

**STATE OF VERMONT
LIQUOR CONTROL BOARD**

IN RE:

**Ekalview, LLC
d/b/a Bayside Pavilion
15 Georgia Shore Road
St. Albans, Vermont**

DECISION

The Liquor Control Board (LCB) held proceedings in Montpelier, Vermont, on May 30, 2012, to consider the suspension or revocation of the first and third class liquor licenses granted to Licensee, Ekalview, LLC, d/b/a Bayside Pavilion, 15 Georgia Shore Road, St. Albans, Vermont. The Licensee was present by and through Charles “Chuck” Lowe, its general manager, Debbie Lowe, owner, majority stockholder and wife of “Chuck”, Donna Holmes, license holder and minority stockholder, and by and through its attorney, Lisa B. Shelkrot. The Department of Liquor Control (DLC) was present and represented by Assistant Attorney General Jacob A. Humbert.

A Notice of Hearing dated March 13, 2012, with Violation Reports attached, was sent to the Licensee by which it was alleged:

- a. that on December 16, 2011, it served alcoholic beverages to numerous patrons displaying obvious signs of intoxication and it allowed those patrons displaying obvious signs of intoxication to stay on the licensed premises in a public non-segregated area in violation of General Regulation No. 17; and
- b. that on December 16, 2011, it served alcoholic beverages to patrons whom it would be reasonable to expect would be under the influence as a result of the amount of alcohol served to that person in violation of General Regulation No. 17(a); and

- c. that on December 16, 2011, it served more than two containers of alcoholic beverages to a single customer at one time in violation of General Regulation No. 37; and
- d. that on December 16, 2011, it allowed games that encouraged the rapid or excessive consumption of alcoholic beverages in violation of General Regulation No. 49(a); and
- e. that on January 14, 2012, it served alcoholic beverages to numerous patrons displaying obvious signs of intoxication and it allowed those patrons displaying obviously signs of intoxication to stay on the licensed premises in a public non-segregated area in violation of General Regulation No. 17; and
- f. that on January 14, 2012, it served alcoholic beverages to patrons whom it would be reasonable to expect would be under the influence as a result of the amount of alcohol served to that patron in violation of General Regulation No. 17(a); and
- g. that on January 14, 2012, it served more than two containers of alcoholic beverages to a single customer at one time in violation of General Regulation No. 37; and
- h. that on February 3, 2012, it offered a promotion that encouraged the rapid or excessive consumption (of alcoholic beverages) which it knew to be in violation of General Regulation No. 49(a); and
- i. that on February 5, 2012, it served alcoholic beverages to a patron whom it would be reasonable to expect would be under the influence as a result of the amount of alcohol served to that patron in violation of General Regulation No. 17(a); and
- j. that on February 5, 2012, due to the over service of a patron, the streets, sidewalks and highways adjacent thereto became a public nuisance when said patron was involved in a domestic disturbance on its licensed premises and then subsequently was arrested for assaulting a police officer in violation of General Regulation No. 36(a).

Said Regulations were duly adopted by the Liquor Control Board.

FINDINGS OF FACT

1. The Licensee, Ekalview, LLC, d/b/a Bayside Pavilion (hereinafter "Bayside"), 15 Georgia Shore Road, St. Albans, Vermont, is the holder of first and third class liquor licenses by which it is permitted to sell alcoholic liquor for on-premise consumption.

2. General Regulation No. 17 states:

No alcoholic beverages shall be sold or furnished to a person displaying signs of intoxication from alcoholic beverages or other drugs/substances. No alcoholic beverages may be consumed on the licensed premises by any person displaying such signs of intoxication. No person displaying such signs of intoxication shall be allowed to stay on the licensed premises, except under direct personal supervision by a licensee or his or her employees in a segregated non public area when the patron's immediate departure could be expected to pose a risk of bodily injury to the patron or any other person.

3. General Regulation No. 17(a) states:

Licensees or his or her employees shall not serve alcoholic beverages to a person 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 section, shall mean the degree of intoxication that would render it unsafe or illegal for the patron to undertake normal and expected activities upon leaving the licensed premises.

4. General Regulation No. 36(a) states:

The Board may fine, that a licensee suffered a disturbance, brawl, fight or illegal activity upon its licensed premises or upon the streets, sidewalks, parking lots or highway adjacent thereto if any individual engaged in such conduct has been allowed to stay on the licensed premises while displaying signs of intoxication from alcohol, drugs or other substances, and/or if it would be reasonable to expect that such person would be intoxicated as a result of the amount of alcohol served to that person. Under such facts, the Board may conclude that any such person's conduct should have been anticipated.

5. General Regulation No. 37 states:

Except as otherwise authorized by law or Liquor Control Board regulation, no malt beverages may be drawn or served otherwise than in glasses, mugs, pitchers, or other containers, of a maximum capacity of thirty two ounces, nor more than

four fluid ounces of spirituous liquor may be available to a customer at one time or used in the making of a single mixed drink, and not more than two of the above containers may be served to a customer at one time.

6. General Regulation No. 49(a) states:

Licensees or their employees shall not offer or permit games, contests, or promotions, which encourage the rapid or excessive consumption of alcohol beverages nor shall they furnish alcoholic beverages to anyone for no charge.

7. Prior to the receipt of any evidence, the DLC, through its attorney, announced that it was withdrawing the allegations of violations of General Regulation No. 17(a) and General Regulation No. 36(a) on February 5, 2012 against Ekalview, LLC. Those two allegations against Ekalview, LLC allegedly occurring on February 5, 2012 are dismissed and are of no further force and effect.

8. DLC Investigator J. Clark is responsible in part for Franklin County, Vermont, which includes St. Albans and consequently Bayside. Sometime before December 16, 2011 he received an anonymous e-mail from someone who described himself as a concerned citizen saying that at the Bayside there was a promotion which allowed an unlimited amount of liquor to be consumed by patrons. This prompted him to arrange for DLC Investigators to enter Bayside on December 16, 2011 in an undercover capacity.

DLC Inspection on December 16, 2011

9. On December 16, 2011 between 10:30 and 11:00 p.m., DLC Investigators Jamie C. Chase and Jerry Cote entered Bayside. They were undercover, to give the impression that they were ordinary patrons. When they approached the bar, the bartender, a female by the name of Brittney, advised them of a "Friday night VIP special" whereby for the price of \$15.00 each, each could order and receive as many mixed drinks as they each wanted, provided the alcohol came from the bar lower shelf rather than the upper shelf.

10. Chase and Cote each paid \$15.00 for the promotion entitled "Unlimited Drink Special" and each received a green bracelet on their wrist, identifying them as VIP members and entitling them to the stated promotion.

11. The Friday night VIP special according to Brittney was to encourage more business since Friday nights tended to be rather slow.

12. Shortly thereafter, Chase ordered a rum and coke at the bar. By the time that Cote and Chase left Bayside at 1:30 a.m., Chase had ordered and was served six mixed drinks, the first was a rum and coke and the rest were gin and tonics. Most of the drink would be taken to the restroom where it was dumped and the glass replenished all or in part with water. Water is largely indistinguishable by color from a gin and tonic or from beer in a colored bottle. Chase had his second drink sometime between 10 and 15 minutes after the first and the remaining five of the six drinks were ordered without specific recollection or notes indicating when they were purchased. Chase wanted to determine how many drinks could be ordered from the bartender under the VIP special before they left Bayside.

13. The bar at Bayside was L shaped. The kitchen was behind the bar and there was an access window in a wall separating the bar from a large dance floor / dining area in which there was a pool table or two. The window was between 3' to 4' by 4' and permitted customers from the dance floor to order from the bar window. If the bartender serving that patron stood at the window and specifically looked into the dance floor area, a great deal of the area could be seen. However, if a bartender did not turn and/or step to the right and specifically look into the dance floor area through the bar window, much less of that large room would be seen by the bartender.

14. During the course of the evening on December 16, 2011, although Chase and Cote separated so as to cover all of Bayside as much as possible, they came together from time to time to exchange information. Cote remained primarily in the bar area and Chase, moved around so as to spend most of his time in the dance area and wherever patrons were gathered away from the bar.

15. A young male patron wearing a Carhart hat who was noticeably loud and obnoxious ordered and was served a Bud Light beer in a bottle from the bar. This individual was displaying alcohol intoxication by his watery eyes, his slurred speech and his loud and obnoxious behavior that drew attention to himself. The young male attempted to engage Chase in conversation but because of racist remarks he was making about a black male who was near the bar with a white female, Chase disengaged from any conversation. The individual was engaged with Chuck Lowe in conversation throughout much of the evening. Brittney served this individual between three and four bottles of Bud Light throughout the evening while his display of intoxication continued to be apparent. (General Regulation No. 17).

The statements of the male in his making racist comments did not result in a separate regulation violation. The comments were loud enough and in themselves offensive enough to cause Chase and Cote discomfort. If they had been heard by the black male, they could have provoked a fight or disturbance.

16. At approximately 12:15 a.m., a male came to the counter and ordered three Bud Light beers in bottles. They were served by Brittney and when the customer walked away with the three beers bottles she turned away and was not watching where he delivered them and neither she nor Chase could see where the customer brought them from their places at the bar.

Chase was never more than 15 feet away and had his eye on the transaction. (General Regulation No. 37).

17. At approximately 12:22 a.m., a group of five males were engaged in the playing of "beer pong". They were playing the game on a ping pong table with a ping pong ball and cups, which appeared to be filled with water. The ball was tossed or skipped across the table with the object of getting it into the cup. They were having a good time, were back slapping and otherwise boisterous with each other and taking enthusiastic sips of their beer while doing so. During the play, there was above average consumption of beer by those five males. The consumption of beer, however, was not tied to the process of playing the game.

Those five males however were intoxicated. This was displayed by and through the group boisterousness that frequently accompanies alcohol consumption by individuals in a group and by the odor of alcohol coming from their persons. They were unsteady on their feet and they had watery eyes and were staggering. Chase observed them for between 15 and 20 minutes and at times stood right next to them. (General Regulation No. 17).

18. The employees on duty at Bayside that evening who could be identified were Chuck Lowe and the bartender Brittney. It was difficult to determine if there were any other employees because from time to time people would appear to be engaged in the task of an employee and at other times they appeared not to be working.

19. At approximately 12:50 a.m., while still observing the beer pong game, Chase was able to see the bar, adjacent tables and quite a bit other activity that he was making an effort to observe.

20. At that time, an older male had passed out at a table with a Heineken beer bottle in hand. He had his head on the table for approximately 15 minutes during which time he did not

move or respond. The group that he was with did not pay attention to him and an employee who came over to the table and cleared it of empties did not assist him or check on him. (General Regulation No. 17).

21. At approximately 1:04 a.m. early Saturday morning, four males came from the dance area to the bar window and ordered drinks from Brittney the bartender. As they approached, they were staggering and had their arms over each other and were slurring their speech and appeared intoxicated. Nevertheless, the bartender served each of them. Although Chase was approximately 15 feet from the bar window when these four males were served, they passed by closer to him as they left with their drink order. (General Regulation No. 17).

DLC Inspection on January 14, 2012

22 On January 14, 2012, Chase and Cote returned to Bayside, again in an undercover capacity, and arrived at approximately 11:00 p.m. It was a Saturday night and there was a \$5.00 cover charge which each paid. There was a much larger crowd than there was on Friday night the 16th of December, 2011 when they were last there, estimated to be somewhere between 50 and 70 patrons. Chuck and a blond female were working the door and one other employee was moving about. There was one bartender. It was hard to identify any other employees or to determine if there were any other employees. Patrons were between 18 and their late 50s.

23. A male and female in their late 30s came to the bar and the male ordered two beers, one for himself and one for her. She appeared under the influence of something, and needed her companion's physical guidance and support. She was closing her watery eyes, was acting lethargic, was unsteady on her feet, had a hard time functioning physically. She appeared tired and had to be supported by him. She was very unsteady on the dance floor and after one dance they left. She was observed drinking a portion of her beer, but not all of it. They were at

Bayside for approximately 25 minutes. The female was clearly displaying signs of intoxication. No Bayside employee interacted with them. (General Regulation No. 17).

24. At approximately 12:40 a.m., a large male came to the front of the bar from the dance floor area. He was wearing a camouflage hat, and was loud and obnoxious. He ordered four Bud Light beers which he was served. He then took the beers to the pool table in the dance floor area and disseminated them to his friends. The bartender could have moved to the window and specifically observed where the male took the beers, but she did not as she remained facing the front of the bar. Chase was in the position to observe the handoff of the beers to the patron's friends. (General Regulation No. 37).

25. At 12:45 a.m., a female approached the bar window from the dance floor area and while she was doing so, she was staggering and stomping her feet in an effort to control her unsteady walk. When she got to the bar window she had to wait for the bartender and was swaying from side to side while waiting. She ordered a shot from the bartender which was served to her. She drank the shot, then staggered back to the area she came from. She was displaying intoxication. (General Regulation No. 17).

26. At approximately 12:55 a.m. near the back of the dance floor area, two female friends were consuming mixed drinks throughout the evening. They were in their early to mid 20s and they were at a table in the area near the "old bar" consuming their drinks. They were laughing, having a good time, had their heads down for a period of time, appeared to be very tired looking, were talking about how much they had to drink and how drunk they were. They were slurring their speech and making a very noticeable display of their intoxication. Chase was concerned about how they would get home because they were alone. For so long as he was at

Bayside, they were under intermittent observation by Chase. No bar staff contacted them or concerned themselves with these two. They left on their own. (General Regulation No. 17).

27. At approximately 1:41 a.m., a male walked to the bar window and there ordered three beers from the bartender, which she served to him. He then walked to the pool area and distributed those beers to his friends. The bartender did not stay at the window to observe his return to the pool area or to notice to whom he distributed the beer purchases that he made. Within a few minutes he returned to the bar window and ordered another beer, which he kept for himself. He was very intoxicated, was staggering and did not have full control of his body. He was not belligerent or argumentative, but he was bumping into people who tried to avoid him. (General Regulation Nos. 17 and 37).

28. At 1:49 a.m., more or less, while Chase was seated in the back of the dance hall area near the pool table, a male sitting to his left at the table who had a beer with him, was simply not responding. He sat still for 15 or 20 minutes during which time no one interacted with him. After that time, a friend of his came over and talked to him. The male then got up from the table, vomited on the floor and then wandered away towards the bathroom. (General Regulation No. 17).

29. Chase referred to his Violation Report from time to time during his testimony to refresh his memory before he answered some of the questions asked of him.

30. Chase's investigative notes were made at Bayside on his cell phone primarily during the time that the incident he was noting was occurring. From those electronic notes, he dictated his Violation Report.

31. On December 16, 2011, at Bayside, there were no fights, disturbances or aggressive displays by one person against another. (Taken from the testimony of Chase).

32. On January 14, 2012 at 11:00 p.m., Jerry Cote, DLC Investigator, arrived at Bayside in an undercover capacity acting as a patron.

33. At approximately 11:40 p.m., a blond female bartender, one of two bartenders on duty, served to a large male wearing a camouflage hat, three long neck beer bottles. The bar at Bayside was busy and Cote was sitting at the bar. Another male came from the dance floor and took two of the beer bottles from the male with the camouflage hat, after they were purchased and served, and returned with them to the dance floor area where he came from. (General Regulation No. 37).

34. At approximately 12:26 a.m. on January 15, 2012, the same male wearing the camouflage hat returned to the bar and requested and was served another three long neck beer bottles by the bartender. From where the bartender was standing, she would have had to change position by some five or six feet to determine where those three bottles were going in the dance floor area. From where she was standing, she could not see where the bottles went. (General Regulation No. 37).

35. At approximately 1:23 a.m., Cote, was near the stage in the dance hall area. An intoxicated female whose eyes were three quarters shut was trying to maintain her balance while dancing. Another female was holding her up. (General Regulation No. 17).

36. At approximately 1:45 a.m., Cote was to the right of the stage in the dance hall area. A young male in his mid-20s carrying a long neck beer bottle was unsteady and lost his balance while walking and fell against the wall. No Bayside employee responded. (General Regulation No. 17).

37. At approximately 1:48 a.m. while Cote was still in the same general area, a male in his 30s was "making out" with a girl while he had a twisted tea, an alcoholic drink, in his

hand. While doing so, he lost his balance, fell to the right and had to grab a pole by which to right himself. (General Regulation No. 17).

38. The large male wearing the camo hat, once again, after 1:48 a.m., ordered and received from the bartender three long neck beer bottles. They were not nonalcoholic beers. (General Regulation No. 37).

39. Cote and Chase tried to stay separated on the Bayside premises. By 1:48 a.m., Cote had been in the dance hall area for between 60 to 90 minutes. From where he was, he had a fairly good view of the area. He did not recall seeing anyone passed out or vomiting on the floor.

40. Although some alcoholic beer comes in green bottles such as Rolling Rock and Heineken, the majority of them are served in brown bottles. On the other hand, nonalcoholic beer is typically served in a green bottle. While Cote did not mention in his Violation Report the color of the beer bottles he saw, his investigative notes made on or about the time of the event contained more information, some of which was not put into the report if not then deemed pertinent. The color of the beer bottles did not seem pertinent after he determined that they were regular alcohol containing beers.

No nonalcoholic beers were being consumed by patrons that evening.

Nonalcoholic beer is not frequently consumed by patrons in bars.

41. Some Bayside patrons consume nonalcoholic beer at Bayside.

42. During Cote's time at Bayside as an undercover investigator, nothing occurred that could be characterized as a disturbance or a physical confrontation.

43. Notes were made by Cote on his I-phone, which he still had with him at the time of his testimony. Those notes were used to create his Violation Report and to the best of his

knowledge there is no information in the report that is not supported by his I-phone notes.

Infrequently, Cote will remember something clearly that he did not dictate into his I-phone notes nor his Violation Report.

44. On the evening of January 14/15, 2012, the employees on duty at Bayside were two bartenders, a heavy set male walking the floor, Chuck Lowe and a heavysset female working the door. (Taken from the testimony of Jerry Cote).

DLC Inspection December 22-23, 2011 - Promotion

45. On December 22, 2011, Investigator Clark entered Bayside and spoke with Brittney, the bartender, about the promotion. She described the Friday night specials as featuring an unlimited amount of drink, but when questioned about the “unlimited” aspect, said that the customer would be cut off if it was appropriate to do so. The promotion was done to increase patronage as Friday nights were typically quiet. On that day, Chuck Lowe was not present on the premises, although expected the next day.

46. On December 23, 2011, Clark returned to Bayside, spoke once more with Brittney while looking for Lowe, who was not there. She connected Clark and Lowe by telephone.

Lowe was notified by Clark on that day that the promotion he was running which allowed unlimited drinking at Bayside was prohibited by General Regulation No. 49(a) for the reason that it encouraged the rapid consumption of alcoholic beverages. Clark advised Lowe to immediately discontinue this promotion. Lowe said that he would. Clark advised Lowe to call him first if in the future he wished to start a promotion and had questions about whether it was a violation, and in the event that Clark could not provide an immediate answer, he would get a prompt answer for him.

47. On December 23, 2011, Investigator Clark ticketed Bayside for the promotion which took place up to then, i.e., December 23, 2011. The ticket is No. 00722, and provided for a \$250.00 administrative penalty, which has been paid. The "ticket" was issued for a Violation of General Regulation No. 49(a). That violation is resolved and is not an issue in this proceeding.

48. Not long after December 23, 2011, a neighboring bar brought to Clark's attention that Bayside was once again advertising a promotion, the details of which could be learned on the Bayside face book page. Lowe did not discuss the new promotion with Clark first.

49. Clark saw on Bayside's face book page an advertisement once more for "unlimited" drink specials for \$25.00. At that point, he decided he would ask DLC Investigator Klausenberg to go to Bayside undercover to look into their new promotion.

50. The first promotion in December, 2011, was entitled "Unlimited Drink Special" which entitled the patron, upon paying \$15.00, to drink an unlimited amount of alcoholic drinks provided they came from the "well" otherwise known as the bottom shelf. Beer was not included or at least not offered. This special ran on Fridays only.

51. The second promotion that Bayside ran was advertised by Bayside on its face book page. It was entitled "VIP Package", and had two levels. The first level was very much like it was before in that for \$15.00 you would have an unlimited amount of alcoholic drinks provided they came from the well or the lower shelf, but now beer was added at that level. The second level was the top shelf level, so to speak, in that for \$25.00 you had an unlimited amount of alcohol available to you to consume from the top shelf as well as premium beer. It was advertised as "all you can drink".

52. In her conversation with Clark, Brittney advised that the promotions did not keep Bayside from shutting off further consumption by a patron whose level of intoxication demanded that it be done.

53. The second promotion constituted a violation of General Regulation No. 49(a) because the promotion by its nature not only allowed but encouraged a patron to drink up to his limit even though they may have had no original intention of doing so. It is in the nature of a promotion which advertised the consumption of an unlimited amount of alcohol, that excessive and rapid consumption is encouraged.

54. There are several reasons why patrons might elect the promotion. Some have the intention to get high, others intend to have that last extra drink "free". If they had bought their drinks individually, they would have paid more than the cost of the promotion. By drinking all that they can get from the bartender, they have the sense that they have gotten their money's worth. (Taken from the testimony of Clark).

DLC Inspection on February 3, 2012 - Promotion

55. On February 3, 2012, a Friday, DLC Investigator John Klausenberg entered Bayside under cover as a patron to inquire into the new promotion.

56. Bayside was not very crowded. A DJ was playing, and there were some minors on the premises listening to the DJ. He went to the female bartender and said that he was interested in the promotion that he heard about. She explained that for \$15.00 he could consume all the well drinks and/or beer that he wanted and for \$25.00 he could have all the upper shelf or premium spirits and beer that he wanted with the exception that shots were not included and a particular Tequila was not included.

57 At the time he entered, which was approximately 10:00 p.m., the bartender and Chuck were on the premises. Klausenberg left Bayside at 12:15 a.m. When he gave the bartender \$25.00 and indicated that he would be interesting in the upper level special, she gave him a blue wrist band, which he put in his pocket. He ordered a Myers rum and coke. He was interested in seeing how many drinks she would serve him during the time that he was at Bayside and so ordered a drink about every 15 or 20 minutes so that in approximately two hours he requested and had been served six mixed drinks, each one Myers and coke, except for the last one. Because they had run out of Myers rum, they gave him a bottom shelf rum.

He consumed some of each of the six drinks, but managed to dump the rest in the toilet and refilled with water.

58. If he as a patron had consumed all six drinks without dumping any of it, it was his belief based upon his training and experience, that the patron would be intoxicated to the point of displaying that intoxication. The service by Bayside of six mixed drinks between 10:00 p.m. and 12:15 a.m. was excessive. It constituted an actualization of the violation of General Regulation No. 49(a).

59. The rule taught to DLC investigators and taught to licensees at the DLC alcohol servers seminars is to serve no more than two drinks per hour or be able to articulate a reason why.

60. The promotion did induce patrons to consume more alcohol than he or she would have consumed if the drinks had to be purchased individually. The promotion was a violation of General Regulation No. 49(a).

While Klausenberg was at Bayside, he was the only patron at the bar and it was easy for the bartender to observe his demeanor. He was not displaying signs of intoxication.

(Taken from the testimony of John Klausenberg).

61. At this point, the State rested.

Bayside Witnesses

62. Steven Coon, a St. Albans resident for 59 years, has since March, 2012, been a Town Selectboard member.

63. Coon's son, who is transitioning from high school to college, has worked at Bayside for the last four summers. At the present time, he is a kitchen worker. Prior to allowing his son to work at Bayside, he satisfied himself with its management and its environment as being appropriate.

64. Coon has been at Bayside many times for meals and entertainment but has rarely been in attendance at Bayside for late night entertainment. He deemed it unlikely that he was at Bayside on December 16, 2011 after 10:45 p.m. or on Saturday, January 14, 2012, at 11:00 p.m.

65. When the allegations from the Liquor Control Board against Bayside were brought to his attention, he and the Chairman of the Selectboard had a meeting with the Town Manager and the Chief of Police and after that meeting it was decided that there was no public safety issue at Bayside that they wished to recognize as such. In fact, he questioned the truth of the allegations in the complaint because they do not coincide with his experience at Bayside. The Selectboard unanimously issued a liquor license to Bayside for the year 2012.

66. He considered the owners and management of Bayside to be good responsible citizens of the community. He found that the bartenders, wait staff, as well as door staff, were professional and correct.

67. Coon was a holder of liquor licenses from the State of Vermont for facilities that he operated in Burlington in the late 70s and early 80s, but never in St. Albans.

68. Coon was not aware of any undercover activity at Bayside by the St. Albans Police Department. (Taken from the testimony of Steven Coon).

69. Hannah Kelly, 19 years of age, worked as a waitress at Bayside during the summer of 2011. In February of 2012, she became bar certified and now is employed at Bayside part time as a bartender. She works Friday late night from approximately 8:30 p.m. to 2:00 a.m. and also on Saturday. She started in February of 2012.

70. Soon after Kelly began bartending at Bayside, Bayside started a VIP drink special that was advertised as "Unlimited Fun" for Friday nights.

71. The Friday night promotion from 9:00 p.m. to 2:00 a.m. increased the patron count and as a result the premises became somewhat louder and there was more dancing. There was a DJ on both Friday and Saturday evenings. There was no difference in patron behavior as a result of the Friday night promotion in her experience.

72. Kelly was not working in December, 2011 or January, 2012. The Friday night specials lasted about a month. Her instructions from management were to the effect that she should shut off from further alcohol consumption anyone who showed signs of intoxication and that if there was a concern about their safety in getting home, to bring it to the attention of Chuck or the manager at that time and they would take care of it. On Friday nights, she has had to cut patrons off from further alcohol drinks. It has been her experience when they complain to Chuck, if they do, that he supports her decision.

73. A drink made at the Bayside, for example a Vodka and tonic where the Vodka is from the lower shelf, is \$6.50 per drink. So that on a Friday night a \$15.00 drink special would

obviously save the patron money. Another benefit to both the patron and Bayside was that if the patron selected the special, there was only a one time exchange of money. The drink special ended sometime in mid-March of 2012. (Taken from the testimony of Hannah Kelly).

74. Caitlin Ann Mackey, age 21, is a college student at Castleton and during her college summer break for three summers including 2012, she has been employed at Bayside as a bartender/waitress.

75. She did not work during the winter of 2011/2012. She did not work at Bayside at a time when the VIP specials or promotions were being offered.

76. By offer of proof, which the Board accepted, she would testify that she received instructions from management to the effect that she as a bartender or wait staff should not serve any patron an alcoholic beverage when they were showing signs of intoxication and that she should cut people off if for the same reason they were no longer entitled to drink. (Taken from the testimony of Caitlin Ann Mackey directly and by and through the offer of proof).

77. Heather Sharon Charron, an employee of Bayside, again with no direct knowledge of the events of December 16, 2011 and January 14, 2012, and with no knowledge of the promotion or drink special, did not testify directly but by and through an offer of proof would testify that she received instructions from Bayside management to the effect that she was not to serve patrons with alcoholic beverages when they were showing signs of intoxication and that she should cut people off from further consumption of alcoholic beverages when for the same reasons they should no longer be served. (Taken from the offer of proof for Heather Sharon Charron made by Attorney Shelkrot).

78. Stephen W. Densham, a resident of St. Albans, who lives five miles from Bayside, is employed by the Small Business Administration (SBA) to engage in small business

development. In that capacity, he provides counseling and general business advice. His work for the SBA is done in Chittenden and Franklin Counties in Vermont.

He has held first and third class liquor licenses in Vermont as well as in other states. He operated the Ruben James establishment in Burlington in the past.

79. He is a patron of Bayside and frequents it anywhere from three to five times a month. Some of the time he there late at night. During the winter of 2011 into early winter of 2012, he was not aware of Bayside running any drink specials and did not participate in any. From December of 2011 through February of 2012, he could not recall ever seeing an intoxicated person on the premises.

He had no specific recollection of being at Bayside on December 16 – 17, 2011 from 10:00 p.m. on, or on January 14 – 15, 2012 from 10:00 p.m. on.

80. Bayside on Friday and Saturday evenings is a fun place to be with dancing and live entertainment. He never saw anyone passed out at tables. He brought his family there for lunch and dinner and was comfortable doing it.

81 Bayside is a current client of the SBA, and as a hospitality specialist with the SBA, he has engaged in counseling with Chuck Lowe concerning Bayside, but those discussions never touched the subject of alcohol. It has been years since he was professionally engaged in alcohol regulations as a licensee and does not consider himself up to date in that regard.

82. The allegations against Bayside describe facts which are inconsistent with his experience at Bayside. Considering the language of the drink promotion, if he had been asked, he would have advised Lowe against the use of the word “unlimited” in the promotion. (Taken from the testimony of Stephen W. Densham).

83. Charles R. "Chuck" Lowe is the manager of Bayside and is typically in attendance at Bayside from 11:00 a.m. to 2:00 a.m. However, he is in and out as he feels the need to be. He is back by 7:00 or 8:00 p.m. until closing. They serve food generally until 9:00 p.m., and sometimes until 10:00 p.m. or so.

84. The Lowe family has been in ownership since 2001 with Debbie Lowe, Chuck's wife, a 99% owner. A 1% nominal share is held by someone else.

85. Lowe was shown Licensee's Exhibit A 1 through 10, which he identified as photos taken of Bayside. Exhibit A (i.e.) Photos 1 through 10 which Lowe authenticated by his testimony was admitted into evidence without objection.

None of the photos, except 9, provide any information to assist the Board in the resolution of an issue in this case. Photo 9 shows the bar at Bayside. Also shown is the window between the dance floor area and the bar, which is circled in the photograph. The bar window allows service to patrons from the dance floor side rather than requiring them to approach the bar from the front.

86. The entire Bayside building is on an area 70' by 40' more or less. The dance floor, dining room area, measures 40' by 40' more or less. There are seven booths in the bar area and some of the tables in the dining/dance hall area are moved to the side or removed for Friday night and Saturday night entertainment purposes.

87. Bayside is open year round and perhaps 70% of their income is generated during the months of June, July and August. 60% more or less of their gross proceeds come from the sale of food and 40% from the sale of alcohol.

88. They have two kitchen employees and they have part time waitresses. His two sons work there sometimes as bartenders, sometimes as kitchen help and sometimes they wait tables as well.

89. They have a young woman working the door instead of a burly male bouncer. It was Lowe's opinion that this helps to set the tone of the place as one where aggressive behavior is not expected. A burly bouncer/doorman might give the opposite impression.

90. He and his wife Debbie instruct their alcohol servers not to serve people who are showing signs of intoxication. He asserted that he instructed his servers not to, in effect, serve that "last drink".

91 Sometime after they started the "Unlimited Fridays" promotion, Bayside was visited by DLC Inspector Jay Clark in December, 2011. Lowe was called and came to Bayside and spoke with Clark.

92. Clark expressed concern to Lowe over the promotion encouraging "rapid consumption" which was prohibited by a liquor regulation. Clark, according to Lowe, found nothing wrong with the promotion except that use of the term "unlimited" would encourage a rapid consumption of alcohol.

93. Shortly thereafter, Lowe began another promotion entitled the "Ultimate VIP Package".

94. On February 24, 2012, he was served with a ticket from DLC Investigator Clark who visited Bayside on or about that date. Lowe identified Ticket #00725, marked as Licensee's Exhibit B, as that ticket. The ticket cited Bayside to a hearing before the LCB for alleged violations of General Regulation Nos. 49(a), 37 and 17, occurring on January 14, 2012 and February 3, 2012.

95. Exhibit B was admitted without objection.

96. Bayside clientele including late night patrons, who tend to be anywhere from 18 to 55 years of age, most of whom he has seen before and most of whom he knows. They are people who live in the area, who drop by for meals and sometimes come for later entertainment. The majority of patrons are not walk in customers, but make a short drive to get to Bayside.

97. Staff are instructed not to over serve. During the promotion when the term unlimited was in use to describe the drinking opportunities in the promotion, the term unlimited could be "misconstrued" to mean actually that, when in fact Lowe intended that service would be limited to those who were entitled to drink alcohol and alcohol would be cut off from those who were displaying signs of intoxication.

98. Lowe's evening duties include walking around Bayside, picking up bottles, interacting with customers at tables or at the bar and include an inspection of the premises inside and out.

99. Lowe had no recollection of hearing any patron at Bayside make a racist comment about a black patron who was then at Bayside. That would not have been allowed. So also, he has never seen any of his serving staff serve and deliver three or more drinks to any patron.

100. Bayside sells Labatte Blue Nordic, which is a nonalcoholic beer in a long neck brown bottle. It is very difficult to tell the difference between Blue Nordic and a regular beer at any distance unless you know specifically what they look like. They sell on the average a case of nonalcoholic beer a week. The lights on a Saturday night are sufficiently low so that it would be very difficult, if not impossible, to read the label on a beer bottle, according to Lowe.

101. DLC Investigator Chase spoke about seeing a patron passed out for a period of time at a table. This did not occur according to Lowe. If it had occurred, he would have noticed it, he asserted.

102. On Saturday night, January 14, the music was the same as it was on Friday night, the day before. This would include the same DJ. However, because of a greater volume of patrons and the noise that they make, the overall noise is higher. He was working that evening with two bartenders and he had Abby and Nick at the door. It was his job to cruise around and assist each of the staff with their assigned tasks where it was needed.

103. With respect to the allegation about a patron stumbling and staggering on the dance floor, he can't say that it did not happen and he can't say that there is not an occasional over consumption. He believes they do the very best they can. They don't have police problems, they don't have fights, they have very few DUIs.

104. As to a patron vomiting on the floor, this did not happen, alleged Lowe, because staff were there and they would have seen it.

105. If a person is ready to leave Bayside and needs a ride home, they will arrange a ride home either by their own private car or by a free taxi ride home. (Taken from the testimony of Lowe).

106. Susan Smith, a lifelong resident of St. Albans, Vermont, frequents Bayside anywhere from three to five days a week. She has lunch there, and on some days has an early dinner there, and on Fridays and Saturdays avails herself of evening entertainment. She brings her 15 year old daughter to Bayside for meals, but not for evening entertainment.

107. She has heard Debbie and Chuck Lowe instruct the bartenders from time to time against serving a patron when in their judgment that patron should not be served.

108. The atmosphere at Bayside is family friendly and she is comfortable bringing her daughter there for meals. The atmosphere during Friday and Saturday evenings starting from approximately 9:00 on is happy with music and dancing and lots of people enjoying themselves.

109. Smith had no specific recollection as to whether she was at Bayside on December 16, 2011 or on January 14, 2012. On Friday and Saturday if the entertainment warrants it, she will stay until 1:00 in the morning or so. (Taken from the testimony of Susan Smith).

110. Tammy Aubuchon, a St. Albans, Vermont, resident, frequents Bayside five times a week and is there between 5:00 p.m. and 9:30 p.m. She is employed and begins work at 11:00 p.m.

111. During the time that she is at Bayside, she has seen Debbie and Chuck Lowe deny drinks to patrons when they appeared intoxicated. She professed never to have seen drunk or intoxicated behavior on the part of patrons nor to see a patron passed out at a table or at the bar or vomiting on the floor at Bayside.

112. She has no specific recollection of being at Bayside on December 16, 2011 nor on January 14, 2012. (Taken from the testimony of Tammy Aubuchon).

113. Betty Ann Finn, age 84, has been a St. Albans resident for approximately 60 years. She lives approximately three miles from Bayside and is there once a day or more but never very late. Her arrival is usually at noon for lunch and sometimes she is there for an early dinner. The atmosphere at Bayside is very friendly and she feels comfortable there as an unescorted woman. She knows many of the patrons of Bayside.

114. She has never seen anyone vomiting in public at Bayside nor has she experienced any loud or obnoxious or intoxicated behavior. This kind of occurrence would make her feel

uncomfortable. She is rarely at Bayside for evening entertainment, although she has sometimes participated in “trivia” night there. She is never there after 10:45 in the evening.

115. She served the community as a “side judge” in Franklin County for some years.

116. She has no recollection of whether she was at Bayside on December 16, 2011 or January 14, 2012. (Taken from the testimony of Betty Ann Finn).

117. Both sides rested. The hearing ended. The opportunity to submit Requests to Find and Conclusions was granted.

CONCLUSIONS

1. The Licensee, Ekalview, LLC, d/b/a Bayside Pavilion (“Bayside), 15 Georgia Shore Road, St. Albans, Vermont, is the holder of first and third class liquor licenses by which it is permitted to sell alcoholic liquor for on premise consumption.

2. At the inception, it is best to state that after considering the divergent testimony, the Board concludes that Bayside serves two basically different groups of patrons, with naturally some “blend” of the two groups.

The first group are those patrons who frequent Bayside for lunch and/or dinner. Occasionally they will be present for later evening entertainment. Those in this group who testified, without exception found Bayside a pleasant place to be but all without exception either were not or could not recall being at Bayside on December 16, 2011 from approximately 10:00 p.m. until closing on the 17th nor on January 14, 2012 at approximately the same time until closing on January 15, 2012.

Another group of patrons are at Bayside in the later evening, particularly Friday and Saturday, from approximately 10:00 on. They come for the music to dance, drink, laugh,

have a good time and relax. It is with this group that Bayside incurred the violations which we will address below.

General Regulation No. 17

3. General Regulation No. 17, which is set forth in full in the Findings, does not need to be summarized to be understood, except to say that a person who enters a licensed establishment or who is already there and displays signs of alcohol intoxication may not be allowed to stay on the premises, may not be served intoxicating beverages and may not be allowed to consume what he or she already has in their hand by way of intoxicating beverages. Such a person needs to be removed from the patron population and segregated under supervision while a safe departure is arranged. Violations cause many and serious public safety concerns.

4. Undercover inspections of Bayside were conducted by two DLC Investigators on two separate occasions during which General Regulation No. 17 violations were found. One on December 16, 2011 and the other on January 14, 2012. Each inspection extended into the next day.

5. There are many common signs or displays of alcohol intoxication. In Vermont, no bartender or waitress who serves alcoholic beverages can do so without having participated in and passed the DLC alcohol servers course which deals heavily with the issue of avoiding over service to patrons and with detecting the signs of intoxication.

An alcohol server in this state must be retrained by taking a refresher course and be so certified at least every two years.

6. In a formal academic like setting where alcohol serving trainees observe DLC trained instructors as they offer instruction, for example in the detection of the various signs of intoxication, the material appears easy to absorb and is understood as common sense.

The problem is, however, that in the real world at bars, for example, alcohol is not often served to patrons in a genteel face to face setting, but rather in an informal "loose" atmosphere with people sometimes in an animated state with music playing, loud voices, in a crowded establishment with busy servers. The patrons who are drinking most likely want to drink more (i.e.) they are having a good time, they are happy and their friends are also happy and are still drinking. Furthermore, the licensed premises in which the alcohol containing drinks are served is a business for profit.

7. If the place is busy and has developed a tolerance for the intoxication of its patrons, intoxicated patrons will be served more alcohol than they should be served. They will expect that tolerance when they come again.

8. It appears that is most likely what happened at Bayside. The Board does not doubt that Bayside's servers and employees who furnish alcohol to patrons have been told that over service is prohibited and that patrons displaying their intoxication must not remain at Bayside and may not be served. The problem is that the level of tolerance of intoxication in a patron at Bayside is greater than it should be. As we have heard by credible testimony in this case, patrons have gone to the bar asking for alcohol containing beverages and either the servers do not observe the patron well enough to see their display of intoxication or seeing it, do not recognize it for what it represents. In some instances, the intoxicated patrons walked by Chuck Lowe or were in conversation with Chuck and he did not react to their condition. When Lowe checked on his patrons and walked around the Bayside interior on the dates in question, he did not see, with recognition, that certain of his patrons were intoxicated and were displaying it. As a consequence, the undercover DLC Investigators found, and the Board agrees with their

findings, that there were eleven violations of General Regulation No. 17 during the inspection on December 16-17, 2011.

In support of this conclusion, the Board refers to Paragraphs 15, 17, 20 and 21 in the Findings.

9. In addition, the undercover DLC Investigators found and the Board agrees with their findings that there were nine violations of General Regulation No. 17 during the inspection on January 14-15, 2012. In support of this conclusion, the Board refers to Paragraphs 23, 25, 26, 27, 28, 35, 36 and 37 in the Findings.

General Regulation No. 17(a)

10. General Regulation No. 17(a) is also set out in full in the Findings portion of this Decision. Its mandate is simple and clear. A server may not provide to a patron that amount of alcohol which it would be reasonable to expect would cause that patron to become “under the influence” as a result of the quantity of alcohol served.

The normal and expected activities of a patron upon leaving the licensed premises include, without limitation, driving an automobile, crossing a heavily congested street, or walking home a considerable distance and encountering people on the way. If this is done by a patron whose degree of intoxication upon leaving the premises would render the foregoing activities unsafe or illegal, than that patron is “under the influence” for purposes of General Regulation No. 17(a). There are serious concerns for public safety here. 7 V.S.A. 1.

11. A violation of General Regulation No. 17(a) is proven when the amount of alcohol served to that patron by the licensee or his agents is such that it would be “reasonable to expect” that the patron would be under the influence as a result of that alcohol consumed. This concept does not require that the patron in fact display any signs of intoxication. Each patron’s

ability to absorb alcohol without displaying his intoxication is different. Some drinkers display their intoxication gradually and predictably, others give little indication of their intoxication until their last drink has been consumed, so to speak. Then they crash. By that time it is too late. This can be avoided if a bartender is alert to who is being served and how often they are served. This is not an unattainable requirement.

In the mind of some bartenders or servers, however, the issue of over service is connected with the patron first displaying intoxication, and not until then. That is a big mistake. Over service, under General Regulation No. 17(a), can and does occur without a display of intoxication.

12. The DLC Investigators' inspection of Bayside on December 16-17, 2011 uncovered no violations of General Regulation No. 17(a). On January 14-15, 2012, however, they uncovered a series of patron purchases that violate General Regulation No. 17(a).

13. At approximately 11:40 p.m. on January 14, 2012, a bartender in violation of General Regulation No. 37, served to a large male wearing a camouflage hat three long neck beer bottles. The bar was busy. After the three bottles of beer were purchased and delivered to the purchaser, another male took two bottles from the purchaser with the camouflage hat and returned with them to the dance floor area. There was no testimony or evidence indicating that the bartender even knew that two of the three bottles were removed from the bar by a person other than the purchaser. (Underlining is for clarity).

At approximately 12:26 a.m., the same male with the camouflage hat returned to the bar, requested and was served another three long neck beer bottles by the bartender. The bartender could not see where those bottles were going so as to ascertain if they were being put in the hands of others and she did not specifically look.

At approximately 12:40 a.m., the same male with the camouflage hat returned to the bar and requested and was served another four long neck beer bottles by the bartender.

Once again, the male wearing the camouflage hat shortly after 1:48 a.m. ordered and was served three long neck beer bottles by the bartender.

So from 11:40 p.m. on January 14 until just after 1:48 on January 15, approximately two hours and ten minutes later thirteen (13) long neck beer bottles were served to the male with the camouflage hat. As we will state hereafter, those sales were violations of General Regulation No. 37, but for the purpose of this discussion, they were collectively a violation of General Regulation No. 17(a). Once again, the fact that the patron by his physical condition as he ordered beer from a bartender, may or may not have displayed signs of intoxication, is not a defense to a violation of General Regulation No. 17(a).

Therefore, there was a violation of General Regulation No. 17(a) at Bayside on January 14 – 15, 2012, in that 13 bottles of beer were sold to the man with the camouflage hat from 11:40 p.m. until approximately 1:50 a.m. on the following day, a time span of two hours and eight minutes, more or less. Reference is made to Paragraphs 24, 33, 34 and 38 of the Findings in support of this conclusion.

General Regulation No. 37

14. General Regulation No. 37 set forth in full in the Findings and as it relates to this case requires simply that a server not sell to any patron any more than two drinks, as they are defined in General Regulation No. 37, to any one customer at any one time.

15. At approximately 12:15 a.m. on December 17, 2011, a male patron came to the window counter side of the bar and ordered three Bud Light beer bottles, which were served by the bartender who turned away immediately after the sale and was not watching where the

customer delivered the beer bottles. The third beer sold and delivered to the patron constituted a violation of General Regulation No. 37.

16. At approximately 12:40 a.m. on December 17, 2011, a large male wearing a camouflage hat presented himself in front of the bar and ordered four Bud Light beers which were served to him. The bartender did not make an effort to see and determine where the bottles of beer were delivered. This constituted an over service of two bottles of beer, which is a clear violation of General Regulation No. 37.

17. At approximately 1:41 a.m. on December 17, 2011, a male patron walked to the bar window, ordered and received from the bartender three beers. The bartender did not remain at the window to observe where the beer was delivered. This sale violated General Regulation No. 37 by one beer.

18. On January 14, 2012 at Bayside, a female bartender at approximately 11:40 p.m. delivered to large male patron wearing a camouflage hat three long neck beer bottles. After they were purchased and delivered, two of them were taken by a friend of the purchaser who returned with them to the dance floor area. Once again, this was an over service by one bottle of beer and a clear violation of General Regulation No. 37.

19. At approximately 12:26 a.m. on January 15, 2012, the male with the camouflage hat returned to the bar, requested and received another three long neck beer bottles from the bartender. From where the bartender was standing, she could not see and did not see where the three beer bottles wound up. Once again, another violation of General Regulation No. 37 by one beer bottle.

20. The large male with the camouflage hat once more at 1:48 a.m. on January 15, 2012, ordered and was served by the Bayside bartender three long neck beer bottles. This constituted another violation of General Regulation No. 37 by one beer bottle.

21. There were therefore three violations of General Regulation No. 37 on the evening of December 16–17, 2011 and three violations of General Regulation No. 37 on the evening of January 14-15, 2012. The Board makes reference to Paragraphs 16, 24, 27, 33, 34 and 38 in the Findings in support of these conclusions.

General Regulation No. 49

22. The management at Bayside decided to increase their patronage and consequent receipts on Friday evenings in December of 2011 and in January of 2012. The events occurring with respect to the December 11 activities at Bayside dealing with General Regulation No. 49 have been resolved by ticket and are not an issue in this case.

23. General Regulation No. 49(a) prohibits licensees or their employees from offering or permitting promotions which encourage the rapid or excessive consumption of alcohol containing beverages.

Sometime after December 23, 2011, a bar in the neighborhood to Bayside brought to the attention of DLC Inspector Clark that Bayside was advertising a promotion details of which were set forth on its Facebook page. After Clark satisfied himself that there was in fact a promotion being advertised by Bayside for unlimited drink specials, he determined that he would ask DLC Inspector Klausenberg to visit Bayside under cover to determine what the new promotion was.

24. Clark had made it clear to Chuck Lowe at Bayside in December, 2011, that a promotion advertising "unlimited" alcohol consumption was a violation of General Regulation No. 49(a).

25. The bartender at Bayside when questioned by Clark about the promotion remarked that the promotion and the use of the word unlimited did not hinder Bayside management or its servers from cutting off a patron who was no longer entitled to consume alcohol by virtue of his/her display of intoxication.

26. On February 3, 2012, a Friday, DLC Investigator John Klausenberg entered Bayside under cover and made inquiry of the bartender about what the promotion entailed.

27. Under the promotion, for \$15.00 a patron could consume all of the "well" drinks and/or beer that he wanted, and for \$25.00 he could have all the upper shelf or premium spirits and beer that he wanted with the exception that shots were not included and a particular named Tequila was also not included. The term "well" equates with bottom shelf and it is where a bar traditionally keeps their less than premium product.

28. Klausenberg paid for the \$25.00 promotion and over the period of time that he was at Bayside from 10:00 p.m. until 12:15 a.m., he requested, was served and appeared to consume six mixed drinks containing Myers rum and coke. Because they ran out of Myers rum, the last drink contained a bottom shelf rum.

29. Klausenberg dumped into the sink in the bathroom most of each of his drink and refilled his glass with water. Needless to say, he did not at any time appear before the bartender displaying any sign of intoxication.

30. It was the opinion of Klausenberg and Clark based upon a considerable number of years of experience as liquor investigators and formerly as police officers dealing with

intoxicated patrons that the consumption of six mixed drinks in two hours and 15 minutes would render that patron intoxicated to the point of displaying that intoxication. Each of the two Investigators were of the opinion that the promotion induced the patron to consume more alcohol than he or she would have consumed if the drinks had to be purchased individually. The Board accepts this reasoning as sound and concludes likewise. The promotion therefore was a violation of General Regulation No. 49(a) in that it encouraged the excessive consumption of alcohol containing beverages.

31. Stephen Coon, a longtime St. Albans resident, is a recently elected Town Selectboard member. His son is employed by Bayside in the kitchen for the last four summers. Coon was satisfied that Bayside was an appropriate environment for his son to be employed in.

32. Coon has been a patron of Bayside for meals and entertainment on many occasions, but rarely for late night entertainment.

33. He has no recollection being at Bayside on the evenings of December 16, 2011 or January 14, 2012.

34. He was instrumental in seeing to it that the Selectboard of the Town of St. Albans issued Bayside a 2012 liquor license.

35. Coon took a personal interest in the DLC allegations of General Regulation violations against Bayside, and because they do not coincide with his experience and observations, he questioned the truth of the DLC allegations.

36. For Coon to say that he questioned the truthfulness of the allegations in the DLC Notice of Hearing against Bayside because they do not coincide with his own personal experience there or his observations, has no merit in making the Investigators' testimony less credible. The violations are specific as to date and time. Coon provided only general comments.

Coon doubted whether he was at Bayside on December 16, 2011 or January 14, 2012 during which the incidents which became violations occurred.

37. While stating that his observations of the bartenders and wait staff as well as door persons at Bayside seemed professional to the extent of his knowledge, it must be understood that he by his own statement has rarely been in attendance at Bayside for late night entertainment.

38. In the late 70s and early 80s Coon was the holder of a liquor license from the State of Vermont for a facility that he operated in Burlington, Vermont, but never in St. Albans.

39. As far as Coon is concerned, the Board does not doubt that when he and his family are in attendance at Bayside for meals there was likely little or no intoxicated behavior that came to his attention.

40. Hannah Kelly, a 19 year old former waitress and now part-time bartender, works at Bayside from approximately 8:30 p.m. to 2:00 a.m. on Fridays and Saturdays. Her bartending began in February of 2012. She was not employed at Bayside in December, 2011 nor in January, 2012.

41. Soon after Kelly began bartending at Bayside, the VIP drink special began and was advertised as "Unlimited Fun" for Friday nights. The Friday night promotion from 9:00 p.m. to 2:00 a.m. did increase the patron count. As a result, the premises became louder and there was more dancing. She was of the opinion that there was no difference in patron behavior as a result of the promotion.

42. She received instructions from Bayside management to the effect that she should shut off from further alcohol consumption anyone showing signs of intoxication and that anyone

needing a ride home at the end of their day to bring it to the attention of Chuck or the manager at that time and it would be taken care of.

43. Since the drink prices average approximately \$6.50 per drink, a patron choosing a drink special promotion on Friday night would obviously save money. A further benefit to the patron and Bayside is that an exchange of money occurs at only one time.

44. Hannah Kelly is an employee of Bayside. Her remarks about patron behavior during the promotion, need to be balanced with her status as an employee. Her testimony supports her continued employment.

45. Caitlin Ann Mackey is a 21 year old college student from Castleton who has been employed by Bayside in the summer months including 2012 as a bartender/waitress. She did not work at Bayside during the winter of 2011/2012. She also did not work at Bayside during the time when any VIP special or promotions were being offered.

46. The State objected to further testimony from Mackey concerning instructions she received from management dealing with the service of alcoholic beverages to patrons, on the basis of lack of personal knowledge.

An offer of proof on this question was accepted by the Board and it is understood that Mackey would testify that she received instructions from management that she as a server should not serve any patron an alcoholic beverage when they were showing signs on intoxication and that those people should be cut off from further consumption of alcoholic beverages.

47. The testimony of Mackey as an ongoing employee at Bayside and one who was not employed at Bayside during the weeks and months in the winter of 2011/2012 when the incidents complained of occurred, is of very limited usefulness.

The Board understands full well that it is most unlikely that any person having management responsibilities over a licensed establishment would give a server anything but the proper pro forma instructions concerning intoxicated patrons. Lack of instruction to alcohol serves is not the problem. Acting on the instruction is.

48. Heather Sharon Charron, an employee at Bayside, with no direct knowledge of the events of December 16, 2011 and January 14, 2012, for the same reasons given for Mackey, gave no testimony but was allowed through her attorney to make an offer of proof to the effect that she would testify that she received instructions from Bayside management that she was not to over serve patrons with alcoholic beverages when they were showing signs of intoxication. Again, for the same reasons, the testimony of Charron by and through an offer of proof made by her attorney has little value in resolving the issues in this case.

49. Stephen W. Densham, a resident of St. Albans, who lives approximately five miles from Bayside, is an employee of the Small Business Administration (SBA) by contract to engage in small business development in the Counties of Chittenden and Franklin in Vermont.

50. In that capacity, he has provided and does provide counseling and general business advice to Chuck Lowe concerning Bayside but not on the issue of alcohol. His services are free to Lowe.

51. Densham has held first and third class liquor licenses in years past but does not consider himself up to date with Vermont liquor laws and regulations.

52. Densham learned of Bayside's difficulties with the DLC in part from Attorney Shelkrot and in conversation with Chuck Lowe.

The allegations against Bayside are inconsistent with his experience. If he had been consulted about the promotion and the language by which it was advertised, he would have advised against the use of the word “unlimited”.

53. Densham has brought his family to Bayside for lunch and dinner, and felt comfortable doing so. Sometimes Densham is at Bayside late for night entertainment.

54. During December of 2011 through February of 2012, Densham proclaimed that he never saw an intoxicated person on the premises nor did he see anyone passed out at tables. He had no specific recollection of being at Bayside on December 16-17, 2011 or January 14-15, 2012 during the hours when the violations were discovered.

55. The Board is not inclined to mitigate or disbelieve the testimony of the DLC Investigators who described the patrons and their display of intoxication, or being over served, on the basis of the general testimony of long time faithful patrons. The Investigators were trained to look at people in a licensed establishment to see if they are displaying signs of intoxication. This is not negated by what a patron on the premises did not see. Patrons by and large are not looking at each other for signs of intoxication. They are there for their enjoyment and become tolerant of others apparent enjoyment. Densham is testifying on behalf of a client and his information must be considered somewhat compromised.

56. Susan Smith, a life long resident of St. Albans, is at Bayside anywhere from three to five days a week for lunch and dinner. She also partakes of evening entertainment on Fridays and Saturdays at Bayside. Her 15 year old daughter sometimes accompanies her to Bayside for meals. Bayside during mealtime is a friendly and comfortable atmosphere and Bayside on Friday and Saturday evenings from 9:00 or so on is a happy place with people enjoying

themselves with music and dancing. This patron behavior is not inconsistent with their intoxication to the point where it was displayed.

57. She has heard management at Bayside instruct the bartenders against serving patrons who are intoxicated. She has no recollection of being at Bayside on December 16, 2011 or January 14, 2012.

58. Smith and other patrons were at Bayside having a good time, interacting with others having a good time and were not looking at each other critically for signs of demonstrated intoxication, which if noticed was not recognized as prohibited behavior.

59. Tammy Aubuchon, a St. Albans, Vermont resident, is at Bayside five times a week between 5:00 p.m. and 9:30 p.m. She has a job which she begins at 11:00 p.m.

60. She had no recollection of being at Bayside on December 16, 2011 or January 14, 2012. She professed to have heard Debbie Lowe and Chuck Lowe when they were on duty at Bayside denying drinks to patrons who appeared intoxicated. She also professed never to have seen drunk or intoxicated behavior on the part of patrons.

61. Aubuchon is very much a regular at Bayside as she is there five times a week for dinner between 5:00 and 9:30 p.m. She is in an environment at Bayside that she enjoys. She would not continue to patronize Bayside if it were otherwise.

On the other hand, as we said before, she is there to have a good time, and is not looking critically at other patrons for signs of intoxication. If other patrons are happy, the atmosphere helps her to be happy. When she states that she has not seen intoxicated patrons at Bayside, she is most likely thinking of patrons whose display of intoxication is gross. Gross intoxication is substantially over the top. Persons who are grossly intoxicated are no longer having a good time nor can they help others to have a good time.

62. Betty Ann Finn, an 84 year old single woman, who has been a St. Albans resident for approximately 60 years, lives three miles from Bayside and spends a lot of time there. She is there every day at noon time for lunch and sometimes is there for an early dinner as well. She finds the atmosphere at Bayside to be friendly and to her liking as an unescorted woman and meets many people there that she knows.

63. She has never experienced any behavior at Bayside which made her feel uncomfortable. She has no recollection of being at Bayside on December 16, 2011 nor January 14, 2012, but in any event is never there after 10:45 in the evening.

64. Ms. Finn is one of Bayside's patrons who regularly come there for meals, who see friends there and who have never had a bad experience there. On the other hand, this group of people is rarely at Bayside in the evening hours from 10:30 or so on.

65. Charles R. "Chuck" Lowe is the manager at Bayside and is married to the owner who holds 99% of the stock. The Lowe family has been in ownership since 2001.

66. Lowe was shown Exhibit A which consisted of ten numbered photographs which he described and which were admitted into evidence. Only one of the photographs provides information about an issue in the case and that is Photo A9. It shows the bar at Bayside and shows the bar window which is of sufficient size to allow patrons to order and be served bar beverages from that window. It confirms what the Investigators have described and that is that if a bartender serves a patron in front of him/her at the bar and he or she takes that drink or drinks into the dance area, unless the bartender goes to the bar window to the right and follows their progress, the bartender will not be able to see where the drinks were taken. If the bartender serves a patron from the bar window, the bartender would have to remain at the window and follow the patron's progress to determine where and to whom the drinks are going.

67. The dance floor / dining room area of Bayside measures approximately 40' x 40' and has a dual use as a dining room and then also for dancing and entertainment purposes.

68. Although Bayside is open year round, 70% of the Bayside income is generated during June, July and August. Lowe estimates 60% more or less of the gross proceeds come from the sale of food and the remaining 40% from the sale of alcohol.

69. Chuck and his wife Debbie work as managers at Bayside. Chuck describes his working hours at Bayside from 11:00 a.m. to 2:00 a.m. during which time he is in and out as he feels the need to be, but is back at Bayside from 7:00 to 8:00 p.m. until closing. Bayside serves food until 9:00 p.m. to 10:00 p.m., depending on need.

70. Bayside employs part-time waitresses as well as bartenders and the Lowes have two sons who work at Bayside sometimes as bartenders, sometimes as kitchen help and sometimes as waiters.

71. Chuck and his wife Debbie instruct their alcohol servers not to serve people who are showing signs in intoxication.

72. Friday evenings have been somewhat slow. Therefore, in December of 2011, they started a promotion entitled "Unlimited Fridays". The details of that promotion have already been explained and need not be repeated. However, on December 23, Bayside was visited by DLC Inspector Clark who advised that the promotion was a violation of General Regulation No. 49(a) because it encouraged the rapid and excessive consumption of alcohol containing beverages. A ticket was written against Bayside for a fine of \$250.00, which Bayside paid. Clark advised Lowe to check with Clark before starting another promotion to avoid another violation. Lowe did not do that. In the Board's judgment, that was stubborn and foolish for Lowe to do. DLC Investigators wish to assist licensees in avoiding violations.

73. It was Lowe's stated belief that in his conversation with the liquor inspector who issued him the ticket in December, the only volatile part of the promotion was the use of the term "unlimited", i.e., allowing unlimited consumption. By removing the term "unlimited" he claimed a subsequent promotion would not violate General Regulation No. 49(a).

Shortly thereafter therefore Lowe began another Bayside promotion entitled the "Ultimate VIP Package". On February 24, 2012, Bayside received another ticket from the DLC which for identification purposes was marked Licensee's B. That ticket required Bayside to appear for a hearing before the Liquor Control Board for alleged violation of General Regulation Nos. 49(a), 17 and 37. Exhibit B was admitted into evidence.

The second promotion was in substance very similar to the first which constituted a violation of General Regulation No. 49(a).

74. Bayside clientele consist of a broad range of people who live in the greater area of St. Albans Bay. The majority of patrons make a short drive to get to Bayside, a small number are walk in patrons.

75. Lowe asserted that he had never seen any of his serving staff serve three or more drinks to any one patron. As far as the patron is concerned who was described as passing out at a table, Lowe asserted against that this simply did not occur. If it had occurred, he would have seen it. So also, as far as the patron vomiting on the floor according to Lowe it simply did not happen.

76. Bayside said Lowe sells on an average a case of nonalcoholic beer a week. From a distance, particularly when the lights are low as they are at Bayside, it is very difficult to tell the difference between nonalcoholic beer from a regular beer. This is true to the inexperienced observers. Liquor Investigators are experienced professionals.

77. Lowe admitted that from time to time there is an occasional overconsumption and from time to time a patron may be stumbling and staggering, but they do a good job in his estimation. They provide a ride home to any patron who requires it at the end of the day.

78. The Board believes that Lowe and his staff while giving lip service to the prohibitions against over service and the need to recognize displays of intoxication, did not see it when it stood before them because they have become tolerant of higher levels of intoxication in their patrons and the display of intoxication that it causes.

79. Bayside is running a business and it thrives as a business when it draws and sustains a generous population of patrons who have a good time and who like being there. On the other hand, Bayside's business is substantially dependent on the maintenance of its liquor licenses, which is dependent upon avoiding violations of liquor regulations. Happy, fun loving, loyal patrons if unchecked can bring about liquor violations.

80. As we have seen from the testimony of the Investigators themselves, they witnessed no fights at Bayside and no aggressive behavior between patrons and basically no disturbances so that there was no unpleasantness. The Board suspects that Lowe by temperament and by his assertiveness deals with intoxicated individuals who are beginning to cause trouble before they cause serious trouble. On the other hand, Bayside must do more than just keep the peace among the patrons. Bayside is accepting and tolerating a level of intoxication in its patrons that is simply too high.

Retraining of Bayside management and alcohol servers is needed.

81. It is difficult for this Board to understand how three and four bottles of beer can be served to patrons six separate times on two separate evenings and for Lowe to maintain that he did not see it. To the Board this means that he is not seeing what he could see by critical

observation. It is not a defense to these violations to simply say they did not occur because I did not see them and if they had occurred I would have seen them. This is not useful reasoning.

82. On the dates of the violations, the intoxicated patrons were as visible to Bayside staff and management as they were to the DLC Investigators. Lowe stated that he knows his customers who by and large are regulars.

It is the duty of Bayside management to observe what is observable to reasonable persons In Re Kenneth J. Tweer, Sr., 146 Vt. 36, 37 (1985).

Since Bayside servers and management have received DLC training and have liquor licenses to protect, the duty to observe is heightened and the ability to understand what was observed should be more acute than that of an ordinary, reasonable person.

83. "Absent compelling indications of error, interpretations of administrative regulations by the agency responsible for their execution will be sustained on appeal." In Re Capital Investment, Inc., 150 Vt. 478, 482 (1988).

84. Insofar as the Board's Findings of Fact and Conclusions of Law herein are inconsistent with or differ from each of the parties specific proposed Findings and Conclusions, those proposals were rejected. Where the Board's Findings of Fact and Conclusions of Law are the same or consistent with the parties' specific proposals, the proposals were accepted.

DECISION

It is the determination of the Liquor Control Board that the first and third class liquor licenses granted to Ekalview, LLC, d/b/a Bayside Pavilion, 15 George Shore Road, St. Albans, Vermont, be suspended for a period of twenty-one (21) consecutive days to begin at the close of business on the 30th day of August, 2012. Said licenses shall be reinstated and effective on the opening of business on the 21st day of September, 2012, provided the

retraining requirements set forth below have then been satisfactorily fulfilled. During the period of suspension, the Licensee Bayside shall not sell or furnish alcoholic beverages on or from the licensed premises.

All of the Licensee Bayside management and alcohol servers shall successfully complete, as soon as it can be arranged, the DLC alcohol servers course, the details of which the Licensee will be informed of by DLC letter following this Decision.

Dated at South Burlington, Vermont, on this 10th day of August, 2012.

LIQUOR CONTROL BOARD

By: Stephanie M. O'Brien
Stephanie M. O'Brien, Chair