

*Commonwealth of Massachusetts  
Alcoholic Beverages Control Commission  
95 Fourth Street, Suite 3  
Chelsea, Massachusetts 02150-2358*

**Jean M. Lorizio, Esq.**  
*Chairman*

**DECISION**

**TRESTLE BRIDGE LLC D/B/A THE THIRSTY TURTLE PUB  
15 CENTRAL STREET  
TEMPLETON, MA 01438  
LICENSE#: 03459-RS-1268  
VIOLATION DATE: 5/31/2019  
HEARD: 7/16/2019**

Trestle Bridge LLC d/b/a The Thirsty Turtle Pub (the "Licensee") holds an all alcoholic beverages license issued pursuant to M.G.L. c. 138, § 12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Tuesday, July 16, 2019, regarding an alleged violation of M.G.L. c. 138, § 69 – Sale or delivery of an alcoholic beverage to an intoxicated person (1 Count) which occurred on May 31, 2019 according to Investigator Teehan's report.

The following documents are in evidence as exhibits:

1. Investigator Teehan's Investigative Report; and
2. Licensee's License Approval.
  - A. Receipt for Alcohol Purchase;
  - B. Licensee's Bartender Handbook;
  - C. Thumb drive of Video Surveillance; and
  - D. Slip of Paper with Times Marked Denoting Specific Spots in Video.

During the hearing, Associate Counsel Kyle E. Gill requested that the Commission grant him time to view the video footage and provide a response. The Commission allowed this request and left the record open to July 23, 2019. Attorney Gill timely filed his affidavit. Owner Jason Arsenault asked that the record be reopened so he could file a rebuttal to the affidavit. The Commission allowed this request and reopened the record until August 12, 2019. Mr. Arsenault timely filed his rebuttal. The record is now closed.

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

**FINDINGS OF FACT**

1. On Friday, May 31, 2019, Investigators Kenny and Teehan ("Investigators"), conducted an investigation of the business operation of Trestle Bridge LLC d/b/a The Thirsty Turtle Pub. (Testimony; Exhibit 1)

2. Investigators entered the licensed premises and observed a male individual, (the “Patron”), who appeared to be intoxicated. The Patron was in possession of a bottle of Shipyard beer. See id.
3. At approximately 10:05 p.m., Investigators observed the bartender on duty make contact with the Patron, serve him a shot of Blackberry Brandy, and observed the Patron consume it. See id.
4. Investigators observed the Patron to be unsteady on his feet and staggered in the bar area. His movements appeared to be slow and his speech was slurred. At times the Patron bobbed his head up and down, with his eyes closed. Based on their training and experience, Investigators formulated the opinion that the Patron was intoxicated. See id.
5. At approximately 10:50 p.m., Investigators observed the bartender on duty serve the Patron a shot of Dr. McGillicuddy’s Liqueur and then a few minutes later, a bottle of Shipyard beer. Investigators observed the Patron consume both beverages. See id.
6. At this point Investigators contacted Templeton Police Department for assistance. A short time later, Templeton Police officers arrived on the premises along with a Massachusetts State Police trooper. See id.
7. Investigators then identified themselves to the female bartender on duty who stated that she would provide the Patron with safe transport home. See id.
8. Investigators informed the bartender of the violation and that a report would be submitted to the Chief Investigator for further action. See id.
9. The receipt for the Patron’s alcoholic beverages purchase indicates he was served five bottles of Shipyard beer and two shots. (Exhibit A)
10. The Patron is a regular patron at the licensed premises, and owner Jason Arsenault and bar manager Kayla Arsenault have known him for many years. (Testimony)
11. For years, the Patron has had some mobility issues with his arms and legs, and he sometimes has to lift his left leg up in order to sit down. The Patron’s normal speech and movements are slow and uncoordinated. The Patron can be hard to understand when he speaks. (Testimony; Exhibit C)
12. Over the course of the approximate five hours that the Patron was at the licensed premises on May 31, 2019, he had four shots of liquor and four Shipyard beers. The Patron was served a fifth beer but did not drink it. (Arsenault rebuttal; Exhibits A, C)
13. The Licensee has been in business since 2017 with no prior violations. (Testimony)

### DISCUSSION

The Licensee is charged with service to intoxicated persons in violation of 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.” M.G.L. c. 138, § 69. “[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

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

In order to prove this violation, it must be shown: (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. Vickowski, 422 Mass. at 609. Evidence must be produced 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). As explained in Vickowski,

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. 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 where acquaintance described patron who later had accident as appearing to feel “pretty good”). 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).

Vickowski, 422 Mass. at 610.

“The [Local Board] may prove that an individual is intoxicated by direct or circumstantial evidence or a combination of the two.” Vickowski, 422 Mass. at 611 (direct evidence of obvious intoxication not required). “[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. It is proper to infer from evidence a patron's excessive consumption of alcohol, “on the basis of common sense and experience, that [a] patron would have displayed obvious outward signs of intoxication while continuing to receive service from the licensee.” Vickowski, 422 Mass. at 611; accord P.J. Liacos, Massachusetts Evidence § 4.2, at 118-119; § 5.8.6, at 242-244 (6th ed. 1994 & Supp. 1994).

In this matter, the Investigators observed the Patron unsteady on his feet with slow movements and slow speech, and based on their observations, they concluded that the Patron was intoxicated. (Testimony; Exhibit 1) However, the owner and bar manager of the Licensee both testified that they have known the Patron for many years, that the Patron is a regular customer, and that the Patron has mobility and speech issues which cause him to act and speak in such a manner. (Testimony) The Commission found the Arsenaults’ testimony about the Patron’s mobility and speech issues credible, and after watching the video footage from the evening of May 31, 2019 and in review of all of the evidence, the Commission is persuaded that there is not substantial evidence that the Patron was exhibiting outward signs of intoxication at the licensed premises on May 31, 2019.

Likewise, there was no evidence that the Licensee served the Patron a “large number of strong alcoholic drinks . . . sufficient to put [the Licensee] on notice that it was serving a [patron] who could potentially endanger others [or himself].” 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). “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 evidence in this case -- that over the course of about five hours, the Licensee served the Patron five beers (four of which he consumed) and four shots of liquor-- would not be sufficient to support an inference of obvious intoxication based on excessive consumption. (Arsenault rebuttal; Exhibits A, C); see Vickowski, 422 Mass. at 611 (insufficient proof where patron, “who was in the habit of drinking beer, ‘sipped’ four to five bottles over the course of approximately two hours”); compare Rivera, 77 Mass. App. Ct. at 21 (where patron was served fourteen drinks over a two-hour period and drank “most” of them, it was for jury to decide whether he likely appeared intoxicated before he was served his last drink).

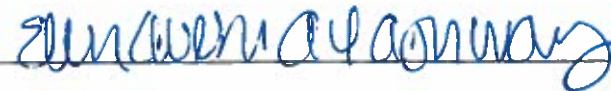
For the aforementioned reasons, this Commission cannot draw an inference of obvious intoxication at the time of sale with the requisite degree of certainty, and therefore, the Commission concludes that there is insufficient evidence to prove that the Licensee violated M.G.L. c. 138, § 69.

#### CONCLUSION

Based on the evidence, the Commission finds the Licensee did not violate M.G.L. c. 138, § 69-Sale or delivery of an alcoholic beverage to an intoxicated person (1 Count).

#### **ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Elizabeth Lashway, Commissioner



Kathleen McNally, Commissioner



Dated: August 30, 2019

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: Local Licensing Board  
Frederick G. Mahony, Chief Investigator  
Kyle E. Gill, Esq., Associate General Counsel  
Michael Teehan, Investigator  
Mark Kenny, Investigator  
Administration, File