

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

NOTICE OF SUSPENSION

August 14, 2013

HANG TAI ENTERPRISES, LLC D/B/A HANG TAI TOO
75 MAIN STREET
MEDWAY, MA 02053
LICENSE#: 068400022
VIOLATION DATE: 10/11/2010
HEARD: 05/08/2012 and 06/27/2012

After hearings on May 8, 2012, and June 27, 2012, the Commission finds Hang Tai Enterprises, LLC d/b/a Hang Tai Too in violation of:

- 1) 204 CMR 2.05(2) – Permitting an Illegality on the Licensed Premises, to wit: M.G.L. c. 138, §34C – Possession of an Alcoholic Beverage by a Person under twenty-one (21) years of age (3 counts); and
- 2) 204 CMR 2.05(2) – Permitting an Illegality on the Licensed Premises, to wit: M.G.L. c. 138, §69 – Sale or Delivery of an Alcoholic Beverage to an Intoxicated Person (2 counts).

Based on the evidence, the Commission imposes the following penalties for the stated violations it finds the Licensee violated:

- 1) For violating 204 CMR 2.05 (2) - Permitting an illegality on the Licensed Premises, to wit: M.G.L. c. 138, §34C (Count 1 to James Paquette, age twenty (20) on the date of this violation) – **INDEFINITE SUSPENSION of the license effective forthwith** until further written order of the Commission. No such order shall be considered by the Commission until the Commission approves an application to be filed by Hang Tai to change the license manager to an individual who was not involved in the events that were the basis of this violation;
- 2) 204 CMR 2.05 (2) - Permitting an illegality on the Licensed Premises, to wit: M.G.L. c. 138, §34C (Count 2 to Christina Richard, age eighteen (18) on the date of this violation), the license is **suspended for forty-five (45) days from and after the date the indefinite suspension is revised by the commission;**
- 3) For violating 204 CMR 2.05 (2) - Permitting an illegality on the Licensed Premises, to wit: M.G.L. c. 138, §34C (Count 3 to Jeffrey Carroll, age twenty (20) on the date of this violation), the license is **suspended for forty-five (45) days, from and after the date of the forty-five (45) day suspension in sub-paragraph 2 above;**
- 4) For violating 204 CMR 2.05(2) – Permitting an Illegality on the Licensed Premises, to wit: M.G.L. c. 138, §69 (Count 1 to Christina Richard, age eighteen (18) on the date of this violation), the license is **suspended for forty-five (45) days of which forty-five (45) days will be held in abeyance for a period of three (3) years, provided no further violations of**

Commission Regulations occur. The abeyance period will begin from and after the date the indefinite suspension is revised by the Commission;

- 5) For violating 204 CMR 2.05(2) – Permitting an Illegality on the Licensed Premises, to wit: M.G.L. c. 138, §69 (Count 2 to James Paquette, age twenty (20) on the date of this violation), the license is **suspended for forty-five (45) days, from and after the date of the forty-five (45) day suspension in sub-paragraph 4, of which forty-five (45) days will be held in abeyance for a period of three (3) years, provided no further violations of Chapter 138 or Commission Regulations occur. The abeyance period will begin from and after the date the indefinite suspension is revised by the Commission.**

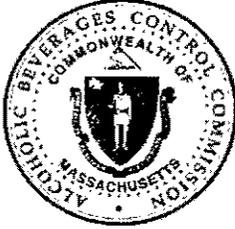
You are advised that you have the right to appeal this decision under M.G.L. c. 30A to Superior Court within thirty (30) days upon receipt of this notice.

ALCOHOLIC BEVERAGES CONTROL COMMISSION



Kim S. Gainsboro
Chairman

cc: Charles M. MacLean, Esq.
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Michael Teehan, Investigator
Administration
File



The Commonwealth of Massachusetts
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DECISION

HANG TAI ENTERPRISES, LLC D/B/A HANG TAI TOO
75 MAIN STREET
MEDWAY, MA 02053
LICENSE#: 068400022
VIOLATION DATE: 10/11/2010
HEARD: 05/08/2012 and 06/27/2012

Hang Tai Enterprises, LLC d/b/a Hang Tai Too (the "Licensee" or "Hang Tai") holds an all-alcoholic beverages restaurant-type license issued pursuant to M.G.L. c. 138, §12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Tuesday, May 8, 2012, and on Wednesday, June 27, 2012, regarding alleged violations of:

- 1) 204 CMR 2.05(2) – Permitting an Illegality on the Licensed Premises, to wit: M.G.L. c. 138, §34C – Possession of an Alcoholic Beverage by a Person under twenty-one (21) years of age (3 counts); and
- 2) 204 CMR 2.05(2) – Permitting an Illegality on the Licensed Premises, to wit: M.G.L. c. 138, §69 – Sale or Delivery of an Alcoholic Beverage to an Intoxicated Person (2 counts).

The following documents are in evidence as exhibits:

1. Investigator Michael Teehan's Investigative Field Report (3 pages);
2. Medway Police Department Report of Medway Police Officer John Meincke (10 pages);
3. Voluntary Statement of Christina Richard, dated January 28, 2011 (2 pages);
4. Affidavit of Christina Richard, dated November 28, 2011 (2 pages);
5. Lab Report of Blood Alcohol Serum Test of Christina Richard (1 page);
6. Massachusetts Drivers' Licenses recovered from accident scene by Police Officer John Meincke (1 page) of:
 - a. Robert A. Paquette (d.o.b. [REDACTED]) expiration date: [REDACTED], 2008; and
 - b. Andrea L. Richard (d.o.b. [REDACTED]) expiration date: [REDACTED] 2013;
7. Printout of Massachusetts Driver's License of James Paquette with photograph, (d.o.b. [REDACTED]), issued on November 01, 2006, expiration date: [REDACTED] 2011(1 page);
8. Printout of Massachusetts Driver's License of Jeffrey Carroll with photograph, (d.o.b. [REDACTED]) issued on October 06, 2008, expiration date: [REDACTED] 2013 (1 page);
9. Printout of Massachusetts Driver's License of Christina Richard with photograph, (d.o.b. [REDACTED]) issued on November 30, 2010, expiration date: [REDACTED] 2015 (1 page);
10. Voluntary Statement of Sandra Paquette, dated January 28, 2011 (3 pages);
11. Google Map and Directions from 75 Main St. Medway, Massachusetts to 45 Holliston St. Medway, Massachusetts (3 pages);

12. Deposition of Christina Richard, pages 1 through 104 reduced to 4 pages per page (26 large pages);
 13. Massachusetts State Police Collision Analysis and Reconstruction Report (10 pages).
- A. Letter from Attorney Charles MacLean to Medway Police Chief Tingley dated October 18, 2010 (2 pages);
 - B. Letter from Attorney Charles MacLean to Alcoholic Beverages Control Commission Investigator Michael Teehan (2 pages);
 - C. Massachusetts State Police Department Office of Alcohol Testing Serum Conversion Chart (2 pages).

There is one (1) audio recording of this hearing, and eight (8) witnesses testified.

FACTS

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

1. Hang Tai Enterprises, LLC d/b/a Hang Tai, Too, is the holder of an all-alcoholic beverages restaurant license originally issued in 2005 by the Town of Medway. The licensed premises is a restaurant with one hundred (100) seats, a lounge, dining room, and kitchen. The establishment is located at 75 Main Street, Medway, Massachusetts. (Commission records, Testimony)
2. Christina Richard, eighteen (18) years old, with a date of birth of [REDACTED] and James Paquette, age twenty (20), with a date of birth [REDACTED] were romantically involved for approximately one (1) year prior to the evening of October 11, 2010. Ms. Richard also lived for approximately seven (7) or eight (8) months with Mr. Paquette, his parents, and his brother Robert in Norfolk, Massachusetts. (Exhibits 3, 4, Testimony)
3. Monday, October 11, 2010, Ms. Richard went to work at a shipping and receiving warehouse. Mr. Paquette visited Ms. Richard at her workplace during lunch time. Mr. Paquette picked up Ms. Richard at the end of her shift at 5:30 p.m. (Exhibits 3, 4, 12, Testimony)
4. They then drove to the Hang Tai, which was approximately a fifteen (15) minute ride from her workplace. (Exhibits 3, 4, 12, Testimony)
5. They arrived at the Hang Tai a little before 6:00 p.m. Initially, they sat in the restaurant section of the premises, at a table in a booth. They ordered food, and each had something small to eat, that is, appetizers, such as chicken wings and rice. They each consumed several drinks of alcoholic beverages. Ms. Richard and Mr. Paquette both were served a large scorpion bowl for their first drink. (Exhibits 3, 4, 12, Testimony)
6. They shared the scorpion bowl because it was large and it came with two (2) straws. An Asian woman served them their alcoholic beverages while seated at this table. The waitress did not request to see proof of age from either of them. After consuming the scorpion bowl, Ms. Richard and Mr. Paquette were served additional alcoholic beverages before their friend Greg Bowman arrived. (Exhibits 3, 4, 12, Testimony)
7. Mr. Bowman was meeting Ms. Richard and Mr. Paquette to celebrate the fact that Mr. Bowman was being deployed for military service the following day. After Mr. Bowman arrived, Ms.

- Richard and Mr. Paquette each consumed additional alcoholic beverages. (Exhibits 3, 4, 12, Testimony)
8. Mr. Paquette and Ms. Richard each consumed four (4) to five (5), sixteen (16) ounce alcoholic beverages apiece, including the scorpion bowl, while seated at the table in the restaurant section. (Exhibits 3, 4, 12, Testimony)
 9. Once Ms. Richard and Mr. Paquette were finished eating, the three (3) friends moved to the lounge/bar area. Mr. Paquette and Ms. Richard each pulled up a seat at the bar and continued to order alcoholic beverages. While Ms. Richard and Mr. Paquette were seated at the bar, neither Ms. Richard nor Mr. Paquette was asked to present an identification or proof of age before being served alcohol. (Exhibits 3, 4, 12, Testimony)
 10. Another friend of theirs, Mr. Jeffrey Carroll, age twenty (20), date of birth [REDACTED] arrived at the Hang Tai and started drinking alcoholic beverages with Ms. Richard and Mr. Paquette. (Exhibits 3, 4, 8, 12, Testimony)
 11. Ms. Richard testified that Mr. Carroll joined her and Mr. Paquette at the bar. Mr. Carroll had one (1) or two (2) alcoholic beverages while in the company of Ms. Richard. Mr. Carroll was not asked to present an identification or proof of age before being served alcohol. (Exhibits 3, 4, 12, Testimony)
 12. While Mr. Paquette and Ms. Richard were seated at the bar, they consumed many alcoholic beverages in a short period of time. Mr. Paquette ordered drinks from Jamie Shi, the bartender stationed behind the bar, who placed the drinks directly in front of both Ms. Richard and Mr. Paquette. They did not eat while they were sitting at the bar. (Exhibits 3, 4, 12, Testimony)
 13. While at the bar, Ms. Richard and Mr. Paquette joked that they were making their way through all the drinks on the menu. Ms. Richard drank sixteen (16) ounce alcoholic beverages that she described as "fruity". They contained a mixture of distilled spirits and fruit juices. (Exhibits 4, 12, Testimony)
 14. Ms. Richard did not remember the exact order in which she and Mr. Paquette consumed the alcoholic beverages, however she did remember that they were drinking mixed drinks. In addition to the scorpion bowl they shared in the restaurant, Ms. Richard admitted that she and Mr. Paquette possessed and drank cocktails that were named "laser beams", "zombies", "kamikazes", and a "strawberry colada." Mr. Paquette also possessed cocktails named "mai tais". (Exhibit 1, 12, Testimony)
 15. Ms. Richard and Mr. Paquette each ordered a strawberry colada for their last drink of the night. Mr. Paquette ordered the drinks from the bartender who directly served each individual their drink. Ms. Richard and Mr. Paquette both finished these coladas, after which they went outside to smoke cigarettes. They were outside the Hang Tai for approximately ten (10) minutes talking and smoking. (Exhibits 1, 2, 3, 4, 12, Testimony)
 16. Mr. Jamie Shi started work at 11:00 a.m. and worked until closing time. Mr. Shi testified that the bar was not busy that evening, as it was a holiday and the bar is not normally busy on a holiday. (Testimony)
 17. Mr. Shi has been a bartender for seventeen (17) years and has been trained in the safe service of alcoholic beverages. He claimed that he checks identifications and he is a professional bartender.

- Mr. Shi “free pours” the drinks, that is, he does not use a shot glass or other device to measure the volume of alcoholic beverages being poured into any mixed drink. (Testimony)
18. Mr. Shi admitted that he served Ms. Richard a “smaller,” sixteen (16) ounce, scorpion bowl with one (1) straw. This cocktail is a mixture of alcoholic beverages, which consists of two (2) parts alcohol and one (1) part fruit mix. (Testimony)
 19. He also admitted that he served her a mixed drink of alcoholic beverages in a shot glass that is named a kamikaze, which consists of two (2) liquors, vodka and triple sec. (Testimony)
 20. Mr. Shi further admitted that he also served her a beer. (Testimony)
 21. Mr. Shi admitted that he served Mr. Paquette a mixed drink of alcoholic beverages that is named a “zombie” which is a rum and brandy drink that was served in a twelve (12) ounce glass. (Testimony)
 22. Mr. Shi further admitted that Mr. Paquette drank, in addition to the zombie, a couple of beers, but cannot remember how many beers he drank. (Testimony)
 23. Mr. Shi also admitted that he served Mr. Paquette a “kamikaze” earlier in the evening. Mr. Shi recalled that this “kamikaze” was not Mr. Paquette’s last drink. (Testimony)
 24. Mr. Shi testified that Mr. Paquette and his friends were at the bar until approximately sometime shortly after 9:00 p.m. (Testimony)
 25. During the evening, Mr. Paquette and Mr. Carroll were discussing whose car was faster. Upon leaving the Hang Tai, Mr. Bowman and Mr. Carroll got into Mr. Carroll’s motor vehicle. Ms. Richard remembers smoking a cigarette in the Hang Tai parking lot, and then getting into Mr. Paquette’s truck. (Exhibits 3,4,12, Testimony)
 26. At 9:17 p.m. Officer Meincke of the Medway Police Department was on patrol in a marked police cruiser. He was leaving the area of Medway Commons, an industrial area, when he heard engines revving. (Exhibit 2, Testimony)
 27. Officer Meincke watched two (2) motor vehicles travelling at a high rate of speed down Holliston Street. He activated his blue lights and siren and continued heading toward the school. He noticed a large amount of dust. He pulled up to a yellow pick-up truck, and he noticed a lot of physical damage to the truck. (Exhibit 2, Testimony)
 28. Officer Meincke observed Mr. Paquette, lying on the ground with his abdomen wrapped around a sign pole. He had been ejected from the truck. Officer Meincke approached Mr. Paquette; he smelled an odor of alcohol on Mr. Paquette. Officer Meincke could see that his eyes were glassy and bloodshot. (Exhibit 2, Testimony)
 29. A good samaritan came over to Officer Meincke at the crash scene and told him there was another individual who was also injured. Officer Meincke then saw Ms. Richard lying on the ground. She had also been ejected from the truck. Officer Meincke radioed for two (2) medical flight helicopters to transport Ms. Richard and Mr. Paquette to a hospital. (Exhibit 2, Testimony)

30. Mr. Paquette died as a result of his injuries sustained in this crash. Ms. Richard was critically injured in the crash, but survived. Ms. Richard suffers problems with both her long term and short term memory due to the accident. (Exhibits 1, 2, 3, 4, 12, 13, Testimony)
31. There was no alcohol located inside or around the outside of the motor vehicle. (Exhibits 1, 2, 3, 4, 12, Testimony)
32. The autopsy results of Mr. Paquette indicate that he had a blood alcohol level of 0.11% BAC. However, there was no expert testimony explaining the significance of these results. (Testimony, Exhibit 13)
33. On September 30, 2011, Commission Investigators Kenny and Teehan visited Hang Tai to interview the bartender Mr. Shi regarding the evening of October 11, 2010. (Exhibit 1, Testimony)
34. Investigators presented Registry of Motor Vehicle photographs of Ms. Richard, Mr. Paquette, Mr. Carroll, and Mr. Bowman to Mr. Shi. (Exhibits 1, 7, 8, 9, Testimony)
35. Mr. Shi recognized Ms. Richard and Mr. Paquette from their photos. Mr. Shi remembered that they were at the bar around 6:30 p.m. with two (2) friends. (Testimony)
36. Mr. Shi admitted that the individuals drank alcoholic beverages at the Hang Tai bar on October 11, 2010. He also admitted that he served them alcoholic beverages. Mr. Shi made several claims that all provided identification to him; yet, no further facts describing the type and appearance of the identifications were provided. (Exhibits 1, 7, 8, 9, Testimony)
37. Administrative review of the Commission records for Hang Tai Enterprises, LLC D/B/A Hang Tai Too indicates no previous violations.

DISCUSSION

I. 204 CMR 2.05(2) – Permitting an Illegality on the Licensed Premises, to wit: M.G.L. Chapter 138, §34C – Possession of an Alcoholic Beverage by a Person Under Twenty-One (21) Years of Age (3 counts):

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Comm., 334 Mass. 613, 619 (1956), for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Opinion of the Justices, 368 Mass. 857, 861 (1975). The procedure for the issuance of licenses and required conduct of licensees who sell alcoholic beverages is set out in M.G.L. c. 138.

M.G.L. c. 138 gives the Commission the authority to grant, revoke and suspend licenses. Chapter 138 was “enacted... to serve the public need and ... to protect the common good.” M.G.L. c. 138, §23, as amended through St. 1977, c. 929, section 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). (Emphasis supplied). The Commission is given ‘comprehensive powers of supervision over licensees,’ Connolly v. Alcoholic Beverages Control Comm., 334 Mass. 613, 617 (1956).

The Commission is given broad authority to promulgate regulations. The Commission may make regulations for “clarifying, carrying out, enforcing and preventing violation of” statutory provisions for the “method of carrying on the business of any licensee,” and “for the proper and orderly conduct of the

licensed business.” G. L. c. 138, § 24, as appearing in St. 1971, c. 478. The Commission has exercised this authority through the promulgation of regulations that are codified at Chapter 204 of the Code of Massachusetts Regulations. The Commission also has comprehensive powers of supervision over licensees and has statutory authority (G. L. c. 138, § 64) to revoke or suspend a license for violation of a regulation. Aristocratic Restaurant of Massachusetts, Inc. v. Alcoholic Beverages Control Commission, 374 Mass. 547 (1978); Connolly v. Alcoholic Beverages Control Comm., 334 Mass. 613, 617 (1956).

A Commission regulation promulgated at 204 CMR 2.05(2) provides in pertinent part, that “[n]o 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 therefore, whether present or not.” The law is well-settled that ‘under the regulation, [204 C.M.R. 2.05(2)] the responsibility of the licensee is to exercise sufficiently close supervision so that there is compliance with the law on the premises. 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, 11 Mass. App. Ct. 785, 788 (1981). It is, thus, quite possible for a licensee to offend the regulatory scheme without scienter. The licensee is responsible for illegalities that occur on the licensed premises. Rico’s of the Berkshires, Inc. v. ABCC, 19 Mass. App. Ct. 1026, 1027 (1985) (rescript).

M.G.L. c.138, § 34C states, in pertinent part, that: “Whoever, being under twenty-one (21) years of age and not accompanied by a parent or legal guardian, knowingly possesses any alcohol or alcoholic beverages, shall be punished.” Although the Licensee argues that the three minors presented identifications before they were served and possessed alcoholic beverages at the Hang Tai, presenting an identification which purports to show that the patron is twenty-one (21) years of age, or older than twenty-one (21) years of age, is not an affirmative defense available for the statutory violation of a minor in possession of alcoholic beverages pursuant to M.G.L. c.138, § 34C.

M.G.L. c.138, § 34B provides, in pertinent part, that “[a]ny licensee, or agent or employee thereof, under this chapter, who reasonably relies on such a liquor purchase identification card, or an identification card issued under section 8E of Chapter 90, or motor vehicle license issued pursuant to said section 8, for proof of a person’s identity and age shall be presumed to have exercised due care in making such delivery or sale [emphasis supplied] of alcohol or alcoholic beverages to a person under twenty-one (21) years of age.” By its plain language, without the need for construction or interpretation, the relief from liability available to a licensee under Section 34B is limited to the accusation that the licensee delivered or sold alcoholic beverages to a person under the age of twenty-one (21). The long-established rules of statutory construction require that the Commission cannot, and will not, read words into this statute. Commonwealth v. Palmer, 464 Mass. 773, 778-779 (2013)(“Our rules of statutory construction counsel that when the meaning of a word used in a statute is clear, we should interpret it in accordance with that meaning, without more. [Footnote omitted] See G.L. c. 4, § 6 (“Words and phrases shall be construed according to the common and approved usage of the language”); Commonwealth v. Poissant, 443 Mass. 558, 563 (2005), quoting Civitarese v. Middleborough, 412 Mass. 695, 700 (1992) (“We will not read into the plain words of a statute a legislative intent that is not expressed by those words”). Compare Commonwealth v. Rahim, 441 Mass. 273, 277-278 (2004) (adhering to plain language where meaning of statute was clear), with, e.g., Commonwealth v. Scott, ante at 355, 358 (2013) (where meaning of statutory term is ambiguous, appropriate to look at language of statute as whole), and Commonwealth v. Hamilton, 459 Mass. 422, 431-433 (2011), citing 81 Spooner Rd. LLC v. Brookline, 452 Mass. 109, 115 (2008) (where statutory language is ambiguous, appropriate to look to legislative history).” Since Section 34B refers only to the activities of delivery and sale, and omits any reference to the act of possession, this statute offers no relief from liability for allowing possession of alcoholic beverages in violation of M.G.L. c. 138, § 34C.

The Commission is persuaded by the evidence that the three (3) individuals, Mr. Paquette, Ms. Richard, and Mr. Carroll, were all younger than twenty-one (21) years of age and were in possession of many alcoholic beverages in the licensed premises of Hang Tai.

The Commission finds that the Licensee committed violations of 204 CMR 2.05 (2) - Permitting an illegality on the licensed premises, to wit: M.G.L. c. 138, §34C- Possession of an alcoholic beverage by a person under twenty-one (21) years of age (3 counts). On the date of these offenses, the above mentioned three (3) under-aged patrons of Hang Tai were twenty (20) years old, eighteen (18) years old, and twenty (20) years old respectively.

II. 204 CMR 2.05(2) – Permitting an Illegality on the Licensed Premise, to wit: M.G.L. Chapter 138, §69 – Sale or Delivery of an Alcoholic Beverage to an Intoxicated Person (2 counts)

M.G.L. c.138, §69 provides that “[n]o alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person.” Thus, four (4) elements are required to prove that a violation of this statute has occurred: 1) a visibly intoxicated person, 2) was sold or delivered, 3) an alcoholic beverage, 4) on a premises licensed under chapter 138. Massachusetts’ courts have held that negligence cases provide “some guidance” as to what must be proven “to show a violation of the statute [G.L. c. 138, §69].” Ralph D. Kelly, Inc. v. ABCC, Middlesex Superior Court C.A. No. 99-2759 (McEvoy, J.)(May 23, 2000) cited in Royal Dynasty, Inc. v. ABCC, Suffolk Superior Court C.A. No. 03-1411 (Billings, J.)(December 9, 2003). The Massachusetts courts have also held that to prove a claim of negligent service to an intoxicated person, evidence must be presented that a license holder sold or delivered alcoholic beverages to a person at a time when a reasonable person in the position of that defendant would have known that [the patron] was intoxicated. See Bennett v. Eagle Brook Country Store, Inc., 408 Mass. 355, 358 (1990); Cimino v. The Milford Keg, Inc., 385 Mass. 323, 327 (1982) cited in Fazio v. Lincoln Restaurant Group, Inc., 18 Mass.L.Rptr. 239, 2004 WL 2049234 (Mass.Super.) (Fabricant, J.)(August 27, 2004).

To meet the burden, “a plaintiff must come forward with some evidence that the patron's intoxication was apparent at the time he was served by the defendant.” Douillard v. LMR, Inc., 433 Mass. 162, 164-165 (2001). “The negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication.” Vickowski v. Polish American Citizens Club, 422 Mass. 406, 610 (1996), and cases cited. A plaintiff can make the required showing by either direct or circumstantial evidence, or a combination of the two. See Douillard v. LMR, Inc., 433 Mass. at 165; See also Cimino v. Milford Keg, Inc., 385 Mass. at 328 (evidence that patron was served six (6) or more white russians and became “loud and vulgar” sufficed).

A patron's consumption of a large quantity of alcohol is a circumstance that, in itself, can support the necessary inference. See Vickowski, *supra*, at 611 (“a jury confronted with evidence of a patron's excessive consumption of alcohol properly could infer, on the basis of common sense and experience, that the patron would have displayed obvious outward signs of intoxication while continuing to receive service”). In Vickowski, however, the Court held that four (4) or five (5) bottles of beer over approximately two (2) hours did not suffice to support the necessary inference, in the absence of any direct evidence that the patron showed signs of intoxication when served. Other cases, similarly, have held substantial quantities insufficient absent other evidence. See Kirby v. Le Disco, Inc., 34 Mass. App. Ct. 630, 632 (1993) (eight (8) beers); Makynen v. Mustakangas, 39 Mass. App. Ct. 309, 314 (1995) (five (5) or six (6) cans of beer).

Moreover, a subsequent blood alcohol level does not suffice in itself to meet the plaintiff's burden, but such evidence may bolster other evidence to form a set of facts sufficient to support an inference. See Douillard, *supra*, at 165- 166. In Douillard, on review of a grant of summary judgment, the Supreme

Judicial Court accepted proffered expert testimony as part of the circumstantial evidence that it held sufficient. The expert extrapolated from a subsequent blood alcohol level to form opinions as to the amount of alcohol the patron had consumed, his blood alcohol concentration at the time he was last served, as well as the signs of intoxication most people would show at that level. *Id.* In this case with Hang Tai, the Commission has no evidence, only the blood alcohol levels without any expert testimony that extrapolates from the subsequent blood alcohol levels to form opinions as to the signs of intoxication most people would show at that level. Thus, in this case with the Hang Tai, the blood alcohol levels do not prove visible intoxication. This Commission itself has previously yielded to the temptation presented by horrific facts surrounding a fatal accident and reasoned backwards to find that a person was manifestly intoxicated before causing a horrific accident. In previous decisions that both directly sanctioned licensees for allegedly violating M.G.L. c. 138, §69 and approved on appeal the action of a local licensing authority in sanctioning licensees for allegedly violating M.G.L. c. 138, §69, the Superior Court reversed such Commission decisions on appeal. In Re: Winh Wah Co., Inc. dba Winh Wah Restaurant, Freetown (ABCC Decision January 19, 2005).

The Commission has acknowledged the Ralph D. Kelly, Inc., supra, where the Superior Court reversed the Commission's decision suspending a license for violating M.G.L. c. 138, §69. In that case, a single, fatal car accident occurred down the street from the licensed premises, minutes after the decedent/operator left the licensed premises. The deceased operator had a blood alcohol level of 0.189%. The Superior Court held that in order to find a violation, "there must be evidence that the violator knew or should have known that the person he served was intoxicated." Ralph D. Kelly, Inc., at page 4. The Superior Court further held that without any "expert testimony to say that a man with a blood alcohol level of .189% taken sometime after death probably would have shown outward signs of intoxication at a certain time prior to death," a violation of M.G.L. c. 138, §69 is not proven. Ralph D. Kelly, Inc., supra at page 4.

Apart from the blood alcohol levels, in this matter the Commission does have proof that two individuals, Mr. Paquette, and Ms. Richard, were inside the Hang Tai. Mr. Shi, the bartender on duty at the Hang Tai on the evening of these alleged violations, admitted that he served both Mr. Paquette and Ms. Richard, each a large number of alcoholic beverages in a small period of time. Mr. Shi mixed the drinks, free poured the alcohol not using a shot glass or any other device to measure the volume of alcoholic beverages being delivered, and served each of them directly.

Mr. Shi admitted that he served alcoholic beverages to "the lady", whom he remembers as being small, and that the Commission finds is Ms. Richard. Mr. Shi testified that he served Ms. Richards many alcoholic beverages during the time she spent sitting at the Hang Tai bar (after being served alcoholic beverages at a table in the dining room) that evening, specifically:

1. a sixteen (16) ounce, scorpion bowl with one (1) straw, which consists of two (2) parts alcohol and one (1) part fruit mix; plus
2. a kamikaze mixed drink in a shot glass, which consists of two (2) liquors, vodka and triple sec; plus,
3. Mr. Shi admitted that he served her at least one (1) beer.

Mr. Shi also admitted that he served Mr. Paquette the following alcoholic beverages during the time he spent sitting at the Hang Tai bar (after being served alcoholic beverages at a table in the dining room) that evening:

1. a zombie, which is a rum and brandy drink in a twelve (12) ounce glass; plus,
2. a kamikaze in a shot glass, which consists of two (2) liquors, vodka and triple sec, which was served earlier in the evening;
3. an undetermined number of beers, because Mr. Shi could not remember the number;

4. several mai tais, which is a cocktail comprised of dark rum, apricot brandy, orange juice, and sour mix.

Mr. Shi's admissions are corroborated by the testimony of Ms. Richard. Although Ms. Richard acknowledged having memory problems after the motor vehicle crash and gave inconsistent statements on the details of the events that happened almost three (3) years ago, the Commission is persuaded and finds that Ms. Richard's statements are consistent with Mr. Shi's admissions. The Commission is therefore persuaded to reach its conclusion based on the admissions of Mr. Shi, which are corroborated by the testimony of Ms. Richard that is consistent with Mr. Shi's admissions.

No witness or other evidence disputed the facts that:

- a. Mr. Paquette and Ms. Richard arrived at the Hang Tai and were seated and began drinking alcoholic beverages at the table;
- b. Ms. Richard and Mr. Paquette started drinking a large scorpion for two (2) for their first drink followed by multiple sixteen (16) ounce drinks of alcoholic beverages;
- c. Each patron consumed additional alcoholic beverages in the restaurant section of the Hang Tai;
- d. After this episode of drinking in the restaurant, they both then moved to the bar;
- e. Neither Ms. Richard, nor Mr. Paquette, ate any food or appetizers while seated or drinking at the bar;
- f. Furthermore, the bar was not crowded or busy.

The Licensee argues that a violation of M.G.L. c. 138, §69 did not occur at the Hang Tai Restaurant. The Licensee puts forth its argument that there is no evidence presented that the bartender knew, or should have known, that the patrons were intoxicated inside the premises. The Licensee argues that Ms. Richard's testimony is inconsistent, and that any evidence of both Mr. Paquette and Ms. Richard being intoxicated at the Hang Tai was offered only in preparation of a civil suit in this matter.

This argument is not persuasive to the Commission.

Mr. Shi, the bartender, testified to the alcoholic beverages that he served Mr. Paquette and Ms. Richard. Mr. Shi served them a large number, and a large variety of potent alcoholic beverages, most of them containing more than one (1) type of distilled spirit, which he free poured into each drink. Mr. Shi served Mr. Paquette and Ms. Richard their last alcoholic drink fifteen (15) minutes before they left the premises and were involved in the fatal car accident.

The evidence which was produced before the Commission persuades the Commission that Mr. Paquette and Ms. Richard were served a large number of alcoholic beverages at the bar, after they consumed a large number of alcoholic beverages in the restaurant section of Hang Tai, in less than three (3) hours.

The Commission finds that given the evidence and the testimony presented during the course of the hearing, that there is persuasive evidence that Mr. Paquette displayed visible signs of intoxication and that the bartender Mr. Shi knew, or should have known, that this patron was intoxicated. After showing visible signs of intoxication, Mr. Shi delivered an alcoholic beverage to Mr. Paquette.

The types and number of drinks that Mr. Shi served Ms. Richard and Mr. Paquette demonstrate to the Commission that Mr. Shi knew, or should have known, that Ms. Richard and Mr. Paquette were each visibly intoxicated, based on the number and kinds of drinks he served these two (2) patrons, coupled

with their consumption of alcohol on the restaurant side of Hang Tai. After showing visible signs of intoxication, Mr. Shi delivered an alcoholic beverage to both Ms. Richard and Mr. Paquette.

Given the evidence and the testimony on the types and number of drinks that Mr. Shi served Ms. Richard and Mr. Paquette, the Commission infers that Ms. Richard and Mr. Paquette were each visibly intoxicated. This inference is further drawn from the evidence of the number and types of drinks Mr. Paquette and Ms. Richard consumed in the restaurant side of Hang Tai. After showing visible signs of intoxication, Mr. Shi delivered an alcoholic beverage to both Ms. Richard and Mr. Paquette. The Commission finds and concludes that there was a violation of 204 CMR 2.05 (2), to wit, M.G.L. c. 138 §69.

CONCLUSION

Based on the evidence, the Commission finds the licensee in violation of 204 CMR 2.05 (2) - Permitting an illegality on the Licensed Premises, to wit: M.G.L. c. 138, §34C- Possession of an Alcoholic Beverage by a Person under 21 years of age (3 counts).

Based on the evidence, the Commission finds the licensee in violation of 204 CMR 2.05(2) – Permitting an Illegality on the Licensed Premises, to wit: M.G.L. c. 138, §69 – Sale or Delivery of an Alcoholic Beverage to an Intoxicated Person (2 counts).

Based on the evidence, the Commission imposes the following penalties for the stated violations it finds the Licensee violated:

- 1) For violating 204 CMR 2.05 (2) - Permitting an illegality on the Licensed Premises, to wit: M.G.L. c. 138, §34C (Count 1 to James Paquette, age twenty (20) on the date of this violation) – **INDEFINITE SUSPENSION of the license effective forthwith** until further written order of the Commission. No such order shall be considered by the Commission until the Commission approves an application to be filed by Hang Tai to change the license manager to an individual who was not involved in the events that were the basis of this violation;
- 2) 204 CMR 2.05 (2) - Permitting an illegality on the Licensed Premises, to wit: M.G.L. c. 138, §34C (Count 2 to Christina Richard, age eighteen (18) on the date of this violation), the license is **suspended for forty-five (45) days from and after the date the indefinite suspension is revised by the commission;**
- 3) For violating 204 CMR 2.05 (2) - Permitting an illegality on the Licensed Premises, to wit: M.G.L. c. 138, §34C (Count 3 to Jeffrey Carroll, age twenty (20) on the date of this violation), the license is **suspended for forty-five (45) days, from and after the date of the forty-five (45) day suspension in sub-paragraph 2 above;**
- 4) For violating 204 CMR 2.05(2) – Permitting an Illegality on the Licensed Premises, to wit: M.G.L. c. 138, §69 (Count 1 to Christina Richard, age eighteen (18) on the date of this violation), the license is **suspended for forty-five (45) days of which forty-five (45) days will be held in abeyance for a period of three (3) years, provided no further violations of Chapter 138 or Commission Regulations occur. The abeyance period will begin from and after the date the indefinite suspension is revised by the Commission;**
- 5) For violating 204 CMR 2.05(2) – Permitting an Illegality on the Licensed Premises, to wit: M.G.L. c. 138, §69 (Count 2 to James Paquette, age twenty (20) on the date of this

- 5) For violating 204 CMR 2.05(2) – Permitting an Illegality on the Licensed Premises, to wit: M.G.L. c. 138, §69 (Count 2 to James Paquette, age twenty (20) on the date of this violation), the license is suspended for forty-five (45) days, from and after the date of the forty-five (45) day suspension in sub-paragraph 4, of which forty-five (45) days will be held in abeyance for a period of three (3) years, provided no further violations of Chapter 138 or Commission Regulations occur. The abeyance period will begin from and after the date the indefinite suspension is revised by the Commission.

The Commission further orders as a condition of its license that all existing employees of this Licensee who engage in the direct handling or selling of alcoholic beverages shall be certified by a nationally-recognized alcoholic beverages server training program within thirty (30) days from the date of this decision, and that all future employees shall be so certified before commencing any period of employment.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner *Kathleen McNally*
Kim S. Gainsboro, Chairman *Kim S. Gainsboro*
Susan Corcoran, Commissioner *Susan Corcoran*

Dated: August 14, 2013

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: Charles M. MacLean, Esq.
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Michael Teehan, Investigator
Administration
File