



*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150*

Jean M. Lorizio, Esq.
Chair

DECISION

**THE TWELVE CRANE STREET CORP. D/B/A DARK HORSE PUB
12 CRANE STREET
SOUTHBRIDGE, MA 01550
LICENSE#: 1218-00055
HEARD: 11/7/2019**

This is an appeal from the action of the Town of Southbridge Liquor Licensing Board (the "Local Board" or "SLLB") in voting to revoke the § 12 all-alcohol license of The Twelve Crane Street Corp. d/b/a Dark Horse Pub ("Licensee") located at 12 Crane St., Southbridge, MA.

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, November 7, 2019.

The following documents are in evidence as exhibits:

1. Licensee's Articles of Organization;
2. Licensee's Business Entity Summary from Secretary of the Commonwealth's Corporations Division website;
3. Licensee's 2019 All Alcoholic Beverages License; and
4. Local Board's Decision, 3/12/2019.
 - A. Southbridge Police Sergeant Ryan Roettger's Memorandum to the Southbridge Liquor Licensing Board Requesting a Violation Hearing, 1/31/2019;
 - B. Southbridge Police Officer Richard Reddick's Memorandum to Sergeant Roettger, 1/27/2019;
 - C. Southbridge Police Department's Summons Report #19-109-AR, 1/31/2019;
 - D. Southbridge Police Department Personnel Narrative for Patrolman Richard Reddick, 1/27/19;
 - E. Southbridge Police Department Arrest Report #19-110-AR, 1/31/19;
 - F. Southbridge Police Department Personnel Narrative for Patrolman Eric Raymond, 1/27/19;

- G. Southbridge Police Department Supplemental Narrative for Patrolman Christopher E. Iozzo, 1/27/19;
- H. Southbridge Police Department Arrest Report #19-111-AR, 1/31/19;
- I. Southbridge Police Sergeant Roettger's Memorandum to the Southbridge Liquor Licensing Board requesting a violation hearing, 2/25/19; and
- J. Local Board's License Regulations.

There is one audio recording of this hearing, and six (6) witnesses testified.

FINDINGS OF FACT

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

1. The Twelve Crane Street Corp. d/b/a Dark Horse Pub ("Licensee"), holds an all alcoholic beverages license and operates a business at 12 Crane St., Southbridge, MA. John Gabriel McCarthy is President, Secretary, Director, and a stockholder of the corporation, as well as being the manager of record. The Licensee has held a § 12 all-alcohol license since 2006. (Testimony, Exhibit 2, Commission Records)
2. On Saturday, January 26, 2019, an event was held on the licensed premises which continued into the early morning hours of Sunday, January 27, 2019. (Testimony, Exhibits B, D & F)
3. At approximately 1:40 a.m. on Sunday, January 27, 2019, Southbridge Police Department dispatched all patrol units to the 12 Crane Street area due to the number of people present. (Testimony, Exhibits A & F)
4. Sergeant Ryan Roettger is the Day Shift Supervisor and the designated liquor agent for the Southbridge Police Department, a position he has held for 15 years. (Testimony)
5. Officer Richard Reddick is a patrolman with the Southbridge Police Department. In addition, Officer Reddick works as a narcotics detective and K9 officer with the department. He has been with the Southbridge Police for 18 years. (Testimony)
6. Bentley Rivera promoted the event and booked the music and security. He was present for the event. (Testimony)
7. Based on a memorandum from Officer Reddick and multiple police reports generated as a result of incidents which took place on January 27, 2019, Sgt. Roettger submitted a written request, dated January 31, 2019, for a violation hearing before the Southbridge Liquor Licensing Board regarding the events of January 27, 2019. (Testimony, Exhibit A)
8. In his request for a hearing, Sgt. Roettger cited the following:
 - 204 CMR 2.05(2) Permitting an illegality on the licensed premises, to wit: Violation of M.G.L. Ch. 138, s. 69 Sale or Delivery to intoxicated persons or SLLB License Regulations 1.03 Admission to the Premises, and SLLB License Regulations 1.11 Illegal Activity on the Licensed Premises, & 1.08 Environs of the Licensed Premise.

M.G.L. Ch. 138, s. 69, Sale or delivery to intoxicated persons;

No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person, or

1.03 Admission to the Premises;

(g) Licensees shall refuse entrance to the premises to a person who appears to be intoxicated or unruly; and shall evict such a patron, except that in such a case the licensee should call the police and should offer assistance to an intoxicated person when possible.

1.11 Illegal Activity on the Licensed Premises;

(a) Licensee shall make all reasonable and diligent efforts to ensure that illegal activities do not occur at the licensed premises. Such efforts shall include:

1. Frequent monitoring of restrooms and other nonpublic areas of the premises for signs of drug activity or other illegalities.

(b) There shall be no disorder, prostitution, illegal gambling, illegal drug use or sales or possession, or any other illegal activity on the licensee premises or any premises connected therewith by interior communication.

1.08 Environs of Licensed Premises;

(e) When any noise, disturbance, misconduct, disorder, act or activity occurs in the licensed premises, or in the area in front of or adjacent to the licensed premises, or in any parking lot provided by the licensee for the use of its patrons, which in the judgment of the SLLB adversely affects the health, welfare, safety or repose of the residents of the area in which the licensed premises are located, or results in the licensed premises becoming the focal point for police attention, the licensee shall be held in violation of the license and subject to proceedings for suspension, revocation or modification of the license. (Exhibit A)

9. Sgt. Roettger was not present at the licensed premises during the event on the night of January 26, 2019 and continuing into the early morning of January 27, 2019. (Testimony)
10. A hearing was held before the Local Board on March 11, 2019. (Testimony, Exhibit 4)
11. By decision dated March 12, 2019, the Local Board found the Licensee in violation of 204 CMR 2.05 (2) Permitting an illegality on the licensed premises, to wit:
 - o M.G.L. Ch. 138, s. 69 or SLLB License Regulations 1.03 Admissions to the Premises;
 - o SLLB License Regulations 1.11(b) Illegal Activity on the Licensed Premises; and
 - o SLLB 1.08 Environs of the Licensed Premises. (Testimony, Exhibit 4)
12. The Local Board found the Licensee not responsible regarding the alleged violation of 1.11(a) Illegal Activity on the Licensed Premise. (Exhibit 4)

13. The Local Board found the Licensee responsible for a violation of M.G.L. Ch. 138, s. 69 or SLLB License Regulations 1.03 Admissions to the Premises and voted to have a warning placed in the file. (Exhibit 4) ¹
14. The Local Board found the Licensee responsible for a violation of SLLB License Regulations 1.11(b) Illegal Activity on the Licensed Premises and voted to have a warning placed in the file. (Exhibit 4) ²
15. Regarding the violation of SLLB 1.08 Environs of the Licensed Premises, the Local Board found the Licensee responsible and voted to revoke the license. (Testimony, Exhibit 4)
16. The Licensee timely appealed the Local Board's decision to the ABCC. (Commission Records)
17. Mr. McCarthy had been on the premise on January 26, 2019 but left prior to the start of the night's event. (Testimony)
18. Mr. McCarthy left Maria Lugo to oversee the licensed premise in his absence. (Testimony)
19. Mr. McCarthy and Maria Lugo routinely follow a procedure each evening wherein they review inventory, security measures, and safety issues at the licensed premises. (Testimony)
20. Officer Reddick and Auxiliary Officer Berkquist worked as detail officers during the event on January 26th and into the early hours of January 27th. They were hired as an additional security measure to compliment the 12 security personnel working at the licensed premise. (Testimony, Exhibits B, D, F)
21. Officer Reddick remained inside the establishment all night, other than escorting 2 patrons from the premise. (Testimony)

¹ M.G.L. Ch. 138 s. 67 states "Any applicant for a license who is aggrieved by the action of the local licensing authorities in refusing to grant the same, or by their failure to act within the period of thirty days limited by section sixteen B, or *any person who is aggrieved by the action of such authorities in modifying, suspending, cancelling, revoking or declaring forfeited the same, may appeal therefrom to the commission within five days following notice of such action* or following the expiration of said period, upon petition in writing, setting forth all the material facts in the case." (Emphasis supplied.) As such, the warning which was placed in the licensee's file by the local licensing authority is not an appealable action and thus not the subject of the appeal before the commission.

² M.G.L. Ch. 138 s. 67 states "Any applicant for a license who is aggrieved by the action of the local licensing authorities in refusing to grant the same, or by their failure to act within the period of thirty days limited by section sixteen B, or *any person who is aggrieved by the action of such authorities in modifying, suspending, cancelling, revoking or declaring forfeited the same, may appeal therefrom to the commission within five days following notice of such action* or following the expiration of said period, upon petition in writing, setting forth all the material facts in the case." As such, the warning which was placed in the licensee's file by the local licensing authority is not an appealable action and thus not the subject of the appeal before the commission.

22. Two brothers were arrested outside of the licensed premise at closing time. They were arrested for the offenses of disorderly conduct, unlawful assembly/failure to disburse and resisting arrest. (Testimony, Exhibits E, H)
23. Officer Reddick was aware of the incident outside the establishment which lead to the arrest of the brothers. At the time, he was working to move patrons from inside the premise and away from the area but was not involved in the incident. (Testimony)
24. Earlier in the night, Officer Reddick had contacted his sergeant and notified him of the large number of patrons at the licensed premise and suggested requesting mutual aid to assist when the establishment closed. (Testimony)
25. Chief Woodson was not present at the licensed premises on the night of the incident. (Testimony)
26. No one who was involved in a disturbance and/or altercation on the night of the incident testified before the Commission. (Testimony)

DISCUSSION

Pursuant to M.G.L. Ch. 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) (citing United Food Corp. V. Alcoholic Beverages Control Comm’n, 375 Mass. 240 (1978); Devine v. Zoning Bd. of Appeal of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Bd. of Appeals of Brookline, 362 Mass. 290, 295 (1972)). 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).” Id.

Both the Local Board and the Commission have the authority to grant, revoke, and suspend licenses. Their powers were authorized “to serve the public need and . . . to protect the common good.” M.G.L. c. 138, § 23. “[T]he purpose of discipline is not retribution but the protection of the public.” Arthurs v. Bd. of Registration in Medicine, 383 Mass. 299, 317 (1981). The Commission is given “comprehensive powers of supervision over licensees,” Connolly v. Alcoholic Beverages Control Comm’n, 334 Mass. 613, 617 (1956), 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).

These “comprehensive powers” are balanced by the requirement that the Local Board and the Commission provide notice to the licensee of any violations, as well as an opportunity to be heard. M.G.L. c. 138, §64. In addition, the Local Board has the burden of producing satisfactory proof that the licensee violated or permitted a violation of any condition thereof, or any law of the Commonwealth. M.G.L. c. 138, §§23, 64.

The Licensee’s obligation under 204 C.M.R. 2.05(2) to maintain control over the premises and to comply with Chapter 138 and local regulations is well-settled. The responsibility of the Licensee is to “exercise sufficiently close supervision so that there is compliance with the law on the

premises.” Rico’s of the Berkshires, Inc. v. Alcoholic Beverages Control Comm’n, 19 Mass. App. Ct. 1026, 1027 (1985) (table). A licensee who sells alcohol is “bound at his own peril to keep within the condition of his license.” Burlington Package Store, Inc. v. Alcoholic Beverages Control Comm’n, 7 Mass. App. Ct. 186, 190 (179); accord Commonwealth v. Gould, 158 Mass. 499, 507 (1893). “It is, thus, quite possible for a Licensee to offend the regulatory scheme without scienter.” Rico’s of the Berkshires, 19 Mass. App. Ct. at 1027.

For the Commission to make a finding, there must be substantial evidence that a violation has occurred. “Substantial evidence of a violation is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Consol. Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 229 (1938); accord Charlesbank Rest. Inc. v. Alcoholic Beverages Control Comm’n, 12 Mass. App. Ct. 879 (1981).

The Local Board has the burden of producing satisfactory proof that the Licensee committed the violation that is alleged to have occurred on January 27, 2019.

The Southbridge Licensing Board found the Licensee permitted a violation of Rule 1.08(e) of the Southbridge License Regulations which states, “[w]hen any noise, disturbance, misconduct, disorder, act or activity occurs in the licensed premises, or in the area in front of or adjacent to the licensed premises, or in any parking lot provided by the licensee for the use of its patrons, which in the judgment of the SLLB adversely affects the protection, health, welfare, safety or repose of the residents of the area in which the licensed premises are located, or results in the licensed premises becoming the focal point for police attention, the licensee shall be held in violation of the license and subject to proceedings for suspension, revocation or modification of the license.” 1.08(e) Southbridge License Regulations.

The licensee has a duty of care to prevent only foreseeable harm to its patrons and others. Westerback v. Harold F. Leclair, Co., 50 Mass. App. Ct. 144, 145 (2000); Carey v. New Yorker or Worcester, Inc., 355 Mass. 450, 451 (1969); Kane v. Fields Corner Grille, Inc., 341 Mass. 640, 641 (1961). The Supreme Judicial Court has held that 204 C.M.R. 2.05(2),

describes a preexisting common law duty which licensees owe to their patrons or guests. A bar owner, for example, has the duty to protect persons on or about the premises from the dangerous propensities of its patrons, served or unserved. When the bar has served a potentially dangerous patron, the duty may extend beyond the premises. When the bar has not served the patron, however, the duty is based merely on a duty to keep the premises safe, and the duty applies on or about the premises. See Gustafson v. Matthews, 109 Ill. App. 3d 884, 65 Ill. Dec. 475, 441 N.E. 2^d 388 (1982) (bar owner had no duty to prevent intoxicated patron from driving away with his five children in the car); Locklear v. Stinson, 161 Mich. App. 713, 411 N.W. 2d 834 (1987) (bar owner not liable when one patron was killed by another patron off the premises). O’Gorman v. Antonio Rubinaccio & Sons, Inc., 408 Mass. 758, 761 n.2 (1990) (citations omitted).

“The duty to protect patrons ... does not require notice of intoxication but may be triggered when the conduct of another person puts a tavern owner or its employees on notice that harm is imminent.” Christopher v. Father’s Huddle Café, 57 Mass. App. Ct. 217, 222-223 (2003). However, a licensee may discharge its duty to protect patrons by taking steps to prevent the harm

– such as denying service to a person who appears intoxicated or who has requested too many drinks, or calling police when a fight occurs or an aggressive patron threatens assault. See, e.g., Greco v. Sumner Tavern, Inc., 333 Mass. 144, 145 (1995); Carey, 355 Mass. at 451.

The Local Board presented evidence through the testimony of Southbridge Police Chief Woodson, Sergeant Roettger and Officer Reddick.

The Commission found the Chief and his officers to be professional and credible. However, neither Chief Woodson nor Sergeant Roettger were present on the night of the incident. As a result, neither of them had any first-hand knowledge regarding the alleged violation. Officer Reddick was present but testified that he was only aware of a “scuffle” outside and was not involved in the situation. Officer Reddick did not have personal knowledge as to the incident which lead to two people being arrested outside of the establishment at closing time.

In order for the Licensee to have permitted an illegality on its premises, the Licensee must have had notice that the harm was imminent, and the Licensee must have been able to foresee the disturbance and prevent it. The record before the Commission is lacking in any evidence that the Licensee should have foreseen an incident occurring. There was no evidence of any disturbance inside the licensed premise. The only evidence presented as to the two men who were arrested being patrons of the establishment was through the testimony of Ms. Lugo who simply stated that she observed them in the licensed premises on the night of the incident. There was nothing presented that would have alerted the Licensee to the possibility of an imminent disturbance. See Kane, 341 Mass. at 641; Carey, 355 Mass. at 451; Greco, 333 Mass. at 145.

The Local Board produced neither eyewitnesses nor direct evidence regarding what took place leading up to the altercation outside the premises. The Local Board produced neither eyewitnesses nor direct evidence regarding any conduct inside that would put the Licensee or its employees on notice of imminent harm.

The Local Board has not proved by legally competent evidence that the Licensee permitted an illegality to wit a violation of SLLB Regulation 1.08.

The Commission is not persuaded that the Licensee committed the alleged violation of 204 CMR 2.05(2) and Rule 1.08 of the Southbridge License Regulations.

CONCLUSION

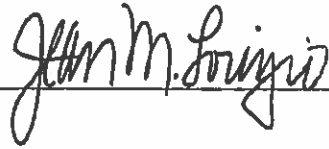
The Alcoholic Beverages Control Commission (“Commission”) **DISAPPROVES** the action of the Town of Southbridge Liquor Licensing Board in finding that The Twelve Crane Street Corp. d/b/a Dark Horse Pub committed a violation of 1.08 Environs of Licensed Premises.

The Commission **DISAPPROVES** the action of the Town of Southbridge in revoking the license.

As such, the Commission remands the matter to the Town of Southbridge 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

Jean M. Lorizio, Chairman



Crystal Matthews, Commissioner



Dated: September 14, 2020

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: Wayne M. LeBlanc, Esq.
Adam J. Costa, Esq.
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration, File