

The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Steven Grossman
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

DECISION

T J'S GRILL & BAR LLC
4 BOURNE BRIDGE APPROACH
BOURNE, MA 02532
LICENSE#: 011800080
HEARD: 08/08/2012

This is an appeal of the action of the Board of Selectman for the Town of Bourne (the "Local Board") for suspending for one (1) day the M.G.L. c. 138, §12 license of T J's Grill & Bar LLC (the "Licensee" or "TJ's") located at Bourne, MA. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, August 8, 2012.

The following documents are in evidence:

1. Joint Pre-Hearing Memorandum dated June 25, 2012;
2. Bourne Police Department Incident Report no.12-365-OF dated March 24, 2012;
3. Local Board's Hearing Notice dated March 30, 2012 for hearing to be held on April 17, 2012;
and
4. Local Board's Decision dated April 26, 2012.

There is one (1) audio recording of this hearing.

FACTS

1. Ms. Judith Ann Tubbs is the managing partner and operates TJ's Grill & Bar LLC, a restaurant and bar located at 4 Bourne Bridge Approach, Buzzards Bay, MA 02532. (Ex.1)
2. TJ's is the holder of a §12 all-alcohol liquor license. (Ex. 1)
3. The Board of Selectmen for the Town of Bourne is the local liquor licensing authority pursuant to M.G.L. c. 138. (Ex. 1)
4. On March 23, 2012, at approximately 6:35 p.m., the Bourne Police arrived at TJ's parking lot and observed Mr. James Curtin vomiting outside the door of his car. (Ex. 2)
5. Mr. Curtin did not have the keys to his car and he refused medical assistance. (Ex. 2)

7. When Officer McDougall arrived on the scene, he made observations of Mr. Curtin's intoxication. When Officer MacDougall spoke with Curtin, he formed the opinion that Mr. Curtin was under the influence of alcohol. He stated during the hearing before the commission that Curtin's breath smelled of alcohol, he had red, glassy eyes, his speech was slurred, and he was unsteady on his feet.
8. Officer McDougall subsequently learned that Mr. Curtin was served several alcoholic beverages at the establishment.
9. Mr. Curtin spoke with Officer McDougall and stated that he drank tequila prior to arriving at TJ's and consumed approximately "four to five" beers when he was at the establishment. Curtin also stated to the officer that the combination of the alcohol put him "over the edge" making him drunk and ultimately ill. He stated that he did not remember how long he was at TJ's, but stated that it was "a while."
10. Officer MacDougall spoke with the bartender on duty, Lauren Hockenberry. Ms. Hockenberry stated to Officer MacDougall that Curtin was served three (3) to four (4), sixteen ounce (16 oz.) Blue Moon beers. MacDougall testified that he saw the receipt¹ and that he went over it with the bartender. He stated that she was not able to re-print the receipts for him for evidence. Ms. Hockenberry was unable to tell the officer when Curtin left the establishment but she did tell him that a person unknown to her brought his car keys to her and notified her that Curtin was sick in the parking lot.
11. Officer MacDougall also interviewed the owner, Judith Tubbs who was not on the location at the time of the original call when MacDougall responded. Ms. Tubbs stated that during Curtin's time in the establishment he left for approximately forty five (45) minutes while the rest of his group remained in the establishment. She told the officer that prior to arriving back into the establishment, she believed Curtin consumed alcohol in his car. According to Tubbs, she did not believe Curtin was intoxicated and was over-served.
12. On or about April 17, 2012, the Local Board held a hearing to determine whether TJ's and/or its employees violated certain provisions of M.G.L. c. 138 and/or the Local Board's rules and regulations. The Local Board made findings of fact and determined that TJ's violated the provisions of M.G.L. c. 138 §69 by serving an intoxicated person on March 23, 2012. The Local Board voted to suspend TJ's license for one (1) day. (Ex. 3, 4)

DISCUSSION

Pursuant to M.G.L. Ch. 138, section 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 Appeal of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Board of Appeals of Brookline,

¹ The receipt was not introduced as evidence.

362 Mass. 290, 295 (1972); Dolphino Corp. v. Alcoholic Beverages Control Com'n, 29 Mass. App. Ct. 954, 955 (1990) (rescript). The findings of a local licensing board are 'viewed as hearsay evidence, [and] they are second-level, or totem pole hearsay, analogous to the non-eyewitness police reports in Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 473 - 476 (1989)." Dolphino Corp. v. Alcoholic Beverages Control Commission, 29 Mass. App. Ct. 954, 955 (1990) (rescript).

The main question before the Commission is whether the patron was visibly intoxicated inside the premises and whether he was thereafter sold or delivered an alcoholic beverage.

There was testimony from several witnesses that the Local Board presented to prove that the patron, Mr. James Curtin was intoxicated when he was inside the premises on the night in question. Officer John MacDougall testified that on March 23, 2012, he arrived at TJ's parking lot and observed Curtin vomiting outside of the door of his automobile. He asked Mr. Curtin for his keys to which Curtin responded that he did not have them. He stated to the officer that the bartender took them from him. At some point, the Bourne paramedics arrived at the scene but Curtin, refused medical treatment. Officer MacDougall then made arrangements with Curtin's girlfriend to have him transported home.

After speaking with the owner, McDougall spoke again with the bartender who stated she did not remember Curtin leaving the establishment at all.

There seems to be inconsistencies in the statements from the owner and the bartender both in statements given to the police and at the hearing. The bartender stated that the patron, Curtin consumed at least five (5) beers and the owner stated that he did not. However what seems to be relevant here is whether or not Curtin while on the premises was visibly intoxicated, and after being visibly intoxicated, was sold or delivered an alcoholic beverage. The Commission finds that Curtin was at the establishment and had been drinking alcohol prior to going to the establishment. The Commission finds from the evidence presented that the patron, Curtin, was served alcohol while he was on the premises. At some point he left the premises and came back in. More alcohol was then consumed. The Commission finds from the evidence presented to the board that he was. The bartender stated that she served him many beers which he consumed. Mr. Curtin himself stated that he had alcohol prior to his arrival, and then drank when he arrived and became violently ill after he stepped outside. The officer then observed him outside vomiting.

As stated in Vickowski, Id at 610, the negligence of the establishment lies in the service to the individual of alcohol who is already showing the signs of intoxication. It can be surmised from the totality of the circumstances that Curtin at some point during the night was showing some signs of intoxication and that he should not have been served by the bartender. There was enough evidence presented to the Commission to support this through the officer's testimony, through Curtin's previous statements and through the bartender's previous statements. The only rebuttal of this was the owner's statements that she "thought the patron was outside consuming alcohol in his car" because it has become common practice for her patrons to do so to avoid paying higher prices in her bar. While this practice may be one that occurring at her premises, there was no evidence of it presented at the hearing. In fact the licensee did not produce her bartender to show any rebuttal of what she was purporting to claim was false testimony in regards to receipts².

² The Licensee claimed that the receipt Officer MacDougall saw was not that of patron Curtin's consumption on the night in question, but rather of a compilation of his friend's and his drinks.

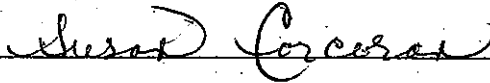
The burden lies on the establishment not to serve to a patron who is intoxicated and the patron's consumption of a large quantity of alcohol is a circumstance that can support a necessary inference. See Vickowskki, supra at 611; Galec, Inc., dba Carriage Wheel Pub, 2011 (ABCC Decision). It is clear in this case that Mr. Curtin was intoxicated or became intoxicated when he was in TJ's and should not have been served additional alcohol by the bartender.

CONCLUSION

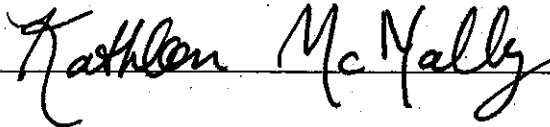
Because the bartender knew or should have known that the patron was intoxicated and continued to serve him, there was clearly a violation of M.G.L. c.138, § 69. The Licensee's appeal from the action of the Bourne Licensing Board for suspending the license of T J's Grill and Bar for one (1) day is **DENIED**.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Susan Corcoran, Commissioner



Kathleen McNally, Commissioner



Dated: October 22, 2012

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

cc: Robert S. Troy, Esq. via Facsimile
Judith Ann Tubbs, Jr., licensee
Frederick G. Mahony, Chief Investigator
Administration
File