



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

BUCK POND ENTERPRISES, INC. DBA TOMMY D'S
250-252 ELM ST.
WESTFIELD, MA 01085
LICENSE#: 144000019
HEARD: 10/21/2013

This is an appeal of the action of the City of Westfield Licensing Commission (the "Local Board" or "Westfield") for revoking the §12 general on premises all alcoholic beverages license of Buck Pond Enterprises, Inc. d/b/a Tommy D's (the "Licensee" or "Tommy D's", or "Buck Pond") located at 250-252 Elm Street, Westfield, MA. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") pursuant to which a hearing was held on Monday, October 21, 2013.

On June 3, 2013, the Local Board conducted a hearing regarding three (3) separate incidents which occurred at the licensed premises. After hearing, the Local Board voted unanimously to revoke Buck Pond's §12 general on premises all alcoholic beverages license.

The following documents are in evidence as exhibits:

Exhibits of Licensee, Buck Pond Enterprises, Inc. d/b/a Tommy D's:

1. Letter and Report from Red Hawk Security for Fire Alarm Inspection, dated 10/24/12 (6 pages);
2. City of Westfield Fire Department Report dated 03/13/13 (5 pages);
3. Definition of the word "Habitation" taken from Dictionary.com (4 pages);
4. Westfield Police Department Report of Sergeant Eric Hall, dated 05/14/2013 (3 pages);
5. Licensing Board of the City of Westfield Special Meeting dated 05/29/13 (26 pages);
6. Whip City Brew List of Incidents, from 2006 to 2013 (6 pages); and
7. Maple Leaf List of Incidents from 2008 to 2013 (6 pages).

Exhibits of the Local Board – The City of Westfield License Commission:

- A. Spreadsheet of Incidents at Tommy D's (8 pages);
- B. Local Board's Decision dated 11/08/06 (3 pages);
- C. Local Board's Decision dated 07/16/08 (5 pages);
- D. Local Board's Decision dated 01/15/13 (4 pages);
- E. Local Board's Decision dated 06/03/13 (5 pages);
- F. Westfield Police Department Call Log for phone call re: Tommy D's and report of Police Officer Mazza dated 03/13/13 (4 pages);
- G. Westfield Police Department Call Log for phone call re: Tommy D's and report of Police Officer

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- Fanion dated 03/29/13 (3 pages);
- H. Westfield Police Department Call Log for phone call re: Tommy D's and police report dated 05/03/13 (5 pages);
- I. Seven Photographs, Exhibit I-1, I-2, I-3, I-4, I-5, I-6, I-7;
- J. Local Board's Rules and Regulations (19 pages);
- K. City of Westfield Inspection Certificates for Eleven (11) Licensees (6 pages);
- L. S.L.R.A (Security Liability Reduction Association) Training (17 pages);
- M. Diagram of Tommy D's Premises drawn by Captain Warren of the Westfield Fire Department (1 page);
- N. Photograph of a motorcycle within the interior of Tommy D's (1 page);
- O. Photograph of the interior of Tommy D's showing a stage and motorcycle(1 page); and
- P. DVD recording of Local Board's hearing held on May 29, 2013.

There is one (1) audio recording of this hearing, and ten (10) witnesses testified.

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

FACTS

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

1. Buck Pond, the holder of an all alcoholic general on premises beverages license issued pursuant to M.G.L. c. 138, §12, is a Massachusetts Corporation located at 250-252 Elm Street, Westfield, Massachusetts. The occupant load or capacity for the first floor of the licensed premises is 300 persons. The second floor capacity is 100 persons. (Testimony, Commission Records)
2. Mr. Gaetano DeNardo is the President, Treasurer, and License Manager of the Licensee, Buck Pond Enterprises, Inc. d/b/a Tommy D's. Cheryl DeNardo is the Clerk of Buck Pond Enterprises, Inc. Gaetano DeNardo and Cheryl DeNardo each own 50 shares of stock in Buck Pond Enterprises, Inc. d/b/a Tommy D's. (Commission Records)
3. The Local Board issued and distributed the "Westfield License Commission Liquor License Rules and Regulations" including, but not limited to, "Punitive Action Guidelines (section 1:11, p.6)" to the Licensee on or about March 18, 2008, and again on or about October 30, 2009. Mr. DeNardo acknowledged that the licensee had received the rules and regulations. Mr. DeNardo is familiar with the Local Board Rules and Regulations. (Testimony, Exhibits 5,C, D, E, J, 5, Commission Records)

First Incident - March 13, 2013: Motorcycle in/on Licensed Premises

4. At approximately 8:30 p.m., Erin, the manager on duty, temporarily left the premises to go home to change a shirt. (Testimony; Admission of the License Manager, Mr. DeNardo, at Local Board Hearing Exhibit P)
5. When Erin left the premises, she left a new employee (a bartender, performing her bartending duties) in control of the premises. (Testimony; Admission of the License Manager, Mr. DeNardo, at Local Board Hearing Exhibit P)

6. While this new employee was left alone to control the licensed premises, the Sons of Mothers Motorcycle club brought a motorcycle into the bar. (Testimony; Admission of the License Manager, Mr. DeNardo, at Local Board Hearing Exhibit P)
7. Thereafter, Erin returned to the licensed premises. (Testimony; Admission of the License Manager, Mr. DeNardo, at Local Board Hearing Exhibit P)
8. At some point, the fire alarm went off inside the premises. (Testimony)
9. Erin, the Assistant Manager of Tommy D's called "911" after the alarm sounded, and told the emergency responders that there was no need to respond to the premises, as everything was under control. (Testimony)
10. Thereafter, Mr. DeNardo (returning from vacation) returned to the premises. (Testimony; Admission of the License Manager, Mr. DeNardo, at Local Board Hearing Exhibit P)
11. Mr. DeNardo took action to silence the fire alarm, and while he stopped the audio component of the fire alarm, the flashing-lights component of the fire alarm continued to function. (Testimony).
12. Mr. DeNardo became very upset with the Sons of Mothers Motorcycle club, and demanded that the motorcycle be removed immediately. (Testimony; Admission of the License Manager, Mr. DeNardo, at Local Board Hearing Exhibit P)
13. The Sons of Mothers motorcycle club complied with Mr. DeNardo's request. (Testimony; Admission of the License Manager, Mr. DeNardo, at Local Board Hearing Exhibit P)
14. At 9:13 P.M. on March 13, 2013, Red Hawk Fire and Security Alarm Company notified the Westfield Police Department that a smoke/fire alarm signal had been received from Tommy D's. The Fire Department, as per procedure and to ensure the protection of public safety, sent one engine to the premises to investigate. (Testimony, Exhibit 1)
15. Westfield Police Officer Richard Mazza responded to the scene at 9:16 p.m. to assess the situation. (Testimony)
16. Upon arrival, Officer Mazza observed smoke throughout the premises and made inquiry as to what triggered the alarm. (Testimony)
17. Officer Mazza observed the License Manager, Gaetano DeNardo, behind the bar, and spoke to him directly about the cause of the smoke. (Testimony)
18. In response, Mr. DeNardo informed Officer Mazza that a person unknown to him had set off a smoke bomb inside the bathroom. (Testimony).
19. Erin told Officer Mazza that someone had lit off a smoke bomb in the bathroom as part of a birthday party celebration, but failed to mention that a motorcycle had been in the bar. (Testimony)
20. Mr. DeNardo never told Officer Mazza, that a motorcycle had been removed from the bar only moments before. (Testimony; Exhibit P)

21. Relying on Mr. DeNardo's representation that a smoke bomb lit off in the bathroom had triggered the alarm, Officer Mazza conducted an inspection and observed no smoke in the bathroom. (Testimony)
22. Officer Mazza did observe smoke in other areas of the premises, the heaviest concentration being located above the dance floor. (Testimony)
23. Moreover, Officer Mazza observed that electric fans had been set up by the License Manager inside the premises for the purpose of blowing smoke outside. (Testimony)
24. The Fire Department arrived at 9:18 p. m and began its own inspection of the premises. (Testimony)
25. In the course of the Fire Department inspection, Westfield Fire Captain Benjamin Warren observed a substantial number of people standing outside the premises smoking cigarettes and wearing 'Sons of Mothers' (known to the Westfield Police Department as a motorcycle club) T-shirts. (Testimony)
26. Captain Warren inspected the bathroom, but failed to observe any smoke therein. (Testimony)
27. Captain Warren did, however, observe heavy white smoke throughout the remainder of the premises, the heaviest smoke concentration being located above the dance-floor. (Testimony)
28. Despite his best efforts, Captain Warren was unable to locate the source of the smoke. (Testimony)
29. Captain Warren was never informed by Mr. DeNardo, or Erin, that a motorcycle had been removed from the bar moments before. (Testimony).
30. Moreover, when the Fire Department arrived at the premises, the audio component of the smoke alarm had already been silenced by the Licensee. However, the alarm lights were still flashing. (Testimony)
31. Captain Warren reset the fire alarm system (which stopped the lights from flashing), and then returned to the fire station and drafted an incident report. (Testimony)
32. Sergeant Eric Hall, the City of Westfield Police Department Community police officer, is in charge of reviewing all calls received regarding licensed alcohol establishments in Westfield. (Testimony)
33. Sergeant Hall did not forward the fire/smoke alarm report at Tommy D's to the Local
34. timony)
35. There was no evidence presented concerning the volume of fuel stored in the motorcycleBoard for further investigation or action because he believed Mr. Denardo's representation that a smoke bomb had been set off. (Testimony)
36. The fire alarm triggered a substantial emergency response from the Westfield Police Department, Fire Department and E911, utilizing valuable public safety resources and personnel. (Tes tank, or in the motorcycle in general, at the time of the incident. (Commission Hearing)

Second Incident - March 29, 2013: Disturbance, Assault and Battery of a Patron

36. On the evening of March 29, 2013, Tyler Bovat was working as a bouncer/security staff at Tommy D's, and had been so employed for approximately one and one half years. (Testimony)
37. Mr. Bovat's responsibilities were to check ID's and to maintain and ensure a secure environment for patrons in general. (Testimony)
38. A fight broke out on the dance, between two male patrons, Nicholas Granger and Mr. Cesar Vargas. (Testimony)
39. The normal altercation protocol at Tommy D's is to separate the combatants and then to remove them from the premises by separate doors. (Testimony)
40. Very close in time, Mr. Granger and Mr. Vargas were both ejected out the same (front) door by the staff of Tommy D's. (Testimony)
41. Mr. Granger was ejected first, followed by Mr. Vargas, a few minutes later. (Testimony)
42. At approximately 1:20 A.M., Westfield Police Officer Timothy Fanion was on patrol in a marked cruiser near Tommy D's when he saw a large group of people being ejected from the premises. (Testimony)
43. He then observed a group of three males chasing a Hispanic man, and made further inquiry. (Testimony)
44. Upon speaking to the three males, Officer Fanion learned that the man they were chasing had just hit their friend, Nicholas Granger. (Testimony)
45. Officer Fanion observed Mr. Granger lying unconscious on the ground with his head hanging off the sidewalk. Officer Fanion called for an ambulance. (Testimony)
46. After Officer Fanion called for back-up, another Officer arrived who pursued and detained Mr. Vargas. (Testimony)
47. Mr. Vargas, who was less than 21 years of age, was charged with criminal assault and battery. (Testimony)
48. Officer Fanion tried for several minutes to wake up an unconscious and unresponsive Mr. Granger, but was unable to do so. (Testimony)
49. An ambulance arrived and EMT's immediately began treating Mr. Granger. (Testimony, Exhibit E)
50. As a result of the actions, and inaction of Mr. Bovat and the security staff in controlling the premises, it was extremely chaotic, disorderly and unsafe on the sidewalk in front of Tommy D's. (Testimony)
51. It was not until after the Police arrived and started dispersing patrons, that safety and order was restored. (Testimony)

52. There were 270 patrons inside the premises at the time of the incident and five (5) bouncers/security staff were on duty. (Testimony, Exhibits E, 5)
53. Mr. DeNardo, the License Manager, was not present at the premises the night of this incident. No employees from Tommy D's placed any '911' or police calls that evening. (Testimony, Exhibits 5, E)
54. Tyler Bovat is not a certified crowd manager, has never participated in any formal training by the Security Liability Reduction Association (S.L.R.A.), and is not familiar with any of the mandated S.L.R.A. rules or crowd control training. (Testimony)
55. Rule 1:07(a) of the Westfield General Licensing Rules for Liquor Licenses 1.07(a) provides that "[i]t shall be the obligation of licensees to ensure that a high degree of supervision is exercised over the conduct of the licensed establishment at all times. Each licensee shall be accountable for all violations that are related to the licensed premises to determine whether or not the licensee acted properly in the given circumstances." (Rule 1.07(a), Exhibit J)
56. Pursuant to the Regulations of the Westfield Local Board, a licensee is responsible for ensuring order and guest safety by protecting "employees, patrons, and members of the public inside and outside of the premises from disruptive conduct, from criminal activity, and from health, safety or fire hazard." (Rule 1.07(c), Exhibit J)
57. Rule 1:09(b) of the Westfield General Licensing Rules for Liquor Licenses provides: "[l]icensees shall call the police and an ambulance and take all other reasonable steps to assist patrons or persons who are injured in or on the licensed premises or whose injuries have occurred outside the premises but have been brought to the attention of the licensee. Failure to follow this procedure may result in punitive action against the licensee's liquor license and/or entertainment license." (Rule 1:09(b), Exhibit J)
58. Rule 1:09(c) of the Westfield General Licensing Rules for Liquor Licensees provides: "Licensees shall train employees to recognize the signs of potential outbreaks." (Rule 1:09(c), Exhibit J)
59. Rule 109(d) of said rules provides: "Licensees shall provide enough personnel to quickly respond to altercations." (Rule 1:09(d), Exhibit J)

Third Incident - May 3, 2013: Disturbance, Assault and Battery of a Patron

60. Tyler Bovat testified that May 3, 2013 was a busy night; there were five bouncers on duty. (Testimony)
61. Mr. Bovat saw a fight break out on the dance floor between several female patrons. (Testimony Exhibits 5, E)
62. Mr. Bovat intervened by directing Ms. Guzman out of the premises through the front door. (Testimony)
63. Moments later, Mr. Bovat also ejected Ms. Diaz out the same front door, and went back inside the licensed premises. He did not call the police or direct anyone else to call the police. (Testimony, Exhibits 5, E)
64. Once both females were outside, the altercation resumed and escalated. (Testimony, Exhibits 5, E)

65. The security staff did not take action to prevent this fight from resuming or escalating. (Testimony)
66. S.L.R.A. (Security Liability Reduction Association) Training, required for Licensees in Westfield as mandated by the Local Board, states: "You still have a responsibility for patron and staff safety even when the patrons or attackers leave the establishment.....e.g. If the patrons "take it outside" or if you see another patron chase someone out of the premises." (Testimony, Exhibits 5, E, J, L)
67. At this point, Westfield Police on patrol became involved. (Testimony)
68. Police Officer Coach witnessed three females fighting in the doorway directly outside of Tommy D's at approximately 12:40 A.M., and was the first person to respond. (Testimony, Exhibits 5, E)
69. While he saw women yelling, swearing and pointing, he failed to observe any bouncers or security staff available to intervene. (Testimony, Exhibits 5, E)
70. As he approached in his cruiser, he observed one female on top of another female assaulting her. (Testimony, Exhibits 5, E)
71. Just as he approached the combatants and told them to "break it up," another female came up and started kicking Vanessa Diaz, who was on the ground. (Testimony, Exhibits 5, E)
72. Officer Coach then arrested the two females, Tinelle Guzman and Danielle Girard, who were assaulting Ms. Diaz. (Testimony, Exhibits 5, E)
73. Several patrons were injured as a result of this incident. (Testimony, Exhibits 5, E)
74. Vanessa Diaz had a lump on her forehead and a cut on her left eye, and another female had a head injury. (Testimony, Exhibits 5, E)
75. A police officer drove Ms. Diaz to the hospital. (Testimony, Exhibits 5, E)
76. The License Manager, Mr. DeNardo, was not present at the premises that evening. (Testimony, Exhibits 5, E)
77. The Police Department did not receive any "911" calls from the Licensee on this evening. (Testimony, Exhibits 5, E)
78. The Local Board has taken progressive punitive action against Tommy D's on prior occasions. (Testimony, Exhibit 5)
79. There were 57 (fifty-seven) violent incident calls to Tommy D's during the period of 2006 to 2012. (Testimony, Exhibit A)
80. In July of 2008, the Local Board imposed punitive sanctions against the Licensee as a result of violations for four violent disturbances (one involving a knife) that occurred on May 9, 2008; May 25, 2008; May 31, 2008; and June 1, 2008. (Testimony, Exhibit C)

81. In 2012 the Local Board imposed punitive sanctions against the Licensee of a 60-day entertainment license roll-back; 30 days held in abeyance for 90 days; 3 days waived; and 27 days served. (Testimony, Exhibit D)
82. In January of 2013, the Local Board imposed punitive sanctions against the Licensee for finding a violation for a disturbance involving a knife, which occurred on August 12, 2012. (Testimony, Exhibit D)
83. Tommy D's had 3 (three) times greater the number of police calls to '911' for violent incidents compared to other licensees of similar size, capacity, and period of time in existence. (Testimony)
84. The number of incidents the Local Board reviewed for Tommy D's from 2006 forward to 2013 was 158 incidents. (Testimony, Exhibit 5)
85. The next licensee similar to Tommy D's is Whip City Brew which had 76 incidents reviewed by the Local Board for the same time period. (Testimony, Exhibit 5)
86. Tommy D's is the only license that has been revoked by the Westfield Board since 2010. (Testimony, Exhibit 5)
87. The Westfield Licensing Board revoked the license of Buck Pond Enterprises, Inc. d/b/a Tommy D's after finding violations for the aforementioned incidents, in conjunction with the Licensee's historical police incident record. (Testimony, Exhibits 5, E)

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 Appeal 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 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).

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, as amended through St. 1977, c.929, §7. "[T]he purpose of discipline is not retribution but the protection of the public." Arthurs v. Board 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., 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 Commission, 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, section 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, sections 23, 64.

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). Disbelief of any particular evidence does not constitute substantial evidence to the contrary. New Boston Garden Corp. v. Bd. of Assessor of Boston, 383 Mass. 456, 467 (1981). The Local Board has the burden of producing satisfactory proof to the Commission that the licensee committed the alleged violations.

The Local Board has the burden of producing satisfactory proof that the licensee adversely affected the public safety and order, and finding that the Licensee committed the three subsequent violations which occurred on March 13, 2013; March 29, 2013; and May 3, 2013. The Local Board revoked Tommy D's license for violations arising from these three incidents. The Commission will discuss each incident and the resulting charges individually and chronologically.

DISCUSSION – March 13, 2013 – First Incident

The Licensee is charged with two separate counts of violating 204 CMR 2.05(2). Said regulation provides:

No licensee for the sale of alcoholic beverages shall permit any disorder, disturbance or illegality of any kind to the place in or on the licensed premises. The licensee shall be responsible therefor, whether present or not.

The responsibility of the licensee is to "exercise sufficiently close supervision so that there is compliance with the law on the premises." Ricos of the Berkshires v. ABCC, 19 Mass. App. Ct. 1026, 1027 (1985).

At the June 3, 2013 local hearing, Mr. DeNardo, license manager and principal of the licensee, admitted that a motorcycle was, in fact, in the bar on the night of the March 13, 2013 incident. Mr. DeNardo provided that he returned home from vacation and arrived at his bar to witness a motorcycle inside the premises. He stated that the manager on duty that day (Erin), needed to temporarily leave the premises to return home to obtain a fresh shirt. During the time it took Erin to go home and return, a motorcycle was brought into the bar by a group of customers (members of the Sons of Mothers motorcycle club). During Erin's absence, the bar was left in the hands of a new employee. While this new employee was left alone to control the bar, the motorcycle club members brought a motorcycle into the bar.

The language of 204 CMR 2.05(2) is clear that "[t]he licensee shall be responsible . . . whether present or not" when an illegality occurs on the premises. The Licensee admits that a motorcycle was inside the premises. The Licensee also made it clear that the Licensee was behind the bar when the Police and Fire Department arrived on the scene and that at this time, the Licensee told the Police and Fire Department that a smoke bomb was the cause of the alarm. The Licensee failed to tell the Police and Fire Departments that a motorcycle had been removed from the bar only moments before, although he clearly knew this to be the case.

Moreover, Mr. DeNardo only admitted to the presence of the motorcycle in the bar after photographic evidence surfaced making the presence of the motorcycle undeniable. At the Local Board hearing, he did make this admission. This incident caused a substantial emergency response from public safety officials on the night of the incident, and a substantial public safety response after the incident. Moreover,

although a fire alarm was triggered, and although the Police and Fire Departments were called to the scene, Mr. DeNardo never ordered an evacuation of the premises. Both patrons and employees remained in the bar and on or in the premises.

While testimony indicates that the Licensee was not on the premises when the motorcycle arrived thereon, it is his clear obligation to maintain sufficient and close control of the premises. See generally, ABCC Commission Decision Boston Ballroom Corporation, heard 2/21/2012 (the law is well-settled that it is the responsibility of the licensee is to exercise sufficiently close supervision so that there is compliance with the law on the premises). While testimony further provides that the Licensee's Manager Erin made a temporary trip home to change her shirt (leaving the premises in the sole control of a new employee), a vendor who sells alcohol is "bound at his own peril to keep within the condition of his license." Commonwealth v. Gould, 158 Mass. 499, 507 (1893). Burlington Package Liquors, Inc. v. Alcoholic Beverages Control Commission, 7 Mass. App. Ct. 186, 190 (1979). It is, thus, quite possible for a licensee to offend the regulatory scheme without scienter. Rico's of the Berkshires, Inc., v. ABCC, 19 Mass. App. Ct. 1026, 1027 (1985) (rescript).

Ownership and management of Tommy D's left a new employee alone with an active and well-known motorcycle club present on the premises. It was during this time, whilst this new employee was left to bartend and, presumptively, solely supervise and control the premises, that the motorcycle club members took the liberty of bringing a motorcycle into the bar during a birthday party celebration for one of the club members. 204 CMR 2.05(2) clearly and unambiguously provides that:

"[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. The licensee shall be responsible therefor, whether present or not."

The Commission concludes, from the testimony of the Police and Fire officials, as well as the admission of the Licensee at the local hearing, that while the owner and manager left the bar unsupervised, a motorcycle was brought into the bar. As it is unequivocal that "the responsibility of the licensee is to exercise sufficiently close supervision so that there is compliance with law on the premises," Rico's of the Berkshires v. ABCC, 19 Mass. App. Ct. 1026, 1027 (1985); it is equally clear that 204 CMR 2.05(2) unambiguously attributes responsibility for close supervision and control of the premises to the licensee. Rum Runners v. ABCC, 43 Mass. App. Ct. 248 (1997).

The next question before this Commission is to determine whether the Local Board properly determined and found the Licensee responsible for each violation as charged. The Local Board alleges that the Licensee committed the following violations:

1. Violation of 204 C.M.R. 2.05 (2): permitting an illegality on the licensed premises, to wit: violations of M.G.L. c. 148, § 23 (1 count); and M.G.L. c. 148, §23 provides, in pertinent part:

"no volatile inflammable fluid except an amount not exceeding one quart contained in an approved safety can . . . shall be kept, used or stored in any part of any building used for habitation, . . . unless a permit has first been obtained therefor from the head of the fire department under such terms and conditions as he may prescribe."

The Commission has had the opportunity to weigh the credibility of all witnesses and finds that all of the Westfield Police Officers and Fire Officials are credible witnesses and professional officers. However, none of the Fire or Police Officers were percipient witnesses with direct personal knowledge as to the quantity of gasoline in the motorcycle on the night of this event. Moreover, there is no allegation that this

building was used for habitation. Accordingly, the Commission does not find substantial evidence to uphold the finding for a violation of 204 CMR 2.05(2) pursuant to M.G.L. c. 148 §23.

2. Violation of 204 C.M.R. 2.05 (2) permitting an illegality on the licensed premises, to wit: M.G.L. c. 148, § 34A (1 count).

The Commission does find that the Licensee is responsible for having committed a violation of 204 CMR 2.05(2) pursuant to c. 148, §34A. Said Section provides that those "having control or supervision of any assembly use group building" who cause or permit "a dangerous condition to exist on the premises at any time" shall be responsible for a violation under §34A. For the purposes of Section 34A, "dangerous condition" includes, but is not limited to: "any blocked or impeded ingress or egress," and "the failure to maintain or the shutting off of any fire protection or fire warning system required by law."

There was specific testimony from Fire Department officials that the presence of the motorcycle in the premises created a dangerous situation in that it both could impede access in the event of an emergency. There was testimony by Fire Department officials that the presence of the motorcycle alone could pose a threat to public safety if something were to go wrong. There was also testimony that Mr. DeNardo took action to shut off the fire protection system on his own initiative before the arrival of the Fire Department. Accordingly, the Commission finds the Local Board's decision of responsibility for violation of 204 CMR 2.05(2) pursuant to c. 148, §34A to be supported by substantial evidence.

3. Violation of Westfield Licensing Board's Rules and Regulations Section 1.07 (a); and Violation of Westfield Licensing Board's Rules and Regulations Section 1.07(c).

The Commission also finds substantial evidence to find the Licensee responsible for violations of Westfield City Licensing Board Regulations 1:07 (a), and (c). Pursuant to Local Rule 1:07(a):

[i]t shall be the obligation of licensees to ensure that a high degree of supervision is exercised over the conduct of the licensed establishment at all times. Each licensee shall be accountable for all violations that are related to the licensed premises to determine whether or not the licensee acted properly in the given circumstances.

It is not challenged that the Licensee and a Manager left the premises in the hands of a new employee, a bartender, to bartend and control the premises alone. This took place while a well-known motorcycle club was present on the premises. As Rule 1:07(a) clearly provides, in pertinent part, that "[i]t shall be the obligation of licensees to ensure that a high degree of supervision is exercised over the conduct of the licensed establishment at all times," the failure to exercise proper supervision alone, with nothing more, is proper grounds for finding a violation of Rule 1:07(a). The Commission is convinced that the facts clearly support a finding that by leaving the new employee unsupervised under the circumstances, the Licensee committed a violation of Rule 1:07(a).

Moreover, Local Rule 1:07(c) provides:

[l]icensees shall take steps to protect employees, patrons, and members of the public inside and outside the premises from disruptive conduct, from criminal activity, and from health, safety, or fire hazard.

Unequivocal testimony was received from members of the Westfield Fire Department that a motorcycle in a bar can create a hazardous problem, and is a health, safety and fire hazard. As responsibility for the presence of this motorcycle in the bar is properly attributable to the Licensee under well-established case-law, as well as 204 CMR 2.05(2) and Local Rule 1:07(a), the Commission concludes that the Local Board

was justified in finding the Licensee in violation of Local Rule 1:07(c). C.f. Rum Runners v. ABCC, 43 Mass. App. Ct. 248 (1997); Rico's of the Berkshires v. ABCC, 19 Mass. App. Ct. 1026, 1027 (1985).

At the hearing before the Commission, the Local Board presented five witnesses who testified regarding the incident that occurred on the evening of March 13, 2013. Westfield Police Officer Mazza, Police Captain McCabe, Police Sergeant Eric Hall, Westfield Fire Department Captain Benjamin Warren, and Deputy Fire Chief Egloff. While none of these witnesses were percipient eye witnesses to a motorcycle being inside Tommy D's on this evening, the acknowledgement of same by the Licensee makes this unnecessary. Due to the admission of the Mr. DeNardo, that a motorcycle was inside the bar, the testimony of these non-percipient witnesses regarding the presence of the motorcycle is relevant and reliable.

DISCUSSION – March 29, 2013 – Second Incident

The Licensee was charged with violating: 204 C.M.R. 2.05 (2) permitting a disorder, disturbance or illegality on the licensed premises (1 Count), pursuant to the Westfield Licensing Board's Rules and Regulations items 1.07, (a), (c) and 1.09, (b), (c), (d).

The Licensee's obligation 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. 204 C.M.R. 2.05(2). A vendor who sells alcohol is "bound at his own peril to keep within the condition of his license." Commonwealth v. Gould, 158 Mass. 499, 507 (1893). Burlington Package Liquors, Inc. v. Alcoholic Beverages Control Commission, 7 Mass. App. Ct. 186, 190 (1979). It is, thus, quite possible for a licensee to offend the regulatory scheme without scienter. Rico's of the Berkshires, Inc., v. ABCC, 19 Mass. App. Ct. 1026, 1027 (1985) (rescript).

Pursuant to the Regulations of the Westfield Local Board, a licensee is responsible for the areas inside and outside the establishment. The Licensee's employee, Tyler Bovat, admitted to the Commission that when the combatants were ejected from the premises, the incident escalated and intensified. The result of this escalation was serious injuries to a patron. The Commission finds that the Licensee failed to control the premises in accordance with Chapter 138, 204 C.M.R. 2.05(2) and the Local Rule 1.07(a) of the City of Westfield.

The licensee is responsible for illegalities, disturbances, and/or disorders that occur on the licensed premises. The licensee has a duty of care to prevent foreseeable harm to its patrons and others. See Tobin, Id.; Westerback v. Harold F. Leclair Co., 50 Mass App. Ct. 144 (2000); Kane v. Fields Corner Grille, Inc. 341 Mass. 640, 641(1961); Carey v. New Yorker of Worcester, Inc. 355 Mass. 450, 451 (1969). The Commission finds that Tommy D's failed to prevent foreseeable harm to its patrons by failing to follow mandated training by ejecting combatants through the same door, almost simultaneously, and by failing to interpose when needed. As a result, Tommy D's failed to meet its compliance obligation "to exercise sufficiently close supervision so that there is compliance with the law on the premises," in direct violation of Local Rule 1.07(a) and 1:07(c).

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. See Kane v. Fields Corner Grille, Inc., 341 Mass 640, 641-642 (1961). 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 only on or about the premises. Carey v. New Yorker of Worcester, 355 Mass. 450, 452 (1969). See Gustafson v.

Mathews, 109 Ill. App. 3d 884 (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 (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 (1990).

The Licensee’s staff admitted that they did not call the police during this incident. The Licensee also failed to call an ambulance to assist Mr. Granger in direct violation of Local Rule 1.09(b). The license manager, Mr. DeNardo, was not on the premises when this incident occurred.

Employee Tyler Bovat testified that there were 270 patrons inside the premises that evening, only five security staff were working that night, and the staff were not wearing clothing that identified them as employees. Tyler Bovat also testified that he was not a certified crowd manager, and that he had not received any training in crowd safety control. Mr. Bovat further testified that he did not even know such crowd safety control training existed, and that he only became familiar with the concept of S.L.R.A. and crowd safety control training after listening to the Fire and Police Officials testify about it during the hearings held in this matter. The Commission finds substantial evidence that the Licensee failed to train its staff to properly recognize and respond to signs of potential outbreaks as required by Local Rule 1.07(c).

The Commission is persuaded that the Licensee did not have adequate control of the premises. The staff were not properly trained as required, and were not sufficiently staffed, as required by Local Rule 1.09(d) to deal with potential altercations such as what occurred on March 29, 2013. The Commission finds that the Licensee’s staff did not call ‘911’ for assistance when the disturbance erupted, nor when there were serious injuries to a patron, in violation of the regulations of the Local Board. Accordingly, the Commission concurs with the decision of the Local Board and finds the Licensee responsible for committing the violations alleged by the Local Board.

DISCUSSION – May 3, 2013 – Third Incident

The Licensee is charged with violating: 204 C.M.R. 2.05 (2) permitting a disorder, disturbance or illegality on the licensed premises (1 Count), Westfield Licensing Board’s Rules and Regulations items 1.07, (a), (c), and 1.09, (b), (c), (d), and that the Licensee was negligent in his response to the disturbance as the Licensee’s crowd training, previously ordered by the Westfield Licensing Board, was not applied during the disturbance. The charges and violations found by the Local Board are identical to the previous incident which occurred on March 29, 2013.

The Licensee is charged with the same violations regarding this incident, as in the aforementioned (March 29, 2013) incident. The facts are similar as well, as this incident also involved a disturbance which began on the dance floor, but escalated outside. In this incident, the disturbance involved an altercation between female patrons. The parties were separated and ejected from the premises. The women were removed from the premises through the same front door, within moments of each other.

When the women were removed from the premises, another altercation began outside and the staff failed to prevent it, or stop it once it began. The result of this failure was a physical injury to a patron. Again, the Licensee’s staff ejected all of the patrons involved in the disturbance out the same door, at approximately the same time. These actions resulted in an escalation directly outside the front door of the premises, and a physical injury to a patron.

The Licensee’s staff did not call the police or “911” when the disturbance initially occurred. The license manager, Mr. DeNardo, was once again, not at the premises when this incident occurred. The staff lacked the proper training and failed to maintain control after ejecting all of the combatants out the same door, at

almost the same time. The staff's decision to simply return inside the premises directly contributed to the continuation and escalation of an incident which began inside the premises. Moreover, the Licensee's staff never called for an ambulance.

This incident is almost identical in its character and nature to the disturbance of March 29, 2013. The Commission is persuaded that the Licensee did not exercise proper control over the premise as it is required to do. The Commission is persuaded that the Licensee failed to take appropriate measures to protect patrons inside the premises, which resulted in injuries outside of the premises. Therefore, the Commission finds that the Licensee committed these violations.

DISCUSSION OF PROGRESSIVE DISCIPLINE

The Local Board found the Licensee responsible for each matter outlined above and subsequently revoked the license. The Commission is now called upon to review the appropriateness of this sanction under the doctrine of progressive discipline and in consideration of the Punitive Action Guidelines of the Rules and Regulations of the Westfield Local Licensing Board.

Section 1.11 states in pertinent part:

Licensees in violation of the applicable laws of the Commonwealth, Regulation of the ABCC and/or these regulations may be subject to the following range of discipline: 1st Offense: warning to 3 days; 2nd Offense: 3 to 6 days; 3rd Offense: 6 to 12 days; 4th Offense: Show cause hearing for license revocation. The term "offense" is defined as one violation of Massachusetts General Law Chapter 138, and/or one violation of the Commonwealth of Massachusetts Regulations. ABCC founded violations are calculated into the Westfield Local Board's Punitive Action Guidelines. Some examples of criteria to invoke penalties are based in part on the following which are relevant to this matter: severity and type of offense; number of prior offenses; and general history of the licensed business. The punitive action guidelines are only a guide. The Westfield License Commission may use its discretion in determining whether the facts surrounding a violation warrant a penalty which is more lenient or severe than that suggested by the guidelines. The punitive action guidelines shall not be construed so as to limit the Westfield License Commission to consider alternative dispositions...." Section 1.11 of the Westfield Licensing Board Regulations.

The Licensee is aware of, and has been provided notice of the Punitive Action Guidelines on at least two previous occasions. Moreover, the Local Board has previously, after hearing, imposed sanctions against the Licensee. To wit, in July of 2008 the Licensee was sanctioned as a result of four different and separately occurring violent disturbances. Moreover, in January of 2013, the Local Board was again required to impose sanctions on the Licensee as a result of a disturbance involving a knife.

A discussion of progressive sanctions is developed and found in two cases: Applebee's Northeast, Inc. dba Applebee's Neighborhood Bar & Grill ("Applebee's"), Suffolk Superior Court C.A. No. 03-610-A (Sikora, J.); and Alcoholic Beverage Control Commission vs. the Licensing Board of the Town of Weymouth. In Applebee's, the Licensee challenged a five (5) day suspension as too severe. The Court laid out the criteria that the Town of Weymouth used for its calibration of penalties. "These included: (i) the number of prior offenses; (ii) the degree of inspection (of customers) exhibited by the licensee; (iii) the severity and type of offense; (iv) the efforts to identify purchasers of alcohol, if any; (v) the appearance of the purchaser receiving the illegal sale; (vi) the quality of evidence of the violation, i.e. clear violation versus questionable one; and (vii) the general reputation of the licensee." Id. at 7.

In reviewing the appropriateness of the penalty, the Court found, "that for several reasons, the resulting sanction does not fall outside the boundaries of rationality." In reviewing the Town's imposed sanctions the Court found that the Town's well-developed disciplinary system helped to avoid "abrupt or draconian punishment." Instead, the system "implemented graduated penalties and afforded the warnings of graduated penalties to offenders." *Id* at 6.

Applying the Applebee's' rationale and analysis to the case at hand, the Commission finds that the sanctions imposed by the City of Westfield, to be intrinsically fair and rational. The Licensee was given appropriate notice of the punitive action guidelines promulgated by the Westfield Licensing Board, and the Local Board adequately followed these rules. That the Licensee had previously received punitive sanctions by the City of Westfield is uncontested.

The Local Board went to great lengths to consider the nature of the offenses, the severity of offenses, the number of police '911' calls to the premises, the escalation and frequency of violent incidents at Tommy D's, as well as the overall history of the Licensee, and prior punitive sanctions in general. The Local Board took into account all of the aforementioned factors and, after doing so, determined that the Licensee had simply lost control of the licensed premises. Therefore, to protect the public good and safety of the City of Westfield, the Local Board revoked the license of Tommy D's.

The Local Board complied with its own rules. The Licensee has a long history of violations for which it has been sanctioned. In reviewing the Local Board's rules, the Local Board could have revoked the license for any one of these violations alone.

The Commission is persuaded that the sanction of revocation is consistent with the Rules and Regulations and punitive guidelines promulgated by the Local Board. The Commission finds that the imposed sanction of revocation underwent a detailed analysis and thorough scrutiny by the Local Board which took into consideration previous sanctions imposed, in conjunction with the history of the Licensee. The Commission finds that the imposed sanction of revocation was one that was not arbitrary and capricious, but rather a reasonable exercise of the Local Board's lawful discretion.

CONCLUSION

The Alcoholic Beverages Control Commission finds that the evidence presented at the hearing was insufficient to prove that the Licensee violated of 204 C.M.R. 2.05 (2), to wit: M.G.L. c. 148, §23 (1 count); but sufficient to find the Licensee violated M.G.L. c. 148, §34A (1 count); and Westfield Licensing Board's Rules and Regulations items 1.07, (a), (c), during the incident that occurred on March 13, 2013.

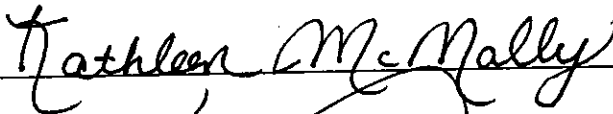
Based on the evidence, the Commission finds on March 29, 2013 the Licensee violated 204 C.M.R. 2.05 (2) (1 Count), Westfield Licensing Board's Rules and Regulations items 1.07 (a), (c) and 1.09 (b), (c), (d). The Commission finds that the Licensee was negligent in his response to the disturbance since crowd training which had been previously ordered by the Westfield Licensing Board was not applied during the disturbance.

Based on the evidence, the Commission finds on May 3, 2013 the Licensee violated 204 C.M.R. 2.05 (2) (1 Count), and Westfield Licensing Board's Rules and Regulations items 1.07, (a), (c) and 1.09 (b), (c), and (d). The Commission finds that the Licensee was negligent in his response to the disturbance since crowd training which had been previously ordered by the Westfield Licensing Board was not applied during the disturbance.

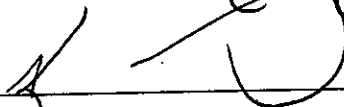
The Alcoholic Beverages Control Commission **APPROVES** the action of the City of Westfield Licensing Board in **REVOKING** the license of Buck Pond Enterprises, Inc. d/b/a Tommy D's. The Commission finds that the action of the Westfield Local Board was not arbitrary and capricious, but based on progressive discipline. The Commission **APPROVES** the action of the Local Board as a reasonable exercise of the Local Board's lawful discretion.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Kim S. Gainsboro, Chairman,



Dated: July 22, 2014

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: Gaetano DeNardo, Licensee via facsimile: (413) 568-2922
Brian J. Pearly, Esq. via facsimile: (413) 568-6745
Frederick G. Mahony, Chief Investigator
Local Board
Administration
File