a direct contributing factor to the loss of life and injury.

Emergency Training of Employees - This factor is closely related to the factor which was discussed earlier, regarding the lack of early notification to the occupants as to the existence of a fire.

Based on the statements of many employees, training in emergency evacuation procedures was practically nil. The owner himself stated there was no master plan for evacuation, while at the same time maintaining that supervisory personnel knew what to do in a case of emergency. Analysis of the actions of employees, which was discussed in the section of Notification to Occupants, clearly indicates there was no common understanding among employees with reference to the emergency evacuation of this building.

Such training for employees is required by the National Fire Protection Association Life Safety Code, was mandated by a report of the Campbell County Grand Jury in 1971 following an earlier fire, and was suggested by city fire officials at other times, according to their statements.

Although certain employees of the Beverly Hills Supper Club acted heroically and were responsible for the safe evacuation of hundreds of occupants, the Investigating Team has concluded that the lack of training of employees in emergency and evacuation procedures was a direct contributing factor to the loss of life and injury.

Means of Egress - Analysis of occupant loads, paths of egress actually used by occupants, and the placement of exits throughout the Beverly Hills Supper Club reveal that occupants of the Crystal and Cabaret Rooms were most affected by limitation of egress in the form of location, size, and access to exits. Fortunately, all but two occupants of the Crystal Rooms escaped and survived - but not without experiencing extreme difficulty in egress. The magnitude of the loss of life and injury in the Cabaret Room is well documented and in the opinion of the

Investigating Team attributable in large part to inadequate means of egress for occupants of that area.

In an earlier section, the National Fire Protection Association's Life Safety Code has been excerpted regarding requirements for exit space. In general, these requirements are designed to provide "exits" sufficient to permit the prompt escape of occupants in case of fire or other emergencies. The Beverly Hills Supper Club was not provided with exits sufficient to permit the prompt escape of occupants.

Included in the earlier section were calculations of allowable occupant loads based on square footage. However, the National Fire Protection Association's Life Safety Code also prescribes the number of exit units which must be available per occupant. Actual measurements were taken of exit width at Beverly Hills, which existed on May 28, 1977. These calculations (which were reported in the earlier section) revealed the total exit units to be 16 1/2. This number of exits, given their actual location and configuration at Beverly Hills, was sufficient to accommodate a total occupant load of only 1,511.

In addition to the obvious deficiency of exit units, both overall and in the area of the Cabaret Room, certain structural impediments to the egress of occupants of the Cabaret Room were also present. The presence of these impediments became particularly critical when the presence of hot gases, smoke, and fire blocked the two main exits from the Cabaret Room. Specifically, both north-east and south-east exits from the Cabaret Room were in part obstructed by the presence of service bars and unused tables and chairs. Further, access to the actual exterior doors at both exits involved multi-level ramps and railings for the occupants actually closest to the exits. Finally, the path of travel to each of these exits was circuitous in that occupants had to pass through various enclosed areas which served various auxiliary functions.

With regard to the Crystal Rooms, the failure to enclose the circular or spiral stairway, which provided primary access to that area, and the resulting immediate passage of smoke to the area of the Crystal Rooms after the fire was discovered in the Zebra Room, forced occupants of this area to use secondary exits. One of these exits was a doorway to the roof over other sections of the club, which was locked and which the occupants could not force open. Had they been able to force open the door, they would have been unable to leave the roof without jumping because of the absence of any other means of escape. Ultimately, occupants of the Crystal Rooms had to turn back from the two most obvious means of egress. They were led by an employee through a service stairway which connected with the kitchen area on the first floor of the club. As reported earlier, several of these occupants became disoriented after reaching the first level of the club and had difficulty in finding their way to their ultimate point of egress out of the Garden Room. Statements indicate that the two deaths which occurred in the area of the Zebra Room were the result of confusion and possibly panic on the part of the two deceased individuals during their attempts to find an exit.

Based on the evidence cited above, it is the opinion of the Investigating Team that the Beverly Hills facility was constructed with insufficient exit units and that this insufficiency was a direct contributing factor to the loss of life and injury.

Structural Systems - Since the Beverly Hills Supper Club regularly operated with occupant loads in excess of 1,000 persons, it should have been of a type of construction which would qualify under the National Fire Protection Association's Life Safety Code definitions as Class A or fire-resistive construction. Inspection of the remains and evaluation of construction plans reveal that the highest classification possible for the Beverly Hills facility is non-combustible or Class C construction. According to the code, Class C places of assembly are limited in capacity to 300 persons.

Two specific aspects of the structural systems which contributed directly to the loss of life and injury are the lack of fire separation devices and the wide-spread use of wood framing material.

Fire separation devices in exit corridors are required in a code context to have a one-hour fire resistive structure, and all doors used as fire separation devices are required to be equipped with self-closing devices.

The exit corridor from the hallway (Hall of Mirrors), near the Zebra Room, to exit doors at the Garden and Cabaret Rooms was constructed with open doorways without doors to the Hall of Mirrors, Garden Room, and Cabaret Room. There is no evidence that any door in this corridor was equipped with a self-closing device.

These open doorways created excessive draft and accelerated the rapid rate of smoke and gases through the corridor and into the remainder of the building. Vertical openings between stories are required to be enclosed and openings protected with self-closing doors. The open spiral stairway was not enclosed and permitted rapid passage of smoke, gas, and fire from the Zebra Room to the second floor exit corridor. Initiative action by employees in the early evacuation of this area probably prevented additional casualties.

Firestopping is required for each 1,000 feet of concealed space between ceiling and floor deck above. Partition walls between the Zebra Room, ladies' room, office, front entrance, and bar area did not extend to the floor deck above; and there was a continuous and connected open space above these areas. This contributed to the supply of oxygen to feed the early stages of the fire to this area.

The vertical shaft, located in the curve of the stairway, containing metal ducts for air handling, was not properly firestopped vertically or horizontally; and voids extended from the concrete first floor to the attic space and into

spaces above the Zebra Room. This also allowed rapid passage of smoke, gases, and fire. As reported by an earlier section, the great majority of deaths were attributed to smoke inhalation. The absence of self-closing doors in the north-south corridor permitted unimpeded travel of fire and gases from the area of the Zebra Room to the area of the Cabaret Room.

Finally, wood framing materials were used extensively throughout the building. Examination of the remains of the Zebra Room indicated the extensive use of wood materials in the concealed spaces there, thus providing a fuel supply for the intense build-up of smoke, heat, and flames. The intensity of this build-up was responsible for the massive amounts of hot gas and smoke containing lethal levels of carbon monoxide, which initially traveled down the main north-south corridor and ultimately entered the Cabaret Room.

The Investigating Team is of the opinion that the deficiencies in the structural systems enumerated above contributed directly to the loss of life and injury.

Electrical System - Shortly prior to the conclusion to the on-site investigation, the State Fire Marshal reported the conclusions of the Investigating Team as to the origin, source, and cause of the May 28 fire at the Beverly Hills Supper Club. Since the release of that report, no evidence has been discovered contrary to the initial conclusion. Due to the almost complete consumption of combustible materials in the area of origin, it has not been possible to develop a more specific conclusion as to origin, source, or cause. The original report is stated below.

The most probable cause of ignition within this area was electrical in nature and would have been fed by combustibles located there. Specifically, the presence of concealed, combustible ceiling tile and wood materials used for supports provided a fuel supply for continued spread of the fire through the

original and other concealed spaces. On-site analysis of the construction of the concealed spaces within the Zebra Room and adjacent areas supports this conclusion.

The above-mentioned ignition sequence led to an intense heat build-up within the concealed space, which ultimately resulted in the accumulation of smoke and hot gases within the Zebra Room itself. It was at this point when the fire was discovered and attempts were made to extinguish it. Some time thereafter, various actions were initiated to notify occupants of the building and the fire department.

During the time attempts were being made to extinguish the fire within the Zebra Room, flashover occurred. In other words, simultaneous ignition of all combustible materials within the room occurred.

During the course of the on-site investigation, a thorough examination was conducted of the remains of the electrical systems in Beverly Hills. Appendix C, Photographs, is a representative sample of photographs taken during that examination. Many serious violations of sound electrical wiring practices and electrical codes were noticed. These code violations are the subject of later sections prepared under the direction of the Special Counsel.

Media reports were widely circulated during early June 1977 that an independent investigation had determined that a small submersion type pump and the wiring leading to the pump were the cause of the fire. Appendix A-18-1 contains a thorough report of the examination of this possible cause. This report concludes that the pump and related wiring was not the cause of the fire.

In summary, the Investigating Team remains of the opinion that the fire was electrical in nature and that the fire originated in the concealed spaces of the Zebra Room.

Interior Finish - The interior walls were finished with decorative paneling 3/16" to 1/4" thick. This paneling has a flame spread of 100-200 based on ASTM E-84.

The main corridor of the Beverly Hills was finished with combustible carpet over a foam paperbacked underlayment, and the walls were lined with combustible paneling (Appendix 33).

These materials, when burning, caused black smoke which was irritating, causing tearing of the eyes and a burning sensation to the nose. In addition, the smoke contained carbon monoxide which produced confusion and disorientation and, as the level increases, produces unconsciousness and ultimately death.

Carpeting and paneling also contributed combustible gases to the fire. Once ignited, the fire in the corridor was very nearly self-sustaining, feeding on both carpet and paneling, with each contributing to the growth of the other.

It is the opinion of the Investigating Team that the interior finish directly contributed to the loss of life and injury. First, by increasing the rate of the spread of the fire from the Zebra Room down the 150-foot corridor to the Cabaret Room. Second, by effectively blocking the main north-south corridor of the club which led to the main entrance, and the most generally known exit to patrons.

Alarm System - Based upon physical evidence gathered by the Investigating Team, there was no active alarm system in the Beverly Hills Supper Club. This is amplified by statements from patrons who advised that there was no audible alarm system which indicated there might be a fire in the club. The Investigating Team does not have a pre-conceived notion as to the nature of the system that might have been employed. However, an audible system of some type clearly would have alerted employees, which could have in turn activated a planned communication pattern throughout the club. The Investigating Team would note at this point that various sensor configurations could have provided early discovery of the fire while it was still essentially confined in the concealed spaces of the Zebra Room.

It is the opinion of the Investigating Team that the lack of this audible

alarm system and a planned evacuation policy contributed directly to the loss of life and injury in this fire.

Sprinkler System - The lack of a sprinkler system will be covered in the later sections with reference to the legal issues of whether such a system was required. Further, investigators are not interested in conjecture as to whether a sprinkler system would have controlled or extinguished the fire. However, such a system would have provided an obvious early alarm, both audibly and visibly by the presence of water spray.

Therefore, it is the opinion of the Investigating Team that the lack of a sprinkler system in the Beverly Hills Club contributed directly to the loss of life and injury sustained in the Beverly Hills fire.

Unfounded Reports - At various times during the investigation and in several media accounts, certain phenomena have been mentioned as possible contributing factors to the loss of life or injury which after investigation do not appear to be substantiated by the evidence available to the Investigating Team. A brief discussion of three such factors follows.

Information was received by the Investigating Team that a uniformed police officer either closed or barricaded an exit door located to the rear and to the left (north-east) of the stage in the Cabaret Room. Investigation failed to substantiate this report. Several witnesses stated that they observed the actions of a uniformed officer at this exit door and that these actions were taken to prevent this door from closing of the exiting occupants (see Appendix B, Statements D-92, F-23, F-88, M-6).

During the investigation, emergency lighting was mentioned frequently. It was found that emergency lighting was available in the building and apparently operational (see Appendix B, Statements B-220 and K-33). Based on interviews with numerous witnesses in regards to emergency lighting and on our knowledge

of similar situations such as the Coconut Grove fire in 1942, it is believed that the heavy black smoke present in the building during the fire obliterated this lighting. Therefore, it is concluded that problems of visibility during the egress of occupants was caused by phenomena other than the lack of emergency lighting.

Finally, some have questioned the timeliness and adequacy of response from fire departments and other first-line emergency personnel. A number of statements in the evidence speak in very graphic terms of the rescue of individuals by firefighters up until the actual collapse of the roof structure. The Investigating Team, after thoroughly discussing this issue with various fire science professionals, is of the opinion that response to this emergency by the Southgate Fire Department and other responding departments was prompt and that officers of these departments were responsible for saving many lives of persons who were trapped in the area of the Cabaret Room.

LEGAL ANALYSIS

GENERAL CONSIDERATIONS

Concern for a fair, just, and accurate assessment of the Beverly Hills' tragedy and recognition of the significance of this report, has dictated extreme care to assure that statements of fact, conclusions, and recommendations are based on reliable, substantial, and probative evidence. However, at the outset it is noted that our findings are not necessarily the same as those developed in the adversarial context of the judicial process. Further, many of the relevant statutes and regulations have not been construed by Kentucky Courts, bringing to mind John Chipman Gray's admonition that statutes are not law but only a source of law since in our jurisprudence "it is the judicial [branch] which has the last say as to what is and what is not law in a community."¹ Where possible, we have taken into account interpretations of cognate provisions in other jurisdictions and standard methods of statutory interpretation and case analysis to the end that there is a high probability of congruence between our findings and what the courts will do in fact.²

One of the most striking features of the Beverly Hills' tragedy, from a jurisprudential perspective, is the disparity between the law-on-the-books in Kentucky and the law-in-action--the actual practices of the "regulated" parties. Almost all contemporary lawyers and judges view the law functionally, as "a body of ideals, principles, and precepts for the adjustment of the relations of human beings and the ordering of their conduct in society".³ But if the law consists merely of paper rules, it cannot serve its avowed function, which in the case of building and fire codes is to protect life and property. As Charles Evans Hughes observed, two years before becoming Chief Justice: "[T]he protection both of the rights of the individual and those of society rest not so often on formulas ...but on a correct appreciation of social conditions and a true appraisal of the actual

effect of conduct."⁴ It is somewhat surprising to discover egregious deviations from the codes since it would appear that the enlightened self-interest of the owners and operators of businesses and buildings would motivate them to comply with code requirements to protect their investment. Certainly, when a city derives 25-30% of its revenue from the operation of a business, it would behoove the city to inspect the premises carefully to protect such an important source of revenue. Surely, the insurer would check the property carefully?

As detailed herein, the deviations were manifold and extreme, including, just to mention some: locks on doors, absence of sprinklers and proper firewalls, hazardous wiring, overcrowding, inadequate exits, and improper construction. However, Beverly Hills continued to operate although many of these code violations were known by the insurer, the operators and owners, and were noted as concerns as a matter of record in the fire marshal's office. A frequent thread running through the testimony indicates that many officials relied on someone else to correct the situation, each in turn believing either that he was without power to act or that the other had acted. The only participants in the tragedy who were clearly ignorant of the latent danger hidden behind walls and within concealed spaces, were the patron-victims.

THE LAW

The bulk of the relevant law consists of Kentucky statutes, regulations and common law.⁵ It appears that no federal regulatory law was directly applicable to the Beverly Hills fire.⁶ In fact, the Federal Fire Prevention and Control Act of 1974 (Pub. L. 93-498, 88 Stat. 1535) provides in Section 2: "The Congress finds that--...(5) while fire prevention and control is and should remain a State and local responsibility, the Federal Government must help if a significant reduction in fire losses is to be achieved." 15 U.S.C., Section 2201. (Emphasis added.)⁷

The regulatory scheme adopted in Kentucky places on the Commissioner of Insurance the duty of promulgating reasonable rules and regulations to provide for a reasonable degree of safety for human life against the exigencies of fire and panic, such rules and regulations to be known as standards of safety.⁸ Counties, cities, and other political subdivisions may enact ordinances dealing with fire protection, but the standards of safety establish a minimum requirement and supersede any less stringent local ordinance.⁹ The Commissioner of Insurance is required to "enforce or aid in the enforcement of all laws, regulations and ordinances of the state and its political subdivisions relating to fire loss."¹⁰ To accomplish these ends he is authorized inter alia, "to supervise and make periodic inspections of all property within the state and to assist cities having fire departments in making inspections."¹¹ He is required to "appoint a state fire marshal and such deputy fire marshals, assistants and employees as are necessary"¹² to accomplish the purposes of the statutes relating to fire protection. The state fire marshal in turn, under the direction of the Commissioner, is to enforce and administer the relevant rules and regulations.¹³

Authority to inspect property to ascertain whether fire hazards exist is also given to the "chief of the fire department of a city, or any officer or member of his department designated by him."¹⁴ Such inspections are to be made "as often as practicable or as often as the city legislative body may direct."¹⁵ A written report of each inspection must be made and kept on file in the chief's office.¹⁶

If the Commissioner finds that any property is unsafe he may order corrective action.¹⁷ The Fire Chief may also order similar corrective action,¹⁸ and may even remedy the hazardous conditions at the owner's expense.¹⁹

The legislature has expressed special concern about electrical wiring, providing:

- (1) A city or county may require any person to obtain permits before commencing construction, alteration or repairs of any electrical wiring, and require such inspection as it deems necessary for the safety of life and property.
- (2) Reasonable standards for the construction, alteration and repair of any electrical wiring shall be adopted by the city or the county and shall have as a minimum standard the requirements of the national electric code which is incorporated into the state standards of safety. The standards so adopted by the city or the county shall be used by the electrical inspector in making his inspections.²⁰

Before discussing the specific safety standards adopted by the state it is important to recognize that apart from state statutory and administrative provisions and local ordinances applicable to situations such as those at Beverly Hills, there is a body of relevant court-made law, generally referred to as the common law. The most pertinent area is the common law of negligence. The legislature has specifically recognized the common law by mandating that

- (1) No owner shall fail to furnish and use reasonable adequate protection and safeguards against fire loss, or fail to adopt and use processes and methods reasonably adequate to render such places safe from fire loss.
- (2) No owner shall require or allow the public or any employee to go into or be in any property under his control which is not reasonably safe from the fire loss.²¹

Thus, although compliance with a specific safety standard constitutes prima facie evidence of absence of negligence,²² and violation negligence per se,²³ the common law imposes additional duties.²⁴ Therefore, for example, even though, arguendo, no Kentucky statute or regulation requires fire alarm or smoke or fire detector systems, the common law of negligence could impose the duty to install and maintain such systems. The reasoning would run as follows: Negligence occurs when a person fails in his duty to exercise

ordinary care in his activities to prevent foreseeable injury to another, and the other is proximately injured thereby.²⁵ Or alternatively, negligence is behavior which should be recognized as involving unreasonable danger to others.²⁶ Such behavior encompasses both misfeasance and nonfeasance. The gravity of the possible harm and not the probability of the occurrence must be given the most weight in considering whether someone has been negligent,²⁷ although both factors must be balanced against the burden of adequate precautions.²⁸ In applying this analysis to the situation at Beverly Hills, the Kentucky Courts could easily find that the owner and operator had a duty to install fire alarm and detector systems. The possible harm was great as evidenced by the loss of life and property in this fire. The probability of a fire occurring, given the past history and condition at the Club, was significant enough to warrant concern. The burden of providing alarm and detector systems was relatively light. Such systems have been commercially available for some time at a reasonable price. While such systems will not prevent a fire, they do provide a method of warning at the earliest possible moment of danger so that a building may be promptly evacuated. The utility of such systems on the night of the fire is beyond question, since the evidence set forth above shows that the fire burned for quite some time prior to detection. At the very least an alarm system would have provided a method of warning all those in the building after the fire was discovered as quickly as possible, thereby avoiding the type of delay that occurred on May 28th.

It is true that no such systems were required by any Kentucky statute, regulation, or custom. However, "customary practice is not ordinary care; it is but evidence of ordinary care." Northwest Airlines v. Glenn L. Martin Co.²⁹ That case involved the question of whether radar should have been installed in a plane that crashed and whether failure to do so made the airline

guilty of contributory negligence. The court concluded that it was pre-judicial error to submit the question of failure to install inflight radar to the jury since radar was at that time not commercially available or necessarily accurate. However, the court implied that if radar had been commercially available and reasonably accurate, then it would have been a question for the jury, regardless of the fact that neither statute, regulation or custom required its use.³⁰ Clearly, the same elements are present in the instant case, since the probability of fire occurring and that of a mid-air collision or storm causing a crash is the same or greater, and a system of adequate fire alarms and smoke and fire detectors were commercially available and reliable, although not so in the case of radar, fulfilling the final and last requirement for a duty to be imposed to have such a system.³¹

SOUTHGATE ORDINANCE

As noted above, cities may adopt local ordinances which are effective to the extent that they are at least as stringent as the state standards of safety. Southgate did adopt, on July 2, 1947, a building code [Ordinance No. 75-(5)] which deals with areas covered by the Standards of Safety. Since several Southgate officials have suggested that this ordinance was repealed, it is necessary to spell out in some detail the pertinent sequence of enactments:

- (1) February 1942, Southgate adopted the 1941 Standards of Safety (Ord. No. 42-(5)).
- (2) October 2, 1946, the 1946 Standards of Safety were adopted (Ord. No. 72-(5)).
- (3) July 2, 1947, the Building Code was adopted (Ord. No. 75-(5)).
- (4) January 19, 1949, Ord. No. 72-(5) was amended and the 1948 Standards of Safety adopted (Ord. No. 87-(5)).
- (5) May 15, 1956, Ord. No. 87-(5) was repealed and Ord. No. 72-(5) was amended and the 1955 Standards of Safety adopted (Ord. No. 139-(5)).

- (6) October 15, 1958, the Building Code (Ord. No. 75-(5) was amended (Ord. No. 159-(5)).
- (7) February 5, 1964, Ord. No. 139-(5) was repealed and the 1963 Standards of Safety adopted (Ord. No. 217-(5)).

In tabular form, the sequence appears as follows:

ORDINANCE
NUMBER

- | | |
|---------|--|
| 42-(5) | Adopted 1941 Standards of Safety, February 1942. |
| 72-(5) | Adopted 1946 Standards of Safety, October 2, 1946. |
| 75-(5) | Adopted Building Code, July 2, 1947. |
| 87-(5) | Amended 72-(5) and adopted 1948 Standards of Safety, January 19, 1949. |
| 139-(5) | Repealed 87-(5), amended 72-(5), and adopted 1955 Standards of Safety, May 16, 1956. |
| 159-(5) | Amending 75-(5), October 15, 1958. |
| 217-(5) | Repealing 139-(5) and adopting 1963 Standards of Safety, February 5, 1964. |

Apparently the city's contention is that by adopting the state's Standards of Safety they repealed by implication the city building code. But, as the United States Supreme Court has recently commented, it is "a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum," Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976), and that it is "a cardinal principle of statutory construction that repeals by implication are not favored." United States v. United Continental Tuna Corp., 425 U.S. 164, 168 (1976). Kentucky courts uniformly reject repeal by implication. See Fiscal Court of Jefferson Cty. v. City of Anchorage, 393 S.W. 2d 608, 612 (Ky. 1965); Hallahan v. Sawyer, 390 S.W. 2d 664 (Ky. 1965). Sutherland's authoritative text states:

The bent of the rules of interpretation and construction is to give harmonious operation and effect to all of the acts upon a subject, where such a construction is reasonably possible [citing Wood v. Common, 229 Kentucky 452.17 S.W. 2d 440 (1929)] even to the extent of superimposing a construction of consistency upon the apparent legislative intent to repeal, where two acts can, in fact, stand together and both be given consonant operation.³²

How the state Standards of Safety, which explicitly authorize enactment of local ordinances can impliedly overrule local ordinances is mysterious. Apparently Southgate officials did not believe until after May 28, 1977, that the ordinance was overruled by adoption of Standards of Safety since it was amended in 1958,³³ and in 1976 sent to a publishing company for codification. Southgate did appear to engage in peculiar activity when on August 2, 1967, the council minutes reveal that "council adopted the 1967 edition of the National Building Code for use of city officer."³⁴ The requirements for effective passage of an ordinance were not met; but if they had been,³⁵ it is not clear how the city officers would employ one code while the citizens were bound by a different one.

At this juncture, it appears that the Southgate 1947 Building Code, Ord. No. 75 - (5) was in effect at the time of fire, except to the extent that it was superseded by the state Standards of Safety. Under that ordinance the following relevant provisions are noted.³⁶ A building inspector is appointed by the Mayor with the consent of council and is under the direct control of the Mayor. The building inspector is charged with the duty of enforcing all laws relating to construction, repair, removal, and demolition of buildings and structures. All building construction requires a permit from the Building Inspector. He inspects electrical installations and construction to ascertain that the law is complied with and if in his opinion "the continuance of a building operation is contrary to the public welfare because of defective or illegal work. He shall order all further work stopped [and] any structure

hereafter erected without permit, or not in conformity herewith, may be directed to be removed."³⁷ In the same vein the ordinance also provides that a building that "may be or shall at any time hereafter become dangerous or unsafe, shall, unless made safe and secure, be taken down and removed."³⁸ This is a potent sanction available in addition to others provided in Section XLV of the Ordinance:

Any person who shall violate any of the provisions of this ordinance or fail to comply with any order or regulation made thereafter, or who shall build in violation of any detailed statement, specifications, or plans submitted and approved thereunder, or any certificate or permit issued thereunder, shall severally for each and every violation and noncompliance respectively shall be fined in the sum of not less than Twenty-five Dollars (\$25.00) nor more than Fifty Dollars (\$50.00). The imposition of one penalty for an violation of this Ordinance shall not excuse the violation or permit it to continue, and all such persons shall be required to correct or remedy such violations or defects within a reasonable time; and when not otherwise specified, each five (5) days that prohibited conditions are maintained shall constitute a separate offense.

The imposition of the penalties herein prescribed shall not preclude the City from instituting an appropriate action or proceeding to prevent any unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use - or to restrain, correct, or abate a violation - or to prevent the occupancy of a building, structure, or premises, or to prevent an illegal act, conduct, business or use in or about any premises.³⁹

Numerous provisions are parallel to the state Standards of Safety, including requirements of enclosing vertical openings,⁴⁰ firestopping,⁴¹ and installing sprinklers in stage areas where scenery and props are stored.⁴² In fact the ordinance provides that "the construction, operation, and maintenance of places of assembly...and the provision of means of egress from all buildings, unless specifically provided for in this Ordinance, shall be in accordance with the current edition of the Standards of Safety..."⁴³ Since violations of the Southgate building also constitute violations of the Standards of Safety, they are considered in conjunction with the state Standards of Safety.

STANDARDS OF SAFETY

The substantial remodeling of Beverly Hills occurred in the 1970's; therefore, only the Standards of Safety in effect from that time until May 28, 1977 are considered. The following chart reflects the various relevant versions of Standards of Safety and incorporated codes.⁴⁴

			<u>Effective Date</u>
1.	1963 SS	National Building Code (NBC) 1955 ed. with 1957 and 1963 amendments, National Electrical Code (NEC) 1962 ed.	March 15, 1963
2.	1972 SS	NBC 1967 ed., National Fire Codes (NFC) vols. 1-10, 1970-71 ed., NEC 1968 ed.	January 14, 1972
3.	1973 SS	NBC 1967 ed., NFC vols. 1-10 1972-73 ed1, NEC 1971 ed.	November 7, 1973
4.	1974 SS	NBC 1967 ed., NFC vols. 1-10 1973-74 ed., NEC 1971 ed.	November 20, 1974
5.	1977 SS	NBC 1976 ed., NFC vols. 1-16 1976 ed., NEC 1975 ed.	April 6, 1977

Several general features of the Standards of Safety apply prospectively "to existing buildings, installations, equipment, conditions and occupancies where safety to life or protection of the public interest requires their enforcement."⁴⁵ This prospective application is clearly valid since it is virtually undisputed that a state may require building owners to update their buildings to meet new fire safety standards.⁴⁶ The Kentucky courts have held that it is within the police power of the state to require buildings to meet the newer standards promulgated by the state,

provided that no one is punished for what was done prior to the new regulations and that a reasonable time is allowed for anyone affected to comply.⁴⁷ Given these qualifications, such laws and regulations do not have an ex post facto effect,⁴⁸ deny anyone due process of law, or result in the taking of property without just compensation.⁴⁹ This construction certainly makes sense.

The time-honored argument that a building complied with all legal requirements when erected many years ago, and that the owner should not now be penalized, is not accepted as an excuse for subjecting the occupants to unnecessary peril from fire. Neither is the argument that the cost of improvements would be prohibitive, so they should not be required. If the cost of reasonable safety is too great the use of the structure should be changed or prohibited as there is no justification for subjecting building occupants to the menace of fire.⁵⁰

Second, there is a question of whether the Standards of Safety constitute an invalid delegation of legislative power. It appears clear, however, that administrative regulations such as these, if filed and promulgated properly,⁵¹ with sufficient guidelines from the legislature and within the scope of agency's authority, will be upheld as constitutional.⁵² The "safeguards test" has been adopted in Kentucky to determine whether sufficient guidelines exist. The major factors considered under this test to determine the validity of an administrative regulation are:

(1) whether provisions exist in the delegating statute sufficient to determine that the powers delegated are confined to a specific area of authority or are at least within an ascertainable scope of authority; (2) whether the delegation is to a newly created agency or to a long established agency with a record of experience and expertise in the field; (3) whether significant decisions will be left to the untrammelled discretion of the agency or if the agency is required to establish criteria for its decisions by issuing regulations; (4) whether agency decisions affecting the rights of individuals are inherently reviewable by the courts in Kentucky; and (5) whether the delegation is necessary in light of the practical needs of effective government.⁵⁴

The type of standards the legislature must provide for the agency in promulgating regulations need not be very detailed. In Louisville & Jefferson Co. Bd. of Health v. Harny,⁵⁵ to "make appropriate rules and regulations and do all things reasonable or necessary to carry out effectively the work and to perform properly the duties intended or required by KRS 212.350 to 212.620, "was considered a definite enough standard even though the KRS sections referred to only made it the duty of the Board of Health to make reasonable regulations for the health of Jefferson County residents. The similarity to the authorization of KSR 227.300 is apparent.

However, in Dawson v. Hamilton,⁵⁶ the court seemed, in dictum, to limit administrative regulations to non-criminal areas. This case, however, is limited to its facts and seems of little value in examining the Standards of Safety. It has already been held that fines may be levied for violation of regulations provided the legislature specifically provided for such action.⁵⁷ Criminal sanctions for violations of agency regulations would be approved by the courts where such regulations meet the "safeguards test." Further, the legislature at any time may revoke or amend such regulations where it determines the criminal sanctions are too harsh.

There is also a public policy aspect to the promulgation of Standards of Safety. The area of fire safety standards has become very complex and technical. For a legislature which meets only 60 days, biannually, to review all the latest material and update its legislation is practically impossible. It is enough for the legislature to set out the areas it is concerned about and provide for reasonable regulation to be promulgated to set out the specifics.

Third, many Standards of Safety parallel those in KRS, including the explicit statement that the use of "shall" indicates a mandatory requirement,⁵⁸

and that

where an ordinance has been adopted by a municipality, the "Standards of Safety" do not modify any provisions of said ordinance, unless the "Standards of Safety" impose greater restrictions, in which case the provisions of the "Standards of Safety" shall control.⁵⁹

State permits are now required where there is construction or substantial remodeling of a place of assembly. They are issued pursuant to the following provision:

General permits required by this subsection will be issued when the requirements of the Standards of Safety have been complied with, and they may be suspended or revoked if the requirements are violated. Application for such permits shall be made in writing. When submission of plans and specifications is required by the Standard of Safety, it is strongly recommended that preliminary plans and specifications be submitted for review in order to eliminate unnecessary delays to the registered architect (and/or professional engineer) through minimizing any changes to the final working drawings. Any deviation from the final plans and/or specifications shall have prior approval from the Office of the Fire Marshal in writing.⁶⁰

Responsibility for the design, plans, and specifications for construction or substantial remodeling of places of assembly is clearly spelled out:

(a) Responsibility for the design, plans, and specifications, covering the construction or substantial remodeling of any building of the classes listed below, shall be intrusted to a professional architect registered in Kentucky, acting within the scope of his professional registration in accordance with KRS Chapter 323. The responsibility for the design, plans, and specifications for the mechanical and electrical systems within such buildings, and, when in the discretion of the Fire Marshal the circumstances so require, the structural design for such buildings, shall be intrusted to a professional engineer acting within the scope of his professional registration in accordance with KRS Chapter 322. Such architects' and engineers' seals and signatures shall be attached to the data covering each area of construction for which the particular professional is responsible.

(b) Plans and specifications in specific detail and in conformity with good architectural and engineering practices shall be submitted to the Office of the Fire Marshal, Department of Insurance, Frankfort, Kentucky, and approval received (see "state permits" preceding) before construction or substantial remodeling is started for the following:

....

4. A place of assembly, regardless of capacity.

....

(c) The architects shall notify this office before the end of construction or remodeling of any building listed above, in order that a final inspection may be made prior to occupancy. When supervision of the construction is not conducted by the architect it shall be noted on the Fire Marshal's "project information sheet."⁶¹

Concerning inspection, the following is provided ("this office" referring to the State Fire Marshal's Office):

Inspection:

(a) This office has statewide jurisdiction to inspect all places insofar as it is necessary for the enforcement of all laws, ordinances and lawful orders requiring any place to be safe from fire loss. The chief of the fire department or an officer or member of his department, designated by him for that purpose, has authority to inspect all places within his jurisdiction except the interiors of private dwellings in order to determine whether hazardous conditions exist in which case he shall order proper remedies. The power of inspection mentioned in this paragraph applies to the interior of private dwellings only when a fire has occurred or when there is reason to believe dangerous conditions exist in the dwelling. (KRS 227.270, 227.370)

(b) If any owner fails to comply with an order issued pursuant to KRS 227.380 or with an order as modified on appeal to the commissioner, the officer may cause the property to be repaired or removed if repair is not feasible, and all fire hazard conditions remedied at the expense of the owner. (KRS 227.390) The fire chief shall have primary responsibility for the safety of places under his jurisdiction. Regulations of this office establish minimum standards, which shall not prevent any city from enacting more stringent regulations; but this office will cooperate with local officials in enforcing all fire safety laws and ordinances of the state and of its political subdivisions. (KRS 227.220, 227.230, 227.320) Inspection of property in the territory served by the fire department shall be made as often as practicable or as often as the legislative body may direct. A written report of continued violations should be sent to the Fire Marshal who will cooperate with local authorities to secure compliance with the standards of safety and other laws, ordinances and regulations of the state and its political subdivisions relating to matters within the scope of this office. (KRS 227.220 et seq.)

(c) It shall be the duty of the chief of police in each political subdivision having a police department to render all possible assistance in the enforcement of the provisions of the standards of safety, and to direct and require police officers to enter places of public assembly for such purpose.⁶²

ASSESSMENT OF COMPLIANCE WITH APPLICABLE LAW

VIOLATIONS OF STANDARDS OF SAFETY

I. National Electrical Code

Violations of the National Electrical Code (NFC) abounded at Beverly Hills.⁶³ The pictures set forth in the appendix constitute graphic illustrations of what is perhaps best described as an electrician's nightmare. Although many National Electrical Code requirements are discernible only by an expert,⁶⁴ most of those set forth below were obvious even to a layman. These included: failure to install a box or fitting at each outlet, switch point, juncture point, or conductor splice;⁶⁵ absence of covers for outlet boxes;⁶⁶ failure to securely fasten in place boxes, fittings, and cabinets;⁶⁷ failure to place all wiring in metal raceways;⁶⁸ absence of fittings;⁶⁹ lack of proper grounding;⁷⁰ absence of bushings;⁷¹ excessive number of conductors in a box;⁷² improper transformer installation;⁷³ failure to close unused openings in boxes and fittings;⁷⁴ and failure to make electrical installations so as to reduce to a minimum the possible spread of fire through fire-stopped partitions and other similar walls.⁷⁵

II. National Building Code

It is often overlooked that the requirements of the National Building Code (NBC)⁷⁶ are as essential for fire protection and prevention as the Life Safety Code embodied in the National Fire Codes (NFC).⁷⁷ The purpose of the National Building Code includes "protection to life and property from fire and hazards incident to the design, construction, alteration, removal or demolition of buildings and structures."⁷⁸

Violations

Beverly Hills, as a two-story, unprotected, non-combustible structure,⁸⁰ exceeded the area limitation of no more than 6,000 square feet.⁸¹ Further, since the area was in excess of 6,000 square feet, and a restaurant, the absence of an approved sprinkler system constituted a violation.⁸² Of course, the basic thrust here is that no unprotected, non-combustible structure should extend over too large an area (upper limit of 18,000 square feet) regardless of sprinklers, due to the danger to life created. The spiral stairs constituted a critical violation of the National Building Code since they were unenclosed.⁸³ Had these stairs been properly enclosed with the requisite self-closing fire doors,⁸⁴ the disastrously rapid spread of smoke and fire would have been drastically reduced.⁸⁵

The addition of a wood frame structure (the check room) clearly violated the proscription that "no building or structure shall be extended on any side of wood frame construction or unprotected, non-combustible construction."⁸⁶

Installation of improper electrical wiring without approval and proper inspections was unlawful.⁸⁷ Since no certificates of inspection and approval were issued,⁸⁸ it was also "unlawful to use or permit the use of, or to supply current for, electric wiring for light, heat or power" for Beverly Hills.⁸⁹ Naturally, since the fire was electrical in origin, compliance in this regard would have avoided tragedy.

III. National Fire Codes

Volume 9 of National Fire Codes set forth by LSC, with the aim of specifying "measures which will provide that degree of public safety from fire which can be reasonably required."⁹⁰ The provisions of the LSC appear only to be common sense codified. We have set forth above the major violations of LSC,⁹¹ including lack of training,⁹² blocking aisles and means of egress,⁹³ absence of

of fire-stopping,⁹⁴ overcrowding,⁹⁵ inadequate and improper exits,⁹⁶ failure to post occupant load,⁹⁷ improper use of the building,⁹⁸ and improper interior finish.⁹⁹

The evidence establishing these violations is overwhelming. In addition to expert testimony and laboratory reports, statements taken from witnesses and parties are highly probative and substantial. Representative excerpts from relevant statements follow.

Training

Mr. Schilling, when asked, "Were the employees trained in how to evacuate the building in event of an emergency?" responded, "No." He did, however, indicate that employees were trained in how to use fire extinguishers and how to fight fire. S-226, at p.16.

Employee C-8 stated: "I was not instructed what to do in case of a fire or the location of any fire extinguishers nothing, you know, you just try to get out and hope that everybody else does."

Employee C-17 provides the following colloquy:

Q. Since you have worked there [Beverly Hills], have you ever received any type of fire training on what to do in a fire?

A. No.

Q. Have you every received any instructions on how to use a fire extinguisher or anything?

A. No.

Q. Were you ever told where the fire extinguishers were located in the building?

A. No.

Employee K-1:

Q. Had you ever been there [Beverly Hills] when they had demonstrations on how to use those fire extinguishers?

A. No.

....

Q. Ever have any instructions on what to do in case of fire from anybody?

A. No.

....

Q. Were you familiar with where any of the fire extinguishers were?

A. No.

....

Q. From what you said, did any of your employers or supervisors ever go over a plan for evacuating customers?

A. No

Overcrowding

A vivid description of overcrowding was provided by Patron M-152:

A. Like you went into the entrance of the Cabaret Room, you go to the left just a few feet. Then there were like three tiers, but there was only one step up for each one. Well, I would say she was a lady usherette ushered us, and there was a table and four chairs. And, of course, it was very annoying because people were trying to watch the show. They were going SSh and sit down, but there was not a place to be seated. It was annoying to us too. They had four chairs, and I said I'll sit with the youngsters. She said no, we'll try to manage someday. So the three sat on the second level, the three teenagers. And the next level down, Ms. Frymire sat and I stood by her. And then Ms. Simms and her and Mr. Frymire were standing at the rail right in front of us which was supposedly an aisle but you couldn't get through for the crowd anytime. Then, our daughter, Jo, and her friend Jim, got disgusted with all of it and went back to the doorway. And they told us, Jo came up and said, Mom, we're going back to the doorway and stand and not put up with this. She really had fallen, not really fallen but stumbled over chairs and there was no way to get through and they were just disgusted with all of it and they went back to the doorway and stood and said if we find seats, we will sit down, if they don't we will stand in the doorway. That is where we will be watching the show. So that is why they were the first out. They stood in the doorway of the Cabaret Room.

Q. You mentioned overcrowded a minute ago. In your opinion was the Cabaret Room overcrowded that night?

A. Well, Ms. Simms had had the reservations for four weeks. Of course I wasn't familiar with the place but you could look around and observe when they seated four of our ten party, I couldn't begin to see where the other six of us was going to sit. Then, of course, the waitress said that she would arrange seats someplace and to give her a little time. That is when we all were just standing.

But we had made reservations for a party of ten preceding.

To be seated together naturally. But there wasn't no way.

Q. Did you notice any chairs or tables set up on the ramp or the tier that lead up, the steps that lead up to those other tiers?

A. Yes. This is why my daughter Jo couldn't get through.

Patron B-61 reports:

We was a little late with our dinner and the show started at 8:30 and we asked the waitress, how the reservations were in the Cabaret Room and she said, oh, don't worry, it's a half hour late today. We walked in the Cabaret Room and the Cabaret Room was pretty full then and the waitress took us and she put us on four seats and they had a pretty heavy woman in the front there, and we squeeze in the back there and she, that lady said, I'm not moving, and then my friend's wife said, well I'm not squeezing back there. So, she took us to another table. She looked around and finally she found a place in the aisle, she said, is that alright, here? Said that's find, [sic] that's a good spot. She brought us four chairs for the table. On the left hand side from the aisle where you go down to the stage. We were sitting there and she ordered drink and she brought it maybe three or four minutes later.

Employee C-17 responded to questioning as follows:

Q. On the night the show was set up for John Davidson, what was the seating arrangements in the Cabaret that night? Was it crowded in there or undercrowded?

A. It was crowded.

Q. Was tables set up in the aisles or anything of this nature?

A. I didn't see tables set up in the aisle. Friday night there were tables in the aisle, but Saturday the show, you know when I was serving my people it hadn't fully begun so I didn't see tables in the aisle but there were chairs on the ramp that I was serving people.

Q. That was the fire ramp that goes out?

A. I called it the fire ramp. It was what I used, you know you used to serve by it.

Q. If you were in there, had been inside the club itself or inside the Cabaret when the word was given to exit the place, would you have had a hard time getting out due to seating arrangement?

A. Oh yeah. I had a hard time serving drinks when everyone was just sitting. So, you know if everybody is getting up and the chairs are just moved a little out of what we are not used to, yeah it would be real hard.

Other representative statements of patrons:

"There was so [many] people there, those tables were so close together that waitresses could hardly get through to deliver the food. Then they were sitting in the aisles." D-3, p.2.

"Mrs. Beavers feels that the main reason that so many people were hurt, and of course, her husband was killed, simply is because there were too many people in the room." B-11

One couple even took photographs that substantiate the overcrowding and blocking of aisles. See Appendic C.

Locked Exit Doors

In addition to the physical evidence indicating exit doors were locked, statements of patrons and employees substantiate that this was indeed the case.

Employee J-3:

Q. O.K. and where were these two ways [to enter]?

A. From the parking lot you come around the side come through the basement. Also you could walk around to the back of the kitchen and come through the back door.

Q. O.K.

A. But usually these doors would be lock ... cause they [employees] could steal things...

....

Q. Do you [know] whether or not the exit in the basement was kept locked? You mentioned a minute ago that you thought they kept it locked?

A. The one I am talking about is kept locked. That's the one right by the stock room next to the garbage room. They keep that locked unless they got a delivery coming in then they would open it up.

Q. O.K. Now how about the exit from the kitchen on the ground level?

A. It was locked but we broke the lock off to get out, you know.

Patron H-3:

The wedding started at 4:00 p.m. and lasted about ten minutes. The party then left the chapel and did some more sightseeing while we had some pictures taken. At this time my sister, Dee, and my wife's girlfriend Linda, went upstairs. They came down and said that the

exit doors upstairs are locked. Also during this time and when we exited earlier, we noticed chairs stacked against the wall in a hallway leading from the Cabaret Room to the garden outside.

The statements of patrons who escaped from the Crystal Rooms on the second floor provide not only evidence concerning locked doors, but also the effect of absence of a proper enclosure for the spiral stairs.

D-35:

My wife and myself arrived at the Beverly Hills Supper Club around 8:15. We went into the front entrance past the fountain, up the steps, we turned to our left and then another left at the top of the stairs to get to the room we were in. It was one of the Crystal Rooms. First one that you arrived at right after you go up the steps. When we got there we had to stand out in the hallway for a little while for them to set up another table for us because we were the last ones from our party to get there. I'd say it took them maybe 15-20 minutes to get the tables and stuff set up, I stood out in the hall and talked to Charlene Matthews, Lenore Gentry, Eugene Allenton, Marcia Allenton and Margaret Watkins. She was helping take the tickets. I guess at about twenty minutes till nine is when they finally had our table put up. We sat down, waiting to be served and while we were waiting to be served, we could notice smoke up in the ceiling and you could smell it, it smelled like wire or something burning but someone stuck their head in the door, I don't know who it was and stated that it was just a cigarette burning and everything was under control. About this time the waitress had started putting our food on the table and we had started eating and then it all happened so fast and someone just came to the door and hollered it's a fire and everyone has to get out. And that is when everyone started going to this exit that was right on my right. By the time myself and four or five other people that I was sitting at the table with.....out to the hallway, smoke was so bad then that we had to get down on our hands and knees and crawl. I remember we crawled to a stairway, a wooden stairway and it was about as wide as a normal door. I know two people would have trouble standing up and walking down these stairways together. After we got all the way down to the bottom of the steps, I remember we went through the kitchen and off to the right and down another hallway. After we were going down this hallway, whoever opened the door in front had to close it back because this fire and big smoke coming through the doorway then. So they closed it back. We turned around and go back and the door behind us we couldn't get out of either, the same one we had just came through, and that is when we noticed this door off to the left and we could see daylight out around the door. It was a wooden door with a padlock on it. No handles on the thing, that's when myself, Rev. Jones, Jerry Hill, Rev. Charles Lyons and I don't know who else was standing there, we tried to break this door down.

And H-21:

We were trying to tell the people to keep calm, that it was a fire downstairs. Before we knew it, I mean it just come up so fast it was just like a tornado. Kind of like a gust of wind. Smoke just started pouring in from everywhere and it happened so fast we just didn't have time to think. I mean in a matter in just seconds the whole upstairs was covered and we were all gaging [sic] and choking, and we were trying to show them how to get back through the hallway into the little room that we stay in back there that goes down to the kitchen. I think people were really starting to panic because everything commenced so fast. I had grabbed one of the napkins that we use to cover my face up, and our captain was telling everybody to try to cover their face. I mean they were really getting sick quite fast, and we went back into the cubbyhole and we kept calling out, Debbie, one of the waitresses I work with, kept calling out into the room, is everybody out, is everybody out. She was trying to make sure everybody was out of that room. Nobody answered her so she shut off the doors to our party room to try and keep it from coming in on us. The lights had went out two times I think I remember and had come back on. But then they had went out the third time and they stayed out. It was quite dark and people were panicking and for some reason we couldn't seem to move. I guess they were just congested in the stairway because we were just at a standstill it seemed there for a while. They were trying to bust the door down that went out on the roof and they couldn't get that down. We really thought we were going to die because we couldn't breathe and I was gasping for breath and my eyes were burning so bad I couldn't even open them. One of the waiters up there, Robert, he grabbed onto me and kept holding me up because I was really getting sick. Everything was so dark you really couldn't see anything that was going on. Somebody said they were trying to get down the elevator door which they couldn't have done but for some reason it took a while for them to start moving through the stairway. When they did, I couldn't hardly stand up. This boy held onto me and he got me all the way down the steps and all the way back to the kitchen and on to the hill.

The problem of confusion in routes of egress is apparent from the statement of Patron A-6, who was seated in the Cabaret Room close to the stage at the time of the fire.

Well, when he said there was a fire, I just got up and I told the lady that I was sitting with, "Come on, let's get out of here." Because I know fires can travel very fast. So she got up. The rest of them stayed sitting. They thought it was part of the comedy act. We made out [sic] way, and we got almost to the end of the line. My friend started to go up on the balcony, and the exit was the other way. I tried to get a hold of her. I kept following her for a short way. I lost track of her, but there was no turning around to go back. They were just forcing you on. So we go around

the end of the balcony and that is a dead end. There is not exit. I said, "Well, dear Lord what are we going to do now?" We couldn't go back. So we just got pushed up to the end, and this is where the firemen had chopped a hole in the wall. They crowded me down and I was in the floor by this time. The man kept putting his hand through the hole and kept saying, "There is someone in there, grab hold of my hand and I will pull you out." So here lays a man on this leg, on my left leg, and girl across my chest. I got my feet from under the man, and I got the girl, I don't know how I did it, but anyway I hoisted the girl up. She was out, she wasn't in a coma, she was fainted. I felt there was still life there so I pushed her up to this guy and we got her out of there not knowing who this man was but I found out later it was her husband and she had lost him. After they pulled her out, I got up there and they pulled me out. Just before this, maybe three or four seconds before, not long, this terrible explosion, and I looked across the hall and this great big billow of black smoke was just whirling after this. All the lights went out.

Analysis

It is evident that the above violations, singly, and certainly in combination, created a highly hazardous situation. For example, without training the usual sequence of events when employees discover a fire, as here, is to fight the fire, alert the fire department, investigate the fire, warn others, do something to reduce the danger, evacuate oneself, and finally evacuate others.¹⁰⁰ With training, the first action more frequently is to raise the alarm or organize evacuation as the first action taken.¹⁰¹ The experts recognize that while every measure that reduces the likelihood of fire and its spread contributes to life safety,¹⁰² behavioral dimensions are also important, such as training, agility, awareness, and beliefs. It is also known that large fire losses are most often due to the following.¹⁰³

- (1) Structural - Lack of fire-stopping, absence of fire doors, unenclosed stairways, and combustible interior finish.
- (2) Improper handling and storage of combustibles.
- (3) Private fire protection weakness.

Certainly, (1) and (3) were present at Beverly Hills. And as a nightclub, we know that the patrons were consuming alcohol, numbing their senses.¹⁰⁴ There were older persons present with reduced agility and acuity, and many were unfamiliar with the layout at Beverly Hills. It is well known that restaurants

and nightclubs generally present fire hazards such as "crowded conditions with inadequate aisles to reach exits, loose chairs to be thrown during escape, blocking of exits with tables or equipment, [and] locking of exits to keep customers from leaving without paying"¹⁰⁵ Indeed it was the Coconut Grove Nightclub fire that brought national attention to bear on the problems of adequate fire safety regulations.¹⁰⁶

There were other special circumstances that should have alerted officials to the fire hazards extant at Beverly Hills. There was, of course, the history of prior fires at Beverly Hills. But in addition, there was the following striking chain of events. After the fire at Beverly Hills in June of 1970, Southgate officials were justifiably concerned about fire hazards.¹⁰⁷ This prompted the Mayor of Southgate¹⁰⁸ to write the fire marshal's office on November 23, 1970, stating that the extensive remodeling at Beverly Hills

has caused myself, and the members of the Board of Council, to wonder if all the plans and specifications are being submitted to your office for approval, and if so, have they all been finally approved. Our concern is about fire hazards.¹⁰⁹

The fire marshal's office responded to the mayor's letter on December 2, 1970, indicating that that office had not received plans for renovation at Beverly Hills and that no approval had been given. On December 7, 1970, Deputy Fire Marshal Boyd, after checking the plans submitted, found ten areas of concern which he put in a memorandum directed to Fire Marshal Calvert. These concerns were:

- (1) The stair enclosure should be installed in accordance with Article V, Section 504 of the Ky. Standards of Safety;
- (2) The interior finish shall meet the requirements of Article III, Section 317 of the Ky. Standards of Safety;
- (3) The kitchen area shall be separated from the rest of the building by construction, having a minimum of one hour fire resistance rating;
- (4) All required exit doors shall have approved type panic release hardware;

- (5) Exit and emergency lighting shall be installed in accordance with Article V, Section 510, 511, and 512 of the Ky. Standards of Safety and bulletin PS No. 2;
- (6) The installation of the heating, ventilation and air conditioning systems shall be installed in accordance with Articles X, XII of the Ky. Standards of Safety;
- (7) The building service and storage facilities shall be installed in accordance with Article VIII, Section 800, paragraph 7 of the Ky. Standards of Safety.
- (8) Exit facilities shall meet the requirements of Article VIII, Section 800, paragraph 5 of the Ky. Standards of Safety;
- (9) A copy of the certified electrical inspector's certification of approval shall be submitted to this office upon completion of the project;
- (10) Stage curtains and draperies shall meet the requirements of Article VIII, Section 800, paragraph 2(h) of the Ky. Standards of Safety.110

When Deputy Boyd was questioned this year about the memorandum and plans, the following colloquy occurred:

- Q. Do you still have a copy of (the plans)?
- A. No sir. Our archives records show that the plans were missing. They were never sent to archives. My records also show . . . the plans were never given a log file number.
- Q. Is that unusual?
- A. Yes sir.
- Q. You noted . . . that normal procedures were not followed in that situation.
- A. No sir, it wasn't normal for the fire marshal to tell me to review the plans and give me a memo on what you find wrong. This is the exact wording that I recall.111

Former Fire Marshal Calvert stated, when interviewed, that the reason why he treated Beverly Hills in a special way was because Deputy Southworth (the present fire marshal) had told him that he (Southworth) was going to persecute Schilling and that was "when I told him I would handle it myself if that was his attitude and that is the reason and the only reason that I handled it."

Apparently, the day after Boyd's memo to Calvert, an inspection was made and an inspection form signed by a State Inspector, Edward Eviston, indicating

"Date inspected - December 8, 1970." On the form, the following handwritten statement appears in a space entitled "deficiencies noted":

I have discussed the ten items listed in your memo of December 7, 1970 with Mr. Schilling and he assures me that all will be complied in the completion of his building. He will let us know prior to completion so that we can make a final inspection.113

Apparently as soon as he received the Eviston inspection report, Calvert wrote to Southgate Fire Chief Ray Muench (December 10, 1970) stating:

I received my inspector's report on (Beverly Hills), and after visual inspection and discussion of these corrections (the ten concerns of Boyd) with Mr. Schilling, I have been assured that the corrections under discussion will be taken care of. My inspector was also assured that the parties responsible for construction of this building will notify this office prior to occupying so that a final inspection can be made by this office.

A copy of the December 10 letter was also sent to the Southgate building inspector, Richard Beiting, who on December 13, 1970, wrote to the Southgate mayor and members of council that

The State Fire Marshal's Office has been involved (re Beverly Hills) and since our first conflict I have received notification and where any controversy occurred, now has been corrected with written confirmation from the State Fire Marshal's Office to that effect.

No final inspection was made, although a partial inspection was reported by Eviston, dated February 9, 1971. The submitted form indicated that there were deficiencies in the portion of the club inspected, including: (1) lack of proper fire walls between the kitchen and dining rooms; (2) absence of a self-closing fire door in the "exit doorway from large dining room, that leads to basement stairs"; (3) absence of a copy of the electrical inspection certificate; and (4) failure to provide letters certifying the flame spread rating of carpets used and certifying the curtains and drapes are flameproof.114

It was later in the same month that extensive newspaper publicity occurred regarding the code compliance status of Beverly Hills. Assistant Fire Marshal

Jesse Martin was quoted in the Kentucky Enquirer (February 26, 1971) as saying that ten defects discovered by the state had not been corrected, including lack of firewalls, stairway enclosures, and improper interior furnishings. Public Safety Commissioner William O. Newman verified that there was no record of a final inspection. The article mentioned other violations, including electrical inspections and exits.

On the following day, Fire Marshal Calvert was quoted as stating that he had located another file that showed that the required corrections had been made. An ensuing series of articles appeared in local papers, one of which quoted Chief Ray Muench as stating that a "sprinkler system, which is not required by state law, has been installed."

The public furor produced was sufficient to provoke a grand jury inquiry. On March 16, 1971, the Campbell County Grand Jury filed a report stating, inter alia,

We heard testimony from state and local fire officials and are satisfied that Beverly Hills has complied with all fire and safety regulations. Frequent visits to this establishment are made by the Southgate Fire Department. We have been informed that the operators of Beverly Hills will train their employees in fire prevention and fire fighting in order to have its own "fire brigade," as soon as the employment situation stabilizes.115

This sequence of events was more than sufficient to alert state and local inspectors that there might be some life safety problems at Beverly Hills. Even the myopic inspector who somehow could fail to perceive that the spiral stairs were not enclosed, with this type of advance notice should have at least directed his attention to that area of the club.

But there was even more attention focused on the Beverly Hills situation prior to the fire by Senator Tom Easterly. He has informed us that after visiting Beverly Hills on December 11, 1976, he was disturbed about the "crowded nature of the facility," the "material in there (that) looked like it

would be the kind that would catch fire easily" and the difficulties of egress.¹¹⁶ Subsequently, he spoke with several employees in the fire marshal's office about Beverly Hills and then with the Fire Marshal himself.

I thought I would mention to him how dangerous I thought this facility (was) and something bad might happen up there. Low and behold, they already knew about it, he said it was a dangerous facility, and don't know his exact words, but he, maybe, in other words that they knew it was dangerous, they knew it was a fire hazard, that they had done what (they) could to correct it, and, but that he was hampered by somebody over him in carrying out and enforcing what he thought was right.¹¹⁷

It is clear that prior to the Beverly Hills tragedy of May 28, 1977, the State Fire Marshal's Office and Southgate officials were aware that the issue of danger to life and violation of Standards of Safety at Beverly Hills had been raised.¹¹⁸ This included frequent reference to the unenclosed stairway, which had such a devastating effect on May 28.

Measures for restricting the spread of fire in buildings are major elements in life safety. Most important is the enclosure of stairways, elevator shafts, and other vertical openings through floors. ... Thousands of lives have been lost due to the rapid upward spread of fire and smoke through unprotected vertical openings.¹¹⁹

If the stairway and main corridor had been enclosed with proper self-closing doors our earlier description of the spread of the smoke and fire from the Zebra Room down the main corridor to the Cabaret Room would be impossible,¹²⁰ and perhaps no loss of life would have occurred.

Explanation

The inescapable question - WHY? Why was it that the hazardous conditions at Beverly Hills, brought to the attention of state and local officials and the public, were permitted to exist for years, finally producing one of the worst tragedies in the history of Kentucky?

Certainly part of the answer lies in the common phenomenon that for most of us, fire is not personalized and is instead perceived as a very unlikely occurrence that happens to others. This often produces an "apathetic attitude (that) subverts fire prevention education and obstructs practical application of fire protection knowledge."¹²¹ Writing in 1967, Percy Bugbee was prophetic when he wrote: "Could there be another Coconut Grove today? Unfortunately the answer must be 'yes' . . . There are some operators of nightclubs (who) . . . make exits as inconspicuous as possible, . . . and crowd tables together to a point where panic might have disastrous results!"¹²² He suggested one effective sanction:

The public can help correct these situations by looking for these (hazardous) conditions and promptly leaving the place when they spot them. . . .¹²³

But where the defects are hidden and not readily observable, the public must rely on others to protect them. One of the avenues of self-help - examining posted occupant load limits - was eliminated with failure of the operators of Beverly Hills to post certificates of occupancy. There was virtually no enforcement of the codes by state or local officials in this matter. The experts have observed that a "fire occurrence generally is a failure either of a code enforcement program or a public education program, except in the case where criminal activity is involved."¹²⁴ The Beverly Hills situation provides ample support for this generalization.

Surely the most culpable acts that created and contributed to maintenance of fire hazards were intentional violations of known safety standards. The electricians who installed wiring at Beverly Hills admitted that they were aware that they were violating the NEC when they failed to place wiring in metallic raceways. An interview with Jerry Kremer, who did considerable wiring at Beverly Hills, revealed that

Mr. Schilling provided all materials used in the Zebra Room. ... The wiring was a number twelve, non-metallic wire, was not run through conduit as specified in the code. Kremer said that he advised Mr. Schilling this was incorrect and Schilling refused to allow him to run the wiring through the metal conduit as it was too expensive. Schilling also advised Kremer that he had permission to use these type supplies and wiring in the building.¹²⁵

This constituted a clear violation of the Standards of Safety and perhaps of the Kentucky criminal code by both Kremer and Schilling.¹²⁶ It is, of course, no defense for an electrician who intentionally makes an improper installation to prove that he acted at the direction of his employer, no matter how demanding. Two other electricians, when questioned about the use of non-metallic cable for wiring they did at Beverly Hills admitted, "Well, it's hanging right out of the canopy out in front.... But, no, I mean, I would be lying if I said we didn't use it because I can go out there and see it."¹²⁷ When asked if they had a free hand in how to make electrical installations, the response:

No, no, no, no, . . . You don't dig Schilling here. His sons don't even get a free hand and they run the joint. I mean he had his own ideas and you had to wire accordingly.¹²⁸

Again, a clear violation of the code by two more electricians. Some insight into the substantial connection between enforcement and compliance is provided by the following colloquy between Deputy Fire Marshal Conover and electrician White:

White: Yes sir. That's right. (Use of non-metallic in place of assembly.)

Conover: Not metallic in places of assembly.

White: Oh, yes. You take that assembly thing, they didn't start enforcing it up here until '73.

Conover: Yeah, but it was still code; statewide code.

White: Well, it was just like running romex through a cold air duct. They just started enforcing that last year and it's been in the code for years.¹²⁹

A major factor in keeping Beverly Hills in operation without compliance was the owner and operator's surreptitious behavior and failure to live up to commitments made. First, as to surreptitious activities, frequently construction was going on without a permit and was discovered by accident when almost completed. Deputy Fire Marshal Bramlage came upon the garden room addition construction by accident. He confronted Mr. Schilling and told him he had to submit plans to the State Fire Marshal's Office. When plans were not forthcoming, he returned to see Mr. Schilling.

I told him that we hadn't received any drawings from him or any architect covering the garden room addition. He said I'll see that I get them done. ... The building was continuing. They didn't stop work. They were continuing to build. And they hadn't, I'm thinking that they had no intention of sending the drawings down. ... I told him that I'd be back. He said where are you going? I said, well, I'm going to the courthouse to get a stop work order. He said, well, don't do that. I'll, uh, I think in the next few days he did have the drawings down.¹³⁰

We also know that at the time of the fire, new construction was going forward at Beverly Hills, without a local or state permit.

Second, another significant factor was the matter of unkept promises and misrepresentations. We have already noted that electrician Kremer reported that Mr. Schilling indicated he had permission to violate the NEC and use non-metallic cable. It also appears that Mr. Schilling told Eviston that he would correct all deficiencies noted, including the unenclosed stairway. Calvert relied on this assurance, as did Inspector Beiting,¹³¹ and the City of Southgate. The Grand Jury report indicates that the operators of Beverly Hills were going to train their employees, and even form a "fire brigade." None of these assurances were kept. Crucial deficiencies remained and no training of employees was provided. It also appears that Mr. Schilling did not comply with the architectural plans drawn up by Mr. Henry Mikkelsen. Mr. Mikkelsen's statement concerning his plans for the Cabaret Room is highly probative concerning the

effect of this deviation.

Q. In what capacity were you employed by the Four R Corporation?

A. As an architect for some remodeling in 1970 approximately.

. . . .

Q. Okay, was there any particular section of the Beverly Hills Country Club that you worked on or was it the whole building?

. . . .

A. Yes, in the Cabaret Room. (Looking at diagram of structure.) But it wasn't Cabaret Room and the stage was over on this end and as far as I recollect, the stage was down on this end.

. . . .

Q. Do you believe that that change in design from your original plans to what you're looking at now would have contributed anything to the danger of these people?

A. Oh yes. There would have been no problem. Mine - man you could pile people in that corner, they are going to keep on going out because . . .

. . . .

Q. So you would have had two exits to the outside.

A. Right. . . .¹³²

Concerning the Garden Room addition, a Kentucky architect, William Roeding, submitted a project information form to the fire marshal's office in which he represented that that addition was to be fire resistive, Type A, a total of 6,000 square feet, and he was to supervise the construction.¹³³ In fact, the addition was unprotected, non-combustible, was 7,245 square feet, and was not supervised by Mr. Roeding.¹³⁴

Inspections

Even with such assurances, it would seem likely that proper inspection would reveal the glaring deficiencies extant at Beverly Hills, especially ones as obvious as the unenclosed spiral stairway. To observe the overcrowding

would naturally have required inspections in the evenings. The standard National Fire Protection Association inspection manual advises that "inspections of theatres, nightclubs, halls, and such places must include visits while in operation."¹³⁵ When questioned about this problem, the Fire Marshal's response was not encouraging:

Q. How would you check to determine whether or not there were adequate exits for the number of persons actually in a restaurant? Do you go back at a point when people are there to see if it's overcrowded or what? How else would you ever know whether or not there is overcrowding?

A. Well, most of the time, when there's overcrowding throughout the state . . . in our schools with ballgames and stuff like that, we usually get complaints from the parents and private citizens.

Q. But you probably wouldn't get those in places like nightclubs.

A. In nightclubs, no.

Q. So how would you find out unless you went out and checked to see?

A. We don't find out. Here again, there's no provision in our operation structure. We don't work anybody unless we have a complaint, on a detailed assignment after 4:30 in the afternoon.¹³⁶

This was confirmed by the deputy fire marshal in charge of the general inspection section, Clell Upton, who stated that "our men are not geared to work evening hours. Our men's hours run from 8:00 to 4:30 normally."¹³⁷

Although the general inspection section is supposed to inspect all existing buildings in Kentucky, none of that section's men had inspected Beverly Hills prior to May 28, 1977.¹³⁸

There were, however, state inspections made where new construction was known to be going forward at Beverly Hills. Why then were the critical existing deficiencies and fire hazards not observed? The statement of Deputy Boyd is pertinent in this regard:

Q. Has that place (Beverly Hills) been inspected by the fire marshal during those seven years (since Boyd wrote memo concerning ten concerns)?

- A. Not to my knowledge.
- Q. Is this normal procedure for that period of time or is it somebody else's responsibility?
- A. I really don't know how to answer that because it's another section of the office and I don't really know what all their procedures are. . . .
-
- Q. But you are responsible for substantial remodeling, and you did get the plans for the Garden Room, is that correct?
- A. Yes sir.
- Q. At that time, did you attempt to determine whether or not these earlier violations had been corrected?
- A. No sir.
- Q. Could you at that time have done so? Would it be within your jurisdiction, given substantial remodeling, to look at the total plant there?
- A. I don't know. As I said, we didn't have any full-time people to do the job.
- Q. When there is a substantial remodeling of a facility, then it wouldn't entail actually examining the total facility in relationship to this remodeling?
- A. We do this now, but of course, we're staffed.
- Q. But at the time the Garden Room was done, you did not?
- A. No sir.
- Q. Then how could you ascertain whether or not the exits and lights were adequate for that particular addition since it was incorporated within the total building? Some of the exits might go out into hallways which might have flame resistance or interior finishes that are inadequate; how would you know?
- A. The Garden Room exited directly to the outside.
- Q. It also goes out, the way you come in, through the rest of the building.
- A. I only reviewed the addition. 139

We should also consider the statement of the fire marshal:

- Q. Would this (the fact that the Garden Room was not fire resistive construction) have not been discernable to the inspector when he went through the building after the Garden Room?
- A. Well, he should have been concerned with it in the new construction most definitely, but in the existing, it was already there, and we're getting back to this question . . .
- Q. But even in the new construction though . . .
- A. I don't know. Under that new construction, as Mr. Boyd says, if you have a copy of that sheet, you should have, I believe the architect listed that as class A construction. Here again, there's one other thing in this case that is horrifying to me, is to establish the pattern that's been followed in the past, my understanding is our man accidentally lucked in on this thing. Stanley's field inspector accidentally came upon it. I don't know how he did this, but this building was 90% completed, this expansion of the Garden Room, before we even got the plans. I think John had to threaten to take him to court before we got the daggone plans in at that.
- Q. Wouldn't that have alerted you then to problems with the remainder of the construction then?
- A. It should have. It would've alerted me if I had been made aware of it. But I wasn't made aware, until Sunday morning I arrived on the scene I did not know that an extension to the Garden Room had been made and did not know that a set of plans had come in our office.
- Q. Since then, have you changed your policy concerning review of your section heads?
- A. No, I haven't made any policy changes because, here again, Mr. Boyd was following the policy that he had no problems once he got the plans. Apparently, he didn't feel like it was necessary to bring it to my attention cause they agreed to do everything that he asked them to do on that expansion.
-
- Q. It seems like my problem relates back to the sequence of inspecting. If you just review the plans and then you have a final inspection, and nothing in between where it's not being supervised, then how can you tell?
- A. Where we have the plans before the job leaves the ground, we do make inspections in between.
- Q. Oh, you do make inspections.

- A. Yeah, you got to. But in this case we didn't because the daggone thing was 90% completed before we were made aware of it. So here again, when you get into these situations . . .
- Q. They violated the law at that point so, therefore, couldn't you compel them to do something?
- A. Yes, if the field inspector had reason to believe there was ~~any~~ anything improper about the construction. He would have made them open it up if there was anything up in there he felt like he needed to see.
- Q. Wouldn't you think he had reason at that point, when he caught them trying to construct without submitting the plans? That would've given me reason.
- A. That would've given me reason too, if I had been the inspector.140
- Deputy Fire Marshal Greenwell commented on the inspections as follows:
- Q. Is there anything else that you would like to add to this meeting that you have had with Mr. Boyd and the Senator?
- A. Well, I know that, I guess everyone knows now, about the additions to the building, but at that time it wasn't brought up that there was any new construction added to it. And after checking the records, it was pretty clear that there was definitely an addition at that given time that he could mention this to Mr. Easterly. He was saying since it was an existing building he had, you know, no authority. It was basically his comment, which is entirely wrong if there was an addition because it very clearly states that point. The whole building has to be brought back into (the picture).
- Q. Even if there was an addition, you as a Deputy State Fire Marshal would still have authority to look at it, wouldn't you?
- A. Yes sir, at that point. If there is a new addition, the whole building is required to come up to code, unless it has a firewall or something.
- Q. Even if you'd walk in there today, if the building was still standing and you noticed fire violations, you could take some action yourself.
- A. Yes sir. (the KRS) . . .
- Q. Would give you that authority.
- A. That's right.
- Q. Because you are a Deputy State Fire Marshal, all of you I guess are Deputy State Fire Marshals.
- A. Yes sir, all the men.

Q. But most of the time this is taken care of by the regular field inspectors?

A. Well, that is sort of a confusing thing. In terms of additions, quite often it's found out the addition's actually underway without plans actually going through. Because of that, the field inspector might be the first contact, but his orders are to basically not even inspect the building with the list of deficiencies. What he is supposed to do is contact the owner and explain that he needs to submit plans and specifications in the office and start from there so that the plan review process will be completed, so I think it very well could be a field inspector's first contact. Actually, the point is to try to get them in the office with the plans first, and get that part of the thing out of the way and then go from there with the field inspections. 141

The picture that emerges is that the Fire Marshal's Office knew of fire hazard problems at Beverly Hills based on inquiries from Southgate, notations of deficiencies by deputy fire marshals, a complaint by a Kentucky senator, and newspaper publicity (kept in a file in the Fire Marshal's Office). Inspections were not complete or thorough, as admitted by at least three deputy fire marshals. We are compelled to conclude that during the period of time from December, 1970 until May 28, 1977, the Fire Marshal's Office did not implement a proper inspection program which would have revealed the code violations. The frequent suggestion in the statements that it was someone else's task to remedy the situation does not reduce the overall obligation of the Fire Marshal's Office to comply with the duties set forth in its own regulations.¹⁴² Slicing duties, no matter how thin, does not eliminate them; in fact, it may only compound them.

The statement of Deputy Boyd also indicates that inadequate records were kept by the Fire Marshal's Office.

- Q. How long do you keep the plans?
- A. We have storage problems, and the maximum time we've kept them is two years and then they go to archives. We send them more often now because there's no place to keep anything.
- Q. Then they would actually be available normally in archives?
- A. Normally, yes sir. Not now, if they were in archives, they would've been destroyed. But they were not in archives.
- Q. You say if they were in archives, they would've been destroyed?
- A. Yes sir.
- Q. Why is that?
- A. They only keep them so long.
- Q. How long do they keep them in archives?
- A. At least five years.
- Q. Doesn't this give you some difficulty in carrying out your inspection program, not having the plans available?
- A. Yes sir, it is. I've heard the statement many times that we need to keep the plans until the building is finished and approved

Q. It seems to me that you would need to keep them much longer than that to see if there is code compliance when different standards come into play.

. . . .

Q. Does that have a notation of the type of wiring, for example, whether its romex, metal raceways or anything like that?

A. This? No, no.

Q. Do you keep any records other than that?

A. All the correspondence.

Q. But as far as the specifications, those aren't kept?

A. No, those go to archives. I asked the attorney about that specifically one day. I felt like certain parts of the specifications should be pulled from that book and kept in the file, such as pertaining to fire alarm systems or sprinkler systems or finishes, but he said no, don't remove it.¹⁴³

Concerning the requirement to keep records, we note that under KRS 227.370 "[a] written report of each inspection shall be made and kept on file in the office of the chief of the fire department."

Under KAR 50:010, a permit shall be required for the construction or substantial remodeling of any "place of assembly, regardless of capacity." That there is a duty to keep plans is reasonably implied, for the Standards of Safety impose a duty ("plans and specification ... shall be submitted to the State Fire Marshal") before construction or substantial remodeling of any place of assembly.

Further, when plans are required (as here), a duty to keep such plans is reasonably implied for "[a]ny deviation from the final plans and/or specifications shall have prior approval from the office of the State Fire Marshal in writing." Obviously the only way one can ascertain whether there is substantial compliance with the standards of safety, despite the deviations, is by resort to the submitted plans and specifications. This is the only reasonable construction which can be given to these mandatory requirements. Any other interpretation would be an unreasonable rule or regulation, in contravention of KRS 227-300, supra.

This logic is clearly mandated by KRS 522:020 and 522:030 also (official misconduct in the first and second degree, respectively). Under these provisions one abuses the public office if one "[r]efrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office." Since one cannot have a deviation, nor be in substantial compliance, without reference to plans and specifications, a duty to keep such records is clearly "inherent in the nature of his office." To contend otherwise is so illogical that the State probably felt it unnecessary to expressly so provide by statute or regulation.

Curiously enough, there were inspections of Beverly Hills made by the Insurance Services Office of Kentucky pursuant to an application for insurance by Beverly Hills under the FAIR plan. These inspections were conducted on January 19, 1971, September 22, 1971, December 30, 1974, and July 15, 1976.¹⁴⁴ In contrast to the Fire Marshal Office's inspections, these revealed a number of fire hazards, including poor access to firefighting, defective wiring, non-standard transformer vaults, and large areas not properly cut off.¹⁴⁵ The Deputy Commissioner (who also is Executive Assistant to the Commissioner) who sits as a non-voting member of the board of directors of the plan,¹⁴⁶ as a representative of the Commissioner, provided us with his view of the program.

Q. What was your duty as a state representative in this plan?

A. To see that the plan was operated from the standpoint of people having insurance availability, proper cost and of the operation of the board itself in the proper manner as far as the Department of Insurance goes because the Commissioner does have the final approval on any action that the voluntary board takes. This is also in connection with HUD (HUD Reinsurance) which is what the pool is basicly [sic] for.

Q. Then it would not be within your understanding that there could be violations of the fire code in institutions that were insured by this company?

A. No sir.

- Q. Are you saying that they would not insure them if there were violations of the fire code?
- A. I am not in a position to say what companies will insure or not insure, sir.
- Q. But might it not be probable that these high risk operations could have violations of the fire code?
- A. Oh certainly, sure. This building here probably has some violations somewhere along the line of a fire code.
- Q. Were you aware that they did conduct inspections of these facilities, the FAIR plan, that they actually had an inspections office that conducted inspections?
- A. The FAIR plan inspection consists of an ISO office making inspections not for fire safety and human life, but for physical defects in the way of such things as I guess structural things.
- Q. They wouldn't check to see if there was a defective wiring?
- A. I am sure that they would. But that is under management of the FAIR plan which is the responsibility of the manager. I don't have nothing to do with inspections.
- Q. You never see these type forms of inspection that the FAIR plan puts out?
- A. I receive these as a matter of form. I think these are the ones.
- Q. Okay. If you were to see a violation on one of those forms like defective electrical wiring or something along that line, do you bring that to the attention of the Fire Marshal's Office?
- A. No sir. These are after charges forms. I think you are getting maybe a misconception of what this plan is. This plan is basically for this type of risk, for people who either can't afford to repair and get their place in a number shape or for some reason or other, and cannot get insurance on the regular market. This here is when they turn them down, completely turn them down. They are practically abandoned.
- Q. I see. Even though they would have fire violations on the premises, they could still get insurance?
- A. Sure. They surcharge them.
- Q. Safety is not considered?
- A. No sir. This is a physical structure. This is giving the people, very frankly it originally started with the west end of Louisville where we had our problems, and the blacks primarily couldn't get

insurance. The companies wouldn't do it. HUD steps in. This is a sponsor in the riots of 1967 and 68 were the cause of the FAIR plan.

. . . .

A. And basically, the FAIR plan divides the three areas. The FAIR accessibility of insurance requirements is one area. The facility or the placement of these risks is the other area and the reinsurance.

Q. Let me cite you an extreme example and see if I am right in my thinking. Say I had this room and I had four cans of open gasoline setting in here, and I wanted to open a nursery for children in it, and if I could get by without the inspector catching me and the Fire Marshal's Office, I could insure that under FAIR plan if I could pay the price?

A. Yes, I would say probably so.

Q. That is extreme.

. . . .

A. Is this Beverly Hills?

Q. This is Beverly Hills, yes. Filters missing, exhaust fans and ventilators greasy, and quite a few things that are fire hazards. We were just wondering. We are just trying to get information. We don't understand it.

A. That is the primary responsibility first of all is the fire safety of the Fire Marshal, and I imagine the city inspector of Southgate and so. The Fire Marshal really has no connection with the fair plan. Now the fair plan inspectors, whoever they may be, they really are ISO people, but this is frankly kind of a social problem or a problem dealing socially with people that just can't get insurance and yet need some and are entitled to some.

Q. You mean you think that restaurants are entitled to insurance if they have conditions that are dangerous to safety of their patrons?

A. That is what the Federal Government tells us.

. . . .

Q. If you had seen this report on Beverly Hills and saw that there was defective wiring, would you have brought that to the attention of the Fire Marshal?

A. Possibly. Possibly. But the Fire Marshal and his duties is not connected to my knowledge in any way, shape or form with the fair plan operation.

Q. But you are the state representative on that board, and as such . . .

- A. You keep saying state representative. I am the representative of the Commissioner of Insurance.
- Q. Okay. Who in turn is the boss of the Fire Marshal.
- A. The Fire Marshal works under the Commissioner of Insurance. That is right.
- Q. So the only person in the state as a state employee who would have access to these report would be yourself?
- A. Anyone would probably have access to a report down there.
- Q. Is inspections public where someone could walk in and get them?
- A. Sure, The inspections and the cancellations, these things are sent to the insured. They are after charges so they can tell them how much it is costing them because they got a bad flue or because there is an explosion next door to them.
- Q. But you never knew it as your task to go through these to see if . . .
- A. Sir, I don't have the time to go through every durn one of those. No sir. That is the responsibility of the facility and the board who is a voluntary board and actually, of course, it is a law now, but this was put in by regulation and started out as a voluntary service of insurance companies to establish a need for a market that could not be insured by a regular market at regular rates.
- Q. Do you know if the Marshal's Office ever comes over and checks out these inspection reports?
- A. These here?
- Q. Un huh.
- A. No sir. I don't think they ever do.
- Q. Did you ever suggest to them that they might do so?
- A. No sir.
- Q. But you are aware that they could do it if they wanted to?
- A. I assume if they want to, they could go down to the Starks Building where the fair plan facility is and do it. Yes they could. I am sure the fair plan would not deny or the manager of the fair plan would not deny the Fire Marshal access to any information that we may have or they may have.¹⁴⁷

The testimony set forth above presents an anomalous circumstance which has already evoked critical public comment.¹⁴⁸ If the inspectors follow established guidelines then they are required to point out features of structure

and occupancy to the applicant or his representative and shall indicate those features which may result in condition charges if the risk is accepted.¹⁴⁹ This at least alerts the operator that there are fire hazards. It is still baffling how the Fire Marshal's office has failed to link up with the Commissioner's (and the state's) representative on the board of the FAIR plan.

Southgate Inspections

At the outset it bears emphasizing that Southgate officials did seek help from the state fire marshal's office concerning fire hazards at Beverly Hills. Letters were sent to the Fire Marshal. And Inspector Beiting requested inspections of Beverly Hills by state deputy fire marshals. Both the Southgate building inspector and inspectors for the local fire department hold other full time jobs. In a real sense their willingness to take on the difficult and arduous task of inspecting local facilities is a manifestation of dedication to public service. Unfortunately, local inspectors do not generally possess any great expertise in understanding of the electrical, building, and fire codes.¹⁵⁰ Therefore it is specially important that the state fulfill its duty to aid local officials in enforcing fire safety laws and ordinances of the state.¹⁵¹

Nonetheless, the primary responsibility for inspecting to assure that safety requirements are complied with is placed on the city. The city responded to its obligation by undertaking numerous inspections of Beverly Hills.¹⁵² Inspector Beiting conscientiously kept after Beverly Hills¹⁵³ and jointly inspected Beverly Hills with the Fire Chief and others. On October 4, 1971, he sent the following list of violations to Mr. Schilling:

- (1) On the main floor several exit signs are inoperable either because of burnt out bulbs or broken glass in signs.
- (2) In the kitchen area, the exterior doors are padlocked which which prohibit employees or patrons from using the exits.
- (3) In the same area the elevator doors still have not had the original hardware put on them, hindering them from being useful as a B label or fire-door.

- (4) In the same area the stairway leading to upstairs is not sufficiently lighted nor does it have a railing for protection from falling, or use as a guide to lead occupants to outside exits.
- (5) Also on the main floor Rm. 135 behind the Boutique Shop the stairs that did lead to upstairs and are now boarded up has a door with the opposite side enclosed, this door should be removed so that there would be no confusion as to exits, and this should be boarded up.
- (6) The exit door behind the stage area and room 1000 is padlocked and therefore is not operating for the purpose it was intended.
- (7) The new storage off the kitchen area exit must have new provisions for another exit door and stairs leading to the ground area.
- (8) The second floor area corridor 219 has a new exit not shown on plan leading to the second floor existing roof. This area has no provisions for getting off the roof which is approximately 35-40 feet off the ground. A wall parapet steel type ladder which can be drilled or toggled to the existing masonry wall would suffice.
- (9) Corridor 201 has exit shown on drawing which is completely ommitted.

We note that unfortunately this joint inspection failed to reveal a host of violations of the NEC, NBC, and LSC that we know were extant. The inspections by the fire department personnel alone were quite superficial.¹⁵⁴

One wonders whether the local officials were ever given any training in the application and scope of the relevant codes. Under questioning the Southgate building inspector revealed that he had never even had an editions of the NBC other than that of 1955:

- Q. Mr. Beiting, what you were provided with by the city was merely this 1955 edition of the National Building Code?
- A. That is correct.
- Q. And this Standard of Safety, 1963 edition.
- A. Right
- Q. You were not provided with a copy of the 1967 edition of the National Building Code?

- A. No. I had no knowledge of that.
- Q. Have you ever been provided with a 1976 edition of the National Building Code?
- A. No.
- Q. It appears as though there was no 1957 or 1963 amendment to this version present here, and you were never given those, were you?
- A. No, I wasn't.
- Q. Concerning the building, in each case of a permit, you did receive plans for those permits?
- A. That is correct.
- Q. And these plans were those that you are showing me here now?
- A. That is correct.
- Q. Did Mr. Root (the city attorney) ever advise you about the State safety standards, the amendments or anything like that?
- A. No. I was not informed of it. 155

The lack of access to the relevant codes might explain some apparent misconceptions of the building inspector. He thought he could accept oral representations from electrical inspectors for approvals of electrical installations. If he had been provided with a copy of the 1957 amendments to the 1955 NBC he would have been aware of the strictures of §103.7 entitled "inspections":

Inspections required under the provision of this code shall be made by the building official or his duly appointed assistant. The building official may accept reports of inspectors of recognized inspection services, after investigation of their qualification and reliability. No certificate called for by any provision of this code shall be issued on such reports unless the same are in writing and certified to by a responsible officer of such service.

Being unaware, however, no certificates of inspection were issued by Southgate, based on certificates in writing from a responsible officer of a recognized inspection service.

The certificates of occupancy issued for Beverly Hills clearly do not comply with the requirements of either LSC §8-1136 or NBC §103.1. Not only were these certificates neither posted nor required by the city to be posted, they do not indicate therein the purpose for which the building may be used or the occupant load of each room.

The following collquy indicates just how unsure the Southgate inspector was about the applicability and interpretation of the code:

Q. Did you know anything about an instance such as the kitchen area shall be separated from the rest of the building by construction having a minimum of one hour fire resistance, was this ever brought to your attention by anybody?

A. It was never brought to my attention but after seeing the plans, of course, were drawn by a competent registered architect, I was assured that this was taken care of.

Q. Well, during your inspections up there, one of the items listed was the stair-enclosure, the spiral stairway that went to the second floor, one of the ten items listed was that the fact that it would have to be enclosed, did you notice this situation existing when you were ther?

A. I had no knowledge what so ever of whether this was a violation or not, I had never heard that before.156

It appears that Southgate officials did inspect Beverly Hills but obviously were unable to perceive the existing hazardous conditions that violated the Standards of Safety and created a high risk of harm to life and property.

THEORIES AND ISSUES OF
COMPENSATION OF VICTIMS

COMPENSATION

As a result of the Beverly Hills tragedy, numerous individuals and families were severely injured. One hundred sixty-four, at the time of this report, were killed. Not only is it necessary to consider prophylactic measures to avoid another similar tragedy, but to consider how the victims of Beverly Hills will receive some compensation. It is obvious that there cannot be adequate compensation for loss of life. Also, it is obvious that even if judgment is entered against the owners and operations of Beverly Hills, their funds will not even come close to satisfying justifiable claims. There are, however, some additional sources that could provide some degree of relief.

1. WORKMEN'S COMPENSATION

Many injuries occurring at Beverly Hills undoubtedly happened to people entertaining business guests as an incident of their employment. A review of the relevant cases shows that they are probably covered under the Kentucky Workman's Compensation statutes.

Several general rules should be kept in mind in instances such as this. When reviewing "deviations" from the course of employment, "it may be stated generally that the deviation should be substantial, or to put it another way, 'minor interludes are immaterial'." Ratliff v Epling, 401 S.W.2d 43, 45 (Ky.1966) (Quoting Larson's Workman's Compensation Law, Vol. I, section 19.63, p. 294.99). "When questions of law are presented, the Workman's Compensation Act must be construed liberally." Cowden Manufacturing Company v Fultz, 472 S.W.2d 679, 681 (Ky. 1971) (citing KRS 342.004). Concerning those who left Beverly Hills and returned to aid others, the following notion is pertinent: "Under familiar doctrines in the law relating to emergencies generally, the scope of an employee's employment is impliedly extended in an emergency to include the performance of any act designed to save life or property in which the employee has an interest." Wilson v Wizer, 544 S.W.2d 231, 233 (Ky. 1977). Quoting Larson's Workman's Compensation Law Vol. I, section 28.11, p. 452.71).

A person engaging in business entertainment is in a position analogous to that presented in Nugent Sand Company v Hargesbeirner, 71 S.W.2d 647 (Ky. 1934). There an employee was directed to the president's mother's house to make repairs. The court, at p. 649, emphasized: "It is clear that in the instant case, where the employee was directed by the Chief Officer of the employer, through his fore-

man, to go and do a certain task and he did so with the company's tools and was paid by the company specially for that work, he was within the orbit of his employment and right to compensation for injuries sustained by reason of his obedience." Where the company directs its servant to pursue business at Beverly Hills and/or pays for said business the analogy is obvious. (A company credit card then becomes a tool of the businessman's trade, for instance.)

In Corker v Corker Steel Products, Inc., 385 S.W.2d 949 (Ky. 1965), a salesman was out making calls on customers in Campbell County. He stopped for lunch; and, as he returned to his car, he was deliberately shot and killed by an unprovoked and apparent madman. The Board denied compensation; and the Kentucky Court of Appeals reversed, holding: "We accept the view that causal connection is sufficient if the exposure results from the employment." Id., at 950. The court overruled Lexington, Kentucky System v True, 124 S.W.2d 467 (1939) which held that the harm must have been reasonably foreseeable. (The court citing Larson's, section 6.50 pp. 46-47; "This criterion cannot in any logical sense be made to depend upon foreseeability.") Corker, supra, was affirmed in Blue Diamond Coal Company v Creech, 411 S.W.2d 331 (Ky. 1967) where a mine worker was shot, after hours, by striking employees.

"The place of employment may be structurally sound and in good condition and yet constitute a source of danger to one hired to work there and if the place may be fairly said to be the efficient and operative cause of the injury, then the employee is entitled to compensation..." Stasel v American Radiator & Standard San. Corp., 278 S.W.2d 721, 723 (Ky. 1955). Clearly a causal connection is established for employees of Beverly Hills who may have been injured the night of the tragedy.

"The fact that the risk may be common to all mankind does not disentitle a workman to compensation, if in the particular case it arises out of the employment it must be established that special exposure is involved. But when a work-

man is sent into the street on his master's business, whether it be occasionally or habitually, his employment necessarily involves exposure to the risks of the streets and injury from such a cause arises out of his employment." Harlan-Wallins Coal Corporation v Foster, 227 S.W.2d 14, 15 (Ky. 1955). (Citation omitted.)

This principle controls in the Beverly Hills situation. Harlan supra, was affirmed in Clear Forbs Coal Company v Roberts, 279 S.W.2d 797, 799 (Ky. 1955). "It is not our prerogative in this character of case to weigh the relative importance of the personal cause and an employment cause when they are combined to cause harm, nor shall we look to primary and secondary causes; but our inquiry is whether the employment is a contributing factor. If it was, the occurrence of the personal cause will not defeat compensability." Id, at 800 (quoting Larson's Vol. 7, section 7.40, p. 50). This principle has particular relevance in light of the Kentucky statutory presumption that injury is not caused by intoxication. See KRS section 342.680.

An injury "'arises out of' the employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. It is in the 'course of' the employment when received while the employee is performing some service for his employer in the line of duty." Louisville and Jefferson County Air Board v Riddle, 190 S.W.2d 1009, 1011 (Ky. 1945). "The facts of each particular case must be examined to determine whether or not the relation of master and servant exists at the place and time of the injury." Ibid.

The present situation is also analogous to Kaycee Coal Company v Short, 450 S.W.2d 262 (Ky. 1970). There a vice president and general manager of a coal sales company was killed when a tree fell across the road when driving home. The Kentucky Court of Appeals affirmed compensability and held:

"If the work duties associated with the employees' home are such that it can genuinely and not fictitiously be said that

the home was part of the employment, then, since travel between two parts of the employer's premises is in the course of employment, an employee injured on a journey from his home work site to other premises of the same employer is entitled to compensation." Id, at 265 (quoting Larson's).

The court concluded that office furniture in the home and a phone at the employer's expense furnished sufficient evidence to sustain the conclusion that Short was killed by an accident that arose out of and occurred in the course of employment. Of course, Beverly Hills' victims can also sustain thier burden, e.g., use of a company credit card and proof of the business relation of the persons involved.

In Turner Elkhorn Company v Goble, 506 S.W.2d 521 (Ky. 1974), the deceased was entering a coal mine to obtain house coal which he would sell and receive one half of the receipts. The company defended on the ground that he had no right to be in the mine at the time. The Circuit Court affirmed the Board's award and the Court of Appeals affirmed. Held:

"In spite of the statement by the mine operator that he had left specific instructions with all the men that no one was to enter the mine while it was closed and that no one was to enter without the operator first making a fire run, there was sufficient evidence to show that Lawrence was following the same routine of work activity at the time he was killed as he had followed a long time prior thereto. The Board was authorized to hold, as it did, that Lawrence was killed by an accident...arising out of and in the course of his employment." Id, at 522 (citation omitted).

The case follows the general rule that deviation must be substantial to be outside the scope of employment.

The Beverly Hills situation is also controlled by Mason-Waller Motor Company v Holeman, 144 S.W.2d 796 (Ky. 1940). Deceased Holeman was a car salesman. He was furnished a car and could work whenever he wished, as he was an excellent car salesman. On the day the accident occurred, he had four companions with him, none of whom were prospective customers. He was on his way to talk to two

prospective customers, but had stopped to drink and dance twice. Hence, the issue was whether he was joyriding, disassociated from work, or whether it was in the course of employment and the accident arose out of the employment. Compensability was affirmed. "Perhaps he had stepped out from the course of his employment while engaged in drinking at various saloons, and taking the party along was a personal matter, yet it was proved that he had gone on the journey to Clay in pursuit of his employer's business and was returning from there when he was killed." Id., at 798

Nor did it matter that Holeman had let one of the party drive, according to the decision. Apparently this is not a substantial deviation. In any event, Beverly Hills victims may also be put to their proof, and the case is on "all fours" as far as the holding goes. See also Duke v Brown Hotel Company, 481 S.W.2d 289 (Ky. 1972) where an entertainer, who had entered into a written contract providing that she accepted an engagement to perform her act under the direction, control, and supervision of the hotel, was confined to remedy of workman's compensation when a fire pot caused her grass skirt to ignite.

Further, injury or death sustained by an employee in a voluntary effort to rescue fellow employees from danger in emergencies comes within the scope of employment. Adams v Bryant, 274 S.W.2d 791 (Ky. 1955). Also, efforts to save the employer's property from emergency situations are also within the course of employment and arise out of the employment. Bell v Lindsey Wilson College, 490 S.W.2d 145 (Ky. 1973). The Court there held:

"The precise job at hand on the precise house of work are not controlling on the question. The ultimate test is whether the service was incidental to employment.

...
Where it can be found that the injury was sustained while the employee was engaged in activity in the interest of his employer, or for the protection of the life or safety of a fellow employee which ultimately amounts to the same thing, it is within the power of the Board to find the accident arose out of and in

the course of employment and as an incident to it." Id., at 147.

Clearly those involved in business the night of the Beverly Hills fire have the right to be put to their proof and to recover benefits if they sustain their burden.

2. INDEMNIFICATION OF STATE EMPLOYEES

SUED FOR NEGLIGENCE

There can be no doubt that state employees can be held personally liable for damages resulting from their negligent acts within the scope of their employment. Dixie Transport Company v Reed, 386 S.W.2d 735, 735 (Ky. 1964); Slusher v Miracle, 382 S.W.2d 867, 869 (Ky. 1964); Spillman v Beauchamp, 362 S.W.2d 33, 36 (Ky. 1962).

However, there is quite a difference between obtaining a judgement and obtaining satisfaction. But there is, in relation to a successful action against a state employee, a potential deep pocket into which the Beverly Hills' victims might reach by virtue of the state's recently enacted statute dealing with indemnification and representation of state employees.

KRS sections 12.211 through 12.215 represent Kentucky's law on defence by the state of civil actions brought against former or present state employees for acts or omissions within the scope or course of their employment.

At the request of the employee, the attorney general may provide for his defense. The attorney general may, however, decline if he finds:

- (a) The act or omission was not within the scope and course of his employment as a state employee; or
- (b) The employee ... acted or failed to act because of actual fraud, corruption, or actual malice on his part; or
- (c) Defence ... would create a conflict of interest between the Commonwealth and the employee ...; or
- (d) Defense ... would not be in the best interests of the Commonwealth.

As subdivision (d) makes clear, the attorney general has almost complete discretion as to when he will or will not take up the defense of an employee. Indeed, he could decide that the amount of possible judgements, if there were

likely to be more than one, would be a factor militating against defense of the cases in the "best interests of the Commonwealth."

The governor is required by section 12.213 to provide by regulation the methods of defense which would be by one or more of the following:

- (a) By the attorney general;
- (b) By employing private counsel;
- (c) By purchasing insurance providing for such defense;
- (d) By department or agency counsel.

If the state decides to undertake the defense of an employee, then the state will pay any judgement or settlement to the extent of \$50,000. KRS 12.214

These provisions of Kentucky law do nothing to the doctrine of sovereign immunity, as the statutes make clear:

Nothing in this section shall be deemed to waive the sovereign immunity of the Commonwealth with respect to a claim covered under this section. KRS 12.214

The difficulty with these provisions from the point of view of potential plaintiffs in the Beverly Hills fire is that the avenue to the \$50,000 is opened only by the state; specifically, the attorney general who has complete discretion in the matter. The provisions cannot be said to involve a right, in any sense, held by either a state employee or one injured by a state employee.

One would think that if an action is brought against state employees, e.g., employees in the Fire Marshal's Office, that that is precisely the type of situation where KRS sections 12.211 - 12.215 would come into operation. However, there is no way of knowing, given the noted discretion.

3. LIABILITY OF UTILITY

We have noted above that the National Building Code makes it unlawful to supply power to a facility unless a certificate of inspection has been issued. This may provide a basis for liability. It is well settled that utilities may be liable for negligence under Kentucky law. See e.g., Isbell v Union Light, Heat and Power Co., 162 F. Supp. (E.D. Ky. 1958); Kentucky Utilities Commission v Black's Adm'x, 51 S.W.2d 905 (Ky. 1932).

Ky. and W.Va. Power Co. v Stacy, 164 S.W.2d (Ky. 1942), involved a reversal of plaintiff's judgement on the basis of inadmissible evidence and an erroneous jury charge. There the injured was a gratuitous licensee, and the court held it was for the jury to determine whether the company breached its duty to refrain from willful and wanton disregard of the condition of the premises (lack of reasonable care to discover defect causing gas explosion). See also Rowan v Western Ky. Gas Company, 82 F. Supp. 591, 594 (W.D. Ky. 1949); Union Light, Heat and Power Co. v Heving, 62 S.W.2d 789 (Ky. 1933); Tri-State Consolidated Gas Company v Campell, 329 S.W.2d 571 (Ky. 1959); Current v Columbia Gas of Kentucky, 383 S.W.2d (Ky. 1964). This issue is already involved in current Beverly Hills litigation.

4. INSURER'S LIABILITY

At common law witnesses would be sanctioned for a failure to give officers outside the courtroom information of any felony known to them. 4 Blackstone Commentaries* 119-21. Today the privilege against self-incrimination is of course protected by the Fifth Amendment of the United States Constitution, applied to the states by the due process clause of the Fourteenth Amendment and its analogue in the Kentucky Constitution. The question presents itself whether an insurer could be held civilly liable for negligent failure to report a conspiracy to violate building codes. An argument can be made under Kentucky law for liability.

Section 41 of the Kentucky Constitution provides:

"All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

KRS 500.020 abolishes common law crimes, providing in section 1 that "Common law offenses are abolished and no act or omission shall constitute a criminal offense unless designated a crime or violation under this code or another statute of this state." Hence, failure to report a crime is no longer a common law offense.

However, KRS 500.040 provides:

"(2) This code shall not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture or other remedy authorized by law to be recovered or enforced in a civil action."

Hence, the civil side of the common law remains intact. This alone could cause civil liability for negligent failure to report crime, if the elements of negligence are met.

The elements of negligence are:

- (1) The existence of a duty
- (2) Breach of that duty
- (3) Proximate causation between the breach and injury to claimant.

These elements are so well settled as to require no citation of authority.

As aforementioned, the duty to report felonies existed at common law. Failure to report a conspiracy to violate building codes is an obvious breach of that duty. Further, proximate causation exists in the Beverly situation for a reasonable insurer can reasonably foresee that a reported fire hazard will cause loss of life if not corrected.

Nor does one need to go back to the common law to find a duty. The duty exists under Kentucky law, as seen from Durbin's Adm'x v Nally, Ballard & Saltsman, 263 S.W.2d 102 (Ky. 1953). The action there sought damages on account of the death of Amos Durbin, Jr., who was killed by falling from a bridge being constructed by appellees in the City of Hazard under a contract with the State Highway Department. Held: Directed verdict for defendant affirmed (deceased had been drinking, he attempted to negotiate a highly hazardous crossing and was contributorily negligent as a matter of law). The court stated:

"Appellant insists that appellees were negligent in failing to erect warnings or barricades at the entrance to the concrete steps. It is true that those responsible for the creation or maintenance of a dangerous condition are generally required to give some warning of the danger. The rule is designed for the protection of those who are unaware of the danger or may not learn of its presence until too late to avoid mishap. It was never intended to relieve one of the duty of exercising care for his own safety, or where a person deliberately expresses himself to a danger of which he was aware, or which is open and obvious, he is guilty of contributory negligence as a matter of law."

Since Durbin's, supra, affirmed a directed verdict for defendant, this language is necessarily dicta. However, the authority cited by the court was an affirmance of a judgement for plaintiff, Codell Const. Co. v Steel, 56 S.W.2d 955

(Ky. 1933), and a reversal of a directed verdict for defendant, York v Cumberland Const. Co., 229 S.W.2d 970 (Ky. 1950), and hence not dicta in those cases.

Nor would it matter if an insurance clearing house, for example, were also the workmen's compensation carrier. KRS 342.055 expressly reserves plaintiff's action where "some other person" is legally liable (i.e., immunity extends only to the employer); and the insurance carrier, as with all third persons under 342.055, has no immunity. Bryant v Old Republic Insurance Co., 431 F. 2d 1385 (6th Cir. 1970); Courtney v American Mutual Liability Insurance Co., 432 F. 2d 783 (6th Cir. 1970). See current KRS 342.700.

The probability of the success of an action on the above basis is quite low.

5. CRIME VICTIMS COMPENSATION

KRS 345.010 et seq. constitutes Kentucky's law on compensation to victims of crime. In view of the possibility of "criminally injurious conduct" (346.020) resulting in injury and loss of life in the Beverly Hills fire, these statutes become important to the victims and the dependents of victims.

Under KRS 346.050, those eligible for benefits include:

- (a) A victim of criminally injurious conduct;
- (b) A surviving spouse, parent or child of a victim of criminally injurious conduct who died as a direct result of such conduct;
- (c) Any other person dependent for his principal support upon a victim of criminally injurious conduct who died as a direct result of such crime.

Thus, the compensation may be distributed to a wide circle and is not limited to the victim himself or his immediate family.

KRS 346.130 limits the amount of the award to \$15,000 with a \$100 deductible amount. In addition, there is a limitation of \$150 per week for lost earnings.

In order for an award to be made, there must have been personal physical injury to or the death of the victim resulting from "physically injurious conduct." KRS 346.130.

The application for the award must be made "not later than ninety (90) days after the occurrence of the criminally injurious conduct ... or not later than ninety days after the death of the victim." However, "upon good cause shown," this period could be extended up to one year. This statute does not define "good cause," but general legal principles would indicate that failure of legal counsel to be aware of the statute would not be good cause.

KRS 346.130(1)(c) requires that the criminally injurious conduct be reported

to the police promptly and

"in no case may an award be made where the police records show that such report was made more than forty-eight (48) hours after the occurrence of such crime unless the board for good cause shown, finds the delay to have been justified."

Given the scope and nature of the Beverly Hills disaster, there would be a good argument for delay.

A limitation on claims which might be filed in the context of the Beverly Hills fire would be the definition of "victim" as a "resident" of Kentucky. KRS 346.020(5). Thus, all of the persons who were killed in the fire who were not residents of Kentucky would fall outside of the statute.

Another limitation which could be important in the context of the Beverly Hills fire is the requirement under KRS 346.140 that the claimant will suffer "serious financial hardships." Thus, even though there be great financial loss in a particular case, there will be no award if the victim or his or her dependents are left in a relatively secure financial position because of insurance or other factors.

There are two related limitations on awards under the statute. Under KRS 346.140, the award must be reduced by any payments

- received or to be received by the claimant as a result of the injury from the following sources:
- (a) From or on behalf of the person who committed the crime;
 - (b) Under insurance programs mandated by law;
 - (c) From public funds;
 - (d) Under any contract of insurance wherein the claimant is the insured or beneficiary.

Under KRS 346.170, the board is subrogated to and has a lien upon any recovery made to the extent of the payment by the state. If the claimant has received payments on an executed judgement, there is no doubt that the award will be reduced by the amount of the payment. If a judgement is unexecuted at the time of the award, it would seem that the award could be reduced under the "to be received" language of the statute. The claimant could argue that the defendant was

unable to satisfy the judgement, if such were the case; and the board should simply be subrogated to the "recovery" (the unexecuted judgement) of the claimant to the extent of previous payments made by the board. If the claimant has not yet obtained a judgement at the time of the award, then the state would simply be subrogated to any recovery when it occurs.

In any event, the jurisdiction of the board is not exclusive, as KRS 345.170(1) provides:

No right of action at law ... shall be lost as a consequence of receiving benefits under the provisions of this chapter....

Unless a claimant has already received payments in excess of \$15,000 from a judgement against the person who committed the criminally injurious conduct, there would be no reason for failing to apply for an award if the facts support the claim. Such an award would be, at least, a hedge against any possible failure in subsequent civil litigation or in execution of a judgement.

The most difficult question under the statute, in any application of it to the Beverly Hills fire, is the definition of "criminally injurious conduct" under KRS 346.020(3):

conduct that occurs or is attempted in this jurisdiction; poses a substantial threat of personal injury or death, and is punishable by fine, imprisonment or death.

Admittedly, the first applications which come to mind are crimes such as murder, robbery, assault, etc. But a close analysis reveals that the statute could very well apply to conduct on the part of potential defendants in criminal or civil litigation arising out of the Beverly Hills fire.

Significantly, the statutes require neither a conviction nor an adverse judgement in civil litigation. KRS 346.080(5) provides:

Claims shall be investigated and determined, regardless of whether the alleged criminal has been apprehended or prosecuted for or convicted of any crime bases upon the same incident, or has been acquitted, or found not guilty of the crime in question owing to criminal irresponsibility or other legal exemption.

Instead, the board must make its decision

on the basis of the papers filed in support (of the claim) and the report of the investigation of such claim. If the board member (to whom the claim was assigned) is unable to decide such claim upon the basis of such papers and such report, he shall order a hearing. At such hearing any relevant evidence, not legally privileged, shall be admissible.

Potentially injurious criminal conduct that readily comes to mind in addition to violation of the Standards of Safety includes the following.¹⁵⁷

KRS 507.040 Manslaughter in the second degree.

- (1) A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person.
- (2) Manslaughter in the second degree is a Class C felony.

KRS 507.040 Reckless Homicide.

- (1) A person is guilty of reckless homicide when, with recklessness, he causes the death of another person.
- (2) Reckless homicide is a Class D felony.

It appears that a claimant could develop sufficient evidence to support the contention that the operators of Beverly Hills acted wantonly and recklessly in regard to the safety of their patrons and employees, thereby causing the death of many.

Another potential candidate for injurious criminal conduct is official misconduct in the second degree.

KRS 522.030 provides: Official misconduct in the second degree -

(1) A public servant is guilty of official misconduct in the second degree when he knowingly

- (a) Commits an act relating to his office which constitutes an unauthorized exercise of his official functions; or
- (b) Refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office; or
- (c) Violates any statute or lawfully adopted rule or regulation relating to his office.

(2) Official misconduct in the second degree is a Class B misdemeanor. (Enact. Acts 1974, ch. 406, section 188.) (Emphasis added.)

The relevance of Kentucky conspiracy law is evident in that prosecutions for conspiracy to violate building codes have been successful in the past. See

Commonwealth v Ruderik, 60 N.E.2d 353 (Massachusetts 1945). Hence, a review of Kentucky conspiracy law is in order.

Of course, it must be remembered that conspiracy is not the only inchoate offense in the KRS. Besides KRS 506.040 and 506.050 (conspiracy provisions), there is also KRS 506.060 (criminal solicitation or conspiracy) and KRS 506.080 (criminal facilitation). Further, there are other indictable offenses, e.g., aiding and abetting. Consequently, some general case law must be kept in mind before the relevant statutory provisions are reviewed.

As far as felonious intent may be concerned, "every man is presumed to intend the natural and probable consequences of his acts." Intent is presumed from the nature and consequences of the act and a specific or expressed intent or preparation is not required to be proven. Powell v Commonwealth, 233 S.W.2d, 113, 114 (Ky. 1950); Davidson v Commonwealth, 340 S.W.2d, 243, 244 (Ky. 1960). "Malice aforethought simply means the doing of an unlawful act without justification or excuse." Powell, supra, at 114. "The law implies malice when one deliberately injures another in an unlawful manner." DeBerry v Commonwealth, 289 S.W.2d, 495, 497 (Ky. 1956). As to aiding and abetting, actual or affirmative participation is not required, although one must at least have been intentionally in agreement with the perpetrator of the offense and have been in a position to render aid or encouragement in its commission. "Of course, one's presence in connection with other circumstances may be considered in determining whether he cooperated or lent his countenance and approval in such a way as to make him guilty of having a part therein." Sumpter v Commonwealth, 251 S.W.2d, 852, 853 (Ky. 1952). "[A] defendant, to be guilty of a crime of aiding and abetting must have shared the criminal intent or purpose of the principal." Haley v Commonwealth, 286 S.W.2d, 525, 526 (Ky. 1956). "It is clear that persons who associate together to commit [crime] and who assist or are present and ready to aid or do aid in its commission

are all guilty of the crime." Tinsley v Commonwealth, 273 S.W.2d 364, 367 (Ky. 1954).

"In order to constitute one an aider and abettor in the commission of a crime, he must be actually or constructively present at the time of its commission, and participate in some way in the act committed. It is not essential that there should be prearrangement or mutual understanding or concert of action; but, in the absence of these, it is essential that the one so charged should in some way, either by overt act or by expression of advocacy or sympathy, encourage the principal in his unlawful acts." McKinney v Commonwealth, 143 S.W.2d 745, 747, 748 (Ky. 1940).

Thus "each individual whose will contributes to the wrongdoing is in law responsible for the whole the same as if performed by himself alone." Waggner v Commonwealth, 182 S.W.2d 661, 663 (Ky. 1944). "One who in the commission of a wrongful act commits another wrong he did not mean to commit is nevertheless liable for the latter wrong." DeBerry v Commonwealth, 289 S.W.2d, 495, 497 (Ky. 1956).

"The mere knowledge that a crime has been committed and the failure to tell of it does not make one an accessory after the fact. To be an accessory after the fact, one must harbor a felon or render him some assistance to escape punishment."

Elmendorf v Commonwealth, 188 S.W. 483, 489 (Ky. 1916). With these rules in mind,

we turn to Kentucky's relevant statutory provisions.

KRS 506.040 provides:

- (1) A person having the intention of promoting or facilitating the commission of a crime is guilty of criminal conspiracy when he:
 - (a) Agrees with one or more persons that at least one of them will engage in conduct constituting that crime or an attempt or sollicitaiton to commit such a crime; or
 - (b) Agrees to aid one or more persons in the planning or commission of that crime or an attempt or sollicitation to commit such a crime.

KRS 506.040(2)(a) through (d) provides the relevant penalties.

KRS 506.050 (1) provides that no person can be convicted of conspiracy "unless

an overt act in furtherance of the conspiracy is alleged and proved to have been committed by one of the conspirators." KRS 506.050(3) provides:

"If a person guilty of conspiracy, as defined by KRS 506.040, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring to commit the crime with the other person or persons, whether or not he knows their identity."

KRS 506.060 provides for criminal solicitation and the defense of renunciation.

KRS 506.080 provides for criminal facilitation:

"A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime."

If officials conspire to violate the building codes, they are guilty of more than one crime. This is obvious where there are involved multiple codes and more than one violation within the building structure. Hence, the officials may be prosecuted for conspiracy and the substantive act. "Should a person be burned to death as the result of a conspiracy to burn a dwelling house, there can be no doubt such a death is the natural consequence of the burning of the house and the conspirators are guilty of murder though they did not intend, or calculate, the death of an inmate of the house as a result of the burning." Whitfield v Commonwealth, 128 S.W.2d 208 (Ky. 1939). "And it is familiar law that where two or more parties conspire or combine to commit an unlawful act, each is criminally responsible for what his associate does in furtherance or prosecution of the common design for which they had combined. If a homicide results in pursuance to a common purpose of the agreement all parties participating are responsible in the same degree even though such killing was not part of the pre-arranged planning." Simpson v Commonwealth, 170 S.W.2d 869, 870 (Ky. 1943) (citation omitted). These rules have particular relevance in a conspiracy to commit building violations, since death is an easily foreseeable natural consequence of such a conspiracy. For

"when individuals associate themselves in an unlawful enterprise, an act done by one in pursuance of a conspiracy is the act of all and extends to such results as are the natural and probable consequences of such act, even though such consequences were not specifically intended as a part of the original plan." Simmons v Commonwealth, 92 S.W.2d 68, 71 (Ky. 1936).

"A reading of cases in which proof of conspiracy was involved ... will show the rule to be that while conspiracy may not be established on suspicion or proof of suspicious acts, it may be proven by circumstances where they are such as to be so unequivocal and incriminating as to remove reasonable doubt of innocence." Baxter v Commonwealth, 166 S.W.2d 24, 28 (Ky. 1942). The evidence concerning the lack of enforcement of building codes could rise to the level of unequivocal and incriminating, given the numerous officials involved. "Our rule is that any evidence of substance which goes toward the establishment of guilt is sufficient to carry a case to the jury and to sustain a conviction." Parsley v Commonwealth, 273 S.W.2d 372, 373 (Ky. 1954). "The rule is that a person who is actively or constructively present when a felony is committed and who renders assistance or encouragement to the perpetrator, may be convicted for aiding and abetting him. The assistance or encouragement may consist of overt acts or oral expressions." Id., at 374. In the present situation, the total lack of enforcement appears to have been orally encouraged, e.g., newspaper articles where officials are quoted as stating that Beverly Hills had a sprinkler system or that Beverly Hills was in compliance with the codes.

Further, "[t]he gravamen of the offense ... is the conspiracy to commit the act referred to therein, and it is immaterial when the conspiracy is found or whether the act is consummated or not." Combs v Commonwealth, 148 S.W.2d 291, 292 (Ky. 1941). And the conspiracy can be shown by circumstantial evidence (e.g., woefully inadequate inspections) if the nature or character exclude every reason-

able hypothesis of innocence of the accused. Arvin v Commonwealth, 43 S.W.2d 516 (Ky. 1931); Baird v Commonwealth, 45 S.W.2d 466 (Ky. 1932). "Under repeated decisions of this court holding that testimony in this class of case is allowed to take a wide range and that participation may be shown by actions, declarations, facts and circumstances, though there be no positive or direct evidence" Bradshear v Commonwealth 121 S.W.2d 718, 719 (Ky. 1938). Chapman v Commonwealth, 172 S.W.2d 228 (Ky. 1943) involved an affirmance of a conviction based on circumstantial evidence. The court observed:

"A conspiracy is almost necessarily established by welding into one chain circumstances which when considered separately are of themselves insufficient and inconclusive, but when connected and examined as a whole, are sufficient to show it." Id., at 231.

"It is nearly always impossible to prove a confederating and bonding together by direct evidence but this is not necessary as the acts and conducts of the defendants may indicate such a confederating and bonding together as clearly as direct testimony to that effect." Maggard v Commonwealth, 155 S.W.2d 228, 232 (Ky. 1941).

Thus even the increase of insurance rates by the clearing house, after the 1974 fire, and their reports thereon, could provide some circumstantial evidence of this character. This is because "while a conspiracy cannot be established by suspicion nor by evidence showing relations and associations which are natural and reasonable, a conspiracy may be shown by circumstances from which the jury may infer its existence." Senibaldi v Commonwealth, 338 S.W.2d 915, 918 (Ky. 1960) (emphasis added). Can insuring a known fire hazard with complete disregard for safety to life be called natural and reasonable?

In Commonwealth v Ruderik, 60 N.E.2d 353 (Massachusetts, 1945), a conviction for conspiracy to violate building codes was sustained. The charge was conspiracy to alter buildings (Coconut Grove nightclub) without a permit. The indictment was in one count, charging:

"On or about June 1, 1942 continuously until May 1, 1943 [the

defendant] continued (1) to alter the buildings at 17 Piedmont Street, 4 and 6 Shawnut Street, and 59 and 65 Broadway, Boston, without a permit issued by the building commissioner of the city of Boston, (2) to alter the buildings in such a way that work to be done was not to be done in accordance with drawings bearing the approval of the commissioner, and (3) to make openings for doorways in party walls without installing in each opening two sets of fire door[s] separated by the thickness of the wall."

The court held :

"The indictment charges but one offense, and the defendant might properly be convicted if there was evidence warranting a finding of a conspiracy to violate the statute in but a single respect. [citation omitted] Accordingly without intimating that proof of other violations was lacking, we shall deal with the sufficiency of the evidence relating to one violation only." Id. at 355.

The court went on to note that Ruderik was a licensed contractor who signed all four building permits involved in the case (said permits were to issue only upon plans properly submitted to the proper authorities). Further, Welansky (the owner of the Coconut Grove) also signed three of the permits. This supplied the conspiratorial connection, the violation being a change in location of restrooms. This change, not on the plans, eliminated a required exit way to the street. Held: "From the foregoing the jury could have inferred that the defendant, who signed all four applications for permits, and Welansky, who signed three of them and discussed with the architect the signing of the fourth, were aware of the statute and by concerted action planned its violation. The Commonwealth did not have to prove that either knew the number of the chapter or the year of its passage. It is enough if they knew that a law required an approved plan for alterations to which they did not conform but which by UNITED ACTION did not comply. The defendant was a builder of many years experience. He knew that the law required permits for the alterations and that he 'had to go according to plan.' Welansky could have been found throughout to have been 'at the head and front of the whole enterprise.'" Id., at 357. One can

contend that the case is on "all fours" with the Beverly Hills situation. See also Jones v. Commonwealth, 108 S.W. 2d 1021 (Ky. 1937).

The ninety-day statute of limitation of KRS 346.060 may constitute a major problem for recovery. It may, of course, be argued that one who has retained an attorney should know of the Compensation of Crime Victims statute and, as to them, the statute begins to run.

However, section 51 of the Kentucky Constitution provides, inter alia, "No law enacted by the General Assembly shall relate to more than one subject, and that shall be express[ed] in the title . . ." To that end, Chapter 346 is titled Compensation of Crime Victims.

It is true that under 346.080 (5), the claims should be investigated and determined regardless of the pendency of any criminal proceeding. Yet here we have a novel situation, whereby it would not appear to many that criminal conduct occurred until an indictment is returned. (This is so because normally a fire is not considered a crime.)

Further, KRS 346.010 provides the purpose of the act: "The General Assembly hereby declares that it serves a public purpose and is of benefit to the state to indemnify those needy residents of the Commonwealth of Kentucky who are innocent victims of criminal acts who suffer bodily injury or death as a consequence thereof. Such persons or their dependents may thereby suffer disability, incur financial hardships and become dependent upon public assistance. To that end, it is the General Assembly's intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime."

Given this express purpose and the novelty of the present situation, it would appear that KRS 346.060 (2), "for good cause shown" might apply and that "the Board may extend the time for filing for a period not exceeding one year after such occurrence." This conclusion is supported by KRS 346.060 (4),

whereby the Board will defer proceedings until criminal prosecution has been concluded anyway. Hence the entire purpose of the Act could be negated if this novel situation did not warrant the one year extension "for good cause shown."

6. RECOVERY FROM THE STATE

If it is assumed, arguendo, that there was negligence on the part of agents of the state acting in the course of their employment that proximately caused injury at Beverly Hills, then the question arises whether the plaintiff victims can recover from the state. This, in turn, depends on whether they can overcome the defense of sovereign immunity.

Actually, the state has already opened the door to recovery from the state somewhat under the Board of Claims Act. That Act, KRS 44.070 et seq., represents Kentucky's limited waiver of sovereign immunity. These statutes bring into existence the state's Board of Claims which is vested with the authority to

investigate, hear proof, and to compensate persons for damages sustained to either person or property as a proximate result of negligence on the part of the Commonwealth, any of its departments or agencies, or any of its officers, agents or employees while acting within the scope of their employment . . .
KRS 44.070

Under KRS 44.070, there may be no award for pain and suffering. The jurisdiction of the Board is exclusive. There is a limit of \$20,000 on a single claim or award.

There may be an appeal to the full Board within 14 days from the order or award. KRS 44.086.

KRS 44.110 reads.

A claim must be presented to the Board within one year from the time it has accrued.

Under KRS 44.160:

Any action prosecuted to award or judgment under the provisions of KRS 44.070 to 44.160 shall preclude the right of a claimant to sue the Commonwealth . . . in any other forum.

The most troublesome provisions for potential plaintiffs in the Beverly Hills cases are those maintaining the exclusiveness of the Board's jurisdiction and the above-quoted provision making the Board decision, in effect, res judicata in any other state forum as to the state. These provisions are not redundant, as they might appear.

First, the Board's jurisdiction is indeed exclusive for all claims of \$20,000 and under, for negligence on the part of state officials. If a claim is above \$20,000 (and the facts presumably support such an amount) then the claimant could proceed in circuit court. There, he would be faced with the doctrine of sovereign immunity. Another possibility would be that the facts of his case sound in something other than negligence, for example, reverse condemnation. See Commonwealth v. Giles, 516 S.W. 2d 338 (Ky. 1974). He might then proceed in circuit court although the facts would also support a negligence action for less than \$20,000.

Under KRS 44.160, once the claimant proceeds to a judgment from the Board, he may not proceed in any other forum. For many of the potential Beverly Hills plaintiffs, the damages would run far in excess of \$20,000. To proceed under the Board would preclude them from going into circuit court where they will, presumably, attempt to overcome the obstacle of sovereign immunity.

There would, of course, be nothing to prevent a plaintiff from proceeding against state officials and employees under the Board, obviating the need for an attack on sovereign immunity, and, at the same time, proceeding against other parties and state officials in their individual capacities in circuit court.

In short, the Beverly Hills plaintiff must gamble. He must weigh:
(1) the possibility of success in the Board of Claims; (2) the likelihood of a

successful attack on sovereign immunity in the state courts; (3) the 1-year statute of limitations in the Board; and (4) the size of the claim.

From the perspective of waiver of sovereign immunity, both this method of abrogation and its terms are unusual in a number of respects. First, most states which legislatively abrogated sovereign immunity did so by means of a Tort Claims Act, often modelled on the Federal Tort Claims Act, which authorized suit against the state in courts of general jurisdiction. The Kentucky act is thus broader in scope than most Tort Claims Acts, which often retain immunity for intentional torts, governmental functions, discretionary acts, good faith enforcement of law, and for certain specified acts or omissions related to specific governmental acts. Second, most states having Tort Claims Acts, and even some without, have legislation which authorizes, and in some cases requires, the state or certain agencies to purchase insurance covering specified risks up to policy limits set forth in the statute. Almost all of these states, either expressly or by judicial implication, have waived sovereign immunity to the extent of this insurance coverage up to the policy limits. Kentucky is unusual in that although it has a statute, KRS 44.050, authorizing certain state agencies to purchase automobile liability insurance, the statute expressly provides that such authorization does not constitute a pro tanto waiver of sovereign immunity, thus subjecting claimants injured by covered risks to the general procedures and liability limits of the Board of Claims Act. The Kentucky liability limit of \$20,000 per claim is quite a bit less compared to those of most states having pro tanto insurance coverage provisions (eg. Kansas, Fla., Ind. N.M., R.I., ranging from \$25,000 to \$100,000), although here the difference is somewhat less extreme.

Third, the Kentucky act is unusual, and perhaps unique, in expressly excluding damages for pain and suffering, which often make up a substantial portion of a typical tort judgment. This probably represents a legislative

judgment concerning the often speculative, and sometimes even windfall character of such damages, although one would think that surely damages would be minimal where the claim is heard by a board of claims sitting without a jury. Thus, although the Kentucky act is broader in scope than most tort claims acts in that it permits a greater number of plaintiffs to present their claims, it is also narrower than most such acts in that the potential recovery of plaintiffs is substantially less, and likely to be inadequate to compensate the plaintiff in a case, for example, involving continuing medical expenses of a substantial nature or substantial loss of earning power over a considerable length of time.

In its present stance concerning further abrogation, Kentucky is in many ways typical of most states. Most states that have partially abrogated sovereign immunity by legislation have tended to hold the line against further abrogation and in some cases even to restore partially the doctrine in effect by means of alternative bases for avoiding liability. In Kentucky, sovereign immunity has been challenged in several recent cases, in which doubt has been expressed concerning the continued validity of the doctrine, while at the same time maintaining that further change is the sole prerogative of the legislature. For example, in 1963 the Kentucky Court of Appeals, in Foley v. Ward, 375 S.W. 2d 392 (1963) upheld a challenge to the doctrine by refusing to abrogate it, reaffirming the traditional view that the constitution precludes any judicial modification. The court cited with approval an earlier case, Taylor v. Westerfield, 26 S.W. 2d 557 (1930), which stated the rationale for the doctrine was the public policy of protecting public funds from being diverted from public functions. Later cases reaffirmed the view that abrogation was a legislative prerogative, Commonwealth v. Davidson, 383 S.W. 2d 346 (1964), but began to express scepticism concerning the Taylor rationale. See e.g. Smith v. Department

of Highways, 495 S.W. 2d 178 (1973). One case suggested that sovereign immunity might be considered as an affirmative defense which might be waived if not properly raised, Board of Educ. of Leslie Co. v. Lewis, 449 S.W. 2d 765 (1970), but this idea was expressly rejected by the Court of Appeals in Knott Co. Board of Educ. v. Mullins, 24 K.L.S. 9, CA-342-MR (1977), citing Davidson to the effect that ". . . the constitutional mandate would be of small stature if its precepts could be 'waived' by any state officer or agent other than the General Assembly."

Meanwhile, scepticism concerning the Taylor rationale seems to be turning to almost open rejection, at least in the lower courts. In Huffman v. Bureau of Highways, No. CA-690-MR, August 5, 1977, the Court of Appeals commented:

On appeal to this court, the appellant contends that sovereign immunity is a judicially created doctrine which has outlived its usefulness and now should be abolished. If we were starting with a tabula rasa, this would be a tempting choice. Regardless of the validity this doctrine once had, it is clearly now a shabby robe when worn by a modern constitutional state. Even the time-worn and honored argument that sovereign immunity is necessary to protect public funds which have been appropriated for specific purposes, see J. Dietzman in Taylor v. Westerfield, 233 Ky. 619, 26 S.W. 2d 557, 69 A.L.R. 483 (1930), no longer has validity in an era when governments tax and spend vast amounts greatly in excess of anything our forefathers could have imagined. Not only has the financial capacity of government increased, but its ability to cause damage has multiplied, as is evidenced by the allegations in this case.

Appellant in Huffman had challenged sovereign immunity on the ground that it violated both the Bill of Rights of the Kentucky Constitution (sections 2, 4, 7, 14, and 20) and the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, saying that since the doctrine was judicially created, it could be judicially overturned. The court summarily rejected the contention that sovereign immunity violated the Kentucky Constitution, citing Wood v. Bd. of Ed. of Danville, 412 S.W. 2d 877 (Ky. 1967). It also predictably rejected the contention that the doctrine was

judicially created, citing Foley. The court seemed tempted by the Equal Protection-Due Process argument, citing Brown v. Wichita St. University, 540 P. 2d 66 (Kan. 1974), in which the Kansas Supreme Court had upheld a similar attack, calling the reasoning "very persuasive" but ultimately declined to follow it. The Kansas Court had found the exceptions in the Kansas immunity statute, K.S.A. 46-901 et seq., which were based on the nature of the governmental agency and type of activity, rather than the circumstances which caused the injury, to be arbitrary and discriminatory in that they denied access to the courts to classes of plaintiffs injured by state action without any rational basis. It also found that the doctrine itself was arbitrary and discriminatory in that it made liability for tortious acts by the state the exception, while liability for private tortious acts remains the rule, again without any rational basis for the difference in treatment. The first rationale would not apply to Kentucky, since it is directed at the doctrine itself rather than any statutory exceptions, although there might be problems with the level of scrutiny and degree of rationality required, as shown by Krause v. State, 285 N.E. 2d 736 (Ohio 1972), in which the Ohio Supreme Court found the disparate treatment of privately and government-injured plaintiffs to be sufficiently justified as a means of protecting state resources. It may be noted that a similar Mississippi challenge to sovereign immunity on equal protection grounds is currently on the United States Supreme Court docket awaiting hearing, Berry v. Hinds County, No. 76-1752, 46 L.W. 3007.

It is also uncertain to what extent developments in the law of municipal tort immunity may give us a valuable indication of the court's view on sovereign immunity. In Haney v. Lexington, 386 S.W. 2d 738 (1964), the Kentucky high court abolished municipal immunity, rejecting supporting arguments similar to the Foley rationale. However, in Louisville v. Louisville Seed Co., 433 S.W.

2d 638 (1969), the court said that although municipal immunity was abolished, municipal tort liability required that there be a duty running from the defendant municipality to the plaintiff, since such a duty is a prerequisite to tort liability in general. It then went on to say that for such a duty to exist, there must be both special dealings between the parties and an injury to the plaintiff distinct from that to the public in general. This reasoning could easily be carried over into the area of sovereign immunity, as it has in several states, and could act as a tempering influence on any abrogation of the doctrine.

The trend throughout the country is to abrogate, but not completely abolish, state sovereign immunity. Most states which have in some way abrogated the doctrine have done so less broadly than Kentucky giving fewer potential plaintiffs a chance to recover, but they have done so in greater depth, giving potential plaintiffs a greater chance to be adequately compensated for injuries caused by wrongful acts of the state. The Kentucky courts have expressed scepticism concerning, and even openly rejected, the traditional reasons used to support the doctrine, but at the same time have consistently reaffirmed the view that the constitution precludes any judicial abrogation, reserving such power solely to the legislature.

The oft-expressed fears that abrogation would lead to a flood of litigation which would paralyze the courts and decimate the public treasury have proved groundless in states which have substantially abolished the doctrine. On the other hand, one can contend that further abrogation would tend to increase the degree of care used in the performance of state functions, to the benefit of both the state and those whose injuries would thereby be averted. Further, alternative bases such as the Louisville Seed limited duty argument are available for limiting state liability by reasonable standards which are fair to both parties.

Summary

There is a clear movement away from the retention of state sovereign immunity. However, this movement, except in a few isolated instances, is not marked by complete abolition of the doctrine, but only by partial abrogation. The most common manner of abrogation is by the enactment of some type of Tort Claims Act or by a statute providing for the purchase of liability insurance. In the case of Tort Claims Acts, there is almost always a list of exceptions for which the state either retains sovereign immunity or denies liability. With respect to liability insurance, such statutes generally provide for only the voluntary purchase thereof, and in those few states which make provision for mandatory purchases, it is the rule to limit the purchase to specific areas, such as coverage of state-operated vehicles. As to both Tort Claims Acts and Liability Insurance, there is always a maximum limit placed on the amount of damages recoverable, and in the area of insurance coverage, it is often stated within the statute that sovereign immunity is waived only to the extent of that coverage.

Regarding Tort Claims Acts, it is the rule to provide that sovereign immunity is waived only to the extent so provided in the act, thus, at least by inference retaining the defense of sovereign immunity for those activities excepted within the act. It is unlikely that the Kentucky courts will abrogate the defense of sovereign immunity and therefore plaintiff-victims of the Beverly Hills tragedy will have to seek recovery from some other source.

7. RECOVERY FROM THE CITY OF SOUTHGATE

Municipal immunity may be defined as the immunity of a municipal corporation from liability arising from its harmful acts, including the negligence of its agents and employees. Much more recent in origin than the doctrine of state sovereign immunity, this doctrine is said to have its origin in the English case of Russell v Men of Devon, 100 Eng. Rep. 359 (1788), in which the plaintiff sued the men of Devon County for damages caused by their failure to properly maintain a bridge. The court dismissed the action on the grounds, inter alia, that the county was unincorporated and thus without a fund to satisfy the claim. Although these grounds suggest liability for an incorporated entity, this case was cited as authority in Maure v Leicester, 9 Mass. 247 (1812), the case which introduced municipal immunity into the common law of this country. In that case, the plaintiff sued the town of Leicester for damages caused by a defective bridge. Although the town was incorporated, recovery was denied, apparently on the basis of the principle enunciated in Russell that "it is better that the individual sustain an injury than that the public should suffer an inconvenience."

As this doctrine developed in the various states, its harshness was somewhat modified as it became limited in most jurisdictions to situations in which the municipality was acting in a governmental, as opposed to a proprietary capacity. Generally, a governmental function has been defined as one performed for the public good, and a proprietary function as one performed for the immediate benefit or profit of the agency performing the function. However,

there has been considerable divergence concerning the tests used to distinguish these functions and the decisions making this distinction even within the same jurisdiction are often difficult to explain or reconcile.

Until 1964, Kentucky followed the majority rule limiting liability to proprietary acts, but in that year, in Haney v Lexington, 386 S.W. 2d 738 (Ky. 1964), as noted earlier, the Court of Appeals judicially abrogated the doctrine, rejecting the governmental-proprietary distinction, saying that both reason and justice were against a rule making immunity the rule and liability the exception, and adopted a contrary rule, retaining immunity only for legislative, judicial, quasi-legislative, and quasi-judicial functions. This was the state of municipal immunity in Kentucky until the Court re-examined the doctrine four years later in Louisville v Louisville Seed Co., 433 S.W. 2d 638 (Ky. 1968). In that case the plaintiff sued the City of Louisville for its negligent failure to install flood wall gates, causing damage to plaintiff's property when the Ohio River over ran its banks. The plaintiff had contacted city officials beforehand and received assurances that the gates would be installed in time. The court noted that the doctrine of municipal immunity had been abolished in Haney, but went on to say that "there must be some limitations on the liability of municipal corporations, given the variety and scope of their activities many of which, such as, providing police and fire protection, are so inherently dangerous that no private business would undertake them. Id., at 641. It is, therefore, necessary, the court said, to reach a compromise on the question of liability which will be sufficient to prevent the curtailment or abandonment of these activities. The court believed that a compromise could best be reached by holding the municipality liable when it acts like a private person and when a private person would be liable. Id., at 643. Applying this rule, the court concluded that a city should be liable

where the city has dealt with the plaintiff on an individual basis or where his injury is isolated from that of the general public, provided that the city is not engaged in an inherent function of government which would not be undertaken by private enterprise. The court then held that flood control was an inherent function of government, that the effects of its failure were felt by a broad segment of the public, and that the city did not deal with the plaintiff on an individual basis, and denied recovery on those grounds. Id., at 643.

The rule announced in Louisville Seed has been recently affirmed and modified in Franfort Variety v Frankfort, No. 74-326 (June 19, 1977). In that case, the plaintiff's property was damaged by the negligence of the city fire department in preventing the rekindling of a fire to which they had been summoned and which they thought they had extinguished. Citing Louisville Seed, the court held that the city had no duty running to the plaintiff, and thus affirmed the judgment of the lower court denying recovery. However, in so holding, the court modified the rule announced in Louisville Seed in several respects. First, the court expressly stated that in the absence of the conditions specified in that case, the city would not be liable because it had no duty to the plaintiff, a conclusion which was merely implied in the earlier case. Second, the court expressly rejected the general principle it had announced in Louisville Seed that the city's liability should be on a par with that of an individual in like circumstances, saying that "a city's relationship to individuals and to the public is not the same as if the city itself were a private individual or corporation, and its duties are not the same. When it undertakes measures for the protection of its citizens, it is not to be held to the same standards of performance that would be required of a professional organization hired to do the job." Id., at .. 5. The court thus introduced the idea that the standard

of care or degree of duty owed by a municipality may be less than that owed by a private citizen. Finally, the court approved, or at least failed to disapprove, the reasoning of the lower court, which had held that since fire protection is an inherent function of government, as a matter of law the fire department did not deal with the plaintiff on an individual basis, nor were plaintiff's losses isolated from those of the general public. This reasoning seems to distort beyond recognition the test announced in Louisville Seed, since it makes the fact that the city is engaged in an inherent function of government sufficient by itself to deny liability, reasoning which if followed would lead to a return to the old governmental-proprietary test for liability rejected in Haney, supra.

As pointed out above, the classic "duty argument" contends that the municipal corporation (or state, as the case may be) cannot be held liable to an individual harmed by the negligent undertaking of an act or failure to act where the duty owed by the municipal corporation is one owed to the public in general as opposed to a duty owed to an individual alone. Once the individual can establish the existence of a duty owed by the municipal corporation to him, it is only necessary then that the individual show the act to be negligent. In Kentucky, the duty can be established in one of two ways, pursuant to the standards set out in the Louisville Seed case:

- (1) Where the city deals with the individual on an individual basis, or
- (2) Where the negligent act of the city fails upon an isolated citizen as distinguished from the general public, and where the act does not involve the ultimate function of government (regardless of any proprietary/governmental function distinction which may have previously existed).

Absent the existence of such a duty, the Supreme Court of Kentucky has held that no negligent act has been committed against the individual and, therefore,

there is no basis for municipal liability. Frankfort Variety, Inc. v City of Frankfort, Opinion of the Supreme Court of Kentucky, No. 74-326 (Ky. 1977).

A number of critical questions arise then with respect to the egalitarianism of the duty/argument, the rationale for its application in relation to the theory it replaced, and the efficaciousness of the adoption of the duty argument when compared to the basic reasons stated in Haney for the abolition of the doctrine of municipal governmental immunity.

The first question which presents itself is whether the imposition of such a hurdle as the "duty to all, duty to no one" rationale treats all parties equally. The answer is clearly no. The distinction which separates "rightful" claimants from prohibited claimants, that is to say, claimants to whom an individual duty has been owed from those who share what is termed a public or general duty, is at best nebulous. There are no criteria established to determine what the court in the Louisville Seed case termed an ultimate function of government, nor is it at all clear when a plaintiff suffers from an act which affects him as an "isolated citizen as distinguished from the general public." City of Louisville v Louisville Seed Co., 433. S.W. 2d 638 (Ky. 1968). Clearly, so the court says, an individual does not suffer as such when the city promises him that a floodgate will be installed and where the city subsequently fails to act on that promise, City of Louisville v Louisville Seed Co., *supra*, or where the city provides fire protection but fails to extinguish completely the initial blaze and where said fire smoulders, subsequently begins anew and does more damage. Frankfort Variety, Inc., et al v City of Frankfort, Opinion of the Supreme Court Court of Kentucky, No. 74-326 (Ky. 1977). In such cases, the court says that the individual fails to establish those dealings which would

create the duty owed to him as an individual, or else the city was engaged in an action which is predicated as an inherent part of the carrying out of the functions of government. The court in Frankfort Variety indicates that the latter functions include at least police, fire and flood protection, and thus the city, when undertaking these acts does not deal with the individual on an individual basis. Except for actions based on a contract, where the city deals specifically with an individual, such an interpretation acts to exclude liability for all other actions by the city regardless of the degree of negligence. The duty argument as applied works an unjust hardship on those least able to bear the burden of the loss, gives the citizen little return for the money he contributes in the form of taxes for the support of said "functions of government," provides the city with an inequitable defense and completely negates the symbiotic relationship which theoretically should exist between the citizen and the city in which he resides.

The next question concerns the efficaciousness of this new doctrine and whether it is, in fact, in line with what the court in Haney v City of Lexington, 386 S.W. 2d 738 (Ky. 1964) contemplated the result would be by removing the defense of governmental immunity. The final conclusion must be that it is not. The court in Haney obviously recognized that the doctrine of municipal immunity was inequitable and unjust by precluding many persons from recovering for injuries incurred as the result of the negligence of a municipal corporation. By removing that final bar the court necessarily expected to provide for a means of recovery against municipal corporations. However, with the imposition of the "duty rationale" this has hardly been the case. As has been demonstrated, many just claims against municipal corporations for injuries incurred as a result of the negligence of the municipality have gone unsatisfied, because of the nebulous and ambiguous nature of the distinction between a duty owed to an

individual as an individual and an individual as a member of the general public. In fact it has been suggested that the decision in Louisville v Louisville Seed could easily be interpreted in terms of the governmental-proprietary functions which the court in Haney purported to discard. See Torts--Sovereign--Immunity--Municipal Liability, 57 Kentucky Law Journal, 763 (Ky. 1969).

Kentucky is not alone in the reliance placed upon the duty argument for limiting the liability of the municipal corporation. This doctrine in one form or another has been, or is applied in the following states, to name a few: Alaska, Arizona, Michigan and Washington. An important case which should be considered here is the Alaska case of State v Jennings, 555 P. 2d 248 (Alaska 1976). This case arose out of the same fact situation as the case of Adams v State, 555 P. 2d 235 (Alaska 1976). In Jennings the Supreme Court of Alaska found the city liable for deaths and injuries sustained in a fire where the city had undertaken to protect the hotel by conducting an inspection and during that inspection had discovered serious fire hazards which it subsequently neglected to have remedied, even though it had the ability to insure the repair of the hazards discovered. The court held that there was a duty on the city to take action with respect to those hazards and that that duty ran to the occupants and for their personal representatives. The court thus designated a specific class of individuals who suffered a peculiar injury as the result of a negligent act of the city where the consequences of that act fell upon that group of individuals as distinguished from the public in general.

The basis for this reasoning stems from the conclusion reached by the court that in undertaking the inspection, the city assumed a common law duty to exercise reasonable care in conducting the inspection and the corresponding duty to have remedied any defects discovered. The court found that the purpose of the inspection was to discover and alleviate fire hazards endangering users of the hotel, that the decedents were the intended beneficiaries of the inspection

(thus constituting a special class), and that they were the foreseeable victims of the fire hazards left uncorrected. The common-law duty, said the court, "is not one owed to the general public, but is a limited one and its beneficiaries are a limited class." Citing Adams v State, 555 P. 2d 235, 241 (Alaska 1976). Thus the defendant undertook and was bound by the same duty as a private entity would have been.

This latter statement, and a further reason relied on by the Alaska court, may well preclude the application of the reasoning in Kentucky. This is so because: 1) the court in Frankfort Variety, Inc. v City of Frankfort, states that "a city's relationship to individuals and to the public is not the same as if the city itself were a private individual or corporation and its duties are not the same." Thus the Kentucky court while not denying the existence of a duty to the individual once an act is undertaken with respect to that individual, does intimate that the degree of care owed to that individual is not the same as if the individual were dealing with another individual. Why this is so is never adequately explained. The only reason given--that the municipality might hesitate to undertake those functions--does not consider the realities of the existence of the city and its relation to the individual. It appears that this would never be the result. Nor does the court ever specify what degree of care the city is bound by. We can only speculate, therefore that it is somewhere below the reasonable care which a private individual would owe to another. The second reason is that, whereas in Alaska, the doctrine of immunity is "a matter to be dealt with by statute and not amplified by court created doctrine," 555 P. 2d 235, 241, (the court there considered the "duty to all, duty to no one" doctrine to be a form of immunity) in Kentucky, the matter of governmental immunity is considered one within which the courts may validly exercise their power.

The justification for the prohibitive effect that the "duty doctrine" has on suits against municipalities, as expressed in the Frankfort case, is the fear that, should municipalities be held to the same duty as individuals in the performance of measures for the protection of its citizens, "it very well might hesitate to undertake them." This would seem to indicate that there is no obligation on the part of the municipality to provide these services initially. Such an interpretation is in fact consistent with the manner in which the Kentucky Courts have handled this situation since Haney. Even if there is no obligation to undertake to provide these services initially, once they are undertaken, it is highly debatable, indeed it is very doubtful, that to make the city liable for their negligent performance would cause the municipality to "hesitate to undertake them." This is for two reasons. First, because of the essential nature of these services, the performance of which is necessary to attract and indeed retain those persons who have settled within the city limits. It must be recognized that the citizen expects and has come to depend upon the city to provide these services. In return he contributes a portion of his wages for the support and maintenance of these institutions. Failure to provide these basic services would almost certainly spell the demise of the political unit which was foolish enough to discontinue them. Without the influx of tax dollars, which would be lost as the citizens migrate to other areas which do provide such services, the city's other institutions would suffer as well. The second reason is that it is highly doubtful, to paraphrase the court's rationale in Haney, that a city or any of its agents ever committed a tort in reliance upon the duty doctrine. This is only to say that the most likely effect will be to increase the efficiency and conscientiousness with which these services are performed.

The real reason for the adoption of such a doctrine seems to be the fear that a great magnitude of suits will follow to such an extent that the

consequence will be to deplete the public coffer and impede the performance of other essential functions of government. This is a very real fear and one which should not lightly be dismissed. That is not to say, however, that those persons injured by the negligence of a municipal corporation should be forced to bear the burden of that injury, especially where it involves great financial loss. The answer then rests with placing some limits upon the amount which can ultimately be recovered by the injured party.

A number of obvious ways immediately come to mind. For instance, limits may be imposed by legislation passed by the general assembly. This could be accomplished (and has been in a number of states) by requiring the city to purchase liability insurance to cover those instances where an individual or group of individuals is injured due to the negligence of the municipal corporation. Or a better way might be to limit recover for injuries suffered to strict out of pocket compensation and those for medical expenses incurred as a result of the injury. In the case of a death due to the municipality's negligence, damages could be distributed in relation to the decedent's life expectancy and earning capacity, in the case of a wage earner, or in relation to the value of the decedent's services contributed to the maintenance of the family, in the case of a homemaker or non-wage earner (due to the age of the victim). Another possible solution would be to limit the amount recoverable by protecting and effectively removing from attachment those funds absolutely necessary for the maintenance and functioning of those basic services provided by the city and essential to the basic performance of those services. Such a standard could be developed by the judiciary and analogized to the formula used in bankruptcy proceedings.

It is clear that in developing any standard there are two competing interests which must be considered. One is the right of the injured party or the

deceased's representative to recover for injuries suffered due to the city or their agents' negligent performance of an act undertaken by them, and the other is to what extent the public as a whole should suffer as a result of that negligence when recovery for those injuries would deplete the funds available for the performance of public services and threaten the very survival of the city itself. This second interest should in no way be interpreted as to deny absolutely recovery to one who is wrongfully injured, but should be considered in fashioning an adequate and workable remedy.

It should be apparent from the above discussion that the duty doctrine has developed into an impenetrable barrier which in most cases unjustly precludes the injured party from recovering against the city. It is hard to escape the conclusion, based on the discussion of the doctrine of immunity in the Haney case and the reasons expressed therein for its abolition, that the use of the doctrine distinguishing the duty owed to the individual from that owed to the general public is unduly harsh and is inconsistent with the result which the court in Haney hoped to effectuate. In fact, the reasoning used in Haney for the abolition of the doctrine of municipal immunity, that when "a theory . . . not grounded upon sound logic, is not just and has been discredited by actual experience, it should be discarded" and "when established things are no longer secure in a fast changing world, the courts should re-examine the precedents and determine if they provide a proper standing under present conditions," could well be used to dispose of the duty doctrine. In any event, it cannot be contended with any seriousness, that the duty doctrine should be permitted to continue in its present state. As such its actual effect as applied is precisely the same as that of Municipal Immunity.

Ultimately, the question must be posed as to why the establishment of a duty should be any more difficult when the city is the defendant. This question, never answered here, was considered and equitably answered in Alaska in the cases of State v Jennings, 555 P. 2d 248 (Alaska 1976) and Adams v State, 555 P. 2d 235 (Alaska 1976). The question is now before the Commonwealth regarding Beverly Hills.

Assessment

The State Courts will probably continue to support the doctrine of sovereign immunity as to the State. However, there is some chance that the City of Southgate may have liability imposed.

FOOTNOTES

1. J. Gray, The Nature and Sources of the Law section 369 (1909). Of course, the legislature can "overrule" the Court on statutory matters where the judicial interpretation is viewed as erroneous. See, e.g., Schwegmann Bros. v. Calvert Distillers Corp. 341 U.S. 384 (1951) overruled by the McGuire-Keogh Act, 66 Stat. 632, c.745 (July 14, 1952), 15 U.S.C. section 45.
2. Oliver Wendell Holmes once defined law as the "prophecies of what the courts will do in fact." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 461 (1897).
3. R. Pound, Law Finding through Experience and Reason 1 (1960).
4. C. Hughes, The Supreme Court of the United States: Its Foundation, Methods and Achievements: An Interpretation 165-55 (1928).
5. Several federal actions are pending dealing with the Beverly Hills tragedy, but the basis of jurisdiction is diversity of citizenship. In such cases, the federal courts are bound by the substantive law of the state and are not free to fashion federal common law. See Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938); C. Wright, Law of Federal Courts section 55 (3d ed. 1976).
6. There are a number of federal acts that relate to fire prevention and control. See e.g., 15 U.S.C. sections 2201-2219; 42 U.S.C. section 290a-c; 15 U.S.C. section 1191, et seq. A helpful digest of federal laws relating to fire protection is set forth in Fire Protection Handbook (G. McKinnon & K. Tower eds. 14th ed. 1976) (Hereinafter cited as Handbook), at A-33. A discussion of federal agencies involved in fire safety appears at A-24-A-29.
7. There are severe constitutional limitations on the extent to which Congress can regulate state and local fire and police departments. The Supreme Court recently held that Congress could not, under the Commerce Clause, impose minimum wage and maximum hours prescriptions on employees of states and their political subdivisions since that would "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions [such as fire and police protection]." National League of Cities v. Usery, 426 U.S. 833, 852 (1976). The Court in Usery specifically declined to pass on Congress' power to act under some other provision than the Commerce clause, such as the spending power or section 5 of the Fourteenth Amendment, 426 U.S., at 852 n. 17. See e.g., Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Concerning the validity of Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. section 651 et seq, see Atlas Roofing Co. Inc. v. Occupational Safety, Etc., 97 S. Ct. 1261 (1977).

8. KRS 227.300. Enact. Acts 1954, ch. 201 section 11. Additional provisions, not directly relevant, were added in 1976.
9. KRS 227.320. Enact. Acts 1954, ch. 201 section 13.806, KAR 50:015 section 2 (5).
10. KRS 227.220. Enact. Acts 1965, ch. 201, section 3.
11. Id., at section (2) (b).
12. KRS 227.230 (emphasis added).
13. Ibid.
14. KRS 227.370. Enact. Acts 1954, ch. 201 section 18.
15. Ibid.
16. Ibid.
17. KRS 227.330. In section (2), however, it is stated: "Before any such order is made a hearing shall be held in accordance with the provisions of KRS 304.2-320, 304.2-330, and 304.2-360.
18. KRS 380. In section (2) an appeal lies from the Chief's action to the Commissioner. However, the order remains in effect until revoked or modified by the Commissioner.
19. KRS 227.390. Penalties for violations are set forth in KRS 227.990:

Any person who violates any provision of KRS 227.200 to 227.400 or any provision of a lawful order, rule or regulation made under the provisions of KRS 227.200 to 227.400, or who induces another to violate any provisions of KRS 227.200 to 227.400 or of any lawful order, rule or regulation made thereunder, shall be fined not less than ten dollars (\$10.00) nor more than five hundred dollars (\$500), or confined in the county jail for not more than sixty (60) days, or both. Each day such violations exist shall, in the discretion of the courts, be considered as a separate offense.
20. KRS 227.480. (Emphasis added.) Enact. Acts 1960, ch. 208, section 5, effective June 16, 1960. KRS contains a series of provisions concerning local regulation of electricians applicable to cities of the second and third classes, and counties containing such cities. See KRS sections 227.450-227.500. Concerning certification of electrical inspections, see KRS 227.489.
21. KRS 227.390. Enact. Acts 1954, ch. 201, section 21. This provision has been construed as a codification of common law and not as imposing any additional duty. Louisville Trust Co. v. Nutting, 437 S.W. 2d 484 (Ky. 1968).
22. Home Insurance Co. v. Hamilton, 253 F. Supp. 752 (E.D. Ky. 1966).

23. Blue Grass Restaurant Co. v. Franklin, 424 S.W. 2d 594 (Ky. 1968). See Negligence-Violation of Safety Regulation as Negligence Per Se: The Perishable Sanction, 62 Ky. L. J. 254 (1973).
24. See Prichard v. Collins, 228 Ky. 635, 15 S.W. 2d 497 (1929). It is interesting to note that the Life Safety Code provides that "nothing in this Code shall be construed to prohibit a better type of building construction, more exits, or otherwise safer conditions than the minimum requirements specified in this Code." Life Safety Code, section 1-3112 (1973 ed.).
25. M & T Chemicals, Inc. v. Westrick, 524 S.W. 2d 740 (Ky. 1974).
26. Edgerton, Negligence, Inadvertence and Indifference, 39 Harv. L. Rev. 849, 860 (1929). See generally W. Prosser, The Law of Torts, ch. 5 (4th ed. 1971).
27. See Ridley v. Grifall Trucking Co., 289 P. 2d 31 (Cal. App. 1955).
28. United States v. Carroll Towing Co., 159 F. 2d 169, 173 (2d Cir. 1947).
29. 224 F. 2d 120, 129 (6th Cir. 1955), cert. denied 350 U.S. 937 (1956). See also Louisville Trust Co. Nutting, 437 S.W. 2d 484, 486 (Ky. 1968).
30. Northwest Airlines v. Glenn L. Martin Co., supra, note 29, at 129.
31. See also The T. J. Hooper, 60 F. 2d 737 (2d Cir. 1932); Adams v. Bullock, 227 N. Y. 208, 125 N. E. 93 (1919).
32. C. Sands, 1A Sutherland Statutory Construction section 23.10, p. 23 (4th ed. 1972).
33. Section III dealing with permits and inspections was amended to read: Any person, firm, or corporation desirous of erecting, changing or altering any building or structure shall apply to the building inspector of the City of Southgate for a permit to do so. A permit shall not be required for a replacement of parts of an existing structure or a repair hereto not involving or affecting the construction, sanitation or safety of the building or structure.
34. See Appendix A-29.
35. Cities of all classes are authorized to adopt building, electrical, and other codes by reference by means of resolution or ordinance. KRS 82.080. However, the motion here involved is neither a resolution nor ordinance. See Bradshaw v. Yager, 265 S.W. 486, 488 (Ky. 1954).
36. See generally Appendix A-30.
37. Ord. 75-(5), section III.
38. Id., at section VI.
39. Id., at section XLV. For penalties imposed under KRS, see note 19, supra.

40. Id., at section XXII.
41. Id., at section XXV.
42. Id., at section XL. The applicable provision is drafted in an awkward fashion indicating that "Those portions of a building occupied as a place of assembly and having a stage arranged or intended for theatrical, operatic, or similar performances, shall be equipped with sprinkler system except in the auditoriums, foyers, lobbies [sic], and immediate vicinity of automatic stage ventilators." The exceptions stated, along with the fact that the provision is placed with those dealing with storage of combustible material, supports the text's interpretation. There was no evidence that props or scenery was stored or used in conjunction with the shows at Beverly Hills.
43. Id., at section VII. Although this provision merely states what the state law imposed on Southgate anyway, it certainly underscores the egregious nature of the failure of the city to provide the building inspector with the relevant safety standards and codes. See discussion Infra, p. H-28. The concluding language of Section VII states: "In all matters not herein specifically defined or clarified by reference, the requirements contained in BUILDING CODE RECOMMENDED BY THE BOARD OF FIRE UNDERWRITERS, NEW YORK, latest revised edition, will prevail and determine the intention of this Ordinance. This could explain what council was attempting to do on August 2, 1967. See discussion Supra, at p. G-8.
44. Until July 1, 1974, the effective date was 30 days from the filing date. Some confusion was probably created when the current version of the Standards of Safety was filed incorporating by reference the 1976-77 edition of the National Fire Codes, Sec 806, KAR 50:015, Section 2 (8) (a). There is no such edition. There is a 1976 edition and a 1977 edition, each with different provisions. For example, the 1976 edition incorporates in volume 9 the 1973 Life Safety Code, whereas the 1977 edition sets forth in volume 9 the 1976 Life Safety Code. Some evidence of the confusion engendered is reflected in that the Southgate Fire Department has a copy of the 1977 edition of the National Fire Codes, and not the 1976 edition. The error was apparently not perceived by the Department of Insurance, Fire Marshal's Office, or Legislative Research Commission. In fact, on April 11, 1977, the Legislative Research Commission wrote to the Governor:

"The Administrative Regulation Review Subcommittee, at its April 6 meeting, approved 806 KAR 50:015 promulgated by the Office of the Fire Marshal. This regulation is the state's standards of safety and fire code, adopting by reference "Standards of the National Fire Protection Association," (1976-77 edition). This code is most commonly referred to as the "National Building Code," which has been adopted by the Fire Marshal's Office for many years.

See Appendix A-36. Aside from the non-existence of a 1976-77 edition of the National Fire Code, the Commission appears to equate the Fire Code with the National Building Code. These are obviously very different

codes, not equivalents. The intent was undoubtedly to adopt the 1976 edition of the National Fire Codes since the specific contents of the volumes set forth in the Standards of Safety are those of that edition and not the 1977 edition. The courts will probably construe the regulations as validly adopting the 1976 edition of the National Fire Codes, but this lack of accuracy has produced unnecessary confusion. See State Property and Building Commission v. Hays, 346 S.W. 2d 3 (Ky. 1961).

45. 806 KAR 50:015, Section 2 (4). [Hereinafter 806 KAR 50:015 cited as Standards of Safety.]
46. See e.g. Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946).
47. City of Louisville v. Thompson, 339 S.W. 2d 869 (Ky. 1960).
48. Ibid.
49. Ibid; Queenside Hills Realty Co. v. Saxl, supra, note 46.
50. Handbook, at 6-92. (Emphasis added.) Accordingly, it is assumed that the National Fire Codes 1970-71 ed. is properly applicable here.
51. See KRS Sections 13.080, 13.125, and see note 44, Supra.
52. Butler v. United Cerebral Palsy of Northern Kentucky, Inc., 352 S.W. ad. 203 (Ky. 1961).
53. Miller v. Covington Development Authority, 539 S.W. 2d 1 (Ky. 1976).
54. Zeigler, Jr., Legitimizing the Administrative State: The Judicial Development of the Nondelegation Doctrine in Kentucky, 4 N. Ky. L. Rev. 87, 118 (1977).
55. 451 S.W. 2d 407 (Ky. 1969).
56. 314 S.W. 2d 532 (Ky. 1958).
57. Louisville & Jefferson Co. Bd. of Health v. Harny, 451 S.W. 2d 407 (Ky. 1969).
58. Standards of Safety Section 3 (WW). See KRS 446.010 (29).
59. Standards of Safety Section 2 (5). Unless indicated to the contrary, citation is to the current Standards of Safety. Where there is a significant deviation from the 1963 Standards of Safety or other intervening versions of the Standards of Safety, these deviations are noted.
60. Standards of Safety Section 4 (2) (a). Prior to the 1974 Standards of Safety, a state permit was not required where a local ordinance required a permit and the ordinance adopted the safety standards. See e.g., 1974 Standards of Safety Section 101-2 (c). The bracketed language was added in the 1977 Standards of Safety to comport with the changes made in the responsibility for design section. See text accompanying note 61, infra. The 1974 Standards of Safety and current Standards of Safety

require not only state permits, but also local permits "where provisions have been made by the municipality for the issuance of permits, and where the municipality has adopted the Standards of Safety, or has regulations at least as stringent [as the Standards of Safety]." Standards of Safety Section 4 (2) (d).

61. Standards of Safety Section 4 (3) (a), (b), (c). Prior versions permitted either an architect or professional engineer to act in regard to all aspects of building design. The delineation now spelled out was the result of litigation. See Roggenkamp, et al. v. Kentucky State Fire Marshal, Franklin Circuit Court, Civil Action No. 86101, July 20, 1976.
62. Standards of Safety Section 4 (4) (a), (b), (c).
63. The violations noted were the same for applicable editions of the National Electrical Code: 1962, 1968, 1971, 1975. References are to the 1962 edition.
64. The National Electrical Code itself states in 90-1 (c): "This Code is not intended as a design specification nor an instruction manual for untrained persons." This underscores the necessity of assuring that proper electrical inspections are conducted. All findings of violations of the National Electrical Code set forth herein were confirmed by qualified electrical experts who examined the scene, physical evidence and photographs cited.
65. National Electrical Code, Section 300-15. (See Appendix C, Electrical Evidence, Photos 1, 3, 10, 14, 15, 17, and 19.)
66. National Electrical Code, Section 370-15. (See Appendix C, Electrical Evidence, Photos 1, 2, 15, and 18.)
67. National Electrical Code, Sections 300-11, 370-13. See Appendix C, Electrical Evidence, Photos 1, 2, 3, and 9.
68. National Electrical Code Sections 520-1, 520-4. See Appendix C, Electrical Evidence, Photos 4, 9, 13, and 15.
69. National Electrical Code Section 342-6. See Appendix C, Electrical Evidence, Photo 5.
70. National Electrical Code Sections 200-2, 250-32, 410-91, 410-96. See Appendix C, Electrical Evidence, Photos 1 and 2.
71. National Electrical Code Section 430-13. See Appendix C, Electrical Evidence, Photo 6.
72. National Electrical Code Section 370.6. See Appendix C, Electrical Evidence, Photo 6.
73. National Electrical Code Sections 450-24, 450-41, 450-42. See Appendix C, Electrical Evidence, Photo 7.
74. National Electrical Code Section 370-8. See Appendix C, Electrical Evidence, Photos 8 and 9.

75. National Electrical Code Section 300-21. See Appendix C, Electrical Evidence, Photos 12, 16, and 16a.
76. All references to National Building Code are to the 1955 edition unless otherwise indicated.
77. The Life Safety Code recognizes as much, stating that it "does not attempt to cover general fire prevention or building construction features, such as are commonly dealt with in fire prevention and building codes." Life Safety Code (L.S.C.) (1973 ed.), Section 1-3113. Unless otherwise indicated, all L.S.C. references are to the 1973 edition. Further, unless noted, the 1973 edition does not substantially deviate from the 1970 edition of L.S.C.
78. National Building Code section 100.2.
79. National Building Code section 100.4 provides that nothing in the code "shall be construed to prevent the enforcement of other laws which prescribe more restrictive limitations." Where Life Safety Code provisions are more stringent, discussion of cognate National Building Code provisions is generally omitted.
80. The classification of construction is determined by the extent to which it conforms with all provisions of the National Building Code applying to that specific type. National Building Code section 701. The nomenclature of unprotected non-combustible that appears in the 1955 and 1967 edition of National Building Code was changed to unprotected limited-combustible in the 1976 edition. See National Building Code 1976 ed., section 705.1.
81. National Building Code section 402.1. This also violates the Southgate Building Code, section IX. If sprinklered throughout, the area could be increased by 200% to 18,000 square feet, National Building Code section 402.3(a).
82. National Building Code 1967 ed., section 812.2. The significance of the contended repeal of the 1947 Southgate Building Code is here apparent. The National Building Code 1967 ed. by its own terms applies only to construction and alteration of buildings, appurtenances and structures "hereafter erected" and thus would apply, by virtue of the state Standards of Safety, only to construction after January 14, 1972. However, the Southgate Ordinance incorporates by reference the latest edition of the National Building Code. See Southgate Building Code, section VIII L. Therefore, it would appear that the 1967 National Building Code was applicable not only to the alterations made after January 14, 1972 (the addition to the Cabaret Room and the Garden Room addition) but to the earlier remodeling as well. The absence of fire walls means that Beverly Hills is considered as one building for purposes of the Code. See National Building Code section 200 - "Building." The same is true for the National Electrical Code. See National Electrical Code, Article 100. The 1976 National Building Code prohibits Class A places of assembly (1,000 or more National Building Code section 310.1) in unprotected limited-combustible buildings unless sprinklered. National Building Code 1976 ed. section 310.2. The 1976 National Building Code became

effective only on April 6, 1977 and therefore, given the limited time to obtain compliance, it is not used for analysis here directly, but is evidence of what could be considered reasonable requirements and as such, is relevant to common law duties. See pp. G-4-G-6, supra. The same is true of the National Building Code 1976 edition's requirements of a fire alarm system for a Class A place of assembly. See National Building Code 1976 ed. section 310.11.

83. National Building Code section 604.2.

84. National Building Code section 604.2(e). See discussion re fire doors in corridor, p. F-17.

85. See A-33. See pp. E-7-E-10, supra.

86. National Building Code section 400.2(b).

87. National Building Code section 1501.1, 1502.2, the Southgate Building Code (S.B.C.) also required inspection of all electrical installations. S.B.C. section XXVII.

88. National Building Code section 1503. The certificate of inspection required is to be issued by the building inspector. He in turn may rely on the certificate of an electrical inspector. The 1957 amendment to National Building Code provides in Section 103.7:

Inspections required under the provisions of this code shall be made by the building official or his duly appointed assistant. The building official may accept reports of inspectors or recognized inspection services, after investigation of their qualifications and reliability. No certificate called for by any provision of this code shall be issued on such reports unless the same are in writing and certified to by a responsible officer of such service.

The only certificate issued was an electrical certificate for the Garden Room addition.

89. National Building Code section 1504.1.

90. See discussion, supra at pp. F-5-F-19.

91. Life Safety Code section 1-2111.

92. Life Safety Code section 17-2111. Without adequate alarm systems, the training requisite takes on added importance.

93. Life Safety Code sections 2-1113, 2-1114, 2-1115, 2-1118, 2-1119, 2-311111.

94. Life Safety Code section 6-1312. Southgate Building Code also required complete firestopping. See Southgate Building Code section XXV.

95. Life Safety Code sections 8-1133(b), 17-2161(b).

96. See discussion supra at pp. F-15-F-16. Life Safety Code sections 2-1111, 2-1115, 5-1111.
97. Life Safety Code section 8-1132.
98. Class A places of assembly are not permitted in unprotected, non-combustible, ordinary and wood-frame construction. Life Safety Code section 8-1111(c).
99. Life Safety Code sections 6-2114, 8-1722, 8-1723. If Beverly Hills had been sprinklered, the requirements for flame spread would have been reduced by one grade, down to no lower than Class C. Life Safety Code section 6-2131. The classification of section 6-2114:

<u>Class</u>	<u>Flame Spread</u>
Class A	0-25
Class B	26-75
Class C	75-200
Class D	201-500
Class E	over 500

100. Handbook, at 8-2.
101. Id., at 8-3.
102. For example, where sprinklers are installed, fire loss is substantially reduced. Handbook, at 1-24.
103. See Handbook, at 1-24. Most fires are originally due to "ignition of decorative materials or furnishings, failures in electrical systems or mechanical equipment, or in accumulation of trash." Id., at 6-45.
104. See Handbook, at 1-6.
105. Id., at 8-3.
106. See Origin and Development of 101 (Life Safety Code), 101-V, Life Safety Code 1973 ed. Well known fires in places of assembly in which there was a large loss of life include:

<u>Place</u>	<u>Number of Deaths</u>
Iroquois Theatre, Chicago, Ill. (1903)	602
Rhythm Club, Natchez, Miss. (1940)	207
Cocoanut Grove, Boston, Mass. (1942)	492
Ringling Brothers and Barnum and Bailey Circus, Hartford, Conn. (1944)	168
Indiana State Fairgrounds Coliseum, Indianapolis, Ind.	74
Dale's Penthouse Restaurant, Montgomery, Ala.	25

See Table 1-2D, Handbook, at 1-10.

107. The Southgate Fire Chief at the time, Ray Muench, reported that lack of water was a problem at the June 1970 fire. See Appendix A-1-1.
108. The Mayor was under a duty to "see that laws and ordinances of the city are enforced and observed." KRS 86.200(1).
109. Appendix A-1-1. Unless otherwise indicated, letters and articles referred to in this chain of events are located in Appendix A-1-1. The City Attorney for Southgate also wrote, on December 7, 1970, to the Department of Health asking if plans for Beverly Hills were submitted to that office. The Department responded on December 8, 1970, indicating that it had received plans for renovation of the kitchen on May 26, 1970, and they were approved.
110. The underscored concern indicates official awareness at this time of the critical absence of a proper enclosure for the spiral stairs.
111. B-219.
112. C-92.
113. The inspection form also designates Beverly Hills as a two story ordinary construction nightclub and restaurant. The blank for number of square feet is not completed. If it had been, the form on its face would have indicated it was over the maximum area limitation imposed by National Building Code section 402.1 (6,000 square feet for two story ordinary and unprotected non-combustible construction) since the original structure exceeded 30,000 square feet. See Appendix A-31.
114. The form again describes Beverly Hills as a two story ordinary construction "nite" club and restaurant. Eviston noted at the bottom of the form that the inspection covered only the portion of the club ready to open and not the basement, east section of the main floor, and the second floor. The day before the inspection (Feb. 8, 1971), a letter was written to Richard Schilling by Albert Gillespie, president of Bee Electric Co., Inc., stating that the company was having all electrical work inspected and doing the work in compliance with the National Electrical Code and local ordinance.
115. A-17. A recent account of the Beverly Hills Grand Jury investigation appeared in the Courier-Journal, July 20, 1977, A-1, A-8, in which it was reported that one grand jury member stated that the jury relied solely on testimony of state fire officials. Calvert did not testify.
116. E-14.
117. Ibid. Senator Easterly said he had also mentioned this matter to James Terrell, Stanley Boyd, and Mike Greenwell in the Fire Marshal's Office. Deputy Mike Greenwell confirmed that he had spoken with Senator Easterly. His testimony was that "He (Easterly) said that there wasn't enough exits and it took . . . about 45 minutes to get out of the building . . . I think that his request basically was just to have an inspection made and to see what was really wrong with the building at that time . . . I went with him on the lunch engagement (with Stanley Boyd) to discuss the

thing. At that time, Mr. Boyd just told him from what he understood that it was, it was politics or something to that effect . . . and at this time it wasn't new construction so he had no authority." G-93. Deputy James Terrell also confirmed Senator Easterly's story observing that the Senator told him that Beverly Hills "was a crazy place to get into . . . just like a maze." T-50. When Terrell was asked whether he spoke with anyone else about the problem that Beverly Hills might be dangerous, he commented: "No, I felt that was before my time and my hands were tied, I was busy on my project, that was for someone else to do. This wasn't my thing; I felt this was another area, general inspection or someone else to take care of this. Ibid. It is interesting that Deputy Fire Marshal Conover also described part of Beverly Hills as a maze. See G-8, p. 27.

118. The Fire Marshal cannot recall discussing Beverly Hills with Senator Easterly. S-263. However, both Deputy Marshals Greenwell and Terrell admit to discussing the Beverly Hills issue with Senator Easterly. See note 117, Supra. Calvert cannot recall Jesse Martin's comment to the newspapers concerning the ten discrepancies at Beverly Hills. C-92. Jesse Martin also cannot recall talking to the newspapers about Beverly Hills. M-155. But, the newspaper clippings concerning these incidents have been and are on file in the Fire Marshal's Office.
119. Handbook, at 1-7.
120. See p. E-7-E-10, supra. See also A-33, at 5-7.
121. Handbook, at 1-2.
122. Bugbee, Cocoanut Grove: 25 Years After, News About Fire, Special Release, Nov. 10, 1967, p. 2.
123. Id., at pp. 2-3.
124. Handbook, at 1-19.
125. K-33, at p. 2. Kremer also reported that "he had informed Mr. Schilling that all the wiring in the area of the main bar was in extremely bad condition and unsafe. He advised that he had told Mr. Schilling that it was a wonder that the building hadn't burned years ago." Ibid.
126. See discussion, Infra at
127. G-8, at p. 14.
128. G-8, at p. 8.
129. G-8, at 13. It was suggested by these electricians that a handyman, Burton Smith, did some of the wiring at Beverly Hills, G-8, at p. 16. This was confirmed by Mr. Smith. See S-44.
130. B-220. Inspector Beiting's notes for 4-22-76 state: "Notified by Chief Shay of Beverly Hills construction - visited site this day, talked with construction superintendent - new addition started - no plans submitted

or permit issued. Left word to have owner (Schilling) contact me at once." Appendix A-11. The next day his notes: "Addition to kitchen - addition to chapel - addition to glass dining room." Ibid.

131. B-222, at p. 5.
132. M-153.
133. Appendix A-31.
134. R-124, at pp. 3, 4.
135. National Fire Protection Association Inspection Manual (2d ed. 1959), at p. 2. The same admonition appears at the same page in the 3d ed., 1970, and the 4th ed., 1976.
136. S-263.
137. U-9, at p. 3.
138. Id., at p. 2. One can question the thoroughness of the inspections conducted when the 21 men in the section conduct 22,000 inspections per year or roughly 4.5 per day, while driving an average of 2,000-2,300 miles per month per man. Id. at p. 3. The National Fire Protection Association manuals cited in note 134, Supra, all recognize the need for thorough and extensive inspections with several trips necessary where large facilities are involved. See National Fire Protection Association Inspection Manual (2d ed. 1959), at p. 3.
139. B-219.
140. S-263.
141. G-93, at p. 4. Deputy Fire Marshal John Bramlage, who conducted an inspection of Beverly Hills, was obviously aware of the unenclosed spiral stairway constituting a fire hazard. Under questioning, he stated:

Q. Are you familiar with the spiral staircase that lays in there just near the main bar room?

A. Yeah, I knew of it. I'd seen it several times.

Q. Isn't this type of structure required to be boxed in?

A. It would normally be, yeah. Should be.

Q. Did you bring this to Schilling's attention, as to why it wasn't closed in?

A. No, I didn't. Like I say again, that was the only existing structure, and I wasn't there to make an inspection of an existing structure, as to the type of construction or how it was constructed.

Q. But your responsibility lies with new construction and renovation and what-have-you. If it's already done, then your section of the Fire Marshal's Office doesn't have anything to do with it?

A. No, it's usually left to the general inspection division. B-220.

142. See note 117, Supra.
143. See B-219.
144. See Appendix A-32; S-276.
145. See S-276, p. 2.
146. See Z-18, p. 1.
147. See Z-18. Since the Fire Marshal's Office is understaffed, it might be appropriate to send a Deputy Fire Marshal over to Insurance Services Office to check inspection reports of places of assembly to see what extreme cases should be checked immediately. Apparently, the Insurance Services Office people take a more careful look at the facilities they inspect than do the public officials. The electrician Kremer reported to state investigators that "he was afraid the State Fire Marshal's Office was going to try to use him as a scapegoat to cover their own lack of inspections, that the wiring he had done within the building was completely safe and that he knew that the wiring in the other part of the building was in his words 'a disaster' and that it was completely unsafe, done in a crude and unsafe manner, and that he had called for an inspection on all the work that he, Kremer, had performed and had been unable to obtain most of these inspections. He felt the reason that the inspections were not made was that the Fire Marshal's Office knew that the wiring in the old part of the building was not up to standards and would not stand an inspection." K-33 at p. 3.
148. See editorial, "FAIR plan wasn't intended as a public subsidy for perils," Courier-Journal, September 8, 1977, p. 4., col. 4.
149. Kentucky Basic Property Insurance Inspection and Placement Program, approved by the Department of Insurance as filed on July 19, 1972, at p. 5. See Appendix A-32.
150. Deputy Boyd, in commenting on improper installation of electrical wiring stated: "Now, if, as you said, the handyman run a circuit for an air conditioner or whatever, and it was not according to code, unless the inspector was knowledgeable of electrical work, which the average fire inspector is not, the only way we would probably know it was not code would be two sources: (1) a visitor that noticed it and notified us; or (2) something went wrong." B-219.
151. Deputy Fire Marshal Boyd indicated that he was not aware of the requirements of the Southgate ordinances nor that his office was required under the Standards of Safety to aid in the enforcement of local ordinances

more stringent than the Standards of Safety. He also indicated that the Fire Marshal's Office does not attempt generally to ascertain what is required by local ordinances. B-219.

152. Although none appear to have been made at night, both the building inspector and fire chief visited Beverly Hills unofficially in the evening. When asked if he noticed overcrowding in the Cabaret Room, the building inspector answered: "Yeah, I have to say I was there several occasions where I thought it was crowded." B-22, at p. 4. When asked about blocking of aisles, he answered: "I never paid any attention to that. I knew it was crowded. I was there on unofficial duty, you know." Ibid.
153. See B-22; Appendix A.
154. For example, the initial inspection of Beverly Hills by Lieutenant John Braun on 10-12-74 indicated: "General Condition - Boiler room is slightly cluttered. Electrical System - Good shape. Paint near one of the boilers. Recommendations - check extinguishers, mount extinguishers on wall if possible, keep CO² around electrical apparatus." The followup inspection on 4-5-75 indicates: "General Condition - Extinguishers recharged in areas inspected. Kitchen inspection not possible at this time. House-keeping much improved. Recommendations - Check extinguishers. Boiler room cluttered (also paint stored here). Thorough housecleaning and better extinguisher location." Unfortunately, we have been unable to interview Lieutenant Braun in time to incorporate his testimony. See pp. D-26, supra.
155. B-122, at 1. We note in passing that KRS section 69.560 provides that the city attorney in a fourth-class city "shall prosecute all pleas of the Commonwealth and all warrants and proceedings instituted for violation of the ordinances or municipal regulations of the city in police court . . . Advise it on all matters of litigation or legal proceedings and perform any other duties of his department required by the city legislative body."
156. B-222.
157. The discussion of various potentially applicable crimes is set forth only as it relates to a determination of the availability of relief pursuant to KRS 346.010 et seq.