STATE OF WISCONSIN CITY OF STOUGHTON DANE COUNTY

In the Matter of the Consideration
of the Revocation of the Class B
Reserve Combination License Held by

SHAKER'S SALOON, LLC

REPORT AND RECOMMENDATION OF
THE STOUGHTON PUBLIC SAFETY COMMITTEE

A hearing was held before the City of Stoughton Public Safety Committee on December 3, 2020 on the complaint of Stoughton Police Chief Greg Leck filed in the above-captioned matter on October 22, 2020. The Complainant appeared by Attorney Richard Manthe. The Licensee was represented at the hearing by Chatta Huffman, its agent, Bradley Dillman, its manager and Steve Meyer, the sole member of Shaker's Saloon, LLC (hereinafter "Shaker's" or "the Licensee"). Shaker's designated Josh Quisling as its representative to present evidence and arguments. The Committee heard testimony from all witnesses proffered by both parties, and received Exhibits 1-10 into the record.

The Complaint alleges that Shaker's Saloon, LLC violated §125.12(2)(ag)2 of the Wisconsin Statutes and identical provisions contained in §§14-31(1)b. of the City of Stoughton Municipal Code. Those provisions effectively prohibit the licensee from maintaining a "disorderly or riotous, indecent or improper house." The Complaint includes allegations of 6 separate incidents which the Complainant asserts constitute a violation of the "disorderly house" statute. Briefly summarized, those allegations are:

1. On October 10, 2020, a patron attending a party at Shaker's was involved in an argument and was shot 6 times in the Shaker's parking lot.

2. On December 18, 2019, Shaker's knowingly allowed its license agent to possess, with intent to deliver, quantities of controlled substances consisting of cocaine and methamphetamine on the licensed premises.

3. On February 22, 2020, Shaker's allowed the consumption of alcohol beverages inside the bar at approximately 2:40 a.m. which was after the legally required closing time.

4. On October 10, 2020, Shaker's staff refused entry by police officers for a bar check in violation of §14-40(g) of the Stoughton Municipal Code.

5. On October 10, 2020, Shaker's had approximately 100-150 people on the licensed premises who were generally not following social distancing recommendations and only approximately 10% of whom were wearing face coverings, in violation of Wisconsin Department

of Health Services (WDHS) Order No. 3 and Public Health of Madison and Dane County (PHMDC) Emergency Order No 9.

6. On October 11, 2020, the manager of Shaker's refused entry to a police officer in violation of §14-40(g) of the Stoughton Municipal Code.

Five officers of the Stoughton Police Department testified on behalf of the Complainant. The Licensee presented testimony from Steve Meyer, the sole member of Shaker's Saloon, LLC.

Exhibits offered and received during the hearing consisted of:

- Exhibit 1: Amusement Device and "Class B" Reserve Liquor & Beer License issued to Shaker's on June 25, 2020.
- Exhibit 2: Shaker's Alcohol Beverage License Application and Agent Appointment dated May 4, 2020, Auxiliary Questionnaire and General License Application.
- Exhibit 3: PHMDC Emergency Order #9 Amendment
- Exhibit 4: WDHS Emergency Order #3 dated October 6, 2020.
- Exhibit 5: Security Camera Photo ID3530.
- Exhibit 6: Security Camera Photo ID3531.
- Exhibit 7: Security Camera Photo ID3542.
- Exhibit 8: Security Camera Photo ID3528.
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- Exhibit 9: Security Camera Photo ID3530.
- Exhibit 10: Minutes of April 14, 2020 Stoughton Common Council meeting.

All oral testimony offered by witnesses and all exhibits offered were received by the Committee without objection by either party.

Based upon the evidence and arguments presented by the parties, the Committee makes the following Findings of Fact, Conclusions of Law and Recommendation for action by the Common Council:

FINDINGS OF FACT

1. The City of Stoughton issued Shaker's a combination Class B liquor license on June 25, 2020 for the 2020-2021 licensing year. That license is currently in effect. (Exhibit 1)

2. The licensed premises consist of property located at 111 Chalet Drive, Stoughton, WI 53589. (Exhibit 1 & 2)

3. On the evening of October 9 and into the early morning hours of October 10, 2020, Shaker's hosted a birthday party on the licensed premises.

4. A patron attending the party at Shaker's was shot 6-8 times in the Shaker's parking lot at approximately the time the bar was closing. The shooting victim was infected with the COVID19 virus at the time of the party and shooting.

5. The shooting involved at least two separate firearms, and 14 shell casings were found at the scene. A stray bullet struck a parked car, and another was lodged in the wall of a neighboring hotel.

6. The victim of the shooting was highly intoxicated at the time.

7. On December 18, 2019 Detective Brandon Hill of the Stoughton Police Department participated with agents from the DEA in the arrest of Dale Kittleson for previous deliveries of cocaine in a "controlled buy" involving DEA agents. Officers arrested Kittleson while he was in the bar area of Shaker's.

5. Officers searched Kittleson upon his arrest and the Shaker's licensed premises shortly thereafter. Law enforcement discovered approximately one total ounce of cocaine on Mr. Kittleson's person, another ½ to ¾ ounce in another location on the premises, methamphetamine and a drug ledger in Mr. Kittleson's truck.

6. The quantity of drugs and the drug ledger demonstrate that the drugs were possessed by Kittleson for the purpose of sale and not for personal use.

7. Shaker's is a limited liability company and was required to appoint an agent for alcohol beverage licensing purposes.

8. At the time of his arrest, Kittleson was the agent of Shaker's.

9. On February 22, 2020, Shaker's allowed four individuals sitting at its bar to consume beer at approximately 2:40 a.m. which was after the legally required closing time.

10. On October 10, 2020, two individuals at the entrance of Shaker's refused entry by police officers who were attempting to conduct a bar check.

11. On October 10, 2020, Shaker's had at least 69 individuals on the licensed premises who were generally not following social distancing recommendations and only approximately 10% of whom were wearing face coverings.

12. Many of the employees of Shaker's working on the evening of October 9 and the early morning of October 10, 2020 were not properly wearing face coverings.

13. On October 10, 2020, Chatta Huffman, Shaker's current agent, was physically removed from the licensed premises by one of the "owners" of the business.

14. Later that same day, the bar manager, Bradley Dillman, refused to answer the door of the licensed premises when Stoughton police attempted to make contact with him.

CONCLUSIONS OF LAW

The Committee makes the following conclusions of law based on the foregoing factual findings:

1. Clear and convincing evidence has been presented that on December 18, 2019, Kittleson possessed controlled substances with intent to deliver those substances in violation of §961.41, Wis. Stats.

2. Because Kittleson was Shaker's agent, Shaker's is responsible for his actions involving the licensed premises.

3. Possession of controlled substances on the licensed premises was a matter related to Shaker's business as it is one of the activities the Licensee is obligated to prevent.

4. Section 14-40(h) of the Stoughton Municipal Code allows employees performing job-related functions to remain on the licensed premises after closing, but prohibits their consumption of alcohol beverages during that time.

5. On February 22, 2020, Shaker's was required to close its business at 2:30 a.m. per §125.32(3), Wis. Stats.

6. Shaker's violated Section 14-40(h) of the Stoughton Municipal Cde by allowing four employees to consume beer at the bar of the licensed premises on February 22, 2020 at approximately 2:40 a.m.

7. PHMDC Emergency Order #9 was issued on September 1, 2020, took effect on September 2, 2020 and was in effect on October 9-10, 2020.

8. Section 2(a) of PHMDC Order #9 requires that every individual age five (5) or older wear a face covering whenever in an enclosed building where people other than the individual's own living unit are present.

9. Section 3 of PHMDC Order #9 also prohibits "mass gatherings" of greater than 10 individuals, excluding employees at any indoor location, and requires physical distancing. A "mass gathering" is defined by the order as "a planned event with a large number of individuals in attendance, such as a concert, festival, meeting, training, conference, performance, show, or sporting event."

10. Section 5(d) of PHMDC Order #9 requires all businesses to develop and implement a written protective measure policy that includes "ensuring individuals are at least six (6) feet from others whenever possible" and "ensuring employees are provided with and wear face coverings at all times when required under section 2" of the Order.

11. Section 6(b)(v) of PHMDC Order #9 provides that "customers may enter taverns only for the purpose of ordering, pick-up, and payment of food or beverage or while in transit."

12. WDHS Order #3 was issued on October 6, 2020 and took effect on October 8, 2020. Order #3, by its terms, remained in effect until November 6, 2020.

13. Section 2(a) of WDHS Order #3 limited public gatherings to no more than 25% of the total occupancy limit for the room or building established by the local municipality.

14. The birthday party and related gatherings at Shaker's on October 9-10 of 2020 constituted a public gathering under WDHS Order #3.

15. The totality of the violations of legal requirements at Shaker's Saloon between October 18, 2019 and October 10, 2020 demonstrate that Shaker's is maintaining a "disorderly house" within the meaning of §125.12(2)(ag)2, Wis. Stats. and constitute grounds for revocation or suspension of Shaker's alcohol beverage licenses.

DISCUSSION

The Committee determines that the Complainant has met its burden of proof with regard to several of the incidents alleged in the Complaint, as discussed more fully below. Based on those events, the Committee recommends that the Common Council accept the Committee's determination that Shaker's has operated a disorderly house, and that its combination "Class B" alcohol beverage license be REVOKED.

1. The meaning of "Disorderly House."

Section 125.12(4)(ag)2 of the Wisconsin Statutes provides for the revocation or suspension of an alcohol beverage license if the licensed premises are maintained as a "disorderly or riotous, indecent or improper house." The term "disorderly house" has been defined by the Wisconsin Supreme Court as follows:

> A house the inmates of which behave so badly as to become a nuisance to the neighborhood is esteemed, at common law, a disorderly house, and so of one which is kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passers-by.

Hawkins v. Lutton, 95 Wis. 492 (1887). The Committee has applied this definition in making its findings and recommendations.

A "disorderly house" can be found based on a single incident. In *City of Cudahy v. DeLuca*, 49 Wis. 2d 90, 181 N.W.2d 374 (1970), the defendants were convicted of keeping or maintaining a "disorderly house, house of ill fame" for allowing their patrons to show pornographic films and watch "go go girls" dance nude in their tavern. The Wisconsin Supreme Court held that the single incident charged was sufficient to support a finding that the defendants maintained a "disorderly house."

In a more recent case, a federal district court upheld the validity of §125.12(2)(ag)2 against a challenge by a licensee that the "disorderly house" provision was unconstitutionally vague. *Hegwood v. City of Eau Claire*, 2011 WL 13187125 (W.D. Wis. 2011); *affd. Hegwood v. City of Eau Claire*, 676 F.3d 600, 602 (7th Cir. 2012). In that case, the court held that "disorderly house" can be defined with reference to Wisconsin's disorderly conduct statute as "one in or around acts which occur that are 'violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly." *Id.* at ¶9. Both the District Court and Court of Appeals found the numerous bar fights, obstructions of police and overserving involved in that case to fit squarely within the definition of a "disorderly house."

These cases demonstrate that, while "disorderly house" cannot be reduced to a definition requiring only the application of a simple formula, the common theme is that the acts occurring on around the licensed premises are of sufficient frequency, and have an actual negative effect on the neighborhood, such that they have become a nuisance.

2. Incidents Establishing a "Disorderly House."

A. Possession on the Licensed Premises of Controlled Substances with Intent to Deliver.

The evidence presented at the hearing established that Kittleson was arrested in possession of approximately 2½ - 3 ounces of cocaine. His truck at the time contained a notebook with names, weights and dollar amounts which Det. Hill testified was of the type used by drug dealers in tracking orders for illicit drugs. The arrest itself occurred as a result of an early sale of illegal drugs by Kittleson as part of a "controlled buy" organized by the DEA. Det. Hill testified that 2½ ounces of cocaine is significantly more than what would be possessed by an individual user, and indicated that the drugs were held for sale. The Committee found Det. Hill's testimony credible, as he was involved in the arrest and either directly observed the facts surrounding the arrest, or received the information from other law enforcement officers as part of their cooperative law enforcement efforts. No evidence was offered that called into question the accuracy of Det. Hill's testimony, and the Committee finds the incident occurred as alleged.

The drug possession incident involving Sharker's license agent was the subject of a prior hearing held by the Committee on February 13 and 26, 2020. Based on the evidence presented at that hearing, the Committee found that grounds for disciplinary action existed under §125.12(2)(ag)6, Wis. Stats., which applies where "The person (licensee) knowingly allows another person, who is on the premises for which the license under this chapter is issued, to possess, with the intent to manufacture, distribute or deliver, or to manufacture, distribute or deliver a controlled substance or controlled substance analog." The Committee recommended revocation

of Shaker's license at that time. The Common Council, however, opted to give Shaker's a second chance, imposing a 48-day suspension instead.

The Committee at that time also determined that the single drug-related incident on the premises, despite its seriousness, was not enough *by itself* to classify Shaker's as a "disorderly house" under §12512(2)(ag)2, Wis. Stats. The Committee nevertheless considers it relevant to the analysis of the "disorderly house" standard as applied to the overall operation of the licensed premises.

B. The October 10, 2020 Shooting Incident.

Shaker's does not dispute that the shooting incident in its parking lot occurred. Nor did it present any evidence to refute the testimony that the shooting victim was attending the party hosted at Shaker's for at least 2-3 hours. The undisputed testimony also established that the victim was extremely intoxicated when he was later shot outside the bar.

Shaker's argued at the hearing that it cannot be responsible for what happens outside its building. The Complainant disagreed, arguing that activities outside of a bar are relevant to whether a "disorderly house" is being maintained.

In *State ex rel. Ruffalo v. Common Council of City of Kenosha*, 38 Wis. 2d 518, 157 N.W.2d 568 (1968), a licensee challenged the nonrenewal of his liquor license which was based in part on disturbances that occurred in the street outside the bar. The Wisconsin Supreme Court held that the common council was within its discretion in considering those incidents in acting on the renewal application.[1]

In the more recent case of *Smith v. City of Milwaukee*, 2014 WI APP 95, 356 Wis. 2d 779, 854 N.W.2d 857, the Wisconsin Court of Appeals upheld the city's refusal to renew a liquor license based on a number of incidents, including a shooting of a patron in the parking lot after leaving the bar. The court noted that, under the *Ruffalo* decision, the behavior of patrons after they leave a tavern can be considered in municipal licensing decisions.

The testimony at the hearing was that the shooting victim was inside Shakers for 2-3 hours or more, and was extremely intoxicated when he left. While Shaker's is not solely responsible for the incident, the Committee is satisfied that it played a role in creating the circumstances leading to the event.

C. Refusal of Entry to Police Officers.

The Complainant alleged two instances where Shaker's is said to have refused entry to a police officer, in violation of Section 14.40(g) of the Stoughton municipal code. Officer Covarrubias testified that in the early morning of October 10, 2020, he attempted a "bar check" at

[1] The statutes have been amended since *Ruffalo* was decided to afford licensees the same due process rights on renewal as in revocation proceedings. *Ruffalo* also involved a non-renewal which, at the time, was treated like an initial application, rather than a revocation. Nevertheless, the recognition by the Supreme Court that a municipality may consider activities outside the physical limits of the licensed premises remains persuasive.

Shaker's and was told he could not enter the premises. While he thought one of them was a "bouncer," Shaker's argued (but did not present evidence) that they were merely patrons.

Shaker's presented testimony that it had a security person at the door maintaining a head count, as it believed it was legally limited to 69 patrons in the bar at any time. The testimony of several witnesses, along with security footage clearly established that Shaker's was very busy that night. The Committee finds it incredible that two patrons would have both the motivation and the opportunity to deny entry to a police officer at the door of the bar.

Shortly after the officer was denied entry, Mr. Dillman, Shaker's manager, came to the door and allowed the officers in. Nevertheless, it appears from the evidence that Shaker's security employees were not adequately trained or experienced to understand that police officers have a right to inspect licensed establishments.

The second incident occurred later in the day on October 10, 2020 when Sgt. Frisch went to the bar to assist Shaker's license agent in her attempt to retrieve the liquor license from the premises. Sgt. Frisch knocked loudly on the locked door, but Mr. Dillman, who was inside, refused to answer the door. It appears from the evidence that Shaker's was not open at the time. The Committee does not interpret the City Ordinance to apply during times when the licensed premises are not open for business, and therefore does not find a violation of the ordinance. *See, Float-Rite Park, Inc. v. Village of Somerset*, 2001 WI APP 113, 224 Wis. 2d 34, 629 N.W.2d 818. The Committee also does not find this incident to be indicative of a disorderly house.

D. Violations of Public Health Orders.

It is undisputed that Shaker's hosted a party on October 10, 2020. Mr. Steve Meyer, Shaker's sole member, testified that 69 people were allowed in the bar at any one time, and all others were required to remain in the parking lot. Officer Covarrubias estimated that about 100 people were inside the bar, only about 10% of whom were wearing face coverings.

Mr. Meyer provided the only testimony on behalf of Shaker's. He testified that Shaker's employed security, provided its employees with masks, and that all employees wore masks while working. He also said they make sure all patrons have masks. He further testified that he monitored public health orders and he made sure that Mr. Dillman kept up with "rigorous standards" for patron health Mr. Meyer imposed.

The Committee did not find Mr. Meyer's testimony regarding the events of October 10, 2020 to be credible for two reasons. First, Mr. Meyer admitted that he was not present at Shaker's at all on October 9 or 10. Whatever his testimony about Shaker's general policies or operations, he could not possibly know what was done on October 10, 2020. Secondly, the evidence clearly contradicted Mr. Meyer's statements. Testimony was presented that only about 10% of the people in the bar were wearing masks. Exhibits 5-9 visually depict employees and customers not wearing masks or maintaining physical distancing. The absence of mask violated §2(a) of the Dane County Health Order, which required face coverings on all patrons and employees. [See, Exhibit 3].

The October 10 event also violated the PHMDC order because it was an indoor "mass gathering" with more than 10 attendees. Shaker's also failed to adopt policies sufficient to assure that patrons and employees wore masks and maintained 6 feet of physical separation as required by §5(d) of Order #9. Finally, by its own admission, Shaker's violated §6(b)(v) of Order #9, which provides that "customers may enter taverns only for the purpose of ordering, pick-up, and payment of food or beverage or while in transit." As the Complainant correctly noted, this provision prohibited all customers from drinking in the licensed establishment on October 10, 2020.

E. After Hours Service.

Uncontroverted evidence at the hearing established that on February 22, 2020, Mr. Dillman, Shaker's manager, allowed 4 individuals to drink beer at the bar at 2:40 a.m. Section 125.32(3), Wis. Stats. prohibited Shaker's from being open after 2:30 a.m. Section 14-40(h) of the Stoughton Municipal Code allows employees performing job-related functions to remain on the licensed premises after closing, but prohibits their consumption of alcohol beverages during that time. Therefore, it was unlawful for anyone to be drinking beer at Shaker's at the time of this incident.

RECOMMENDATION

In determining the appropriate sanction for the violation proven, the Committee is primarily concerned with the protection of the public. Earlier this year, Shaker's was facing a recommendation from this Committee for revocation of its license. All parties involved recognized that it was a severe sanction, but the Committee was concerned that Shaker's had not shown the motivation to put in the effort necessary to learn and comply with legal requirements applicable to tavern operations. The Common Council imposed a 48-day license suspension instead.

It is abundantly clear to the Committee that Shaker's fails to comprehend its obligation to comply with the law. The most obvious example is the fact that it has continued operating more than a month[2] after the PHMDC Order #9 took effect, prohibiting any customers indoors. On October 10 none of the incidents that occurred should have happened, because Shaker's should not have been open for regular business.

Instead, an indoor event lasting several hours involving anywhere from 69-100 people, most of whom were not wearing face coverings or maintaining physical distancing, took place at Shakers. That event created a significant opportunity for the transmission of COVID19. The likelihood of a "superspreader" event became more acute when the shooting victim tested positive for the virus after spending hours inside with the crowd.

While not alleged as separate violations in the Complaint, the hearing testimony disclosed other conduct which convinces the Committee that Shaker's is unlikely to right its ship. While Shaker's claims to support law enforcement and public safety, its manager falsely told Sgt. Frisch who was investigating the shooting that Shaker's security cameras were closed circuit and did not

[2] PHMDC Order #9 went into effect on September 2, 2020. The evidence presented at the hearing did not establish whether Shaker's has continued operating after October 10.

have recording capabilities. Yet forensic technicians were able to recover recordings on the system after it was seized in a search warrant.

In addition, while Chatta Huffman is now the license agent for Shaker's, and has the responsibility for all activities the licensed premise, she appears to be little more than a figurehead. She was upset upon learning of the shooting because she had opposed the tavern being open given her COVID concerns.[3] On October 10, when she attempted to retrieve the liquor license from Shaker's, she was physically removed from the licensed premises by Shaker's employees. She appears to have been given the responsibility of an agent, but none of the authority necessary to exercise that responsibility.

Section 125.04(6)(a)2, Wis. Stats. provides that an alcohol beverage license may not be issued to a limited liability company unless:

> The entity vests in the agent, by properly authorized and executed written delegation, *full authority and control of the premises described in the license* or permit of the entity, *and of the conduct of all business on the premises relative to alcohol beverages*, that the licensee or permittee could have and exercise if it were a natural person.

Implicit in that requirement is that the entity does not then physically prevent the agent from exercising any of those duties. Shaker's said what it had to say to get a license, then effectively ignored its obligations. In short, Shaker's appears either unable or unwilling to operate in accordance with applicable laws, ordinances and community standards.

Finally, Det. Adams testified that the individual whose birthday was being celebrated was being served 32 "shots." That example, coupled with the testimony that the shooting victim was very intoxicated raises serious concerns about overserving of patrons. Overserving may well have led to the shooting on October 10, and will likely lead to further disturbances if allowed to continue.

Having determined that Shaker's has been maintaining a disorderly house, the Committee's options for recommended actions are limited to suspension or revocation. §125.12(2)(b)2, Wis. Stats. In light of the concerns expressed above, the Committee recommends that the combination Class B alcohol beverage license of Shaker's Saloon, LLC be REVOKED.

Respectfully submitted this 16th day of December, 2020.

CITY OF STOUGHTON
PUBLIC SAFETY COMMITTEE

By: Greg Jensen
Greg Jensen, Chairperson

[3] It was not clear from the evidence presented whether Ms. Huffman simply considered the gathering a bad idea, or whether she and others involved were aware it was legally prohibited by PHMDC Order #9.