



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

*Deborah B. Goldberg*  
*Treasurer and Receiver General*

*Kim J. Gainsboro, Esq.*  
*Chairman*

**DECISION**

**O'TOOLE'S PUB, INC.**  
**24 RAYNOR AVE.**  
**WHITMAN, MA 02382**  
**LICENSE#: 146200008**  
**HEARD: 06/16/2015; 07/16/2015; 07/30/2015**

This is an appeal of the action of the Town of Whitman Board of Selectmen (the "Local Board" or "Whitman") for suspending the M.G.L. c. 138, §12, all alcoholic beverages license of O'Toole's Pub, Inc. ("Licensee" or "O'Toole's") located at 24 Raynor Avenue, Whitman, Massachusetts for five (5) days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and hearings were held on Tuesday, June 16, 2015; Thursday, July 16, 2015; and Thursday, July 30, 2015.

The following documents are in evidence as exhibits:

1. Town of Whitman's Notice of Hearing dated 3/12/2014;
2. Town of Whitman's Letter 3/26/14 Postponement of Hearing;
3. Town of Whitman Meeting Minutes 4/8/2014 and 05/05/2014;
4. Town of Whitman Decision 4/9/2014;
5. ABCC Decision and Notice of Suspension 2/11/2002;
6. ABCC Decision and Notice of Suspension 7/29/2008;
7. ABCC Decision and Notice of Suspension 8/5/2008;
8. ABCC Decision and Notice of Suspension 7/30/2008;
9. Town of Whitman's Amended Decision 2/24/2015;
10. Whitman Police Department Incident Report #12-4457 dated 5/27/2012;
11. Key for Incident Report 12-4457;
12. Whitman Police Department Incident Report #14-470 dated 1/19/2014;
13. Key for Incident Report 14-470;
14. Whitman Police Department Incident Report #14-822 dated 2/02/2014;
15. Key for Incident Report 14-822;
16. Whitman Police Department Incident Report #12-6591 dated 8/5/2012;
17. Key for Incident Report 12-6591;
18. Two (2) Videos (Interrogation; interior footage from night of February 2, 2014, sent via email download - Physical copies NOT in file);

19. Subpoena for witness Thomas Meehan;
20. Summary of police calls to O'Toole's prepared by Chief of Police Benton for Local Board;
21. Memo dated February 20, 2014 to Town Administrator from Timothy Grenno, regarding incidents for calls at O'Toole's Pub;
22. Whitman Police Report dated March 3, 2013;
23. Written Statement of witness Kerri Egan dated 4/7/2014, regarding February 2, 2014 incident;
24. Written Statement of witness James Doherty dated 4/7/2014, regarding February 2, 2014 incident;
25. Written Statement of witness James Doherty dated 4/7/2014 regarding January 19, 2014 incident; and
26. Written Statement of Licensee Thomas O'Toole dated 4/7/2014 regarding May 27, 2012 incident.

There is one (1) audio recording of this hearing, and eleven (11) witnesses testified.

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

#### FACTS

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

1. O'Toole's Pub, Inc. operates a bar/restaurant and is the holder of an all alcoholic beverages license pursuant to M.G.L. c. 138, § 12. (Commission Records)
2. Thomas O'Toole has a 51% interest, and his wife Michelle O'Toole has a 49% interest in the license. (Commission Records)
3. Mr. O'Toole is the license manager. He works every Friday night and oversees the bar. (Commission Records, Testimony)
4. O'Toole's Pub has a seventy (70) person capacity and a 1:00 a.m. closing hour. (Commission Records, Testimony)
5. O'Toole's Pub has nine (9) employees, two of whom are full-time cooks. The full-time cooks perform many other duties, including security. The bar staff are TIPS certified. (Testimony)
6. O'Toole's Pub has a video surveillance system which has been in operation for several years. Mr. O'Toole allows the Whitman Police to view video surveillance. The Whitman Police have viewed video footage on at least seven (7) occasions. (Testimony)
7. The Local Board of Whitman has not promulgated any written rules and regulations regarding alcohol licenses and progressive discipline. (Commission Hearing)

#### First Incident – May 27, 2012

8. In the early evening on May 27, 2012, two men entered the licensed premises and were talking loudly. (Testimony, Exhibits 9, 10, 20, 21, 26)
9. Mr. O'Toole was inside his office. Upon hearing the two men talking, he turned on the video surveillance system. (Testimony, Exhibits 9, 10, 20, 21, 26)
10. Mr. O'Toole observed the two men on the video surveillance camera, who appeared to be intoxicated. (Testimony, Exhibits 9, 10, 20, 21, 26)
11. Both men were denied service of alcoholic beverages. (Testimony, Exhibits 9, 10, 20, 21, 26)
12. The two men left the premises through the front door. (Testimony, Exhibits 9, 10, 20, 21, 26)
13. Shortly thereafter, an altercation took place outside of the premises between the two men and other unidentified individuals. (Testimony, Exhibits 9, 10, 20, 21, 26)
14. A passer-by called 911. (Testimony, Exhibits 9, 10, 20, 21, 26)
15. At approximately 7:45 p.m. Whitman Police Officer Robert Stokinger received a radio call and responded to O'Toole's Pub. (Testimony, Exhibits 9, 10, 20, 21, 26)
16. When Officer Stokinger arrived, there were two injured men on the ground outside of the premises. (Testimony, Exhibits 9, 10, 20, 21, 26)
17. An off-duty Emergency Medical Technician was tending to one of the men. (Testimony, Exhibits 9, 10, 20, 21, 26)
18. One of the injured men told Officer Stokinger that three or four men, who were not identified, jumped him. (Testimony, Exhibits 9, 10, 20, 21, 26)
19. Officer Stokinger did not speak to anyone inside the premises. (Testimony, Exhibits 9, 10, 20, 21, 26)
20. The video surveillance system depicted patrons leaving the bar. (Testimony, Exhibits 9, 10, 20, 21, 26)

#### Second Incident - August 5, 2012

21. Whitman Police Officer William Balonis responded to O'Toole's Pub on August 5, 2012 at 1:05 a.m. as a result of a 911 call. (Testimony, Exhibits 9, 16, 20)
22. Upon arrival Officer Balonis met a woman (Female Patron) outside of O'Toole's. (Testimony, Exhibits 9, 16, 20)
23. The Female Patron informed the Officer that she had called 911. She told the Officer that she had been inside O'Toole's and was assaulted by employee Dean Gardner. (Testimony, Exhibits 9, 16, 20)

24. Female Patron told the Officer that Mr. Gardner had grabbed her by the arm, took her alcoholic beverage away from her, called her names, and rushed her out the door. (Testimony, Exhibits 9, 16, 20)
25. Mr. Gardner explained to the Officer that the Female Patron had refused to leave the premises at the 1:00 a.m. closing hour, so he grasped her by the arm, took her alcoholic beverage away, and escorted her out the door. (Testimony, Exhibits 9, 16, 20)
26. Officer Balonis determined that Female Patron was intoxicated and drove her home. (Testimony, Exhibits 9, 16, 20)

#### Third Incident – March 13, 2013

27. On March 13, 2013 at approximately 8:24 p.m. Whitman Police Officer Robert Silva received a 911 call for a disturbance inside O'Toole's Pub. (Testimony, Exhibits 9, 20, 22)
28. Whitman Police responded to the premises. (Testimony, Exhibits 9, 20, 22)
29. Officers reported a verbal altercation between patrons, who were sent on their way. (Testimony, Exhibits 9, 20, 22)

#### Fourth Incident – January 14, 2014

30. On January 19, 2014 James Doherty ("Doherty") was working inside O'Toole's Pub as the cook and bouncer. (Testimony, Exhibits 9, 12, 20, 21, 25)
31. Amanda Miller was the bartender this evening. (Testimony, Exhibits 9, 12, 20, 21, 25)
32. At approximately 12:45 a.m. an unidentified patron alerted Mr. Doherty, who was at the back of the pub, that a patron (Patron A) was jumped outside by four to six individuals. (Testimony, Exhibits 9, 12, 20, 21, 25)
33. Mr. Doherty went outside and saw Patron A inside his truck, which was parked across the street from O'Toole's. (Testimony, Exhibits 9, 12, 20, 21, 25)
34. Patron A told Mr. Doherty that he had been pulled out of his car and beaten by five or six males. (Testimony, Exhibits 9, 12, 20, 21, 25)
35. Patron A sustained injuries to his eyes, nose, and his mouth. (Testimony, Exhibits 9, 12, 20, 21, 25)
36. Mr. Doherty did not call 911 because he was not carrying his cell phone. (Testimony, Exhibits 9, 12, 20, 21, 25)
37. A short time later, a second fight erupted outside the licensed premises between Patron A and two of the men involved in the first altercation. (Testimony, Exhibits 9, 12, 20, 21, 25)
38. Two 911 calls were placed. (Testimony, Exhibits 9, 12, 20, 21, 25)

39. Whitman Police Officer John Cormier and other officers responded to O'Toole's Pub. (Testimony, Exhibits 9, 12, 20, 21, 25)
40. When officers arrived, there was an unconscious male lying on the ground in the parking lot next to the premises. (Testimony, Exhibits 9, 12, 20, 21, 25)
41. Patron A had been inside O'Toole's drinking water. (Testimony, Exhibits 9, 12, 20, 21, 25)
42. Neither of these altercations took place inside the premises. (Testimony, Exhibits 9, 12, 20, 21, 25)
43. Officer Cormier did not go inside O'Toole's. (Testimony, Exhibits 9, 12, 20, 21, 25)

Fifth Incident – February 2, 2014

44. During the late evening of Saturday, February 1, 2014, into the early morning of Sunday, February 2, 2014, Mr. Doherty was working security at O'Toole's. (Testimony, Exhibits 9, 14, 15, 20, 21, 23, 24)
45. Amanda Miller and Kerri Egan were the bartenders. (Testimony)
46. Mr. O'Toole was not present. (Testimony)
47. Between 11:00 p.m. and 11:30 p.m. a group of approximately 30 people (comprised of 15 couples) arrived at O'Toole's after attending a Whitman Little League fundraiser (little league group) at the V.F.W. Post in Whitman. (Testimony, Exhibits 9, 14, 15, 20, 21, 23, 24)
48. This little league group consumed alcoholic beverages for several hours at the fundraiser. (Testimony, Exhibits 9, 14, 15, 20, 21, 23, 24)
49. At O'Toole's the little league group consumed alcoholic beverages for approximately one and a half to two hours. (Testimony, Exhibits 9, 14, 15, 20, 21, 23, 24)
50. At closing time, James Fosdick and Glenn Bosse started having a verbal altercation across the bar from Tom Meehan. (Testimony)
51. Mr. Bosse and Mr. Meehan were members of the little league group, but Mr. Fosdick was not. (Testimony)
52. As the verbal altercation escalated, Mr. Bosse and Mr. Fosdick moved within reaching distance of each other. Mr. Meehan physically intervened by standing in between the two men. (Testimony)
53. As Mr. Meehan attempted to de-escalate the argument, he looked for Mr. Doherty, whom he knew to be security, to help stop the fight. (Testimony)
54. Mr. Doherty was standing three to four feet away with his arms crossed, watching the altercation unfold. (Testimony)
55. Mr. Doherty did not intervene to stop the altercation. (Testimony)

56. The argument turned physical when Mr. Fosdick tried to shove Mr. Meehan out of the way to get to Mr. Bosse. (Testimony)
57. At some point, Mr. Bosse struck Mr. Fosdick in the head with a beer bottle. (Testimony)
58. In this fight the lottery machine was pushed over. (Testimony, Exhibit 18)
59. It was not until this time that Mr. Doherty, as security, intervened by pushing both Mr. Fosdick and Mr. Meehan to the ground. (Testimony)
60. While Mr. Doherty sat on top of Mr. Fosdick and Mr. Meehan, Mr. Bosse, who was not on the ground, kicked Mr. Fosdick in the head, causing significant injuries. (Testimony)
61. Many patrons who saw the fight began yelling to call 911 and the police. (Testimony)
62. Ms. Egan, who was tending the bar, placed a 911 call from her cell phone. (Testimony)
63. Whitman Police Officers and Emergency Medical Services responded to O'Toole's as a result of the 911 call. (Testimony)

#### 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) citing United Food Corp v. Alcoholic Beverages Control Comm'n, 375 Mass. 240 (1978). 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.

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. 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 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 (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 that the Licensee committed the violations alleged on May 27, 2012; August 5, 2012; March 13, 2013; January 19, 2014; and February 2, 2014. The Local Board suspended the license for five (5) days, for violations arising from these five incidents. (Exhibit 9) The Commission will discuss each incident and the resulting charges individually.

#### May 27, 2012 - First Incident

The Licensee is charged with four (4) violations:

- 1) Improper Management of the licensed premises in violation of G.L. chapter 138, section 23;
- 2) Permitting a disorder, disturbance, illegality on the licensed premises in violation of 204 CMR 2.05 (2), specifically a verbal altercation on the premises which escalated to a physical altercation immediately outside the licensed premises and which resulted in serious injuries to two (2) patrons;
- 3) Failure to properly exercise a duty of care to prevent foreseeable harm to these patrons, as O'Toole's pub staff members failed to take action or contact the police, although it was foreseeable from the verbal altercation that a physical altercation may occur; and
- 4) Failure to effectively communicate with Whitman Police Department to prevent the physical altercation and /or to allow for an appropriate response to such altercation, specifically there is no evidence that O'Toole's Pub staff members reported the verbal altercation to the police prior to the physical altercation and O'Toole's Pub staff members were unable to identify those patrons who were responsible for the injuries sustained by the two male victims even though the assailants had been in O'Toole's Pub both before and after the attack. (Exhibit 9)

#### 1) Improper Management of the licensed premises in violation of G.L. chapter 138, § 23

The Licensee is charged with Improper Management of the licensed premises in violation of G.L. c. 138, § 23, for each of the five (5) incidents. Chapter 138, § 23, states in pertinent part:

*"Whenever, in the opinion of the local licensing authorities, any applicant for a license under section twelve, fourteen, fifteen or thirty A fails to establish to their satisfaction his compliance with the requirements of this chapter, or any other reasonable requirements which they may from time to time make with respect to licenses under said sections, respectively, or to the conduct of business by any licensee thereunder, said authorities may refuse to issue or reissue to such applicant any such license; and whenever in their opinion any holder of such a license fails to maintain compliance with this chapter or it appears that alcoholic beverages are being or have been sold, served or drunk therein in violation of any provision of this chapter, they may, after hearing or opportunity therefor, modify, suspend, revoke or cancel*

such license, or may levy a fine in accordance with regulations which shall be promulgated by the alcoholic beverages control commission . . . .”

M.G.L. Ch. 138, § 23. (Emphasis supplied.)

The Local Board does not specifically articulate what constitutes improper management, other than alleging a blanket violation of § 23. Likewise, this allegation does not state a violation of any of the alcoholic beverage laws with sufficient particularity to give adequate notice as to what violation, if any, the Licensee is charged with committing. Therefore, the Commission does not make any findings regarding the five (5) allegations of improper management and finds that the Licensee did not commit these violations.

2) & 3) Permitting a disorder, disturbance, illegality on the licensed premises & failure to properly exercise a duty of care to prevent foreseeable harm to patrons

As both of these are effectively charges of violations of 204 C.M.R. 2.05(2), the Commission's analysis of these two charges is the same.

204 CMR 2.05 (2) states: “No 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 Licensee's obligations 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.

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). (Italics supplied.) 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 only on or about the premises.” See Gustafson v. Mathews, 109 Ill.App.3d 884, 65 Ill. Dec. 475, 441 N.E.2d 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 patron 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 (1955); Carey, 355 Mass. at 451.

The Local Board did not produce any evidence to substantiate these charges. It did not meet its burden of proof for any of these allegations that occurred on May 27, 2012. The Local Board did not produce any direct evidence or percipient witnesses to the events that transpired inside or outside the licensed premises. Furthermore, these violations occurred several years ago, and are extremely stale. The only evidence before the Commission was that Officer Stokinger was dispatched to O’Toole’s as a result of a radio call. Upon arrival he observed two men who were injured. Officer Stokinger did not speak to anyone inside the pub on this evening, and could only testify to what he observed outside the premises after the incident occurred, and what the injured patrons told him. Mr. O’Toole testified that he arrived at the premises and went to his office. There were a few patrons inside the pub. Mr. O’Toole was in his office when he heard loud voices in the bar. He turned on the video surveillance camera and observed two patrons leaving the bar, followed by another patron. He went outside and observed two injured men on the ground. A 911 call had been already been placed by that time.

However, even if substantial evidence had been introduced regarding the incident, there could be no violation based on these facts. In order for the licensee to have permitted an illegality on its premises, the licensee must have notice that that harm is 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 this incident occurring. Evidence of the factors which the Commission has found in the past to be controlling in finding a violation of permitting an illegality are absent in this matter. The pub was not overcrowded. See Diamante Restaurant, Inc. d/b/a Diamante Restaurant (ABCC Decision September 7, 2012). The two men who were injured were not served alcohol inside the premises, and were only inside the premises for a short period of time before they left. There was no evidence of a verbal altercation inside the premises. As a result, there was no indication that the patrons’ conduct should 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.

Since the Licensee could not have foreseen the assault, it could not have prevented it. The duty to protect patrons may be triggered when the conduct of another person puts a licensee or its employees on notice that harm is imminent. There was no evidence of any conduct that put the Licensee on notice of imminent harm that was foreseeable and that the Licensee could have prevented. See Father’s Huddle Café, 57 Mass. App. Ct. 217 (2003).

Furthermore, this incident occurred outside the premises. To the extent that the Local Board charged this violation for conduct that occurred outside the premises, there was no violation of 204 C.M.R. 2.05(2), to wit: a physical altercation immediately outside the licensed premises and

which resulted in serious injuries to two (2) patrons. See North Street Market Place, LLC, d/b/a Jae's Spice (ABCC Decision September 29, 2010) (204 C.M.R. 2.05(2) only applies to disturbances, disorder, or illegalities occurring in or on licensed premises, and not "around" the licensed premises).

4) Failure to effectively communicate with Whitman Police Department to prevent the illegality

The Licensee is also charged with failure to effectively communicate with Whitman Police to prevent the physical altercation. The Commission has determined that the Licensee did not permit a disturbance, it was not foreseeable, and it occurred outside the premises. Therefore, even if the Licensee had called 911, it would not have prevented the assault. Further, the Local Board lacks any rules requiring a Licensee to call 911. Without written rules, the Licensee could not have been aware that it could be charged with any violation for not calling 911. Furthermore, when the license manager, Mr. O'Toole, learned of the incident, a 911 call had already been placed. The Commission determines that the Licensee did not commit this violation.

Ultimately, the Commission was not presented with any evidence as to what actually transpired during the altercation to prove these allegations. The incident occurred outside the premises, and there was no evidence offered to prove any of the factors that would indicate that the Licensee was on notice of foreseeable imminent harm and could have prevented it. As the Commission finds that the Licensee did not permit an illegality, the Commission determines that there is no violation for the Licensee's failure to call 911. The Commission finds that the Licensee committed no violations as a result of the May 27, 2012 incident.

August 5, 2012 - Second Incident

The Licensee is charged with committing two (2) violations for the night of August 5, 2012:

- 1) Improper management of the licensed premises in violation of G.L. Ch. 138, § 23;
- 2) Permitting a disorder, disturbance, or illegality on the licensed premises in violation of 204 CMR 2.05 (2), specifically: (1) service of an intoxicated person; and
- 3) Permitting a disturbance for which police intervention was required to restore peace. (Exhibit 9)

1) Improper management of the licensed premises in violation of G.L. Ch. 138, § 23

The Commission, as discussed *supra*, makes no findings regarding the charge of improper management.

2(1)) "Permitting an Illegality on the licensed premises in violation of 204 CMR 2.05 (2), specifically service of an intoxicated person . . . ."

The Licensee is charged with permitting an illegality on the premises, to wit: service to an intoxicated person in violation of M.G.L. c. 138, § 69. Section 69 states: "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.

In order to prove this violation, the Local Board must prove five elements: (1) that an individual was intoxicated; (2) on the licensed premises; (3) that an employee of the licensed premises (4) knew or reasonably should have known that the individual was intoxicated; and (5) 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 v. Polish Am. Citizens Club of Deerfield, Inc., 422 Mass. 606, 609 (1996). "[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, 422 Mass. at 609 (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." Vickowski, 422 Mass. at 610; accord McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 161 (1986).

The Local Board presented no evidence to prove this allegation. Furthermore, similar to the prior allegations, this allegation is extremely remote in time. The Local Board did not produce any witnesses with direct knowledge of any of the elements necessary to support a finding of a violation of M.G.L. c. 138, § 69. Officer Balonis did not testify before the Commission, the female patron who was allegedly overserved did not appear, and the bartender/employee who allegedly served the patron did not appear before the Commission. The only evidence submitted to the Commission regarding this incident were police reports read into the record by Whitman Chief of Police Scott Benton about what occurred after the service of alcoholic beverages. The relevant time period for this charge is the time of service of alcoholic beverages. Chief Benton was not a percipient witness to this incident. A non-eyewitness police report, by itself, does not rise to the level of substantial evidence. Dolphino Corp., 29 Mass. App. Ct. at 955, citing Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 473-476 (1989). The Commission was not presented with any direct evidence that this patron was inside the premises, or that this patron was served alcoholic beverages inside the premises, let alone that when she was served an alcoholic beverage inside the premises she was exhibiting visible and obvious signs of intoxication.

2(2)) Permitting a disorder, disturbance, or illegality on the licensed premises in violation of 204 CMR 2.05 (2), specifically . . . permitting a disturbance for which police intervention was required to restore peace.

The Licensee is also charged with permitting an illegality, a disturbance for which police intervention was required to restore peace. Once again, the Local Board did not produce any evidence, let alone substantial evidence, to sustain its burden of proving this allegation. The Commission was again presented entirely with uncorroborated hearsay evidence in the nature of police reports as proof that these incidents and violations occurred. Uncorroborated hearsay statements in a police report do not constitute substantial evidence in an administrative hearing before the Commission. See Dolphino, 29 Mass. App. Ct. 954 (1991). The Commission finds that the Local Board has not presented any evidence that these violations occurred, and thus, has not met its burden of proof. Therefore, based on a lack of evidence, the Commission determines that the Licensee committed no violations as a result of the August 5, 2012 incident.

### March 13, 2013- Third Incident

The Licensee is charged with violations arising from the night of March 13, 2013:

- 1) Improper Management of the licensed premises in violation of G.L. Ch. 138, § 23;
- 2) Permitting a disorder, disturbance, or illegality on the licensed premise in violation of 204 CMR 2.05(2) specifically a verbal altercation among patrons;
- 3) Failure to effectively communicate with the Whitman Police Department to prevent the altercation and /or prevent the altercation from escalating. (Exhibit 9)

#### 1) Improper Management of the licensed premises in violation of G.L. Ch. 138, § 23

As previously stated *supra*, the Commission makes no findings regarding the charge of improper management.

#### 2 & 3) Permitting a disorder, disturbance, or illegality on the licensed premise in violation of 204 CMR 2.05(2) specifically (1) a verbal altercation among patrons; and (2) failure to effectively communicate with the Whitman Police Department to prevent the altercation and /or prevent the altercation from escalating

The Local Board did not produce any evidence to substantiate these allegations. The Local Board produced no witnesses -- not the police officer, patrons, nor Licensee employees -- with any direct knowledge of this incident. The only evidence which the Local Board presented was uncorroborated hearsay in the nature of police reports submitted in evidence. The Commission finds that the Local Board did not meet its burden. Therefore, based on the complete lack of evidence, the Commission determines that no violations were committed by the Licensee for the March 13, 2013 incident.

### January 19, 2014 - Fourth Incident

The Licensee is charged with the following violations arising out of the night of January 19, 2014:

- 1) Improper management of the licensed premises in violation of G.L. Ch. 138, § 23;
- 2) Permitting a disorder disturbance or illegality on the licensed premises in violation of 204 CMR 2.05(2), specifically, permitting a physical altercation resulting in serious injuries to two patrons and the issuance of criminal charges against five (5) male parties;
- 3) Failure to properly exercise a duty of care to prevent foreseeable harm to these patrons; and
- 4) Failure to effectively communicate with the Whitman Police Department to prevent the physical altercation and/or to allow for an appropriate response to such altercation, specifically, there is no evidence that O'Toole's staff reported the altercation to the police. (Exhibit 9)

1) Improper management of the licensed premises in violation of G.L. Ch. 138, § 23

The Commission, as discussed *supra*, makes no findings regarding the charge of improper management.

2 – Permitting a disorder disturbance or illegality on the licensed premises in violation of 204 CMR 2.05(2), specifically, (1) permitting a physical altercation resulting in serious injuries to two patrons and the issuance of criminal charges against five male parties; (2) failure to properly exercise a duty of care to prevent foreseeable harm to these patrons; and (3) failure to effectively communicate with the Whitman Police Department to prevent the physical altercation and/or to allow for an appropriate response to such altercation, specifically, there is no evidence that O'Toole's staff reported the altercation to the police.

The Licensee is charged with permitting an illegality in violation of 204 CMR 2.05(2), specifically, permitting a physical altercation resulting in serious injuries to two patrons and the issuance of criminal charges against five (5) male parties; failure to properly exercise a duty of care to prevent foreseeable harm to these patrons; and failure to call the police. In evaluating the evidence presented, the Commission, once again, finds there was no evidence presented by the Local Board to substantiate these charges. The Local Board presented no evidence that prior to the altercation outside of the premises, there was an altercation inside the pub, or any conduct that would put the Licensee on notice of imminent harm. See *Father's Huddle Café*, 57 Mass. App. Ct. 217 (2003). The Local Board did not present any of the individuals involved in the altercation to testify before the Commission. The altercation occurred outside and across the street from the pub. Someone told Licensee employee James Doherty that there was a fight outside and across the street. Doherty left the premises, ran across the street, and tried to help the injured parties. Doherty did not call the police because he was not carrying his cell phone.

In analyzing the allegations of permitting an illegality, to wit: an altercation resulting in injuries, and failure to exercise a duty of care to prevent foreseeable harm to patrons, the Commission, having previously addressed the legal framework, finds there was no evidence that the Licensee permitted an illegality. There was no evidence as to what if any nexus there was to O'Toole's. There was no evidence presented that any altercations, verbal or physical, occurred inside the premises prior to the incident. There was no evidence of how the incident transpired. The only nexus to O'Toole's was that one of the patrons had been inside O'Toole's earlier that evening, drinking ice water.

Furthermore, the incident happened outside of the premises, and across the street. The Commission finds that the Local Board has not proven by substantial evidence that the Licensee permitted an illegality, an altercation, which was foreseeable. As the Commission finds that the Licensee did not permit an illegality, the Commission determines that there is no violation for the Licensee's failure to call the police. The Commission finds, based on the prior legal analysis/discussion and the lack of evidence submitted by the Local Board, that no violations were committed by the Licensee as to all allegations for the March 13, 2013 incident.

February 2, 2014 – Fifth Incident

Finally, from the night of February 2, 2014, the Licensee is charged with the following:

- 1) Improper management of the licensed premises in violation of G.L. Ch. 138, § 23;
- 2) Permitting a disorder disturbance or illegality on the licensed premises, in violation of 204 CMR 2.05 (2). Specifically, instructing patrons and staff not to report a physical altercation as the result of which one patron sustained a serious head injury and criminal charges were issued against the other patron;
- 3) Failure to properly exercise a duty of care to prevent foreseeable harm to these patrons, as instead of immediately reporting the incident to police and injures to first responders, an O'Toole's staff member instructed patrons and staff not to call police; and
- 4) Failure to effectively communicate with the Whitman Police Department to prevent the physical altercation and/or to allow for an appropriate response to such altercation, specifically, an O'Toole's pub staff instructed patrons and staff members not to report the altercation to the police. (Exhibit 9)

1) Improper management of the licensed premises in violation of G.L. Ch. 138, § 23

The Commission, as discussed *supra*, makes no findings regarding the charge of improper management.

2 -4 ) Permitting a disorder disturbance or illegality on the licensed premises, in violation of 204 CMR 2.05 (2), specifically (1) instructing patrons and staff not to report a physical altercation as the result of which one patron sustained a serious head injury and criminal charges were issued against the other patron; (2) failure to properly exercise a duty of care to prevent foreseeable harm to these patrons, as instead of immediately reporting the incident to police and injures to first responders, an O'Toole's staff member instructed patrons and staff not to call police; and (3) failure to effectively communicate with the Whitman Police Department to prevent the physical altercation and/or to allow for an appropriate response to such altercation, specifically, an O'Toole's pub staff instructed patrons and staff members not to report the altercation to the police.

The Commission heard evidence from multiple witnesses, including Tom Meehan, James Doherty, and Kerri Egan, regarding the events of this evening. Glenn Bosse and James Fosdick did not appear before the Commission. The Commission has carefully considered and evaluated all of the evidence presented. Two men were arguing inside the premises and a third patron attempted to break it up. Despite his efforts, the verbal argument escalated into a physical confrontation. While patron Meehan was standing between the two men, he looked for Doherty, who was working as security, to intervene and help him stop the fight. However, while the verbal altercation was escalating, Doherty was standing three to four feet away, with his arms crossed, watching the argument instead of breaking it up. Doherty did not intervene until the fight had escalated to a physical altercation resulting in injuries to patrons and a machine being knocked over.

The licensee has a duty to prevent foreseeable harm to its patrons. See Westerback v. Harold F. Leclair Co., Inc., 50 Mass. App. Ct. 144 (2000). This physical disturbance was undoubtedly foreseeable. Doherty was put on notice that a physical altercation would likely occur based on

his viewing a verbal altercation that was so certain to escalate into physicality that the two individuals approached each other from across the bar while arguing, and another patron had to place himself in between the two of them. The Commission finds that it was foreseeable that a physical altercation and imminent harm to patrons would result. See Father's Huddle Café, 57 Mass. App. Ct. 217, (2003).

This matter is similar to previous cases before the Commission that established foreseeability of a patron-on-patron assault. See Kane, 341 Mass. at 641 (bartender observed a boisterous patron engage in "words back and forth," "loud talk," and "a lot of commotion" before the patron charged the plaintiff and landed on him); Carey, 355 Mass. at 451 (patron, who was part of a group across the aisle from the plaintiff that was "making a lot of noise," "talking loud," "getting up and jumping around," and then shot the plaintiff); Greco v. Sumner Tavern, Inc., 333 Mass. 144, 145 (1955) (foreseeability where intoxicated patron was boisterous and talking loudly, "antagonizing" other patrons fifteen minutes before assaulting the plaintiff); Trempe & Torres, Inc. d/b/a Marabu Café (ABCC Decision August 21, 2012) (where Lawrence clubs had a practice of pat-frisking for weapons at the door, where licensee did not pat-frisk or engage in usual security practices, it was foreseeable patrons could enter with weapons); Scioli Corp. d/b/a Scioli's Pizza Bar (ABCC Decision September 11, 2012) (foreseeability of imminent harm where "bouncer" working for licensee attacked a patron; when the victim spoke with the licensee about the attack, the licensee did not call the police or emergency personnel and requested that the patron not call police either; the bouncer, who was still on the premises, then attacked the victim again).

The Commission heard evidence that employee Kerri Egan called police immediately from her cell phone, and police and emergency medical responders arrived shortly thereafter. As a result, the Commission finds that the Licensee did not commit the violations of staff instructing patrons not to call the police, and the Licensee's failure to effectively communicate with the Whitman Police Department.

However, the Commission finds based on the evidence, that the Licensee committed the violation of: Permitting an illegality, a disturbance, which resulted in the licensee's failure to properly exercise a duty of care to prevent foreseeable harm to its patrons.

### CONCLUSION

#### First Incident – May 27, 2012

The Alcoholic Beverages Control Commission finds that the evidence presented at the hearing was insufficient to prove that the Licensee committed the violations of Improper Management of the licensed premises in violation of G.L. chapter 138, section 23; Permitting a disorder, disturbance, illegality on the licensed premises in violation of 204 CMR 2.05 (2); Failure to properly exercise a duty of care to prevent foreseeable harm to patrons; and Failure to effectively communicate with the Whitman Police Department to prevent a physical altercation, during the May 27, 2012 incident.

#### Second Incident - August 5, 2012

The Alcoholic Beverages Control Commission finds that the evidence presented at the hearing was insufficient to prove that the Licensee committed the violations of Improper Management of the licensed premises in violation of G.L. c. 138, § 23; Permitting a disorder, disturbance, or illegality on the licensed premises in violation of 204 CMR 2.05 (2), specifically service of an intoxicated person; and Permitting a disturbance, during the August 5, 2012 incident.

#### Third Incident – March 13, 2013

The Alcoholic Beverages Control Commission finds that the evidence presented at the hearing was insufficient to prove that the Licensee committed the violations of Improper Management of the licensed premises in violation of G.L. c. 138, § 23; Permitting a disorder, disturbance, illegality on the licensed premises in violation of 204 CMR 2.05 (2); and Failure to properly exercise a duty of care to prevent foreseeable harm to patrons, during the March 13, 2013 incident.

#### Fourth Incident – January 14, 2014

The Alcoholic Beverages Control Commission finds that the evidence presented at the hearing was insufficient to prove that the Licensee committed the violations of Improper Management of the licensed premises in violation of G.L. c. 138, § 23; Permitting a disorder, disturbance, illegality on the licensed premises in violation of 204 CMR 2.05 (2); Failure to properly exercise a duty of care to prevent foreseeable harm to patrons; and Failure to effectively communicate with the Whitman Police Department to prevent a physical altercation during the January 19, 2014 incident.

#### Fifth Incident- February 2, 2014

The Alcoholic Beverages Control Commission finds that the evidence presented at the hearing was insufficient to prove that the Licensee committed the violations of Improper Management of the licensed premises in violation of G.L. c. 138, § 23; Staff instructing patrons not to report a physical altercation resulting in injuries to a patron; and Failure to effectively communicate with the Whitman Police Department, during the February 2, 2014 incident.

Based on the evidence, the Commission finds that the Licensee committed the violation of: Permitting an illegality, a disturbance, which resulted in the licensee's failure to properly exercise a duty of care to prevent foreseeable harm to its patrons.



### DISPOSITION

Based on the evidence, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Town of Whitman Board of Selectmen in finding violations for four incidents on May 27, 2012; August 5, 2012; March 13, 2013; and January 14, 2014.

Further, the Commission **DISAPPROVES** the action of the Town of Whitman Board of Selectmen in finding that on February 2, 2014 the Licensee committed violations of Improper management of the licensed premises G.L. c. 138, § 23; Staff instructing patrons not to report to Whitman police a physical altercation resulting in injuries to a patron; and Failure to effectively communicate with the Whitman Police Department.

The Commission **APPROVES** the action of the Town of Whitman Board of Selectmen in finding that on February 2, 2014, the Licensee committed the violation of Permitting a an illegality, a disturbance, on the licensed premises in violation of 204 CMR 2.05 (2), which resulted in the licensee's failure to properly exercise a duty of care to prevent foreseeable harm to its patrons.

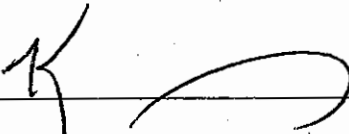
The Local Board imposed a five day suspension for finding violations on five separate dates over the course of three years. While it provided no explanation as to why it decided on a five day suspension, the Commission assumes the Local Board intended to suspend the Licensee's license for each date there were violations. Following the Local Board's presumed logic, and because the Commission only finds violations on one date, the Commission recommends that the Licensee's license be suspended for one day.

### **ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kathleen McNally, Commissioner



Kim S. Gainsboro, Chairman



Dated: December 17, 2015

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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Local Licensing Board  
Administration, File