BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF: TOP SHELF, LLC d/b/a TOP SHELF GRILL 600 MAIN ST VANCOUVER, WA 98660-3130 LICENSEE LICENSE NO. 087981-1L AVN 1L8337C	LCB NO. 22,892 OAH NO. 2009-LCB-0004 ORDER DENYING MOTION FOR RECONSIDERATION

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

1. The Liquor Control Board issued its Final Order in this case on August 17, 2010.

2. The Licensee, through its attorney William Baumgartner filed a Petition for Reconsideration, received by the Board on August 27, 2010.

3. The Education and Enforcement Division of the Board, through Assistant Attorney General Brian Considine, filed a Response to the Licensee's Motion on September 3, 2010.

4. 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; NOW THEREFORE;

IT IS HEREBY ORDERED that the Petition for Reconsideration is DENIED.

IT IS HEREBY FURTHER ORDERED that the Complaint filed in case 22,892 is sustained and that the liquor license privileges granted to Top Shelf, LLC d/b/a Top Shelf Grill at 600 Main Street in Vancouver, Washington, License 087981, are hereby suspended for a term of five (5) days. In lieu of a license suspension, the Licensee may pay a monetary penalty in the amount of five-hundred dollars ($500.00) due within 30 days of this order. If timely payment is not received, suspension will take place from 10:00 a.m.

on November 4, 2010 until 10:00 a.m. on November 9, 2010. Failure to comply with the terms of this order will result in further disciplinary action.

Payment in reference to this order should be sent to:

Washington State Liquor Control Board

PO Box 43085

Olympia, WA 98504-3085

DATED at Olympia, Washington this 22 day of September, 2010.

WASHINGTON STATE LIQUOR CONTROL BOARD

Sharon Foster

Ruthann Kurose

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).

Washington State
Liquor Control Board

September 22, 2010

William Baumgartner
Attorney for Licensee
112 W 11th St Ste 150
Vancouver, WA 98660-3143

Top Shelf LLC
d/b/a Top Shelf Grill
10013 NE Hazel Dell Ave #501
Vancouver, WA 98685-5203

Brian Considine, AAG
GCE Division, Office of Attorney General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100

RE: ***ORDER DENYING MOTION FOR RECONSIDERATION***
ADMINISTRATIVE VIOLATION NOTICE NO. 1L8337C
LICENSEE: Top Shelf LLC
TRADE NAME: Top Shelf Grill
LOCATION: 600 Main St, Vancouver, WA 98660
LICENSE NO. 087981-1L
LCB HEARING NO. 22,892
OAH NO. 2009-LCB-0004
UBI: 602 500 080 001 0001

Dear Parties:

Enclosed please find a Declaration of Service by Mail and a copy of the Board Notice in the above referenced matter.

If you have any questions, please contact me at (360) 664–1602.

Sincerely,

Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Tacoma and Vancouver Enforcement and Education Divisions, WSLCB
Amber Harris, WSLCB

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF: TOP SHELF, LLC d/b/a TOP SHELF GRILL 600 MAIN STREET VANCOUVER, WA 98660 LICENSEE LICENSE NO. 087981 AVN NO. 1L8337C	LCB NO. 22,892 OAH NO. 2009-LCB-0004 BOARD NOTICE TO PARTIES OF RECONSIDERATION OF FINAL ORDER

The Board issued its Final Order, supporting the Initial Order of the ALJ's recommended decision, on August 17, 2010, which was served on the parties by mail on August 18, 2010. On August 27, 2010, the Board received a request for Reconsideration from the Licensee.

The Board will consider the Licensee's request for Reconsideration. The Education and Enforcement Division may, but is not required to, file a response to the request for Reconsideration, no later than September 7, 2010. No reply by the Licensee shall be filed without further request by the Board. The Final Order of the Board is hereby stayed, pending further order of the Board. The Board will issue its decision on Reconsideration on or before September 22, 2010.

DATED at Olympia, Washington this 31st day of August, 2010.

WASHINGTON STATE LIQUOR CONTROL BOARD

Linda U. Bremer

Sharon Foster

Ruthann Kurose

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

RECEIVED
AUG 27 2010
LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

In Re: Top Shelf, LLC, dba Top Shelf Grill 600 Main Street Vancouver, WA 98660 Licensee License No. 087981	OAH No.: 2009-LCB-0004 LCB No.: 22,892 LICENSEE'S PETITION FOR RECONSIDERATION

Top Shelf, LLC, d/b/a Top Shelf Grill ("Licensee"), by and through Licensee's attorneys, William V. Baumgartner and Laurence R. Wagner of Baumgartner, Nelson & Price, PLLC, submits this petition for reconsideration of the Final Order of the Board entered in this matter on August 17, 2010.

STATEMENT OF GROUNDS

The Washington State Liquor Control Board ("WSLCB") should reconsider and reverse its Final Order, because WSLCB Enforcement officers do not have the authority to use minor investigative aides to enter onto premises posted off limits to minors in the absence of a rule promulgated by the WSLCB under RCW 66.08.030.

POINTS AND AUTHORITIES

The sale of liquor is a highly regulated industry and the WSLCB unquestionably has broad powers with regard to the regulation of the sale of liquor in Washington. But as explained in *Hi-Starr, Inc. v. Washington State Liquor Control Bd.*, 106 Wn.2d 455, 458-59, 722 P.2d 808 (1986), that power must be exercised through publicly adopted regulations:

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"Legislative functions cannot be delegated to an administrative body but the Legislature may delegate administrative power. *Keeting v. PUD 1*, 49 Wn.2d 761, 767, 306 P.2d 762 (1957); *see also* 1 C. Koch, *Administrative Law & Practice* § 1.22 (1985); R. Pierce, Jr., S. Shapiro & 811 P. Verkuil, *Administrative Law & Process* § 3.4.5 (1985); B. Schwartz, *Administrative Law* § 2.12 (2d ed. 1984). Regarding the standards required for a proper delegation of administrative power *Barry & Barry, Inc. v. Department of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972), *appeal dismissed*, 410 U.S. 977, 93 S.Ct. 1503, 36 L.Ed.2d 173 (1973), states:

> '[T]he delegation of legislative power is justified and constitutional, and the requirements of the standards doctrine are satisfied, when it can be shown (1) that the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.'

"The dominion of the Board is broad and extensive. *Quan v. State Liquor Control Bd.*, 69 Wn.2d 373, 379, 418 P.2d 424 (1966). The broad powers of the Board are, in part, enumerated under RCW 66.08.050. The Board has the authority to make necessary and advisable regulations consistent with the spirit of RCW 66. RCW 66.08.030(1); *see State ex rel. Thornbury v. Gregory*, 191 Wash. 70, 78, 70 P.2d 788 (1937). However, the broad and extensive powers given the Board are not all inclusive. Numerous statutory guidelines have been provided which broadly define the authority and duty of the Board and which insure procedural safeguards against arbitrary administrative action and abuse of discretionary power. *See* in particular RCW 66.08.010; .030; .050; .150; RCW 66.24.010; .400-.450; RCW 66.98.070; *see also* RCW 34.04."

The issue at this juncture is not whether the WSLCB has the authority to pass a regulation pursuant to RCW 66.08.030 allowing Enforcement to use minors in compliance checks at facilities that are restricted to adults. The issue at this juncture is whether, in the absence of a such a regulation, Enforcement may do so.

Without the guidelines of a regulation adopted pursuant to RCW 66.08.030, Enforcement is free to use minors in compliance checks without any safeguards for the protection of either the minor or the licensee, who is engaged in a legitimate business that generates substantial revenue for the State. Nothing prevents Enforcement from using minors under the age of 18 in compliance checks, even though they might be might be exposed to activities such as nudity and gambling. Nothing prevents Enforcement from using deceptively mature appearing minors in compliance checks. Indeed, Enforcement affirmatively argues

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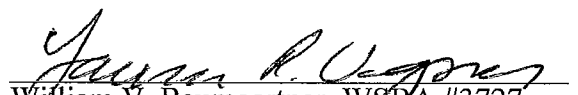
that its own internal policy, specifically WSLCB Enforcement Policy #287, which prohibits using deceptively mature minors and emphasizes that the safety of minor investigative aides used in compliance checks is paramount, is not binding on it and is "irrelevant." (Enforcement's Response to Licensee's Petition for Review, pg. 24, lines 7-8.) Allowing Enforcement to use a minor in compliance checks at facilities restricted to adults without the authority of a regulation adopted by the WSLCB invites arbitrary administrative action by Enforcement and abuse of Enforcement's discretionary power.

CONCLUSION

Without the authority of a rule adopted by the WSLCB pursuant to RCW 66.08.030, Enforcement's use of a minor in its compliance check at License's premises was unlawful. Licensee therefore respectfully requests that the WSLCB reconsider its Final Order and enter an Order dismissing the Complaint filed in this case.

DATED this 26th day of August, 2010.

BAUMGARTNER, NELSON & PRICE, PLLC



William V. Baumgartner, WSBA #3727
Laurence R. Wagner, WSBA #17605
Attorneys for Licensee

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Received

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WSLCB

RECEIVED

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LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF: TOP SHELF, LLC d/b/a TOP SHELF GRILL; DUBLIN DOWN, LLC d/b/a DUBLIN DOWN; and B.G.S. 00, LLC d/b/a BOOMERS SPORTS BAR & GRILL, LICENSEES.	OAH NOS. 2009-LCB-0004, 2009-LCB-0005 and 2009-LCB-0006 LCB NOS. 22,892, 22,893 and 22,894 ENFORCEMENT'S RESPONSE TO LICENSEES' MOTIONS FOR RECONSIDERATION OF FINAL ORDERS

The Enforcement and Education Division of the Washington State Liquor Control Board (Enforcement), by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and BRIAN J. CONSIDINE, Assistant Attorney General, submits this response in opposition to the Petitions for Reconsideration of the Final Order of the Liquor Control Board (Board) filed by Licensees TOP SHELF, LLC d/b/a TOP SHELF GRILL, DUBLIN DOWN, LLC d/b/a DUBLIN DOWN, and B.G.S. 00, LLC d/b/a BOOMERS SPORTS BAR & GRILL.[1]

I. FACTUAL BACKGROUND

On February 11, 2009, the Board issued separate Complaints to all three Licensees alleging that, on or about December 2, 2008, the Licensee or an employee thereof, gave, sold, and/or otherwise supplied liquor to a person under the age of 21, contrary to RCW 66.44.270 and WAC 314-11-020(1). In each case, Enforcement sought a five-day suspension of the

[1] As the content of the Petitions for Reconsideration filed by the three Licensees is identical, Enforcement is filing a single response to all three Petitions.

ORIGINAL

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license or a five-hundred dollar ($500) monetary penalty, as these were the first violations of their type for each of the Licensees within a two-year period. *See* WAC 314-29-020. All of the Licensees timely requested an administrative hearing.

In April 2009 the parties submitted stipulated facts and exhibits in all three cases. Thereafter, the Licensees moved to suppress the evidence and dismiss their cases. On November 18, 2009, Administrative Law Judge (ALJ) Janet Schneider denied the Licensees' motions to suppress and dismiss. On July 2, 2010, ALJ Schneider entered Findings of Fact, Conclusions of Law, and Initial Orders in each of the cases sustaining the Board's Complaints and recommending imposition of the standard penalties.

The Licensees timely filed Petitions for Review setting forth their exceptions to the ALJ's Initial Orders. On August 17, 2010, following consideration of the Licensees' exceptions to the Initial Orders, the Board issued Final Orders adopting and upholding ALJ Schneider's Initial Orders. On August 27, 2010, the Licensees filed Petitions for Reconsideration of the Board's Final Orders.[2]

II. ARGUMENT

A. Licensees' Petitions Do Not Advance Any New Legal Argument Or Authority.

Agencies have a limited right to reopen and reconsider their final decisions. *See* RCW 34.05.470; *St. Joseph Hosp. v. Dep't of Health*, 125 Wn.2d 733, 743, 887 P.2d 891 (1995) (citing *Seattle v. Hall*, 24 Wn. App. 357, 362, 602 P.2d 366 (1979)). The general purpose for a motion for reconsideration is to allow the decision-maker to address errors of fact that result from fraud, mistake, or misconception, or to address obvious errors or law, irregularities in the proceedings below or newly discovered evidence. *See e.g.*, *St. Joseph Hosp.,* 125 Wn.2d at 743 (quoting *Hall*, 24 Wn. App. at 363); CR 59(a). Its purpose is not to simply give the parties an opportunity to reargue their cases.

[2] Pursuant to RCW 34.05.470, any party in an administrative action may file a petition for reconsideration of an agency final order. A petition for reconsideration does not stay the effectiveness of an order and it is not a prerequisite for seeking judicial review. RCW 34.05.470(2), (5).

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In these cases, the Licensees' Petitions for Reconsideration are misplaced. The Licensees do not offer any new evidence or legal authority that was not previously available, nor do they advance any legal argument not previously considered by the Board. Indeed, in their Petitions for Reconsideration, the Licensees do nothing more than restate one of their primary arguments. The Licensees have argued this same position before the Board in their Petitions for Review. *See* Licensees' Petitions for Review. Accordingly, the Licensees' Petitions for Reconsideration are an improper attempt to obtain another "bite at the apple," and should, therefore, be denied.

B. Compliance Checks Using Minor Operatives Are A Permissible Means By Which Liquor Enforcement Officers Discharge Their Statutorily Authorized Enforcement Of The Liquor Laws.

In their Petitions for Reconsideration, the Licensees once again advance the argument that Enforcement may only conduct compliance checks at liquor establishments pursuant to publicly promulgated rules, and that in the absence of a rule specifically authorizing compliance checks, Enforcement is prohibited from acting. Specifically, the Licensees state:

> The issue at this juncture is not whether the WSLCB has the authority to pass a regulation pursuant to RCW 66.08.030 allowing Enforcement to use minors in compliance checks at facilities that are restricted to adults. *The issue at this juncture is whether, in the absence of such a regulation, Enforcement may do so.*

Petitions at 2 (emphasis added).[3] Without citing to any relevant, new authority in support of their position, the Licensees assert that in the absence of a rule dictating how Enforcement officers may enforce liquor laws and rules, the use of minors in the conduct of compliance checks "invites arbitrary administrative action" and is unlawful. Petitions at 2-3. This

[3] The Licensees also assert that in the absence of the "guidelines" of a regulation, "Enforcement is free to use minors in compliance checks without any safeguards for the protection of either the minor or the licensee. . ." Petitions at 2. This is essentially a policy argument and the Licensees fail to provide any evidence or facts to demonstrate any minor investigative aid or licensee was ever in any actual or even probable peril during any particular compliance check. Moreover, the Licensees recognize that, while it is not binding law, Enforcement already has polices in place to assure the wellbeing of its minor investigative aides. Petitions at 3. The Licensees provide no legal authority indicating compliance checks are unlawful based upon its hypothetical fears. In short, their assertions are nothing more than hyperbole.

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argument does not differ significantly from what the Licensees argued to the Board in their previously filed Petitions for Review. *See* Licensees' Petitions for Review. Enforcement's response, similarly, remains the same—the Licensees' argument is without merit.

The Licensees fail, again, to demonstrate that Enforcement's compliance checks at the Licensees' establishments were unlawful. The sale of alcohol is historically a highly regulated industry, not only in Washington State, but throughout the nation. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970); *see also Jow Sin Quan v. Washington State Liquor Control Board,* 69 Wn.2d 373, 382, 418 P.2d 424 (1966). The Legislature granted the Board broad power to "enforce the penal provisions of [Title 66 RCW] . . . and the penal laws of this state relating to the manufacture, importation, transportation, possession, distribution, and sale of liquor." RCW 66.44.010(2); *see also* RCW 66.08.010. Therefore, the dominion of the Board in regulating, supervising, and licensing the retail sale of alcohol is "broad and extensive."[4]

To carry out the Board's statutorily prescribed duties, the Legislature has authorized the Board to "appoint and employ...liquor enforcement officers" who "shall have the power, under the supervision of the board, to enforce the penal provisions of this title and the penal laws of this state relating to the manufacture, importation, transportation, possession, distribution, and *sale of liquor*." RCW 66.44.010(4) (emphasis added). When an enforcement officer believes that a licensee has violated the liquor laws, the officer is authorized to cite the licensee with an administrative violation. *See* WAC 314-29-005.

In the discharge of their duties, liquor enforcement officers, like their state, county, and city law enforcement counterparts, are permitted to utilize a wide variety of investigative tools. One such investigative tool is a controlled purchase, or "compliance check," in which a

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[4] A liquor license does not constitute a vested property right, but rather "a temporary permit, in the nature of a privilege, to engage in a business that would otherwise be unlawful." *Jow Sin Quan,* 69 Wn.2d at 382; WAC 314-07-015*; see also Anderson, Leech, & Morse, Inc. v. Washington State Liquor Control Bd.*, 89 Wn.2d 688, 694-95, 575 P.2d 221 (1978); *Scottsdale Insurance Co. v. Intl. Protective Agency, Inc.,* 105 Wn. App. 244, 249, 19 P.3d 1058 (2001) (noting that a liquor license is "merely representative of a privilege granted by the state").

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minor decoy, employed by the Board, attempts to purchase alcohol from a licensed premise. Compliance checks allow liquor enforcement officers to observe and regulate a licensees' interactions with minors. *See* WAC 314-29-005(1).

There can be no doubt that Enforcement is empowered to enforce the statutes and rules of the Board. Additionally, the law is clear that selling alcohol to a person under the age of twenty one, as the Licensees have done in the instant cases, violates the law. Ultimately, the Licensees' argument insists that it is not enough that the Legislature and the Board have empowered liquor enforcement officers to enforce the laws and rules prohibiting minors from purchasing alcohol. The Licensees contend that the Board must also promulgate rules dictating the specific methods its officers may employ to enforce the law. *See* Petitions at 2-3. However, the Licensees do not cite to any relevant, new authority in support of its contention that an administrative agency with law enforcement powers must micro-manage what methods its agents must use to enforce the law, or forego such enforcement altogether.

Contrary to the Licensees' contention, the methods that law enforcement officers may employ to enforce the penal and administrative laws of this state need not be expressly spelled out in statute or rule before they may be used. Rather, the investigative creativity of law enforcement is constrained by statute, case law and the state and federal constitutions. The conduct of a compliance check using a minor operative is no different than any other undercover law enforcement operation that uses an operative or informant. The use of decoys or informants to afford a person with opportunity to violate the law has long been upheld by Washington courts as a viable and legally permissible law enforcement technique. *See Gray,* 69 Wn.2d 432; *State v. Emerson*, 10 Wn. App. 235, 242, 517 P.2d 245 (1973); *City of Seattle v. Gleiser*, 29 Wn.2d 869, 189 P.2d 967 (1948); *see also Playhouse Inc. v. Liquor Control Board,* 35 Wn. App. 539, 667 P.2d 1136 (1983) (where the court held in the context of liquor enforcement officer enforcing Board rules: "deceitful practices . . . including the use of

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undercover agents and limited police participation in unlawful enterprises, are not constitutionally prohibited.").

Here, the Licensees were cited for violations of RCW 66.44.270(1) and RCW 66.44.310(1)(a) after Enforcement conducted compliance checks at the Licensees' premises. The statutes in Title 66 RCW provide the Board authority to enforce these provisions and to employ liquor enforcement officers to enforce the liquor laws and rules. The enforcement method used in the instant cases--the use of a minor decoy to afford the licensees an opportunity to obey or violate the law--is fully supported by Washington case law.

III. CONCLUSION

The Licensees' Petitions for Reconsideration do not advance any new arguments or cite to any new, relevant legal authority not previously considered by the Board. The Licensees seek merely to reargue a position already taken in their Petitions for Review. Therefore, Enforcement respectfully requests that the Board deny the Licensees' Petitions for Reconsideration.

DATED this 2nd day of September, 2010.

ROBERT M. MCKENNA
Attorney General

Gordon P. Kay WSBA #37178
for:

BRIAN J. CONSIDINE, WSBA #39517
Assistant Attorney General
Attorneys for Enforcement

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