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*Alcoholic Beverages Control Commission*  
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*Treasurer and Receiver*  
*General*

Kim S. Gainsboro  
*Chairman*

**Jaman Corp**  
**dba Crossroads**  
**405 Nagog Square**  
**Acton, MA 01720**  
**License #: 000600011**  
**Heard: October 6, 2010**

## **DECISION**

This is an appeal of the action of the Licensing Board of the City of Acton ("the Board") for suspending the license of Jaman Corp dba Crossroads located at 405 Nagog Square, Acton, MA for one (1) day. The Licensee timely appealed the Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on October 6, 2010.

The following exhibits are in evidence:

1. Town of Acton Letter dated June 14, 2010;
2. Police Chief Letter dated June 9, 2010;
3. Selectmen Letter dated July 12, 2010;
4. Town of Acton Notice of Decision dated July 13, 2010; and
5. Receipts from Crossroads.

There is one (1) tape of this hearing.

## **FACTS**

1. On May 25, 2010, an unnamed female (hereafter, "Ms. X") was a patron at Crossroads. She arrived at 7:09 p.m. and left at 9:30 p.m. Testimony, Ex. 5
2. She stayed for approximately 2 and one half hours. Ms. X ate and had approximately two and a half glasses of wine. Testimony, Ex. 5

3. Crystal Brown was bartending that evening. She has worked at Crossroads for seven (7) years and is TIPS certified. She was Ms. X's server. Testimony
4. Ms. Brown testified that Ms. X has been in Crossroads before, and that she and her companion were going over paperwork on the night in question. She testified that she had average contact with Ms. X during that night. Ms. Brown testified that Ms. X did not display any signs of intoxication. Testimony
5. Ms. Brown testified that Ms. X left after the bill was paid. Testimony
6. Officer John Collins an Acton Police officer was on routine patrol on May 25, 2010 at approximately 9:56 p.m. Testimony, Ex. 2
7. He observed a car driving east bound on Great Rd. He watched the driver pull into the parking lot at 465 Great Rd (Acton Convenience), approximately  $\frac{3}{4}$  mile from Crossroads. Testimony, Ex. 2
8. He observed Ms. X leave her car and enter the store. He testified that he did not see her stumble or have any difficulty walking into the store. Testimony
9. A short time later, Ms. X left the store carrying a four (4) pack of Sutter Home Wine. Again, he testified that he did not see Ms. X have any difficulty walking or getting into her car after she left the store. Testimony
10. Thereafter, Ms. X drove out of the parking lot. Officer Collins followed Ms. X in his cruiser and observed her car weaving in and out of her lane. Testimony, ex. 2
11. Officer Collins put on his emergency lights and Ms. X over her car. Officer Collins smelled alcohol on her breath and recognized her from a previous operating under the influence arrest. During the conversation, Ms. X told Officer Collins she had 2 1/2 glasses of wine at Crossroads. He asked her to perform a number of field sobriety tests. Testimony, Ex. 2
12. Officer Collins arrested Ms. X for operating under the influence of alcohol. While at the station Ms. X elected to take a breathalyzer test. The result was a .13% BAC. Testimony, Ex. 2

### DISCUSSION

Pursuant to M.G.L. c. 138, §67, "[t]he ABCC is required to offer a de novo hearing, that is, to hear evidence and find the facts afresh. United Food Corp v. Alcoholic Beverages Control Commission, 375 Mass. 240 (1978). As a general rule the concept of a hearing de novo precludes giving evidentiary weight to the findings of the tribunal from whose decision an appeal was claimed. See, e.g. Devine v. Zoning Bd. of Appeals of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 295 (1972); Dolphino Corp. v. Alcoholic Beverages Control Comm'n, 29 Mass.App.Ct. 954, 955 (1990)(rescript)." The Local Board has the burden of producing satisfactory proof to the Commission that the licensee committed the alleged violations.

The Commission's decision must be based on substantial evidence. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 528 (1988).

“Substantial evidence” is “such evidence as a reasonable mind might accept as adequate to support a conclusion.” Id. M.G.L. c. 138 provides a comprehensive scheme for the regulation of alcoholic beverages in Massachusetts.

Here, the licensee is charged with violating M.G.L. c. 138, §69, “No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person.” Massachusetts’ courts have held that negligence cases provide “some guidance” as to what must be proven “to show a violation of the statute [G.L. c. 138, §69].” Ralph D. Kelly, Inc. v. ABCC, Middlesex Superior Court C.A. No. 99-2759 (McEvoy, J.) (May 23, 2000) cited in Royal Dynasty, Inc. v. ABCC, Suffolk Superior Court C.A. No. 03-1411 (Billings, J.) (December 9, 2003). To prove this violation there must be evidence that the licensee served alcohol to an individual when it knew or should have known that he was intoxicated. See Bennett v. Eagle Brook Country Store, Inc., 408 Mass. 355, 358 (1990); Cimino v. The Milford Keg, Inc., 385 Mass. 323, 327 (1982).

Proof of intoxication at the time of service may be proven by “direct evidence, circumstantial evidence, or a combination of the two.” Douillard v. LMR, Inc. 433 Mass. 162 (2001). While evidence of apparent intoxication, or of elevated blood alcohol levels, at some later point in time does not, by itself, suffice to show that the patron's intoxication was evident at the time the last drink was served. “[The court’s] reluctance to accept such evidence as sufficient stems from the uncertainties of the situation, including the possible delayed impact of the consumption of alcohol, and the unknown effect on a patron of the last drink served to him by a licensee.” From the mere fact of intoxication observed at some later time (e.g., at the accident scene), one could not tell what contribution the patron's final drink had made toward that state of intoxication. Evidence of later intoxication has been admitted for purposes of bolstering other evidence concerning a patron's condition at the time alcohol was served, but it is not sufficient by itself to establish apparent intoxication at the time that alcohol was served. Id.

The facts of this case are somewhat analogous to those in Royal Dynasty v. ABCC (Mass. Superior Court No. 03-1411 Judge Billings (2003)). In that case two individuals had consumed a number of alcoholic beverages at the Royal Dynasty. The bartender and another patron testified at the hearing before the Commission that the men exhibited no signs of intoxication at the time of service. The two left between 9:15 and 9:30.

At Approximately 9:40, the men were drag racing and crashed into a motorcycle. The crash resulted in a fatality. While at the police station both men agreed to take a preliminary breathalyzer tests. One resulted in a .198% and the other in a .116%.

Like this case, there was no expert testimony from a toxicologist concerning whether the BAC was consistent with the amounts found to have been consumed at the premises or concerning the effects that this amount of alcohol would have visibly or otherwise on a patron of the weight and build of the patrons. Royal Dynasty v. ABCC (2003). As a result, Judge Billings found that there was not substantial evidence before the Commission to find a violation of M.G.L. c. 138, §69.

“In Douillard, the court found the “necessary link” in the testimony of an expert toxicologist, using “retrograde extrapolation analysis.” Commonwealth v. Senior, 433 Mass. 453, 458-59 (2001). The Local Board, however, did not hear or perform any such analysis in this case from which it might have concluded that the patrons were visibly intoxicated when last served.” Royal Dynasty, *supra*.

The state of the evidence in this case is similarly lacking. Ms. X ate and had approximately two and a half glasses of wine in two and a half hours. Ms. Brown has waited on her before. She had average contact with her that evening. Ms. Brown has been TIPS certified

and knows the signs of an intoxicated individual. The Local Board produced no evidence to the contrary. Ms. Brown testified that Ms. X did not appear intoxicated when she was served alcohol at Crossroads.

As in the Royal Dynasty case, the only evidence before the Local Board of Ms. X's intoxication came from the testimony of Officer Collins, who was not present at Crossroads. It may be that proper analysis of the patron's blood alcohol level obtained at the police station would alone or in combination with the other evidence support a conclusion that Ms. X was over served and that Ms. Brown knew or should have known this. Royal Dynasty, *supra*. However, no such analysis was done in this case. Without it, the evidence of a violation of M.G.L. c. 138, §69 was insubstantial and therefore does not support the suspension order.

#### CONCLUSION AND DISPOSITION

The Commission disapproves the action of the Local Board Acton Board in finding this violation and remands this matter to the Local Board.

#### ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman \_\_\_\_\_

Susan Corcoran, Commissioner \_\_\_\_\_

Dated at Boston, Massachusetts this 4<sup>th</sup> day of November 2010.

You have the right to appeal this decision to the Superior Court under the provisions of Chapter 30A of the Massachusetts General Laws within thirty days of receipt of this decision.

cc: Local Licensing Authority  
Frederick Mahony, Chief Investigator  
Nina L. Pickering Cook, Esq. via facsimile 617-621-6636  
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