

**STATE OF VERMONT
LIQUOR CONTROL BOARD**

**In Re: V-TWIN, LLC D/B/A CORNER POCKET
92 PORTLAND STREET
MORRISVILLE, VERMONT**

DOCKET NO. 2017-004

BOARD DECISION AND ORDER OF REVOCATION

V-Twin, LLC d/b/a Corner Pocket (“Licensee”) appeared before the Liquor Control Board (“Board”) on April 5, 2017 in Montpelier for a contested case hearing to consider sanctions against its First and Third-Class Liquor Licenses. The Department of Liquor Control (“DLC”) alleges that Licensee violated General Regulation Nos. 7(a), 17 (one count remaining in light of April 7, 2017 *Interim Order*), 17a (two counts), 29, 36 and 44. Jacob A. Humbert, Esq., Assistant Attorney General, represents DLC. Harold B. Stevens, Esq. represents and appeared on behalf of the Licensee. The Board rules as follows:

FINDINGS OF FACT

1. At all relevant times, Licensee held First-Class and Third-Class liquor licenses, permitting the sale of beer, wine, fortified wine and spirits to the public for on-premises consumption.
2. We incorporate our April 7, 2017 *Interim Order* in this matter by reference as if set forth at length herein.
3. In its December 21, 2016 Notice of Hearing, DLC alleged that Licensee violated the following General Regulations duly adopted by the Board:
 - a. General Regulation No. 7(a): No licensee, licensee employee or any individual performing work or services for a licensee on a licensed premises shall interfere with, nor permit any other individual to interfere with, provide false written or verbal information to, or fail to cooperate with a Liquor Control Investigator or other Vermont Law Enforcement Officer in the performance of their duties.
 - b. General Regulation No. 17: No licensee shall sell or furnish alcoholic beverages to any individual displaying signs of intoxication from alcoholic

beverages or other drugs / substances. No licensee shall allow alcoholic beverages to be consumed on the licensed premises by any individual displaying such signs of intoxication. No licensee shall allow any individual displaying such signs of intoxication to stay on the licensed premises, except under direct personal supervision by a licensee or licensee employee in a segregated nonpublic area when the patron's immediate departure could be expected to pose a risk of bodily injury to the patron or any other individual.

- c. General Regulation No. 17(a): Licensees or licensees' employees shall not serve alcoholic beverages to any individual whom it would be reasonable to expect would be under the influence as a result of the amount of alcohol served to that person. Under the influence, in this Regulation, shall mean that degree of intoxication that would render it unsafe or illegal for the patron to undertake normal and expected activities upon leaving the licensed premises.
- d. General Regulation No. 29: All licensees shall have present on the licensed premises at all times when open for business a responsible employee, agent or principal. Every licensee and licensee employee involved in the sale or service of alcoholic beverages or the sale of tobacco products must be able to read, write, and speak the English language with sufficient facility to be able to understand and comply with Vermont's Liquor and Tobacco Laws and Regulations.
- e. General Regulation No. 36: All licensees shall control the conduct of all individuals on their licensed premises. All licensees must ensure the safety of individuals entering, leaving, or remaining on the licensed premises. No licensee shall permit or suffer any disturbances, brawls, fighting or illegal activity upon the licensed premises; nor shall a licensee permit or suffer such premises to be conducted in such a manner as to render such premises or the streets, sidewalks, parking lots or highways adjacent thereto a public nuisance.
- f. General Regulation No. 44: A first class licensee or first and third class licensee must be able to show that they are at all times operating the food and liquor business connected with the licensed premises; the licensee shall not lease, sub-lease or let out the food or liquor business on a percentage basis or any other agreement, except as provided in 7 V.S.A. § 222 (4). With the prior approval of the Board, a Club may let out its food business on a percentage or concession basis, provided the Club retains general supervision and control of the conduct of such food business.

4. The following DLC Exhibits were admitted and considered:

- 1 – Vermont Medical Examiner Report Regarding Paul Smith
- 2 – Photograph of Licensee's Freezer
- 3 – Photograph of Licensee's Kitchen
- 4 – Video surveillance footage from Licensee's Establishment
- 5 – Condensed version of Exhibit 4
- 6 – Summary of activities shown on surveillance according to Inv. Genest
- 7 – Amanda Bolduc, State Forensic Chemist Curriculum Vitae
- 8 – Bolduc report assessing BAC
- 9 – Photograph of crash scene looking eastbound
- 10 – Photograph depicting tire tracks where Mr. Smith's vehicle entered river
- 11 – Photograph of Darling Road
- 12 – Photograph of accident scene
- 13 – Photograph of accident scene
- 14 – Photograph of vehicle in river
- 15 – Photograph from under Tenney Bridge bank near VAST Trail
- 16 – Photograph of Tenney Bridge looking down at Mr. Smith's vehicle
- 17 – Photograph of Vehicle in river
- 18 – Photograph of damage to Mr. Smith's vehicle
- 19 – Photograph of rear of Mr. Smith's vehicle
- 20 – Photograph of Mr. Smith's hood damage
- 21 – Cell phone records for Mr. Smith from AT&T

5. The Following Licensee Exhibits were admitted and considered:

- A – Darcy Richardson, MS Curriculum Vitae
- B – Photograph of accident scene "Arrow and Bridge sign"
- C – Photograph depicting the way Mr. Moodie was headed
- D – Photograph of vehicle in river
- E – State of Vermont Uniform crash report
- F – Google Maps - Map of the area of accident location
- K – Photograph of food in freezer at Licensed Establishment
- I – Photograph of food in freezer at Licensed Establishment
- J – Photograph of view from loading dock

6. The Board considered testimony from Steven Shapiro, M.D., State of Vermont Chief Medical Examiner, two chemists (Amanda Bolduc for DLC and Darcy Richardson for Licensee), DLC Investigator Skyler Genest, Morristown Detective Ryan Bjerke, two of Licensee's staff (bartenders Lindsey Danielle Royce and Lisa Tanner), Licensee's patrons (James Keene and William Scott Fitzgerald), and DLC fact witness Joseph Moodie.

7. We considered video surveillance evidence from inside the Licensed Establishment. The time period relevant to our decision spans from approximately 2:52 p.m. to approximately 9:00 p.m. on Friday, November 25, 2016. Licensee's surveillance video covered several angles simultaneously; in all, there was more than 18 hours of video collected during that time.
8. The Board notes that the time stamp on the video is in military time and the parties agreed that the time stamp is approximately 20 minutes later than the actual time. Our decision will reflect all relevant times in a traditional "12 hour" format.

November 25-26, 2016

9. The video evidence confirms that at approximately 3:08 p.m. on November 25, 2016, Paul Smith entered the Licensed Establishment. Over the next six hours, Mr. Smith consumed 10 alcoholic drinks, which were served by bartenders Lindsay Danielle Royce and Lisa Tanner, as follows:
 - a. 3:09 p.m.: 12-ounce Heineken bottle (Royce);
 - b. 3:59 p.m.: one dark liquor mixed drink, free poured (Royce);
 - c. 4:06 p.m.: one dark liquor mixed drink, free poured (Royce);
 - d. 4:28 p.m.: 12-ounce Heineken bottle (Royce);
 - e. 5:12 p.m.: 12-ounce Heineken bottle (Royce);
 - f. 5:44 p.m.: one dark liquor mixed drink, free poured (Royce);
 - g. 6:09 p.m.: one dark liquor mixed drink, free poured (Royce);
 - h. 6:28 p.m.: 12-ounce Heineken bottle (Tanner);
 - i. 7:11 p.m.: 12-ounce Heineken bottle (Tanner); and
 - j. 8:19 p.m.: one dark liquor mixed drink, free poured (Tanner).
10. Licensee used no devices, such as a regulating spout or measuring shot glass to determine the amount of alcohol poured into each drink.

11. Licensee concedes that the above times are correct and agrees, generally, with the amount of alcoholic beverages that Licensee served to Mr. Smith. *See* Licensee's Proposed Findings of Fact, ¶5 ("Paul Smith was served five 12 ounce Heineken beers, three 90 proof, one and a half ounce mixed drinks, and a one and a half ounce whiskey shot in a 3 ounce tumbler packed with ice over the course of a 6 hour period of time.")
12. Mr. Smith displayed obvious signs of intoxication, as follows:
- a. 6:53 p.m.: threw two pencils behind the bar;
 - b. 6:54 p.m.: fumbled and dropped his cell phone onto the bar;
 - c. 7:17 p.m.: pushed several break open tickets off bar;
 - d. 7:31 p.m.: knocked basket of break open tickets off of the bar;
 - e. 8:34 p.m.: stumbled over edge of carpet on way to restroom; and
 - f. 8:43 p.m.: knocked into woman next to him as he exited the premises.
13. During the hours captured by the surveillance videos, Mr. Smith clearly exhibited increasingly diminished dexterity and his movements became increasingly uncoordinated. His affect towards others became increasingly aggressive.
14. Mr. Smith appeared agitated and became engaged in two separate verbal arguments with another patron, the latter of which had to be forcibly broken up by Ms. Cononi. The video depicts Ms. Cononi intervening the second verbal altercation and striking Mr. Smith several times in the face.
15. Mr. Smith is seen entering and exiting the Licensed Establishment several times over the course of the surveillance video. Later in the evening, Mr. Smith returned to the Licensed Establishment wearing a Halloween mask.
16. The last time he leaves the Licensed Establishment is at approximately 9:01 p.m. The evidence is undisputed that, at that time he left the Licensed Establishment, Mr. Smith operated his vehicle, driving it from the Licensee's parking lot with another man and Mercedes Cononi's dog.

17. Licensee concedes that “during the last three hours Paul Smith stayed at the bar, his BAC hovered between 0.09 and 0.10, which is where his alcohol concentration would have been when he left the bar. There may have been a fourth whiskey which would have made those last three hours hover between 0.09 and 0.12.” *Licensee’s Findings of Fact* at ¶39.
18. Mr. Smith’s vehicle was found in the Lamoille River at 8:20 a.m. the next morning, Saturday, November 26, 2016. It was heavily damaged from a high speed crash into the river. Mr. Smith, his passenger and Ms. Cononi’s dog were found inside the vehicle. All three had died.
19. Dr. Shapiro concludes that Mr. Smith died from drowning.
20. There is no dispute that Mr. Smith’s BAC at the time of his death was 0.194%.
21. The following facts are disputed:
 - a. When did the motor vehicle accident occur: did it occur immediately after Mr. Smith left the Licensed Establishment or closer to the time that Mr. Smith’s vehicle was found the next morning at or around 8:20 a.m. on November 26, 2016? The Medical Examiner’s report cannot place a time of death. An eyewitness, Joseph Moodie, testified that he saw the lights of an erratic driver behind him on the road where the crash occurred shortly after 9:00 p.m. on November 25, 2016. Mr. Smith’s cellular telephone was with him at the Licensed Establishment, but not on him at the time of the accident and his death. The phone was at the home of Jim Keene. There was no definitive explanation for how Mr. Smith’s cellular telephone ended up at Mr. Keene’s residence.
 - b. Whether the amount of alcohol Licensee served to Mr. Smith resulted in a BAC of 0.194% or 0.100% to 0.120%. DLC’s expert attested that his BAC is consistent with the number of drinks Licensee served Mr. Smith. Licensee’s

expert suggests that Mr. Smith's final BAC is product of additional drinking subsequent to leaving the Licensed Establishment.

22. Based on the surveillance system video admitted into evidence, there was only one bartender on duty that evening, except for a few minutes during shift change at approximately 6:00 p.m. Patrons were left unsupervised in the bar area on three occasions: 2:52 p.m. to 2:54 p.m.; 7:31 p.m. to 7:32 p.m.; and 7:39 p.m. to 7:42 p.m. while the bartender took a smoke break outside. Licensee asserts that the bartender can observe the bar from outside.

November 30, 2016

23. Detective Bjerke met with Licensee's owner, Scott Abbott, on November 30, 2016 at the Licensed Establishment. Mr. Abbott initially denied his surveillance system was working at the time because he believed that it had been malfunctioning. Mr. Abbott allowed Det. Bjerke behind the bar to inspect the surveillance system and they noted that there was power to it. Once it was established that the surveillance system was operational, Det. Bjerke asked to view the video. Mr. Abbott indicated that he would prefer to view the video first. After some amount of conversation, Mr. Abbott gave Det. Bjerke consent to take surveillance materials into custody.
24. Mr. Abbott testified credibly that while he could have been more cooperative, he did not intend to mislead Det. Bjerke or interfere with his investigation.
25. Mr. Abbott testified that he does not work at the Licensed Establishment.
26. On December 20, 2016, Investigator Genest met with Mr. Abbott. During this meeting, Inv. Genest asked Mr. Abbott about his establishment's food service operation. Mr. Abbott pointed to a rack of snack chips as the sole evidence of their food service. The kitchen area (including refrigerator and freezer) and photographs thereof revealed no evidence that it was used for the storage and/or preparation of food for service. Inv. Genest learned that if patrons wanted food, they were given local restaurant menus.

27. Ms. Royce and Mr. Abbott testified that the Licensee serves food, namely in the form of a turkey sandwich, called a “Stuffer.” Licensee asserts that the “Stuffer” is a mainstay, indeed a “specialty” on their “menu.” Based on Inv. Genest’s testimony, there was no evidence that evidence that Licensee’s “menu” actually included turkey sandwiches at any time relevant to this matter.
28. Licensee’s staff concedes that the “Stuffer” was rarely ordered and cumbersome to prepare since some components were kept frozen. Constructing the sandwich would require the sole staff member on duty to leave the patron areas virtually unattended. Licensee’s staff members Ms. Royce and Ms. Tanner could not recall with sufficient specificity the frequency with which “Stuffers” are ordered or made.
29. In the approximately six hours that the surveillance footage covered, no patron was served or can be seen consuming any type of sandwich.

CONCLUSIONS OF LAW

1. The Board is established as the paramount authority in the administration of Vermont’s liquor statutes and regulations. *See Verrill, Jr. v. Daley, Jr.*, 126 Vt. 444, 446 (1967).
2. When considering whether a license shall be revoked or suspended for the violation of a liquor statute or regulation, the Board sits as a tribunal with a judicial function to perform and has statutory authority under 7 V.S.A. §236 to suspend or revoke any license for violating the provisions of Title 7 or any regulation. *See In Re: Wakefield*, 107 Vt. 180, 190 (1935).
3. Licensee holds First and Third-Class Liquor Licenses as defined by 7 V.S.A. §2(10) and §(22). Licensee is, therefore, subject to this Board’s jurisdiction.

4. Licensee was properly notified of the alleged violations detailed above and of its right to appear at a hearing to respond to the above-listed, alleged violations consistent with 3 V.S.A. §809(a)-(c).
5. DLC must prove the alleged violations by a preponderance of the evidence, which is the usual standard of proof in state administrative adjudications. *See Huddleston v. University of Vermont*, 719 A.2d 415 (1998); 3 V.S.A. §§ 801-849; *In re Muzzy*, 141 Vt. 463, 472, 449 A.2d 970, 974 (1982). This standard compels DLC to prove that, more likely than not, a violation occurred. If any violations are found, then the Board has concluded that DLC has met its burden.
6. An appropriate standard for establishing intoxication in the context of our liquor laws is provided by 23 V.S.A. §1201(a), Vermont's "Driving Under the Influence" statute. That statute prohibits a person from operating a motor vehicle if his or her blood alcohol content is 0.08% or more. Other administrative bodies have so concluded that this is an appropriate benchmark for determining intoxication, including the Vermont Department of Labor, in cases of workplace intoxication. *See Cyr v. McDermott's, Inc.*, 2010 VT 19 (reversing decision of Commissioner on completely separate grounds).
7. There is more than a preponderance of the evidence confirming the following:
 - a. Licensee furnished alcoholic beverages to Mr. Smith while he was displaying signs of intoxication from alcoholic beverages;
 - b. Licensee allowed alcoholic beverages to be consumed on the licensed premises by Mr. Smith while he displayed signs of intoxication;
 - c. Licensee allowed Mr. Smith to stay on the licensed premises without direct personal supervision by Licensee in a segregated nonpublic area; and
 - d. Licensee served alcoholic beverages to Mr. Smith when it was reasonable to expect that he would be under the influence as a result of the amount of alcohol served to him.
8. Licensee concedes that at the time Mr. Smith left the Licensed Establishment he was intoxicated (i.e. over the legal limit to operate a motor vehicle).

9. Licensee concedes that Mr. Smith drove his vehicle in an intoxicated state away from the Licensed Establishment.
10. The uncontested evidence of Mr. Smith's intoxication at the Licensed Establishment on November 25, 2016 is more than sufficient to conclude that the violations of General Regulations No. 17 and 17(a) occurred. Accordingly, the Board concludes that Licensee violated General Regulation No. 17 and No. 17(a) (one count each) on November 25, 2016 with respect to Mr. Smith.
11. We need not decide whether Licensee's overservice of alcoholic beverages to Mr. Smith to the point of intoxication led directly to his, his passenger and Ms. Cononi's dog's tragic death subsequent to his leaving the Licensed Establishment. That is a matter, perhaps, for another tribunal.
12. Although the overservice of Mr. Smith is clear, it is impossible to know precisely how much alcohol was served to Mr. Smith given the Licensee's practice of free pouring alcohol into mixed drinks. It is important to mention, once again, the Board's concern with such a practice:

[t]his is a notoriously inaccurate process and in most cases in the experience of the Board when the bartender is preparing the drink while being observed by the intended customer, there is a tendency to over pour rather than under pour. A 'free pour' can be what the bartender wants it to be at any given time. It can vary from patron to patron, can vary with the degree that the bartender is busy or not[.]

In Re M.S.D.D. Inc. d/b/a Spanked Puppy Pub (2008) at Conclusions, ¶24.

13. Furthermore, Mr. Smith's combative state inside the licensed premises, coupled with him leaving the Licensed Establishment in his own vehicle in an undisputed intoxicated state certainly constitutes at least one violation of General Regulation No. 36. Licensee failed to control the conduct of Mr. Smith while on their licensed premises. Licensee created an environment wherein it suffered a fight upon the licensed premises. Licensee, by allowing Mr. Smith to leave the licensed premises as a driver of a motor vehicle certainly created the

potential for injury or loss of life on the streets, sidewalks, parking lots or highways adjacent to the Licensed Establishment.

14. Consistent with our April 7, 2016 *Interim Order*, there is ample evidence to find that Licensee served Ms. Cononi alcoholic beverages when it would be reasonable to expect that she would be under the influence as a result of the amount of alcohol served to her. A violation of a one count of General Regulation 17(a) with respect to Ms. Cononi has been established.
15. We conclude that, at all time periods relevant to this matter, Licensee failed to adequately operate a food business connected with the Licensed Establishment. The Board does not find Licensee's testimony regarding the turkey "Stuffer" credible. We reach this conclusion based on Inv. Genest's December 2016 site visit and photographs taken at the time which show a dormant kitchen facility, unfit to store foods for public consumption or prepare meals. As discussed above, we conclude that the staffing levels were insufficient to regularly prepare meals, including the "Stuffer." We agree with DLC that Licensee's food business, if there is one, is inadequate to address the public safety purposes underlying General Regulation No. 44. The Board promulgated this regulation to ensure that patrons have substantial food available to them, upon request, to diminish the physical effects of consuming alcoholic beverages, namely the body's absorption of alcohol. We find one violation of General Regulation No. 44.
16. We find one violation of General Regulation No. 29. It is patently unacceptable for a Licensee to allow its sole on-duty employee to go outside to take cigarette breaks, leaving the bar unattended. We find the explanation that the bar was viewable from outside unavailing.
17. We do not believe that Mr. Abbott intentionally provided false information about his surveillance system or interfered in any sanctionable manner with Det. Bjerke's investigation. We find no violation of General Regulation No. 7(a).

CONCLUSION

18. Overall, the Board finds violations of General Regulations No. 17 (2 counts, including one for which a 30-day suspension was previously ordered and served), No. 17(a) (2 counts), No. No. 29, No. 36 and No. 44. The Board dismisses the alleged violation of General Regulation No. 7(a).
19. Licensee has previously served three separate suspensions, including a 5-day, 7-day and 21-day suspension for violations of our General Regulations. We incorporate Licensee's enforcement history by reference as it is set forth at length herein.
20. The violations that we find here are not only staggering in number, but diverse in scope. The April 5, 2017 contested case hearing presented the Board with a stunning glimpse inside the workings of this Licensed Establishment and leads the Board to agree with the DLC recommendation that the First and Third-Class Liquor Licenses be revoked. Licensee poses a significant threat to the public's health, welfare and safety.
21. The Board, therefore, will revoke Licensee's First and Third-Class Liquor Licenses based on one violation of General Regulation No. 17 with respect to Mr. Smith.¹
22. Licensee, therefore, has no Licenses to suspend or revoke. For the remaining violations: General Regulation No. 17(a) (two counts), No. 29, No. 26 and No. 44, the Board fines the Licensee the maximum for each, \$2,500.00. *See* 7 V.S.A. §236(b) ("[a]s an alternative to and in lieu of the authority to suspend or revoke any permit or license, the liquor control board shall also have the power to impose an administrative penalty of up to \$2,500.00 per violation against a [...] holder of a first, second or third class license for a violation of the conditions under which the license was issued or of this title or of any rule or regulation adopted by the board. The administrative penalty may be imposed after a hearing before the board [.]"). The total fine imposed, therefore, is \$12,500.00.

¹ The Board understands that Licensee did not renew its licenses for 2017-2018 and currently holds no valid licenses. This revocation, therefore, applies retroactively to the last date that Licensee held valid Licenses and from that date forward.

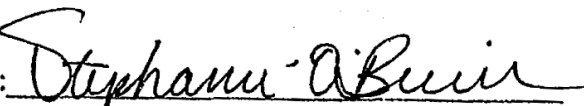
23. In the event that any principal of VTWIN, LLC d/b/a Corner Pocket including, but not limited to, Scott Abbott, a successor entity or anyone acting on their behalf or at their direction, applies for any form of Vermont liquor license at any time in the future, DLC must refer the applicant to the Board for a hearing before the application can be considered. A “successor entity” for this purpose, is an entity that consists in whole or in part, some or all, of the same stockholders, directors, officers, partners and/or individuals as the revoked Licensee.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Board **REVOKES** VTWIN, LLC d/b/a Corner Pocket’s First and Third Class liquor licenses and assesses an **ADMINISTRATIVE PENALTY** in the amount of \$12,500.00 to be paid to DLC within 45 days of this *Order*.

DATED at Montpelier, Vermont this 23rd day of May 2017.

VERMONT LIQUOR CONTROL BOARD

By: 
Stephanie M. O'Brien, Chair


Julian Sbardella, Member


Martin Manahan, Member


Sam Guy, Member

RIGHT TO APPEAL

Within 30 days after copies of this Order have been mailed, either party may appeal to the Vermont Supreme Court by filing a Notice of Appeal with the Department of Liquor Control and paying the requisite filing fee. See 3 V.S.A. § 815(a); V.R.A.P. 4 and 13(a).