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Alcoholic Beverages Control Commission
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DECISION

T. A. GOSSIOS, CORP. D/B/A SANDWICH TAVERNA
290 ROUTE 130
SANDWICH, MA 02563
LICENSE#: 1074-00057
HEARD: 09/14/2017

This is an appeal of the action of the Town of Sandwich Board of Selectmen (the "Local Board" or "Sandwich") for suspending the M.G.L. c. 138, § 12 all alcoholic beverages license of T. A. Gossios, Corp. d/b/a Sandwich Taverna ("Licensee" or "Taverna" or "Gossios") located at 290 Route 130, Sandwich, Massachusetts for two (2) days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a hearing was held on Thursday, September 14, 2017.

The following documents are in evidence as exhibits:

1. Receipt 12/17/2016 from Sandwich Taverna;
2. ServSafe Alcohol Certificate for O. Mahoney;
3. Local Board's Notice of Hearing, 1/31/2017;
4. Local Board's Decision, 4/28/2017;
5. Narrative Report of Sandwich Police Officer P. Grigorenko;
6. Minutes of Local Board Meeting, 4/27/2017;
7. Excerpt from ServSafe Fundamentals of Responsible Alcohol Service, 2nd edition;
8. Attorney Riley's Letter 6/12/2017 to ABCC re: Commission Order of 5/12/2017; and
9. Local Board's Policy on Liquor License Violations, 11/9/2006.

There is one (1) audio recording of this hearing, and four (4) witnesses testified.

The Commission took Administrative Notice of the Licensee's Commission file.

FINDINGS OF FACT

The Commission makes the following findings based on the evidence presented at the hearing:

1. T. A. Gossios, Corp. d/b/a Sandwich Taverna ("Licensee" or "Taverna") located at 290 Route 130, Sandwich, Massachusetts holds a § 12 all alcoholic beverages license. (Commission File)

2. On Saturday, December 17, 2016, at approximately 9:00 p.m., an unnamed male individual ("Patron") entered the licensed premises. Between that time and approximately 12:00 a.m., Patron consumed four Yuengling beers and two shots of Fireball whisky. (Testimony; Exhibit 1)

3. Owen Mahoney was the bartender on duty that evening, and he spoke with and served Patron all six of the alcoholic beverages. (Testimony)

4. Patron and Mahoney knew each other personally and socialized with each other. Mahoney had observed Patron intoxicated on at least one prior occasion. (Testimony)

5. At all times on December 17, 2016, except after Patron consumed his last alcoholic beverage at about midnight, Patron did not appear intoxicated to Mahoney. (Testimony)

6. The owner/manager of record of the Licensee, Thanos Gossios, spoke with Patron shortly after Patron arrived that evening and observed Patron on occasions throughout the evening. Gossios never observed Patron exhibiting signs of intoxication. (Testimony)

7. After Patron was served his final alcoholic beverage—a Yuengling beer,-- Mahoney observed that Patron was acting differently. Patron was more animated and was speaking more loudly. (Testimony)

8. Mahoney spoke with the man and woman who appeared to be with Patron that evening and advised them that he did not feel comfortable with Patron driving home. The woman advised Mahoney that she would give Patron a ride home. (Testimony)

9. At approximately 12:30 a.m., Mahoney escorted Patron to Patron's friend's vehicle, placed him in the back seat, and returned to Taverna. (Testimony; Exhibit 6)

10. At some point shortly thereafter, Patron got into his own vehicle, drove it from the premises, and was in a single vehicle accident. (Testimony)

11. On December 18, 2016, the Town of Sandwich Police Department conducted an investigation of Taverna and the motor vehicle accident. Officer Grigorenko conducted interviews with several of Patron's friends. (Testimony; Exhibit 5)

12. The Local Board held a hearing on April 27, 2017 regarding an alleged violation of M.G.L. c. 138, § 69, Sale of alcohol to an intoxicated person, and 204 CMR 2.05 (2) ("[n]o licensee for the sale of alcoholic beverages shall permit any disorder, disturbance or illegality of any kind to take place in or on the licensed premises"). (Exhibits 3, 4, 6)

13. By decision dated April 28, 2017, the Local Board found a violation and suspended Taverna's license for a period of two (2) days.[1] (Exhibits 4, 6)

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[1] Although the Licensee was charged with violations of M.G.L. c. 138, § 69 and 204 CMR 2.05 (2), the Local Board specifically voted to find a violation of § 69 and no other disorder, disturbance or illegality on the premise. (Exhibit 6 at pp. 20, 22 (finding a violation of service to intoxicated); Exhibit 4 (finding a violation of the "General Laws")) Consequently, the Commission frames the asserted violation as: 204 CMR 2.05 (2) to wit: a violation of M.G.L. c. 138, § 69.

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. 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." Dolphino Corp. v. Alcoholic Beverages Control Comm'n, 29 Mass. App. Ct. 954, 955 (1990). 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, 29 Mass. App. Ct. at 955.

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. Evidence from which a rational mind might draw the desired inference is not enough. See Blue Cross and Blue Shield of Mass. Inc. v. Comm'r of Ins., 420 Mass 707, 710 (1995). "The Local Board has the burden of producing satisfactory proof to the Commission that the licensee committed the alleged violations." Jaman Corp., d/b/a Crossroads (ABCC Decision Nov. 4, 2010). Adjudicatory findings must be "adequate to enable [a court] to determine (a) whether the order and conclusions were warranted by appropriate subsidiary findings, and (b) whether such subsidiary findings were supported by substantial evidence." Charlesbank Rest. Inc. v. Alcoholic Beverages Control Comm'n, 12 Mass. App. Ct. 879 (1981) (quoting Town of Westborough v. Dep't of Pub. Util., 358 Mass. 716, 717-718 (1971)).

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Comm'n., 334 Mass. 613, 619 (1956), for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Opinion of the Justices, 368 Mass. 857, 861 (1975). Both the Local Board and the Commission have the authority to grant, revoke, and suspend licenses. "The Commission has comprehensive powers of supervision over licensees," Boston Licensing Bd. v. Alcoholic Beverages Control Comm'n, 367 Mass. 788, 795 (1975), as well as broad authority to issue regulations. The Local Board has authority to enforce Commission regulations. New Palm Gardens, Inc. v. Alcoholic Beverages Control Comm'n, 11 Mass. App. Ct. 785, 788 (1981).

The Local Board has the burden of producing satisfactory proof that the Licensee violated 204 CMR 2.05(2) to wit: M.G.L. c. 138, § 69[2] and that the penalty imposed by the Local Board—a two-day suspension-- was a reasonable exercise of its lawful discretion.

The Massachusetts General Laws prohibit the sale of alcoholic beverages to an intoxicated person. See M.G.L. c. 138, § 69 ("[n]o alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person"). "[A] tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have known that the patron is intoxicated." Vickowski v. Polish Am. Citizens Club of Deerfield, Inc., 422 Mass. 606, 609 (1996) (quoting Cimino v. Milford Keg, Inc., 385 Mass. 323, 327 (1982)). "The negligence lies in serving alcohol to a person who already is showing discernible signs of

[2] See supra n. 1.

intoxication." Id. at 610; see McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 161 (1986).

In order to prove this violation, the Local Board must show: (1) that an individual was intoxicated on the licensed premises; (2) that an employee of the licensed premises knew or reasonably should have known that the individual was intoxicated; and (3) that after the employee knew or reasonably should have known the individual was intoxicated, the employee sold or delivered an alcoholic beverage to the intoxicated individual. See Vickowski, 422 Mass. at 609. "The imposition of liability on a commercial establishment for the service of alcohol to an intoxicated person . . ., often has turned, in large part, on evidence of obvious intoxication at the time a patron was served." Id.; see Cimino, 385 Mass. at 325, 328 (patron was "totally drunk"; "loud and vulgar"); Gottlin v. Graves, 40 Mass. App. Ct. 155, 158 (1996) (acquaintance testified patron, who had accident, displayed obvious intoxication one hour and twenty minutes before leaving bar); Hopping v. Whirlaway, Inc., 37 Mass. App. Ct. 121 (1994) (sufficient evidence for jury with regard to one licensee where acquaintance described patron who later had accident as appearing to feel "pretty good" while at that licensed premise). Contrast Makynen v. Mustakangas, 39 Mass. App. Ct. 309, 314 (1995) (commercial establishment could not be liable when there was no evidence of obvious intoxication while patron was at bar); Kirby v. Le Disco, Inc., 34 Mass. App. Ct. 630, 632 (1993) (affirming summary judgment for defendant in absence of any evidence of obvious intoxication); Wiska v. St. Stanislaus Social Club, Inc., 7 Mass. App. Ct. 813, 816-817 (1979) (directed verdict in favor of commercial establishment affirmed when there was no evidence that patron was served alcohol after he began exhibiting obvious signs of intoxication).

The Local Board must produce some evidence that "the patron in question was exhibiting outward signs of intoxication by the time he was served his last alcoholic drink." Rivera v. Club Caravan, Inc., 77 Mass. App. Ct. 17, 20 (2010). The Local Board may prove that an individual is intoxicated by direct or circumstantial evidence or a combination of the two. See Vickowski , 422 Mass. at 611 (direct evidence of obvious intoxication not required). "[S]ome quantum of direct evidence that the patron was exhibiting outward signs of intoxication is unnecessary; circumstantial proof alone can suffice if it is sufficiently robust." Rivera, 77 Mass. App. Ct. at 21. "[S]ervice [to a patron] of a large number of strong alcoholic drinks [would be] sufficient to put [a licensee] on notice that it was serving a [patron] who could potentially endanger others." Cimino, 385 Mass. at 328 (where patron had been served six or more White Russians); see O'Hanley v. Ninety-Nine, Inc., 12 Mass. App. Ct. 64, 65 (1981) (inference of obvious intoxication could be drawn where patron consumed at least fifteen beers and six martinis). "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." Douillard v. LMR, Inc., 433 Mass. 162, 165 (2001). Yet, such evidence may be used to bolster other evidence concerning a patron's condition at the time alcohol was served. Id. at 166.

Here, the only percipient eyewitnesses who testified at the hearing before the Commission were the bartender, Mahoney, and the owner/manager of record, Gossios. Mahoney testified that he served Patron four Yuengling beers and two shots of Fireball whisky over the course of approximately two and a half to three hours. (Testimony) Mahoney, who knew Patron socially, had seen Patron intoxicated in the past and testified that Patron did not show signs of intoxication on December 17, 2016 until after Mahoney served Patron his last alcoholic drink. (Testimony) Gossios corroborated Mahoney's testimony by testifying that he spoke with Patron early on that

night, observed him on occasions throughout the evening, and never observed Patron exhibiting signs of intoxication. (Testimony) Consequently, there was no direct evidence of service to an intoxicated patron.[3]

The only other witnesses who testified at the hearing before the Commission were the investigating Sandwich police officer, Officer Grigorenko, and one of the Local Board members who sat on the hearing before the Local Board. Neither of those witnesses was present at Taverna on the night in question. Officer Grigorenko testified at the hearing before the Commission that during his investigation he was told by Patron's friends that:

1. Patron had consumed alcoholic beverages earlier in the day on December 17, 2016;
2. Patron was showing signs of intoxication earlier in the day on December 17, 2016; and
3. Patron's female friend at the Taverna told Mahoney that Patron was intoxicated and that Patron should not be served any more alcoholic beverages but that Mahoney subsequently served Patron another alcoholic beverage.

(Testimony; Exhibit 5) The Commission cannot find a violation of § 69 based on the statements made to Officer Grigorenko, which the officer in turn relayed to the Commission. A decision of a board that rests entirely upon hearsay evidence cannot be sustained. Moran v. School Committee of Littleton, 317 Mass. 591, 596-597 (1945) (citations omitted); Vannak Kann d/b/a The Crown (ABCC Decision August 9, 2016) (violation of § 69 disapproved where all of the evidence presented to the Commission constituted hearsay and the only witnesses at the hearing were police officers who were not inside the premises at the relevant time); Braintree Brew House LLC d/b/a The Brew House (ABCC Decision March 27, 2013) (violation of § 69 disapproved where all of the evidence presented to the Commission constituted hearsay; all of the witnesses who testified had either arrived at the scene after the patron was outside the premises or were with the patron at the hospital). "If the pertinent evidence is exclusively hearsay, that does not constitute 'substantial evidence' even before an administrative tribunal." Sinclair v. Director of the Div. of Employment Sec., 331 Mass. 101, 103 (1954).

Therefore, pursuant to the controlling law as determined by binding court decisions, the Commission is persuaded and finds that the Local Board has not proved by legally competent evidence that Patron manifested objective, observable signs of intoxication while inside the

[3] Without sufficient evidence, the Commission must resist the temptation to reason backwards to find that a person was manifestly intoxicated before being involved in or causing a horrific accident. In Royal Dynasty, Inc. v. ABCC, Suffolk Superior Court C.A. No. 03-1411 (Billings, J.) (December 9, 2003), the Superior Court reversed the Commission decision which found a violation of M.G.L. c. 138, § 69. The Superior Court described the facts in that case as "a horrific fatal accident, the extraordinarily reckless behavior by two recently-departed Royal Dynasty patrons that caused it, the failed PBT [portable breathalyzer test] and field sobriety tests at the scene, and the evident absence of another source of alcohol for either man." Royal Dynasty, at 10. The Superior Court acknowledged that with those facts, "it is tempting to reason backward to the conclusion that they [the allegedly intoxicated patrons] must have been visibly intoxicated when served." Id. However, the elements necessary to prove a violation of M.G.L. c. 138, § 69 require the presence of a visibly intoxicated person in or on a licensed premise, followed by a sale or delivery of an alcoholic beverage to that visibly intoxicated person.

licensed premises and, after manifesting such signs of intoxication, was sold or delivered an alcoholic beverage.

Moreover, the Commission concludes that Patron's consumption of four beers and two shots of whiskey over the course of almost three hours does not constitute an inference of intoxication. "When evidence of excessive consumption is lacking, as matter of common sense and experience, the inference may not be drawn." Vickowski, 422 Mass. at 611; see Kirby, 34 Mass. App. Ct. at 632 (consumption of eight beers insufficient to support inference of obvious intoxication); Makynen, 39 Mass. App. Ct. at 312 (same, as to consumption of five to six cans of beer).

The Local Board has the burden of proving that the Licensee was on notice that Patron was showing discernible signs of intoxication at the time he was served the last alcoholic beverage. In the present case, no evidence was offered to prove Patron's intoxication at the time of purchase other than pure conjecture or surmise. Given these circumstances and the evidence presented, the Commission finds that we cannot draw an inference of obvious intoxication at the time of sale with the requisite degree of certainty.

CONCLUSION

The Commission **DISAPPROVES** the action of the Local Board in finding a violation of M.G.L. c. 138, § 69, and for suspending the M.G.L. c. 138, § 12 all-alcohol license of T. A. Gossios, Corp. d/b/a Sandwich Taverna. As such, the Commission remands the matter to the Town of Sandwich Board of Selectmen with the recommendation that it find no violation and that no further action be taken against the Licensee, as any penalty would be discrepant with this Decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth A. Lashway, Commissioner _____

Kathleen McNally, Commissioner _____

Dated: February 15, 2018

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.

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cc: Christopher J. Kirrane, Esq. via facsimile 508-477-5697
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Frederick G. Mahony, Chief Investigator
Local Licensing Board
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