

**BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD**

IN THE MATTER OF:

FAMILY LEGACY RESTAURANTS LLC  
PETE'S BAR & GRILL  
1360 SE BISHOP BLVD  
PULLMAN, WA 99163

LICENSEE

LICENSE NO. 357538

LCB NO. 22,838

OAH NO. 2008-LCB-0027

FINAL ORDER OF THE BOARD

**I. BOARD'S CONSIDERATION**

The above entitled matter coming on regularly before the Board, and it appearing that:

1. A formal hearing was held on October 15, 2008 at the licensee's timely request for a hearing on an administrative violation notice issued by the Liquor Control Board.

2. The Complaint alleged that on April 1, 2008 the Licensee or employee(s) thereof, allowed or permitted an apparently intoxicated person(s) to consume and/or possess alcohol on a licensed premises contrary to RCW 66.44.200 and WAC 314-16-150.

3. At the hearing, the Education and Enforcement Division of the Board was represented by Assistant Attorney General Gordon Karg and the Licensee was represented by Ronald Shirley, Attorney at Law, Pullman, Washington.

4. On October 30, 2008 Administrative Law Judge Edward S. Steinmetz entered his Findings of Fact, Conclusions of Law and Initial Order in this matter which dismissed the Complaint.

5. A Petition for Review of the Initial Order was filed timely by the Enforcement and

Education Division, accepting the facts as found by the ALJ but taking exception to the ALJ's conclusions of law and dismissal of the complaint.

6. No reply to Enforcement Division's Petition for Review of the Initial Order was filed by the Licensee.

7. The entire record in this proceeding was presented to the Board for final decision, and the Board having fully considered said record and being fully advised in the premises enters the following Findings of Fact, Conclusions of Law and Final Order.

## **II. FINDINGS OF FACT**

1. The Board hereby adopts the undisputed facts contained in the Initial Order. Specifically, Findings of Fact Nos. 1-14 contained in the Initial Order are hereby adopted as the Board's Findings of Fact Nos. 1-14 and are incorporated by reference into this Final Order.

## **III. CONCLUSIONS OF LAW**

1. The Board has jurisdiction over the licensee and over this matter and is not bound by the Conclusions of Law contained in the Initial Order. RCW 66.24.010, RCW 34.050.464.

2. Although not legally bound by the Conclusions of Law contained in the Initial Order the Board hereby adopts and incorporates by reference certain of the Conclusions of Law contained in the Initial Order. Specifically, Initial Conclusions of Law Nos. 1, 2, 3 and 4 are hereby adopted as the Board's Conclusions of Law.

3. The Board specifically rejects the remaining Initial Conclusions of Law Nos. 5, 6, 7 and 8 contained in the Initial Order and substitutes Conclusions of Law Nos. 4, 5, 6, 7 and 8 as set out below.

4. A Licensee who permits any person apparently under the influence of liquor to purchase, physically possess or consume liquor on the licensed premises is in violation of the law. RCW 66.44.200; WAC 314-16-150.

5. The appropriate legal test for whether a Licensee has permitted an apparently intoxicated person to possess alcohol in violation of WAC 314-16-150 is contained in the case law of *Reeb Inc. v. Washington State Liquor Control Board*, 24 Wn. App. 349 (1979) and *Oscar's Inc. v. Washington State Liquor Control Board*, 101 Wn. App. 498 (2000). That test is whether the facts establish that a Licensee had at least constructive knowledge of circumstances that would foreseeably lead to the prohibited activity (possession and/or consumption of liquor by an intoxicated person) and acquiesced to or failed to prevent from occurring either the prohibited activity or the circumstances which could foreseeably lead to the prohibited activity.

6. In this case the undisputed facts establish the Licensee had at least constructive notice of circumstances that would foreseeably lead to an intoxicated person having the ability to possess or consume alcohol on the licensed premises and the licensee acquiesced to or failed to prevent those circumstances from occurring. Specifically, the licensee catered to college students, allowed the premises to become crowded, served apparently highly potent "Wiley" cocktails and the licensee was aware of and had instructed its employees to be aware of patron intoxication in general. Given this combination of circumstances a reasonable person could foresee that an intoxicated patron could have access to and the ability to possess additional liquor, even if the Licensee did not sell to or serve the intoxicated patron.

7. The Licensee in this case had an obligation to take appropriate steps to prevent already intoxicated patrons from being able to possess or consume additional liquor. Failure to do so is to permit an intoxicated person to possess liquor on the licensed premise in violation of WAC 314-16-150.

8. The undisputed facts establish the Licensee took action to ensure adequate staffing to advise its employees to be "vigilant" in looking for signs of intoxication, that the premises were quite busy on the night the violation occurred and that the apparently intoxicated patron

was apprehended quickly. However, these facts do not relieve the Licensee of its obligation to comply with RCW 66.44.200 and WAC 314-16-150 and do not constitute a defense to the violation. These facts and others may, however, be evidence of factors which could be relevant to establishing the appropriate penalty for the licensee's violation of RCW 66.44.200 and WAC 314-16-150.

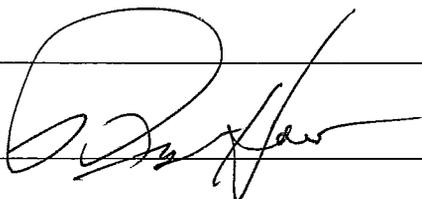
**IV. ORDER**

NOW THEREFORE; IT IS HEREBY ORDERED that that the Administrative Law Judge's Findings of Fact, Conclusions of Law and Initial Order heretofore made and entered in this matter be, and the same hereby are, REVERSED, except as to those Initial Findings and Conclusions specifically adopted by the Board, and the Board's June 12, 2008 Complaint is SUSTAINED. This matter is REMANDED to the Administrative Law Judge with instructions to enter an order finding a violation of RCW 66.44.200 and WAC 314-16-150 and assigning an appropriate penalty for such violation.

DATED at Olympia, Washington this 26<sup>th</sup> day of January, 2009.

WASHINGTON STATE LIQUOR CONTROL BOARD

  
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Reconsideration. Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order or (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof,

should be filed by mailing or delivering it directly to the Washington State Liquor Control Board, Attn: Kevin McCarroll, 3000 Pacific Avenue Southeast, PO Box 43076, Olympia, WA 98504-3076, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board's office. RCW 34.05.010(6). A copy shall also be sent to Martha P. Lantz, Assistant Attorney General, 1125 Washington St. SE, P.O. Box 40110, Olympia, WA 98504-0110. A timely petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Stay of Effectiveness. The filing of a petition for reconsideration does not stay the effectiveness of this Order. The Board has determined not to consider a petition to stay the effectiveness of this Order. Any such request should be made in connection with a petition for judicial review under chapter 34.05 RCW and RCW 34.05.550.

Judicial Review. Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

**STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE WASHINGTON STATE LIQUOR CONTROL BOARD**

In the Matter of:

FAMILY LEGACY RESTAURANTS, LLC  
PETE'S BAR & GRILL  
1360 SE BISHOP BLVD  
PULLMAN, WA 99163

Licensee

LICENSE NO. 357538

OAH Docket No. 2008-LCB-0027  
LCB Case No. 22,838

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND INITIAL ORDER**

**STATEMENT OF THE CASE**

On April 2, 2008, the Washington State Liquor Control Board (Board) issued an Administrative Violation Notice to Family Legacy Restaurants LLC, d/b/a Pete's Bar & Grill, 1360 S.E. Bishop Blvd., Pullman, Washington. In its Notice, the Board alleged that on or about April 1, 2008, the Licensee, or an employee thereof, violated the provisions of RCW 66.44.200(2) and WAC 314-16-150 by permitting an apparently intoxicated person to possess/consume alcohol on the premises. The Licensee made a timely request for hearing.

On June 12, 2008, the Board issued a formal Complaint in which it alleged that on or about April 1, 2008, the Licensee, or an employee thereof, allowed or permitted an apparently intoxicated person(s) to consume and/or possess alcohol on a licensed premises contrary to RCW 66.44.200 and WAC 314-16-150.

This matter came on for hearing before Edward S. Steinmetz, Administrative Law Judge, Washington State Office of Administrative Hearings, in Spokane, Washington, on October 15, 2008. At hearing, the Board's Education and Enforcement Division was

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**LIQUOR CONTROL BOARD  
BOARD ADMINISTRATION**

represented by Gordon Karg, Assistant Attorney General. The Licensee was represented by Ronald Shirley, Attorney at Law, Pullman, Washington. Appearing as witnesses for the Board were Liquor Enforcement Officers Patrick Matthews, Ryan Navrat, and Robert M. Lucas, as well as Lt. Robert Reynolds. Appearing as a witnesses for the Licensee were Joseph Fairbanks, Owner and Operator of the licensed establishment, and Britney Voight, Bartender.

Based upon the record presented, the undersigned Administrative Law Judge enters the following Findings of Fact:

### **FINDINGS OF FACT**

1. The Licensee, Family Legacy Restaurants LLC, d/b/a Pete's Bar & Grill, operates a restaurant and lounge located at 1360 S.E. Bishop Blvd., Pullman, Washington. The premises is licensed by the Board for the sale of spirits, beer, and wine for on-premises consumption pursuant to License No. 357538.

2. On the evening of April 1, 2008, Liquor Enforcement Officers Patrick Matthews, Ryan Navrat, and Robert M. Lucas traveled to the Licensee's premises for the purpose of conducting an undercover compliance investigation. Accompanying the liquor enforcement officers was an underage operative.

3. At approximately 9:06 p.m., Liquor Enforcement Officer Ryan Navrat entered the Licensee's premises for the purpose of conducting the undercover compliance check. Liquor Enforcement Officers Matthews and Lucas stayed outside in a parked vehicle along with the minor operative. As Officer Navrat entered the Licensee's premises, he noted that the premises was quite busy with an estimated 120 to 150 patrons present. Officer Navrat

purchased a large goblet glass and got in line in order to obtain a "Wiley" drink which is served by the Licensee. A Wiley drink consists of a mixture of spirits, liqueurs, and juices served in a distinctive "goblet" shaped glass. While waiting in line, Officer Navrat observed a young male individual, later identified as Randal Newhouse, also standing in line in order to obtain a Wiley drink. Officer Navrat noted that Mr. Newhouse looked tired at that point and was exhibiting droopy eyes. After purchasing his own Wiley drink, Officer Navrat then observed Mr. Newhouse purchase a Wiley drink and consume it quickly.

4. At some point after obtaining his Wiley drink, Officer Navrat situated himself in a table in a corner of the Licensee's lounge area. Officer Navrat had a good view of the lounge portion of the Licensee's establishment. Officer Navrat observed Mr. Newhouse sit down at a large table with approximately six to eight other patrons. Mr. Newhouse was sitting approximately three chairs in from the wall, or in approximately the middle of the large rectangular table.

5. Officer Navrat observed a large glass of clear liquid, later identified as water, sitting in front of Mr. Newhouse. Officer Navrat observed Mr. Newhouse periodically taking sips of water from the glass.

6. While continuing to observe the Licensee's establishment, Officer Navrat observed Mr. Newhouse attempt to get up from the table, and he appeared to lose his balance. Mr. Newhouse steadied himself with the aid of the table, and then sat back down. Officer Navrat noted no other concerns at this point because Mr. Newhouse appeared to have water in front of him and was not consuming or possessing any other beverages.

7. At approximately 10:55 p.m., Officer Navrat observed a male individual approach the table where Mr. Newhouse was situated. This unidentified male had two Wiley drinks in his possession. The color of one drink was red or orange, and the color of the other drink was green. Officer Navrat observed the unidentified male individual begin drinking from the green Wiley drink. This unidentified male individual then placed the orange Wiley drink down in the middle of the table where Mr. Newhouse was seated.

8. After the unidentified male individual had placed the orange Wiley drink down in the middle of the table, Officer Navrat then observed Mr. Newhouse obtain a straw, presumably from his own empty Wiley drink, and push this straw into the orange Wiley drink. Mr. Newhouse slid the orange Wiley drink toward him and took a sip out of the Wiley drink. Officer Navrat then observed Mr. Newhouse push the drink slightly to the side. This process was repeated over the next five to eight minutes with Mr. Newhouse periodically taking sips out of the orange Wiley drink and then pushing the glass slightly to his side.

9. After approximately five to eight minutes of observing Mr. Newhouse consuming from the orange Wiley drink, Officer Navrat then received a telephone call from Liquor Enforcement Officer Lucas. In either this conversation, or another conversation shortly thereafter, Officer Navrat was advised that the underage operative had attempted to gain access to the lounge portion of the Licensee's premises, but had been asked for identification and was subsequently denied entrance into the Licensee's establishment. Officer Navrat then advised Liquor Enforcement Officer Lucas that he was observing Mr. Newhouse in an apparently intoxicated condition, consuming from the Wiley drink. Liquor Enforcement Officers Lucas and Patrick Matthews entered the Licensee's premises shortly thereafter.

10. After Liquor Enforcement Officer Patrick Matthews entered the Licensee's establishment, he observed the individual identified as Randal Newhouse sitting at a table with an orange Wiley drink on the table to Mr. Newhouse's side. Officer Matthews then went and made contact with Britney Voight, Bartender. Officer Matthews advised Ms. Voight of his position that Mr. Newhouse was an apparently intoxicated person who was in possession of and was consuming from the orange Wiley drink. Officer Matthews instructed Ms. Voight to go pull the drink from Mr. Newhouse and to obtain Mr. Newhouse's identification. Ms. Voight complied with this direction.

11. Officer Matthews subsequently poured a portion of the orange Wiley drink into an evidence sample bottle. This sample of the Wiley drink was subsequently transported to the Spokane Education and Enforcement Office, and placed into an evidence locker. Lt. Robert Reynolds, of the Spokane Enforcement Office, subsequently prepared a case report, Exhibit 16, and sent the sample of the orange Wiley drink to the Washington State Toxicology Laboratory for testing. Exhibit 17. The Washington State Toxicology Laboratory subsequently issued a report on May 9, 2008, stating the test results that the sample provided by Lt. Reynolds showed the presence of alcohol/ethanol in a percentage of 11.9%. Exhibit 18.

12. At hearing, the Licensee agreed and stipulated that Mr. Newhouse was in fact in the Licensee's establishment on the evening of April 1, 2008. The Licensee further agreed and stipulated that the Wiley drink from which the sample was taken and sent to the Washington State Toxicology Laboratory for testing did indeed contain alcohol.

13. Britney Voight was working as a bartender for the Licensee on the evening of April 1, 2008. Ms. Voight's testimony establishes that prior to starting her shift on April 1, all

staff had a meeting in which bartenders, wait staff, and door persons were again reminded to be vigilant and to look for signs of apparent intoxication in patrons of the Licensee's establishment. Ms. Voight's testimony further establishes that the Licensee had more staff on duty than was normal. Ms. Voight testified that Mr. Newhouse did appear tired to her, but she simply attributed this to the school schedule at Washington State University. Ms. Voight confirmed that at approximately 10:30 p.m., Mr. Newhouse had approached her and asked for a glass of water. Ms. Voight subsequently served Mr. Newhouse a glass of water in a large "pounder" beer glass. Ms. Voight testified to her impression that when she went up to take the drink from Mr. Newhouse and to ask for his identification, he did not appear intoxicated. Ms. Voight testified that Mr. Newhouse was not slurring his words and appeared to her to be "everyday normal." Ms. Voight did acknowledge that at one point she observed Mr. Newhouse place his head in his hand and look tired. Mr. Newhouse advised Ms. Voight that the orange Wiley drink was his friend's.

14. The credible testimony of Officer Navrat establishes that he determined that Mr. Newhouse was apparently intoxicated not only because Mr. Newhouse had stumbled when attempting to get up from the table, but because Mr. Newhouse's face was flushed, his eyes were droopy, and he was swaying when he did stand up or attempt to walk. Officer Navrat also observed Mr. Newhouse place his head into his hand to rest his head, and it appeared that his head was swaying while resting in his hand.

Based upon the above Findings of Fact, the following Conclusions of Law are entered:

## CONCLUSIONS OF LAW

1. As a holder of a retail liquor license, Family Legacy Restaurants LLC, d/b/a Pete's Bar & Grill, is subject to the jurisdiction of the Washington State Liquor Control Board. The Board has the authority, pursuant to RCW 66.24.010, to suspend or cancel a license so long as the Licensee is afforded an opportunity for a hearing. A proper hearing was provided in this case.

2. The provisions of WAC 314-16-150 are applicable and state as follows:

(1) No retail licensee shall give or otherwise supply liquor to any person under the age of twenty-one years, either for his/her own use or for the use of his/her parent or of any other person; or to any person apparently under the influence of liquor; nor shall any licensee or employee thereof permit any person under the said age or in said condition to consume liquor on his/her premises, or on any premises adjacent thereto and under his/her control.

(2) No retail licensee shall permit any person apparently under the influence of liquor to physically possess liquor on the licensed premises.

3. The facts in this case establish that Randal Newhouse was in the Licensee's establishment on the evening of April 1, 2008. The facts establish that Mr. Newhouse consumed a Wiley drink in a hurried fashion. The facts also show that at the point that Mr. Newhouse sat down at a large rectangular table with a glass of water, his face was flushed, his eyes were droopy, he was swaying, and he stumbled or lost his balance as he attempted to get up from the table. This tribunal concludes that at this point Mr. Newhouse was in fact apparently intoxicated.

4. The facts also establish that subsequently, another unidentified male patron, who was apparently sitting at the same table with Mr. Newhouse, approached the table where

Mr. Newhouse was seated with a red or orange Wiley drink and a green Wiley drink. The facts establish that the orange Wiley drink contained alcohol. This tribunal notes that the unidentified male patron did not hand the orange Wiley drink to Mr. Newhouse, and did not place the Wiley drink directly in front of Mr. Newhouse. The unidentified male simply placed the orange Wiley drink in the center of the table. Mr. Newhouse then reached out, slid the orange Wiley drink toward him, placed a straw in the drink, and began consuming from the alcoholic beverage. From these facts, the sole issue to be resolved in this matter is whether or not the Licensee violated the provisions of WAC 314-16-150 by permitting Mr. Newhouse to possess and/or consume the alcoholic Wiley drink. (emphasis added).

5. In determining whether or not the Licensee “permitted” Mr. Newhouse to consume the Wiley drink while in an apparently intoxicated state, this tribunal has sought guidance from Washington State case law. The only case found which provides suitable guidance was issued by the Washington State Court of Appeals in *Reeb v. Liquor Control Board*, 24 Wn. App. 349, 600 P.2d 578 (1979). In that case, the Liquor Control Board had cited an establishment for violation of then existing WAC 314-16-025 which apparently prohibited contact between topless dancers and patrons of the establishment. The issue in Reeb was whether or not the establishment had permitted a violation of the regulation by permitting patrons and dancers to have physical contact. In deciding this case, the Court of Appeals states: “The word ‘permit’ as used in the regulation does not imply that the licensee must have permanently sanctioned the prohibited act; it refers to the licensee’s actual or constructive knowledge of the circumstances which would foreseeably lead to the prohibited activity.” *Reeb* at 353. Citing *Boyce v. Adams*, 87 Wn. 2d 56, 549 P.2d 18 (1976).

6. The facts in this case establish that on the evening of April 1, 2008, the Licensee had gathered its staff prior to the time period at issue, and had reminded all staff to be vigilant and to look for the signs of apparent intoxication. The Licensee also had more staff on duty as was normal. The facts further establish that the Licensee's premises was quite busy on the evening of April 1, 2008, with approximately 120 to 150 patrons present. In this environment, the facts show that a patron, Randal Newhouse, who, after consuming one Wiley drink, had asked for and received a glass of water. Later, this patron was observed taking sporadic sips out of a Wiley drink which was placed on the table. This continued for approximately five to eight minutes until liquor enforcement officers entered the Licensee's establishment and contacted Ms. Voight, the Licensee's bartender. It is clear that the Licensee did not itself sell or serve the alcoholic beverage to Mr. Newhouse. The facts otherwise fail to establish that the Licensee had actual knowledge of Mr. Newhouse exhibiting the signs of apparent intoxication, or his sporadic possession and consumption of the Wiley drink.

7. The remaining concern is whether or not the Licensee should be held to have had constructive knowledge of the prohibited conduct. In other words, should the Licensee, in the exercise of due diligence, be expected to have identified Mr. Newhouse as an apparently intoxicated person, and taken steps to ensure that Mr. Newhouse did not possess or consume alcohol? Resolving this concern would certainly be easier in a smaller establishment with only a few patrons present, and where the prohibited conduct had continued for a period of time longer than five to eight minutes. Under such circumstances, it would have been much easier to determine whether a particular patron appears intoxicated, and whether that person sporadically drinks from a beverage which had not been served to

him or her. However, in the present matter, although the Licensee had more staff on than was normal, staff were responsible for simultaneously monitoring the actions of approximately 120 to 150 patrons. The ability of the Licensee's staff to focus their attention on a single patron was much less than that afforded to Officer Navrat. The mere possibility that a patron may attempt to circumvent the law and consume alcoholic beverages while in an apparently intoxicated state does not, in the mind of the undersigned, equal actual or constructive knowledge of the prohibited conduct. After carefully considering all the facts as set forth above, and while this tribunal understands and respects the concern of the Board's Education and Enforcement Division, this tribunal cannot conclude that the Licensee had constructive knowledge of Mr. Newhouse's prohibited conduct.

8. Ultimately, the undersigned does not conclude that the Licensee "permitted" Mr. Newhouse to possess and consume the alcoholic beverage on the evening of April 1, 2008. Accordingly, this tribunal concludes that the evidence fails to establish that the Licensee violated the provisions of WAC 314-16-150 on the evening of April 1, 2008. The Board's Complaint in this matter should therefore be dismissed.

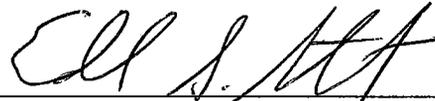
Based upon the foregoing Conclusions of Law, NOW THEREFORE,

**INITIAL ORDER**

IT IS HEREBY ORDERED, That the Board's Complaint in this matter be DISMISSED.

DATED at Spokane, Washington, this 30 day of October, 2008.

WASHINGTON STATE OFFICE OF ADMINISTRATIVE HEARINGS



Edward S. Steinmetz  
Administrative Law Judge  
Office of Administrative Hearings  
221 N. Wall St., Suite 540  
Spokane, WA 99201-0826  
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**LIQUOR CONTROL BOARD  
BOARD ADMINISTRATION**

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**BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD**

IN THE MATTER OF:

FAMILY LEGACY RESTUARANTS LLC  
d/b/a PETE'S BAR AND GRILL  
1360 BISHOP BLVD  
PULLMAN, WA 99163

LICENSEE

LICENSE NO. 357538

OAH NO. 2008-LCB-0027  
LCB CASE NO. 22, 838

ENFORCEMENT DIVISION'S  
PETITION FOR REVIEW OF THE  
INITIAL ORDER

The Washington State Liquor Control Board's Education & Enforcement Division ("Enforcement"), by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and GORDON KARG, Assistant Attorney General, and pursuant to RCW 34.05.464 and WAC 314-29-010, submits the following exceptions to the Initial Order issued by Administrative Law Judge Edward S. Steinmetz, on October 30, 2008, in the above-captioned case.

**I. PROCEDURAL BACKGROUND**

On June 12, 2008, the Board issued a Complaint to the Licensee, Family Legacy Restaurants, LLC, d/b/a Pete's Bar and Grill ("Licensee"), alleging that on or about April 1, 2008, the Licensee and/or an employee thereof, permitted an apparently intoxicated person to possess and/or consume liquor on the licensed premises in violation of WAC 314-16-150.

This case was heard and considered by the Administrative Law Judge ("ALJ") in Spokane, Washington on October 15, 2008. After a full evidentiary hearing, the ALJ entered

1 Findings of Fact and Conclusions of Law, in its Initial Order issued on October 30, 2008. In the  
2 Initial Order, the ALJ dismissed the Board's Complaint. Enforcement respectfully takes  
3 exception to the Initial Order of the ALJ.

## 4 II. DISCUSSION

5 Pursuant to WAC 314-29-010(4)(b), any party, upon receipt of a proposed order, may file  
6 exceptions within twenty days of service of the order. The reviewing officer (including the  
7 agency head reviewing an initial order) "shall exercise all the decision-making power that the  
8 reviewing officer would have had to decide and enter the final order had the reviewing officer  
9 presided over the hearing [.]” RCW 34.05.464(4). Therefore, the Washington State Liquor  
10 Control Board is not bound by the ALJ's Conclusions of Law in the Initial Order.

### 11 A. The Preponderance Of The Evidence Demonstrates The Licensee's Employees 12 Permitted An Apparently Intoxicated Individual To Consume Alcohol On The Licensed Premise.

13 The ALJ found that the patron observed by Enforcement officers on April 1, 2008 was  
14 apparently intoxicated and was consuming an alcoholic beverage at that time. However, the ALJ  
15 concluded as matter of law that the Licensee's actions did not "permit" this prohibited behavior,  
16 as that term is defined by case law. Enforcement respectfully argues that the ALJ erred, by  
17 applying an incorrect standard for what constitutes the element "permit" and in concluding the  
18 facts adduced at hearing do not sustain, by a preponderance of the evidence, this element of the  
19 alleged violation.

20 WAC 314-16-150 (2) provides specifically that "no retail licensee shall permit any  
21 person apparently under the influence of liquor to physically possess liquor on the licensed  
22 premises." In *Reeb Inc. v. Liquor Control Board*, 24 Wn. App. 349, 600 P.2d 578 (1979), a  
23 licensee challenged a Superior Court ruling upholding an administrative penalty issued by the  
24 Board for a violation of a Board regulation prohibiting the licensee from permitting persons to  
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1 engage in certain types of intimate physical contact.<sup>1</sup> See also *Oscar's Inc. v. Liquor Control*  
2 *Board*, 101 Wn. App. 498, 505, 3 P.3d 813, 818 (2000).

3 In *Reeb* the licensee employed erotic dancers to operate inside the establishment. *Reeb*,  
4 24 Wn. App. at 350. The dancers were prohibited, by Board regulation, from engaging in  
5 intimate physical contact with patrons. *Id.* A liquor control officer had entered the  
6 establishment and observed one of the dancers engaging in the prohibited intimate contact with a  
7 customer. *Id.* The dancer denied it took place. *Id.* It was established that the licensee had not  
8 sanctioned the prohibited activity, had in the past terminated employees for engaging in  
9 questionable conduct, and had explicitly informed dancers of what types of conduct were  
10 prohibited. *Id.* at 351.

11 On review, Division One of the Court of Appeals held that the word “permit”, as used in  
12 the regulation, did not require that the “licensee must have permanently sanctioned the prohibited  
13 act” instead the term “refers to the licensee’s actual or constructive knowledge of the  
14 circumstances which would foreseeably lead to the prohibited activity.” *Reeb*, 24 Wn. App. at  
15 353. The Court went on to conclude that the licensee was aware of the existence of a potential  
16 problem with its dancer’s engaging in questionable conduct and yet it continued to have such  
17 dancers in the establishment. *Id.* The Court held that under these circumstances, the licensee  
18 had “permitted” the prohibited conduct. *Id.*

19 In *Oscar's Inc. v. Liquor Control Board*, Division One of the Court of Appeals  
20 reaffirmed the holding in *Reeb* that the term “permit”, as used within the Board rules, does not  
21 mean a licensee encouraged or sanctioned prohibited behavior. *Oscar's*, 101 Wn. App. at 506.  
22 The Court held that, according to *Reeb* and the Board, to “permit” means: “acquiescence of or  
23 failure to prevent not only prohibited activity but also circumstances of which the licensee has at  
24 least constructive knowledge that would foreseeably lead to prohibited activity.” *Id.*

25  
26 <sup>1</sup> The regulation at issue in *Reeb*, WAC 314-16-125, no longer exists in the current Liquor Control Board regulations.

1           **1.     The ALJ Applied An Incorrect Legal Standard In Reaching Its Conclusions**  
2           **Of Law.**

3           As has been established in both *Reeb* and *Oscar's*, a licensee is determined to have  
4 permitted prohibited activity if they have at least constructive knowledge of circumstances that  
5 could foreseeably lead to prohibited conduct. *Reeb*, 24 Wn. App. at 353; *Oscar's*, 101 Wn. App.  
6 at 506.

7           In the initial order, the ALJ specifically states: “The remaining concern is whether or not  
8 the Licensee should be held to have constructive knowledge *of the prohibited conduct*”  
9 (emphasis added). (Conclusions of Law 7). The initial order goes on to conclude that “the mere  
10 possibility that a patron may circumvent the law . . . does not, in the mind of the undersigned,  
11 equal actual or constructive knowledge *of the prohibited conduct*. (emphasis added).  
12 (Conclusions of Law 7).

13           In order to sustain the Board’s complaint Enforcement recognizes it has the burden of  
14 proof in demonstrating the Licensee permitted an apparently intoxicated person to possess or  
15 consume alcohol. WAC 314-16-150 (2). However, in meeting the burden of proving the  
16 “permitted” element of the violation, Enforcement is not required to prove that the Licensee had  
17 actual or constructive knowledge that the prohibited activity had or was taking place. *See Reeb*,  
18 24 Wn. App. at 353. On the contrary, the case law the ALJ cites to as controlling in this matter  
19 specifically sets forth that Enforcement need only demonstrate that the Licensee had at least  
20 constructive knowledge of *circumstances* that could *foreseeably* lead to a violation. *See Reeb*, 24  
21 Wn. App. at 353; *Oscar's*, 101 Wn. App. at 506. Enforcement respectfully requests the Board  
22 apply the correct legal standard to the facts when considering this matter.

23           **2.     The Licensee In This Case Had At Least Constructive Knowledge Of**  
24           **Circumstances Which Would Foreseeably Lead To Prohibited Activity.**

25           Here, all the Licensee’s employees had been informed to be vigilant in looking for signs  
26 of patron intoxication at the beginning of the evening in question. (Finding of Fact 13).  
Licensee’s staff also had some knowledge that patron’s would include students from the nearby

1 Washington State University. (Finding of Fact 13). It was quite busy that night with  
2 approximately 120 to 150 patrons. (Finding of Fact 6). The apparently intoxicated individual in  
3 question, later identified as Mr. Randall Newhouse, had purchased alcohol from the Licensee's  
4 employees already that evening. (Finding of Fact 3). One employee had noticed that Mr.  
5 Randall "looked tired" and acknowledged that at one point she had seen him place his head in his  
6 hands and continue to look tired. (Finding of Fact 13). Mr. Newhouse was sitting at a large  
7 table in the lounge area with six to eight other patrons. (Finding of Fact 4). An alcoholic drink  
8 was sitting on the table, just to the side of Mr. Newhouse. (Finding of Fact 8). Liquor Control  
9 Officer Navrat was sitting in a corner of the lounge and had a good view of the lounge area,  
10 indicating visibility of the table where Mr. Newhouse sat was not generally obstructed from  
11 view. (Finding of Fact 4).

12 The element of "permit" as defined in *Reeb* and *Oscar's* only requires knowledge of  
13 circumstances that could foreseeably lead to prohibited activity. *Oscar's*, 101 Wn. App. at 506.  
14 Licensee's staff was aware of a potential problem with patron intoxication, due to the  
15 instructions they received that evening; and that they were catering to college students. Similar  
16 to *Reeb*, the Licensee also must have recognized the existence of a potential problem with patron  
17 intoxication as it specifically instructed its employees to be on the look out for it. An employee  
18 of the Licensee was aware that Mr. Newhouse exhibited signs that should have aroused suspicion  
19 as to what his actual condition was, especially as staff members had been specifically  
20 admonished to vigilantly look for signs of intoxication. The knowledge of Mr. Newhouse's  
21 behavior combined with the Licensee's employees having knowledge that Mr. Newhouse had  
22 been served alcohol and had access to alcohol while in the lounge, should have aroused further  
23 suspicion.

24 In short, the facts adduced at hearing, as set forth in the ALJ's findings of fact,  
25 demonstrate the Licensee's staff was at least aware of a set of circumstances that could  
26

1 foreseeably lead to Mr. Newhouse being apparently intoxicated and consuming or possessing  
2 alcohol.

3 **B. The Number Of Patrons And Staff On The Premise Do Not Excuse The Licensee's**  
4 **Legal Duty To Abide By All Board Laws And Regulations.**

5 The initial order notes that the Licensee had more staff on duty the night of April 1, 2008  
6 than was normal for the establishment. (Conclusion of Law 6). Additionally, the Licensee's  
7 establishment was busy that evening with approximately 120 to 150 patrons present.  
8 (Conclusion of Law 6). The ALJ, in his conclusion of law, suggests the issue would be easier to  
9 resolve had the establishment been small and with fewer patron's present. (Conclusion of Law  
10 7). After this observation, the ALJ went on to conclude that because the staff were responsible  
11 for 120 to 150 patrons they were not afforded the same ability to focus on a single patron as the  
12 undercover officer inside the establishment. (Conclusion of Law 7).

13 As provided in WAC 314-11-005(3), licensee's are responsible for controlling their  
14 conduct, the conduct of their employees and their patrons on the licensed premise, at all times. A  
15 high number of patrons coupled with insufficient staff to monitor them all should not be allowed  
16 to act as a defense to failing to abide by all liquor laws and rules. To do so would not only be  
17 antithetical to the plain language of WAC 314-11-005(3), but would allow a licensee to simply  
18 under-staff its premises as a way to avoid culpability for, potentially, a wide variety of liquor law  
19 and regulation violations.

20 Here, if the Licensee allowed more patrons into their premises than could be adequately  
21 monitored by the employees on duty, it did not absolve the Licensee from its duty to control the  
22 conduct of their patrons or from abiding by all liquor laws and regulations. Furthermore, in this  
23 case the undercover officer simply sat in the corner and observed the entire lounge area.  
24 (Finding of Fact 4). Nothing in the finding of fact suggests the officer and the employees on  
25 duty were not afforded the same opportunity to observe all the patrons in the lounge. Again, if  
26 the ratio of employees to patron's created a situation in which they were unable to observe the

1 apparent intoxication and consumption of alcohol by Mr. Newhouse, this is not an adequate  
2 defense to the violations alleged.

3 **III. CONCLUSION**

4 Enforcement has demonstrated by a preponderance of the evidence, through the sworn  
5 testimony of trained liquor enforcement officers that Mr. Randall Newhouse was apparently  
6 intoxicated and was permitted to consume alcohol on the licensed premises on  
7 April 1, 2008. Therefore, the Enforcement Division respectfully requests that the Initial Order  
8 not be adopted in this matter, that the complaint be sustained, and the standard penalty be  
9 imposed.

10 DATED this 18<sup>th</sup> day of November, 2008.

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