

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: NC BUILDING CODE COUNCIL

RULE CITATION: N.C. EXISTING BUILDING CODE
101.2 Scope, Exceptions

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

X Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

It does not seem to me that the Council has the authority to restrict the exemption found in G.S. 143-138(b4) by requiring that exempt farm buildings "not [be] used for sleeping purposes."

That statute exempts certain farm buildings from the application of building codes to their construction or use. It explicitly states:

(b4) Exclusion for Certain Farm Buildings. - Building rules do not apply to (i) farm buildings that are located outside the building-rules jurisdiction of any municipality, (ii) farm buildings that are located inside the building-rules jurisdiction of any municipality if the farm buildings are greenhouses, (iii) a primitive camp, or (iv) a primitive farm building.

There is nothing in the exemption that requires that a farm building "described by G.S. 143-138(b4)" not be used for sleeping purposes. Likewise there is nothing in the statute that prohibits any farm building from being used for sleeping purposes.

And just to be certain, the statute does go on to define farm buildings and other agricultural use terms:

“For the purposes of this subsection:

(1) A "farm building" shall include any structure used or associated with equine activities, including, but not limited to, the care, management, boarding, or training of horses and the instruction and training of riders. Structures that are associated with equine activities include, but are not limited to, free standing or attached sheds, barns, or other structures that are utilized to store any equipment, tools, commodities, or other items that are maintained or used in conjunction with equine activities. The specific types of equine activities, structures, and uses set forth in this subdivision are for illustrative purposes, and should not be construed to limit, in any manner, the types of activities, structures, or uses that may be considered under this subsection as exempted from building rules. A farm building that might otherwise qualify for exemption from building rules shall remain subject only to an annual safety inspection by the applicable city or county building inspection department of any grandstand, bleachers, or other spectator-seating structures in the farm building. An annual safety inspection shall include an evaluation of the overall safety of spectator-seating structures as well as ensuring the spectator-seating structure's compliance with any building codes related to the construction of spectator-seating structures in effect at the time of the construction of the spectator-seating.
..."

Finally, to make the point clear that the legislature did not seem concerned whether or not a building structure might be used for sleeping purposes, we should note that there is a permitted inspection of farm buildings, but that inspection has limits:

“For the purposes of this subsection:

(1) A farm building that might otherwise qualify for exemption from building rules shall remain subject only to an annual safety inspection by the applicable city or county building inspection department of any grandstand, bleachers, or other spectator-seating structures in the farm building. An annual safety inspection shall include an evaluation of the overall safety of spectator-seating structures as well as ensuring the spectator-seating structure's compliance with any building codes related to the construction of spectator-seating structures in effect at the time of the construction of the spectator-seating.
..."

For the same reasons that the Council has no authority to restrict the application of the exemption, it has no authority to declare that farm buildings are subject to the codes concerning “electrical, plumbing for human use, and mechanical systems for these buildings.” The statute states that “[b]uilding rules do not apply to” the various farm structures. What those stated systems are not supposed to be exempt from – according to the NC EBC (Existing Building Code) – are “building rules” and presumably what this EBC covering those systems is, is a “building rule” that is not supposed to apply according to the statute.

This same objection applies to exceptions 2 and 3 as well.

In a separate problem I do not understand how the Exception #6 is intended to apply or make a building or structure “exempt from the provisions of this code” as stated at the beginning of the exceptions.

§ 143-138. North Carolina State Building Code.

(a) Preparation and Adoption. - The Building Code Council may prepare and adopt, in accordance with the provisions of this Article, a North Carolina State Building Code. Before the adoption of the Code, or any part of the Code, the Council shall hold at least one public hearing. A notice of the public hearing shall be published in the North Carolina Register at least 15 days before the date of the hearing. Notwithstanding G.S. 150B-2(8a)h., the North Carolina State Building Code as adopted by the Building Code Council is a rule within the meaning of G.S. 150B-2(8a) and shall be adopted in accordance with the procedural requirements of Article 2A of Chapter 150B of the General Statutes.

The Council shall request the Office of State Budget and Management to prepare a fiscal note for a proposed Code change that has a substantial economic impact, as defined in G.S. 150B-21.4(b1), or that increases the cost of residential housing by eighty dollars (\$80.00) or more per housing unit. The change can become effective only in accordance with G.S. 143-138(d). Neither the Department of Insurance nor the Council shall be required to expend any monies to pay for the preparation of any fiscal note under this section by any person outside of the Department or Council unless the Department or Council contracts with a third-party vendor to prepare the fiscal note.

(b) Contents of the Code. - The North Carolina State Building Code, as adopted by the Building Code Council, may include reasonable and suitable classifications of buildings and structures, both as to use and occupancy; general building restrictions as to location, height, and floor areas; rules for the lighting and ventilation of buildings and structures; requirements concerning means of egress from buildings and structures; requirements concerning means of ingress in buildings and structures; rules governing construction and precautions to be taken during construction; rules as to permissible materials, loads, and stresses; rules governing chimneys, heating appliances, elevators, and other facilities connected with the buildings and structures; rules governing plumbing, heating, air conditioning for the purpose of comfort cooling by the lowering of temperature, and electrical systems; and such other reasonable rules pertaining to the construction of buildings and structures and the installation of particular facilities therein as may be found reasonably necessary for the protection of the occupants of the building or structure, its neighbors, and members of the public at large.

(b1) Fire Protection; Smoke Detectors. - The Code may regulate activities and conditions in buildings, structures, and premises that pose dangers of fire, explosion, or related hazards. Such fire prevention code provisions shall be considered the minimum standards necessary to preserve and protect public health and safety, subject to approval by the Council of more stringent provisions proposed by a municipality or county as provided in G.S. 143-138(e). These provisions may include regulations requiring the installation of either battery-operated or electrical smoke detectors in every dwelling unit used as rental property, regardless of the date of construction of the rental property. For dwelling units used as rental property constructed prior to 1975, smoke detectors shall have an Underwriters' Laboratories, Inc., listing or other equivalent national testing laboratory approval, and shall be installed in accordance with either the standard of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the property owner shall retain or provide as proof of compliance.

(b2) Carbon Monoxide Detectors. - The Code (i) may contain provisions requiring the installation of either battery-operated or electrical carbon monoxide detectors in every dwelling unit having a fossil-fuel burning heater, appliance, or fireplace, and in any dwelling unit having an attached garage and (ii) shall contain provisions requiring the installation of electrical carbon monoxide detectors at a lodging establishment. Violations of this subsection and rules adopted pursuant to this subsection shall be punishable in accordance with subsection (h) of this section and G.S. 143-139. In particular, the rules shall provide:

- (1) For dwelling units, carbon monoxide detectors shall be those listed by a nationally recognized testing laboratory that is OSHA-approved to test and certify to American National Standards Institute/Underwriters Laboratories Standards ANSI/UL2034 or ANSI/UL2075 and shall be installed in accordance with either the standard of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the property owner shall retain or provide as proof of compliance. A carbon monoxide detector may be combined with smoke detectors if the combined detector does both of the following: (i) complies with ANSI/UL2034 or ANSI/UL2075 for carbon monoxide alarms and ANSI/UL217 for smoke detectors; and (ii) emits an alarm in a manner that clearly differentiates between detecting the presence of carbon monoxide and the presence of smoke.

- (2) For lodging establishments, carbon monoxide detectors shall be installed in every enclosed space having a fossil fuel burning heater, appliance, or fireplace and in any enclosed space, including a sleeping room, that shares a common wall, floor, or ceiling with an enclosed space having a fossil fuel burning heater, appliance, or fireplace. Carbon monoxide detectors shall be (i) listed by a nationally recognized testing laboratory that is OSHA-approved to test and certify to American National Standards Institute/Underwriters Laboratories Standards ANSI/UL2034 or ANSI/UL2075, (ii) installed in accordance with either the standard of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the lodging establishment shall retain or provide as proof of compliance, (iii) receive primary power from the building's wiring, where such wiring is served from a commercial source, and (iv) receive power from a battery when primary power is interrupted. A carbon monoxide detector may be combined with smoke detectors if the combined detector complies with the requirements of this subdivision for carbon monoxide alarms and ANSI/UL217 for smoke detectors. For purposes of this subsection, "lodging establishment" means any hotel, motel, tourist home, or other establishment permitted under authority of G.S. 130A-248 to provide lodging accommodations for pay to the public.
- (b3) Applicability of the Code. - Except as provided by subsections (b4) and (c1) of this section, the Code may contain provisions regulating every type of building or structure, wherever it might be situated in the State.
- (b4) Exclusion for Certain Farm Buildings. - Building rules do not apply to (i) farm buildings that are located outside the building-rules jurisdiction of any municipality, (ii) farm buildings that are located inside the building-rules jurisdiction of any municipality if the farm buildings are greenhouses, (iii) a primitive camp, or (iv) a primitive farm building. For the purposes of this subsection:
- (1) A "farm building" shall include any structure used or associated with equine activities, including, but not limited to, the care, management, boarding, or training of horses and the instruction and training of riders. Structures that are associated with equine activities include, but are not limited to, free standing or attached sheds, barns, or other structures that are utilized to store any equipment, tools, commodities, or other items that are maintained or used in conjunction with equine activities. The specific types of equine activities, structures, and uses set forth in this subdivision are for illustrative purposes, and should not be construed to limit, in any manner, the types of activities, structures, or uses that may be considered under this subsection as exempted from building rules. A farm building that might otherwise qualify for exemption from building rules shall remain subject only to an annual safety inspection by the applicable city or county building inspection department of any grandstand, bleachers, or other spectator-seating structures in the farm building. An annual safety inspection shall include an evaluation of the overall safety of spectator-seating structures as well as ensuring the spectator-seating structure's compliance with any building codes related to the construction of spectator-seating structures in effect at the time of the construction of the spectator-seating.
- (2) A "greenhouse" is a structure that has a glass or plastic roof, has one or more glass or plastic walls, has an area over ninety-five percent (95%) of which is used to grow or cultivate plants, is built in accordance with the National Greenhouse Manufacturers Association Structural Design manual, and is not used for retail sales. Additional provisions addressing distinct life safety hazards shall be approved by the local building-rules jurisdiction.
- (3) A "farm building" shall include any structure used for the display and sale of produce, no more than 1,000 square feet in size, open to the public for no more than 180 days per year, and certified by the Department of Agriculture and Consumer Services as a Certified Roadside Farm Market.
- (4) A "primitive camp" shall include any structure primarily used or associated with outdoor camping activities, including structures used for educational, instructional, or recreational purposes for campers and for management training, that are (i) not greater than 4,000 square feet in size and (ii) are not intended to be occupied for more than 24 hours consecutively. "Structures primarily used or associated with outdoor camping activities" include, but are not limited to, shelters, tree stands, outhouses, sheds, rustic cabins, campfire shelters, picnic shelters, tents, teepees or other indigenous huts, support buildings used only for administrative functions and not for activities involving campers or program participants, and any other structures that are utilized to

store any equipment, tools, commodities, or other items that are maintained or used in conjunction with outdoor camping activities such as hiking, fishing, hunting, or nature appreciation, regardless of material used for construction. The specific types of primitive camping activities, structures, and uses set forth in this subdivision are for illustrative purposes and should not be construed to limit, in any manner, the types of activities, structures, or uses that are exempted from building rules.

(5) A "primitive farm building" shall include any structure used for activities, instruction, training, or reenactment of traditional or heritage farming practices. "Primitive farm buildings" include, but are not limited to, sheds, barns, outhouses, doghouses, or other structures that are utilized to store any equipment, tools, commodities, livestock, or other items supporting farm management. These specific types of farming activities, structures, and uses set forth by this subdivision are for illustrative purposes and should not be construed to limit in any manner the types of activities, structures, or uses that are exempted from building rules.

(6) A "farm building" shall not lose its status as a farm building because it is used for public or private events, including, but not limited to, weddings, receptions, meetings, demonstrations of farm activities, meals, and other events that are taking place on the farm because of its farm or rural setting.

(b5) Exclusion for Certain Minor Activities in Residential and Farm Structures. - No building permit shall be required under the Code or any local variance thereof approved under subsection (e) for any construction, installation, repair, replacement, or alteration costing five thousand dollars (\$5,000) or less in any single family residence or farm building unless the work involves: the addition, repair, or replacement of load bearing structures; the addition (excluding replacement of same capacity) or change in the design of plumbing; the addition, replacement or change in the design of heating, air conditioning, or electrical wiring, devices, fixtures (excluding repair or replacement of electrical lighting devices and fixtures of the same type), appliances (excluding replacement of water heaters, provided that the energy use rate or thermal input is not greater than that of the water heater which is being replaced, and there is no change in fuel, energy source, location, capacity, or routing or sizing of venting and piping), or equipment, the use of materials not permitted by the North Carolina Uniform Residential Building Code; or the addition (excluding replacement of like grade of fire resistance) of roofing. The exclusions from building permit requirements set forth in this paragraph for electrical lighting devices and fixtures and water heaters shall apply only to work performed on a one- or two-family dwelling. In addition, exclusions for electrical lighting devices and fixtures and electric water heaters shall apply only to work performed by a person licensed under G.S. 87-43 and exclusions for water heaters, generally, to work performed by a person licensed under G.S. 87-21.

(b6) No State Agency Permit. - No building permit shall be required under such Code from any State agency for the construction of any building or structure, the total cost of which is less than twenty thousand dollars (\$20,000), except public or institutional buildings.

(b7) Appendices. - For the information of users thereof, the Code shall include as appendices the following:

- (1) Any rules governing boilers adopted by the Board of Boiler and Pressure Vessels Rules,
- (2) Any rules relating to the safe operation of elevators adopted by the Commissioner of Labor, and
- (3) Any rules relating to sanitation adopted by the Commission for Public Health which the Building Code Council believes pertinent.

The Code may include references to such other rules of special types, such as those of the Medical Care Commission and the Department of Public Instruction as may be useful to persons using the Code. No rule issued by any agency other than the Building Code Council shall be construed as a part of the Code, nor supersede that Code, it being intended that they be presented with the Code for information only.

(b8) Exclusion for Certain Utilities. - Nothing in this Article shall extend to or be construed as being applicable to the regulation of the design, construction, location, installation, or operation of (1) equipment for storing, handling, transporting, and utilizing liquefied petroleum gases for fuel purposes or anhydrous ammonia or other liquid fertilizers, except for liquefied petroleum gas from the outlet of the first stage pressure regulator to and including each liquefied petroleum gas utilization device within a building or structure covered by the Code, or (2) equipment or facilities, other than buildings, of a public utility, as defined in G.S. 62-3, a cable television company, or an electric or telephone membership corporation,

including without limitation poles, towers, and other structures supporting electric, cable television, or communication lines.

(b9) Exclusion for Industrial Machinery. - Nothing in this Article shall extend to or be construed as being applicable to the regulation of the design, construction, location, installation, or operation of industrial machinery. However, if during the building code inspection process, an electrical inspector has any concerns about the electrical safety of a piece of industrial machinery, the electrical inspector may refer that concern to the Occupational Safety and Health Division in the North Carolina Department of Labor but shall not withhold the certificate of occupancy nor mandate third-party testing of the industrial machinery based solely on this concern. For the purposes of this paragraph, "industrial machinery" means equipment and machinery used in a system of operations for the explicit purpose of producing a product or acquired by a State-supported center providing testing, research, and development services to manufacturing clients. The term does not include equipment that is permanently attached to or a component part of a building and related to general building services such as ventilation, heating and cooling, plumbing, fire suppression or prevention, and general electrical transmission.

(b10) Replacement Water Heaters. - The Code may contain rules concerning minimum efficiency requirements for replacement water heaters, which shall consider reasonable availability from manufacturers to meet installation space requirements and may contain rules concerning energy efficiency that require all hot water plumbing pipes that are larger than one-fourth of an inch to be insulated.

(b11) School Seclusion Rooms. - No State, county, or local building code or regulation shall prohibit the use of special locking mechanisms for seclusion rooms in the public schools approved under G.S. 115C-391.1(e)(1)e., provided that the special locking mechanism shall be constructed so that it will engage only when a key, knob, handle, button, or other similar device is being held in position by a person, and provided further that, if the mechanism is electrically or electronically controlled, it automatically disengages when the building's fire alarm is activated. Upon release of the locking mechanism by a supervising adult, the door must be able to be opened readily.

(b12) Cisterns. - The Code may include rules pertaining to the construction or renovation of residential or commercial buildings and structures that permit the use of cisterns to provide water for flushing toilets and for outdoor irrigation. No State, county, or local building code or regulation shall prohibit the use of cisterns to provide water for flushing toilets and for outdoor irrigation. As used in this subsection, "cistern" means a storage tank that is watertight; has smooth interior surfaces and enclosed lids; is fabricated from nonreactive materials such as reinforced concrete, galvanized steel, or plastic; is designed to collect rainfall from a catchment area; may be installed indoors or outdoors; and is located underground, at ground level, or on elevated stands.

(b13) Migrant Housing. - The Council shall provide for an exemption from any requirements in the fire prevention code for installation of an automatic sprinkler system applicable to buildings meeting all of the following:

- (1) Has one floor.
- (2) Meets all requirements of 29 C.F.R. § 1910.142, as amended.
- (3) Meets all requirements of Article 19 of Chapter 95 of the General Statutes and rules implementing that Article.

For purposes of this subsection, "migrant housing" and "migrant" shall be defined as in G.S. 95-223.

(b14) [Exclusion for Routine Maintenance. -] No building permit shall be required under the Code for routine maintenance on fuel dispensing pumps and other dispensing devices. For purposes of this subsection, "routine maintenance" includes repair or replacement of hoses, O-rings, nozzles, or emergency breakaways.

(c) Standards to Be Followed in Adopting the Code. - All regulations contained in the North Carolina State Building Code shall have a reasonable and substantial connection with the public health, safety, morals, or general welfare, and their provisions shall be construed reasonably to those ends. Requirements of the Code shall conform to good engineering practice. The Council may use as guidance, but is not required to adopt, the requirements of the International Building Code of the International Code Council, the Standard Building Code of the Southern Building Code Congress International, Inc., the Uniform Building Code of the International Conference of Building Officials, the National Building Code of the Building Officials and Code Administrators, Inc., the National Electric Code, the Life Safety Code, the National Fuel Gas Code, the Fire Prevention Code of the National Fire Protection Association, the Safety Code for Elevators and Escalators, and the Boiler and Pressure Vessel Code of the American Society of Mechanical Engineers, and standards promulgated by the American National Standards Institute, Standards

Underwriters' Laboratories, Inc., and similar national or international agencies engaged in research concerning strength of materials, safe design, and other factors bearing upon health and safety.

(c1) Exemptions for Private Clubs and Religious Organizations. - The North Carolina State Building Code and the standards for the installation and maintenance of limited-use or limited-access hydraulic elevators under this Article shall not apply to private clubs or establishments exempted from coverage under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, et seq., or to religious organizations or entities controlled by religious organizations, including places of worship. A nonreligious organization or entity that leases space from a religious organization or entity is not exempt under this subsection.

(d) Amendments of the Code. - The Building Code Council may periodically revise and amend the North Carolina State Building Code, either on its own motion or upon application from any citizen, State agency, or political subdivision of the State. In addition to the periodic revisions or amendments made by the Council, the Council shall revise the North Carolina State Building Code: Residential Code for One- and Two-Family Dwellings, including provisions applicable to One- and Two-Family Dwellings from the NC Energy Code, NC Electrical Code, NC Fuel Gas Code, NC Plumbing Code, and NC Mechanical Code only every six years, to become effective the first day of January of the following year, with at least six months between adoption and effective date. The first six-year revision under this subsection shall be adopted to become effective January 1, 2019, and every six years thereafter. In adopting any amendment, the Council shall comply with the same procedural requirements and the same standards set forth above for adoption of the Code. The Council, through the Department of Insurance, shall publish in the North Carolina Register and shall post on the Council's Web site all appeal decisions made by the Council and all formal opinions at least semiannually. The Council, through the Department of Insurance, shall also publish at least semiannually in the North Carolina Register a statement providing the accurate Web site address and information on how to find additional commentary and interpretation of the Code.

(e) Effect upon Local Codes. - Except as otherwise provided in this section, the North Carolina State Building Code shall apply throughout the State, from the time of its adoption. Approved rules shall become effective in accordance with G.S. 150B-21.3. However, any political subdivision of the State may adopt a fire prevention code and floodplain management regulations within its jurisdiction. The territorial jurisdiction of any municipality or county for this purpose, unless otherwise specified by the General Assembly, shall be as follows: Municipal jurisdiction shall include all areas within the corporate limits of the municipality and extraterritorial jurisdiction areas established as provided in G.S. 160A-360 or a local act; county jurisdiction shall include all other areas of the county. No such code or regulations, other than floodplain management regulations and those permitted by G.S. 160A-436, shall be effective until they have been officially approved by the Building Code Council as providing adequate minimum standards to preserve and protect health and safety, in accordance with the provisions of subsection (c) above. Local floodplain regulations may regulate all types and uses of buildings or structures located in flood hazard areas identified by local, State, and federal agencies, and include provisions governing substantial improvements, substantial damage, cumulative substantial improvements, lowest floor elevation, protection of mechanical and electrical systems, foundation construction, anchorage, acceptable flood resistant materials, and other measures the political subdivision deems necessary considering the characteristics of its flood hazards and vulnerability. In the absence of approval by the Building Code Council, or in the event that approval is withdrawn, local fire prevention codes and regulations shall have no force and effect. Provided any local regulations approved by the local governing body which are found by the Council to be more stringent than the adopted statewide fire prevention code and which are found to regulate only activities and conditions in buildings, structures, and premises that pose dangers of fire, explosion or related hazards, and are not matters in conflict with the State Building Code, shall be approved. Local governments may enforce the fire prevention code of the State Building Code using civil remedies authorized under G.S. 143-139, 153A-123, and 160A-175. If the Commissioner of Insurance or other State official with responsibility for enforcement of the Code institutes a civil action pursuant to G.S. 143-139, a local government may not institute a civil action under G.S. 143-139, 153A-123, or 160A-175 based upon the same violation. Appeals from the assessment or imposition of such civil remedies shall be as provided in G.S. 160A-434.

A local government may not adopt any ordinance in conflict with the exemption provided by subsection (c1) of this section. No local ordinance or regulation shall be construed to limit the exemption provided by subsection (c1) of this section.

(f) Repealed by Session Laws 1989, c. 681, s. 3.

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AGENCY: NC BUILDING CODE COUNCIL

RULE CITATION: N.C. EXISTING BUILDING CODE
202 – Definitions

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

- ☐ Approve, but note staff's comment
- X Object, based on:
 - ☐ Lack of statutory authority
 - X Unclear or ambiguous
 - ☐ Unnecessary
 - ☐ Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

The definition of "nightclub" sparked quite a bit of debate a few years ago when new sprinkler rules were being introduced. There was considerable debate about what constituted a "nightclub" and even more debate about whether that would or should apply to a place that might be a "restaurant" during the day but a club at night.

I will raise a few issues with this iteration:

In item 1 of the definition it is unclear what the square footage is "net" of. Net implies that there is more footage that has been subtracted out. It is not clear how to arrive at the net figure.

It item 2, I am not sure if it is clear what would constitute "live" or "recorded entertainment." For instance if an Italian restaurant that met the seating capacity in this rule and served wine, had Vic Damone, or Tony Bennett – or Muzak – playing in the background, would that be a nightclub? Would a restaurant that had singing wait staff be a nightclub as well?