

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

CUTTERCREST, LLC
d/b/a SPORTS PAGE GRILLE & BAR
907 FIRST STREET
SNOHOMISH, WA 98296-2906

LICENSEE

LICENSE NO. 356164-3F

LCB NO. 23,557

OAH NO. 2009-LCB-0044

FINAL ORDER SUSTAINING
COMPLAINT

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

I. PROCEDURAL HISTORY OF THE CASE

1.1. The Liquor Control Board issued a Complaint dated September 30, 2009, alleging that on July 18, 2009 the above-named Licensee, or employee(s) thereof, allowed or permitted an apparently intoxicated person to possess or consume liquor on the licensed premises in violation of WAC 314-16-150(2).

1.2. The Licensee made a timely request for hearing, and Administrative Law Judge Jason Grover was assigned to hear the case, and held a prehearing conference.

1.3. The licensee filed a Motion for Summary Judgment and the Education and Enforcement Division filed a Response, and a cross motion for partial summary judgment. Argument on the motions was heard by telephone on February 18, 2010, and by order dated March 2, 2010¹, the administrative law judge denied both motions.

¹ The Initial Order purports to be dated March 2, 2009, but as the argument and briefing, along with other time frames relevant to the case clearly show it was issued in 2010, the Board has determined the actual date of the order was March 2, 2010.

1.4 An administrative hearing was held before Administrative Law Judge Jason H. Grover on March 9, 2010. The Licensee appeared through David Osgood. The Education and Enforcement Division of the Board was represented by Assistant Attorney General Gordon Karg.

1.5. The Administrative Law Judge issued an Initial Order on May 10, 2010, sustaining the Board's Complaint and imposing the standard penalty for a second violation within a 24 month period, of a five-day suspension of the liquor license or payment of a \$2,500 monetary penalty in lieu of the suspension. In Finding of Fact 15 of the Initial Order, the ALJ suggests that the Board consider as mitigating circumstances the Licensee's business policies and practices that are intended to reduce the risk of future violation. The Board noted that the penalty matrix has recently been revised, effective 11/14/09. If the alleged violation was committed today, the Licensee would be subject to a 7-day suspension with no monetary option for a second violation within a 24 month period.

1.6. The Licensee filed a timely Petition for Review to which the Education and Enforcement Division of the Board replied. The Licensee challenges the validity of the regulation under which the violation notice was issued, WAC 314-16-150(2), making it a violation when a licensee permits an apparently intoxicated person to consume and/or possess alcohol on a licensed premises.

II. FINDINGS OF FACT

2.1. The Board hereby adopts and incorporates by reference Findings of Fact Nos. 1 through 12 of the Initial Order.

III. CONCLUSIONS OF LAW

3.1. The Board hereby adopts and incorporates by reference Conclusions of Law Nos. 1 through 12 of the Initial Order. The Board does not adopt Conclusions of Law Nos. 13 through 15, and makes the following additional Conclusions.

3.2. 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.

3.3. In this case the undisputed facts establish the Licensee had at least constructive notice of the signs of intoxication displayed by Mr. Hoff, while possessing and consuming an alcoholic beverage on the premises. 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.

3.4. The Board has authority to issue violation notices to premises licensed to sell alcohol when an apparently intoxicated person is allowed to possess or consume liquor on the premises. RCW 66.44.200 and WAC 314-16-150.

3.5. WAC 314-16-150 states, in relevant part:

(1) No retail licensee shall give or otherwise supply liquor toany person apparently under the influence of liquor; nor shall any licensee or employee thereof permit any person ...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.

A violation of this rule occurs when a licensee and/or an employee sells or supplies liquor to, or permits a person apparently under the influence of liquor to consume and/or possess liquor on the licensed premises.

3.6. The Licensee has challenged the validity of WAC 314-15-150, asserting that it is contrary to the authority of the Board and conflicts with legislative intent. In support of this argument, the Licensee cites to legislative history, asserting that the Legislature affirmatively chose to relieve licensees of certain responsibilities with regard to persons who appear to be intoxicated, and to impose the responsibility on the individual. The Board concludes that this argument is not valid. The Licensee's argument would have the Legislature removing liability from a Licensee, even if an obviously intoxicated person continued to consume alcohol on the licensed premises, so long as the Licensee did not directly sell the product to the individual. Such an interpretation would allow the Licensee to observe (or even encourage) another person to purchase alcoholic beverages for an apparently intoxicated person, and observe the apparently intoxicated person consume them, so long as the Licensee did not sell or serve the beverage directly to the apparently intoxicated person. The Legislature could not have intended this result, and the Legislative history does not demonstrate such an intent. By amending RCW 66.44.200 to impose a separate liability on the apparently intoxicated person, the Legislature did not demonstrate the intent to relieve the Licensee of the responsibility to control the consumption of alcohol on the licensed premise.

3.7. RCW 66.08.010 states that [Title 66 RCW] is "deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals, and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose."

The Legislature has provided the Board with broad rulemaking authority to adopt rules

For the purpose of carrying into effect the provisions of this title [Title 66 RCW] according to their true intent *or of supplying any deficiency therein*, the board may

make such regulations not inconsistent with the spirit of this title as are deemed necessary or advisable.

* * *

RCW 66.08.030(1). The Board's authority to regulate the conduct of persons on licensed premises, and to hold the Licensee responsible for the conduct of persons on the licensed premises, was upheld in *Corral, Inc., v. Washington State Liquor Control Board*, 17 Wn. App. 753, 566 P.2d.214 (1977). Washington courts have long upheld the broad authority of the Board to regulate and control the dispensation of alcoholic beverages. *Cosro, Inc. v. Washington State Liquor Control Board*, 107 Wn.2d 754, 757, 733 P.2d 539 (1987); *Anderson, Leech & Morris, Inc., v. Washington State Liquor Control Board*, 89 Wn.2d 688, 575 P.2d 221 (1979); *Jow Sin Quan v. Washington State Liquor Control Board*, 69 Wn.2d 373, 379, 418 P.2d 424 (1966); *Sukin v. Washington State Liquor Control Board*, 42 Wn. App 649, 653, 710 P.2d 814 (1985).

3.8. The regulation challenged by the Licensee is both necessary to carry into effect the provisions of Title 66 RCW and consistent with the spirit of the title. If a licensee is only prohibited from actively selling or supplying a person apparently under the influence of liquor, and not prohibited from allowing the person to continue to possess or consume liquor on the licensed premises, then a Licensee could "allow" or "permit" another person to purchase alcoholic beverages for a person, and observe the apparently intoxicated person consume them, with impunity, so long as the Licensee did not sell or serve the beverage directly to the apparently intoxicated person. Such a result would be contrary to the clear intent of the Legislature.

3.9. RCW 66.44.200(1) clearly imposes a duty on liquor licensees and their employees to make sure that alcohol is not supplied or distributed to apparently intoxicated persons. The challenged regulation furthers that purpose, and is not inconsistent with the intent of the Legislature. The addition of a civil infraction for the apparently intoxicated person to continue to

consume alcohol [RCW 66.44.200(1)] and remain on a licensed premises does not diminish the criminal responsibility of the licensee (See RCW 66.44.200(10 and RCW 66.44.180)

3.7. This is the Licensee's second sustained violation of this nature within a two year period.

ORDER

IT IS HEREBY ORDERED that the Board's Complaint in this matter is SUSTAINED.

IT IS FURTHER ORDERED that the license privileges of Cuttercrest LLC d/b/a Sports Page Grille & Bar, under License No. 356164-3F shall be suspended for a period of five (5) days. In lieu of a license suspension, the Licensee may pay a monetary penalty in the amount of \$2,500. Payment must be made to due within 30 days of this order. 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
Enforcement and Education Division
PO Box 43085
Olympia, WA 98504-3085**

DATED at Olympia, Washington this 13 day of July, 2010.

WASHINGTON STATE LIQUOR CONTROL BOARD

Sharon Foster

Ruthann Kuwori

Linda Villegas Bremer

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. 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 Mary M. Tennyson, Senior 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).



**Washington State
Liquor Control Board**

July 15, 2010

David Osgood, Attorney
1411 4th Ave Ste 1506
Seattle, WA 98101-2247

Cuttercrest, LLC
d/b/a Sports Page Grille and Bar
6629 Cascade Dr SE
Snohomish, WA 98296-8945

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

**RE: FINAL ORDER OF THE BOARD
ADMINISTRATIVE VIOLATION NOTICE NO. 3F9199A
LICENSEE: Cuttercrest, LLC
TRADE NAME: Sports Page Grille and Bar
LOCATION: 907 1st St, Snohomish, WA 98296
LICENSE NO. 356164-3G
LCB HEARING NO. 23,557
OAH NO. 2009-LCB-0044
UBI: 601 629 483 001 0002**

Dear Parties:

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

The applicable monetary penalty is due by August 16, 2010 or suspension will take place from 10:00 am on August 27, 2010 until 10:00 am on September 1, 2010.

When you are sending in payment, please send it to the mailing address indicated in the Final Order and label the check with your License and Administrative Violation Notice numbers listed above. If you have any questions, please contact me at (360) 664-1602.

Sincerely,

Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Bellingham Enforcement and Education Division, WSLCB
Amber Harris, WSLCB

PO Box 43076, 3000 Pacific Ave. SE, Olympia WA 98504-3076, (360) 664-1602 www.liq.wa.gov

1
2
3 **WASHINGTON STATE LIQUOR CONTROL BOARD**

4 IN THE MATTER OF:

5 CUTTERCREST, LLC
6 SPORTS PAGE GRILLE AND BAR
7 907 1ST ST
8 SNOHOMISH, WA 98296

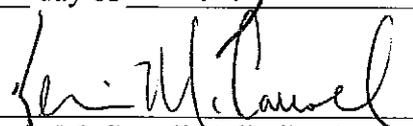
LCB NO. 23,557
OAH NO. 2009-LCB-0044

DECLARATION OF SERVICE BY
MAIL

8 LICENSEE
9 LICENSE NO. 356164-3G

10 I declare under penalty of perjury under the laws of the state of Washington that on July
11 15, 2010, I served a true and correct copy of the FINAL ORDER SUSTAINING COMPLAINT in
12 the above-referenced matter, by placing a copy of said documents in the U.S. mail, postage
13 prepaid, to all parties or their counsel of record.

14 DATED this 15th day of July, 2010, at Olympia, Washington.

15
16 
17 Kevin McCarroll, Adjudicative Proceedings Coordinator

18
19 DAVID OSGOOD, ATTORNEY
1411 4TH AVE STE 1506
20 SEATTLE, WA 98101-2247

GORDON KARG, ASSISTANT ATTORNEY
GENERAL, GCE DIVISION
OFFICE OF THE ATTORNEY GENERAL
1125 WASHINGTON STREET SE
PO BOX 40100
OLYMPIA, WA 98504-0100

21
22 CUTTERCREST, LLC
23 d/b/a SPORTS PAGE GRILLE AND BAR
6629 CASCADE DR SE
24 SNOHOMISH, WA 98296-8945

25
26
DECLARATION OF SERVICE BY
MAIL

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

LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

MAY 13 2011

RECEIVED

IN THE MATTER OF:

CUTTERCREST, LLC
dba SPORTS PAGE GRILLE & BAR
907 FIRST STREET
SNOHOMISH, WA 98296

LICENSEE

LICENSE NO. 356164-3F

Docket No. 2009-LCB-0044
No. 23,557

INITIAL ORDER

JURISDICTION and APPEAL RIGHTS

Pursuant to 34.05 RCW (the Administrative Procedure Act), 34.12 RCW, and WAC 314-29-010, the Notice of Administrative Violation issued under WAC 314-16-150 is appealable to an administrative law judge. The decision of the administrative law judge is an initial order, subject to review by the Board pursuant to RCW 34.05.464, WAC 314-42-095 and WAC 10-08-211. ***Appeal rights are described at the end of this order.***

PROCEDURAL BACKGROUND

1. This matter is an adjudicative proceeding pursuant to the Administrative Procedure Act to review action the Washington State Liquor Control Board Enforcement Division (Enforcement) undertook against Cuttercrest LLC dba Sports Page Grille & Bar (Licensee).

2. On July 20, 2009, Enforcement issued an Administrative Violation Notice to the Licensee for a violation of WAC 314-160150 - permitting a person apparently under the influence of liquor to possess or consume liquor on the licensed premises.
3. The Licensee, Cuttercrest LLC, filed a timely application for an administrative hearing and review of the Administrative Violation Notice, which prompted this administrative proceeding before the Office of Administrative Hearings.
4. After an initial prehearing conference, the Licensee filed a timely Motion for Summary Judgment pursuant to WAC 10-08-135 requesting entry of an order dismissing the Administrative Violation Notice on the grounds that the regulation under which the Licensee was cited was nullified by a 1998 legislative amendment to RCW 66.44.200(2). Enforcement filed a cross-motion for partial summary judgment on January 26, 2010. After briefing and oral argument, both motions were denied.
5. The matter proceeded to a full hearing on March 9, 2010.
6. All proceedings were digitally recorded.

ISSUES

1. Whether the Licensee permitted an apparently intoxicated person to consume and/or possess alcohol on a licensed premises on July 18, 2009, in violation of WAC 314-16-150(2), as alleged in Enforcement's Complaint dated September 20, 2009.

EVIDENCE CONSIDERED

1. **Enforcement Exhibits 1-6: Admitted.** The parties stipulated that for the Certified Licensing History contained in Exhibit 5, any information more than two years old should not be considered in the determination of any penalty imposed.

2. **LICENSEE EXHIBITS 1-4:** Withdrawn by the Licensee.
3. Testimony of WSLCB Lt. Kate Miyasato;
4. Testimony of WSLCB Sgt. Troy McCallister;
5. Testimony of Cuttercrest LLC Owner, William Wildrick.

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

FINDINGS OF FACT

1. The testimony of the parties conflicted on material points. The undersigned, having carefully considered and weighed all the evidence, including the motivations of the parties, the reasonableness of the testimony, and the totality of the circumstances presented resolves conflicting testimony in favor of the testimony offered by Lt. Kate Miyasato and Sgt. Troy McCallister.
2. The Licensee, Cuttercrest LLC.d/b/a Sports Page Grille & Bar (Licensee), operates a sports bar located at 907 1st Street, Snohomish, Washington. The premises is licensed by the Board for the sale of beer, wine and liquor for on-premises consumption pursuant to License No. 356164-3F.
3. On July 18, 2009, WSLCB Lt. Kate Miyasato and Sgt. Troy McCallister were conducting premises compliance checks on liquor licensed establishments in the area of First Street in the City of Snohomish, Washington. First Street is a location of strategic interest (LSI) because there are ten to fifteen licensed premises within walking distance of each other.

4. At approximately 9:35 P.M., Lt. Miyasato and Sgt. McCallister entered the Licensee's premises. Lt. Miyasato positioned herself at the top of a ramp that leads from the pool table area down to the bar area. From her location, Lt. Miyasato could better observe the patrons. Two staffmembers were behind the bar. There was a doorman at the door and Cuttercrest LLC Owner William Wildrick was also on duty. There were approximately thirty to thirty-five patrons in the bar during the time period in question, however, it was not overly crowded. From her location, Lt. Miyasato observed a male patron, later identified as Tyler Hoff, stagger from the pool table area down the ramp with a drink in his hand. Lt. Miyasato observed Mr. Hoff stop in front of the bar and talk to some other patrons. He took several sips of his drink. His coordination was poor as he drank from his drink, he was swaying and his eyes were glassy.

5. Mr. Hoff then staggered to the outdoor beer garden. Lt. Miyasato and Sgt McCallister followed Mr. Hoff. William Wildrick followed the three outside. Lt. Miyasato observed Mr. Hoff fumble with a cigarette and then fumble with his cell phone as he attempted to send a text message. Lt. Miyasato noted that Mr. Hoff looked frustrated with the process. Mr. Hoff swayed as he stood in the beer garden. At one point, he bent down and almost hit his head on a table. He then straightened up and staggered back inside. As he passed through the door frame, he bumped into it and stumbled inside.

6. Lt. Miyasato approached Mr. Hoff by the bar and identified herself. She asked him how much had been served to him. He said, "one". Lt. Miyasato took the drink and smelled it. It smelled strongly of whiskey. She saw Mr. Wildrick and offered to let him smell it. He told her that he couldn't smell.

7. Lt. Miyasato asked Mr. Hoff to step outside so that she could talk to him. After stepping outside, Lt. Miyasato told Mr. Hoff that he appeared to be intoxicated. Mr. Hoff said that he was sorry and that he was intoxicated. He told her that he had been drinking at home before he went out. Lt. Miyasato asked him what his drink was and he told her it was a "7 & 7". Both Lt. Miyasato and Sgt. McCallister testified that Mr. Hoff's speech was slurred.

8. Lt. Miyasato took a sample of the drink for the State Toxicology Lab. The toxicology report was admitted as exhibit 6. The report shows that the drink had a 9.49% ethanol content.

9. Lt. Miyasato prepared the Administrative Violation Notice at issue in this proceeding.

10. At hearing, William Wildrick, Owner of Licensee Cuttercrest LLC, disputed Lt. Miyasato's account of the incident and denied that Mr. Hoff was apparently intoxicated.

11. Mr. Wildrick testified that the Licensee has safeguards in place to prevent violations. Employees are trained to detect intoxicated persons. The Licensee's policies prohibit employees from serving intoxicated persons. Employees are required to take the drinks of intoxicated persons and offer them free coffee and food and to arrange for their transportation. During busy days, the Licensee attempts to ensure that sufficient staff are present on the floor. Servers are instructed to remove unattended drinks, to pace service and to try to have patrons get their drinks at the bar.

12. This violation would be the Licensee's second violation of this type within a two-year period.

CONCLUSIONS OF LAW

1. WAC 314-16-150(b) provides, "No retail licensee shall permit any person apparently under the influence of liquor to physically possess liquor on the licensed premises."

2. The Licensee does not dispute that it has a liquor license issued by the Washington State Liquor Control Board or that Mr. Hoff possessed and consumed liquor on the licensed premises. Therefore, those elements of the offense have been established.

3. The next issue to be determined is whether Mr. Hoff was apparently under the influence while on the Licensee's premises. "Apparently under the influence" has been defined as being "seemingly drunk". *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 268, 96 P.3d 386 (2004).

4. In the present case, Mr. Hoff exhibited several overt signs of intoxication. He staggered when he walked, he had glassy watery eyes, his speech was slurred, he swayed when he stood, he exhibited a general lack of coordination and fumbled with his cigarettes and cell phone, Additionally, Mr. Hoff admitted to Lt. Miyasato that he was intoxicated.

5. Based on the testimony presented, I find that Mr. Hoff was apparently under the influence of liquor during all relevant times.

6. The next issue to be determined is whether the licensee *permitted* Mr. Hoff to possess or consume liquor on the premises.

7. The word "permit" 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." *Oscars, Inc. v. Washington State Liquor Control Board*, 101 Wn. App. 498, 506-508, 3 P.3d 813, (2000).

8. In the present case, Mr. Hoff was on the Licensee's premises, was apparently intoxicated and was in possession of alcohol at the time that enforcement contacted him. The Licensee failed to adequately monitor Mr. Hoff while he was on the premises to ensure that he did not possess alcohol.

9. Based on the foregoing analysis, the Department has established all elements of the violation. The Board's Complaint in this matter, as amended, should be sustained.

10. This violation constitutes a second violation in a twenty-four month period.

11. The Board has the authority to establish an appropriate penalty as a matter of its discretion. Under RCW 66.24.010, the Board has the authority to suspend the Licensee's liquor license. Effective May 5, 2003, the Board has adopted as rules a set of "standard penalties" which may be applied to certain offenses. WAC 314-29-015. This regulatory provision states that the standard penalties are meant to serve as guidelines, and that the Board retains discretion to impose a different penalty based upon the existence of mitigating or aggravating circumstances. An escalating penalty scheme is adopted based upon the existence of any prior violations that the Licensee may have incurred within a prior two year period. WAC 314-29-015.

12. The standard penalty in this matter for a second violation of WAC 314-16-150, is a five day suspension of the Licensee's liquor license. In lieu of license suspension, the Licensee is afforded a monetary penalty option in the amount of \$2,500.00. WAC 314-29-020.

13. In the matter of penalties, the role of the Administrative Law Judge is to draw the Board's attention to those aggravating or mitigating circumstances which the Board may wish to consider in deciding whether to deviate from the standard penalty established by regulation. Examples of mitigating or aggravating circumstances are set forth at WAC 314-29-015(4).

14. WAC 314-29-015(4) provides that penalty schedules are meant to serve as guidelines. . Based on mitigating or aggravating circumstances, the liquor control board may impose a different penalty than the standard penalties outlined in these schedules. Mitigating circumstances that may result in fewer days of suspension and/or a lower monetary option may include demonstrated business policies and/or practices that reduce the risk of future violations.

15. In the present case, as detailed in Finding of Fact 11, the Licensee has business policies and practices intended to reduce the risk of future violations. These policies should be considered mitigating factors and should be considered by the Board when imposing its penalty in accordance with WAC 314-29-020.

INITIAL ORDER

NOW THEREFORE, IT IS HEREBY ORDERED, That the Board's Complaint in this matter is Sustained. On a date to be established in the Board's Final Order, the license privileges of Cuttercrest LLC d/b/a Sports Page Grille & Bar, under License No. 356164-3F, shall be suspended for a period of five (5) days. In lieu of a license suspension, the Licensee may pay a civil monetary penalty in the amount of Two Thousand Five Hundred Dollars (\$2,500.00).

Dated on the 10th day of May, 2010 at Olympia, Washington.


Jason H. Grover
Administrative Law Judge
Office of Administrative Hearings
2420 Bristol Court SW
PO Box 9046
Olympia, WA 98507-9046

FURTHER APPEAL RIGHTS

Any party may file a petition for review of the initial order with the Liquor Control Board within twenty days of the date of service of the initial order. RCW 34.05.464, WAC 10-08-211, and WAC 314-42-095(2)(a). The petition for review must (a) identify the parts of the initial order the petitioner objects to and (b) refer to the evidence in the record that supports the petitioner's position.

A petitioner must mail a copy of the petition for review to each of the other parties and their representatives at the same time the petitioner files the petition. Within ten days after service of the petition for review, any other parties may file a response to the petition. WAC 314-42-095(2)(b). A responding party must likewise mail a copy of the response to each of the other parties and their representatives at the same time the responding party files the response.

The members of the Liquor Control Board will review the administrative record, the initial order, the petition for review, and any responses. WAC 314-42-095(3). Following this review, the Board will enter a final order WAC 314-42-095(4). Within ten days of when the Board issues the final order, any party may file a petition for reconsideration, stating the specific grounds upon which relief is requested. RCW 34.05.470(1) and WAC 10.08.215. A party may appeal the Liquor Control Board's final order to the Superior Court under RCW 34.05.510 *et seq.*

RECEIVED

MAY 28 2010

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

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

IN THE MATTER OF THE HEARING OF

CUTTERCREST, LLC
D/B/A SPORTS PAGE GRILLE & BAR
907 FIRST STREET
SNOHOMISH, WA 98296

LICENSEE

LICENSE NO. 356164-3F

OAH NO.: 2009-LCB-0044
LCB NO.: 23,557

LICENSEE'S PETITION FOR
REVIEW OF FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
INITIAL ORDER.

COMES NOW the licensee, by and through the undersigned counsel of record, and pursuant to the provisions of RCW 34.05.464, 34.12 and WAC 314-42-095, petitions for review of Administrative Law Judge (ALJ) Jason Grover's Findings of Fact, Conclusions of Law and Initial Order dated May 10, 2010.

I. INTRODUCTION

On July 18, 2009, WSLCB Lieutenant Kate Miyasato and Agent Troy McAllister were making compliance checks in liquor licensed establishments during Snohomish, Washington's annual Kla Ha Ya Days festival.

**LICENSEE'S EXCEPTIONS TO FF&CL
AND INITIAL ORDER - 1**

DAVID R. OSGOOD
LAW OFFICES OF DAVID OSGOOD, P.S.
1411 FOURTH AVENUE, SUITE 1506
SEATTLE, WASHINGTON 98101
TEL: (206) 838-8777
FAX: (206) 838-8778

1
2
3 At approximately 9:35 p.m. the two entered the Licensee's premises and Lt. Miyasato
4 positioned herself on a ramp that goes from the lower portion of the premises (where the bar is
5 located) to the upper portion (where the booths and pool tables are located).

6
7 According to Lt. Miyasato, the premises were moderately busy, with about 30 – 35 people in
8 the premises. Lt. Miyasato observed and contacted Mr. Tyler Lee Hoff moving from the upper
9 portion of the premises to the outdoor beer garden area. Ms. Miyasato reported that Mr. Hoff was
10 staggering, and exhibiting signs of poor coordination. She further notes that he "fumbled" with a
11 cigarette and cell phone, swayed as he stood in the beer garden, and that his eyes looked "glassy".
12 Lt. Miyasato observed that Mr. Hoff had a plastic cup in his hand.
13

14 Lt. Miyasato, Agent McAllister, and Mr. Bill Wildrick, the governing member of Cuttercrest,
15 LLC went outside with Mr. Hoff. Lt. Miyasato confirmed that the plastic cup contained a drink
16 which smelled like whiskey. Mr. Hoff admitted that he had been drinking, and stated that he had
17 been drinking at home before going out, but that it was his first at the Licensee's. He said that the
18 drink was a "7 & 7".
19

20
21 Lieutenant Miyasoto prepared an Investigative Summary setting forth her observations and
22 actions from the compliance check conducted on July 18, 2009. Lieutenant Miyasoto issued an
23 AVN to the Licensee on July 20, 2009, for a violation of WAC 314-16-150 – permitting a person
24 apparently under the influence of liquor to possess or consume liquor on the licensed premise.
25 Significantly missing from her observations is any evidence that she had seen Mr. Hoff purchase an
26 alcoholic beverage, or that she questioned him as to when he had purchased it, or whether he had any
27 medical conditions which might cause him to exhibit signs of "apparent intoxication."
28
29

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

II. STANDARD OF REVIEW

Review of an Administrative Law Judge's Initial Order is governed by RCW 34.05.474.

III. EXCEPTIONS

The following exceptions will address the paragraphs in ALJ Grover's Initial Order to which the Licensee takes exception.

A. Findings of Fact.

1. Petitioner excepts to Finding No. 1, insofar as conflicting testimony is resolved in favor of Lt. Miyasato and Sgt. Troy McCallister. Lt. Miyasato and Sgt Troy McCallister's testimony is inconsistent with each other in major respects, not only with the licensee.

5. Licensee excepts to Finding No. 5, insofar as it excludes testimony from Agent Miyasato that there was no one in the door frame when Mr. Hoff bumped into it—and testimony from Sgt. McCallister that Mr. Hoff tripped while trying to get around several people. The testimony of the two is materially different, and should be seen as undermining the credibility of Agent Miyasato.

7. Licensee excepts to Finding No. 8, insofar as Licensee avers that while Mr. Hoff may have apologized to Agent Miyasato, it was not for "being intoxicated."

B. Conclusions of Law.

1-2. Licensee excepts to Conclusion No. 1 - 2, insofar as it seeks to challenge the legitimacy of WAC 314-16-150(b) (No retail licensee shall permit any person apparently under the influence of

1
2 liquor to physically possess liquor on the licensed premises). The Licensee restates and incorporates
3 its arguments from Licensee's Motion for Summary Judgment and the supporting documentation.
4

5 An administrative agency created by statute has only those powers expressly granted or
6 necessarily implied by that statute. Properties Four, Inc. v. State, 125 Wn.App. 108, 105 P.3d 416
7 (2005), Barendregt v. Walla Walla School Dist. No. 140, 26 Wn.App. 246, 249, 611 P.2d 1385
8 (1980).
9

10 RCW 66.44.200(1) prohibits selling liquor to persons under the influence of liquor: "No
11 person shall sell any liquor to any person apparently under the influence of liquor." The word "sell"
12 means that one person sells, exchanges, barter, or distributes the liquor to another.¹ There is no
13 evidence in the record that Cuttercrest, LLC sold any liquor to Tyler Hoff. The evidence is that Mr.
14 Hoff was observed holding a plastic cup, which was believed to contain an alcoholic mixed drink.
15 Evidence that Mr. Hoff was apparently intoxicated does not establish that he purchased the drink, or
16 that Cuttercrest, LLC sold him the drink. Neither Lt. Miyasato nor Agent McCallister observed Mr.
17 Hoff purchase the drink from either bartender on duty—even if he did, they cannot know either what
18 time he purchased the drink, or how he would have presented himself to the bartender when
19 ordering.
20
21

22
23 **A. The ALJ or the Board Should Dismiss the Complaint's Allegation that Cuttercrest, LLC**
24 **Violated WAC 314-16-150 Because the Regulation is a Nullity.**

25 **(1) Title 66 Only Allows the Board to Enact a Regulation That is Consistent with RCW**
26 **66.44.200 and with its Legislative Intent.**
27
28

29 ¹ RCW 66.04.010(31).

1
2 Washington's legislature empowered the Liquor Control Board to make regulations. But the
3 legislature imposed the same, substantial limitation on the Liquor Control Board's power as it does
4 on virtually every administrative agency. The Board can only enact regulations that carry out the
5 provisions enacted by the legislature in Title 66; additionally, the regulations must be consistent with
6 the legislature's true intent:
7

8 For the purposes of carrying into effect the provisions of this title according to their true
9 intent or of supplying any deficiency therein, the board may make such regulations not
10 inconsistent with the spirit of this title as are deemed necessary or advisable.²

11 In short, the Board can only make regulations consistent with the legislature's act or the
12 legislative intent. If an administrative agency enacts a regulation that does not carry out the
13 provisions of the enabling statute or is contrary to the legislature's intent, the regulation is *ultra vires*
14 and invalid. A regulation is a nullity where it is inconsistent with a statute." Thus, if WAC 314-16-
15 150 fails to carry out RCW 66.44.200, or any other statute of equal specificity, or if the regulation is
16 inconsistent with the legislature's intent the regulation is invalid and the hearing officer should
17 dismiss the Complaint as a matter of law.
18
19

20 **(2) A Regulation is Inconsistent with the Enabling Statute if it Imposes a Duty on a**
21 **Class not Identified by the Legislature of Imposes a Duty Broader than one Authorized**
22 **and Intended by the Legislature.**

23 Regulations that impose duties or responsibilities not imposed in an enabling statute are
24 inconsistent with the statute. Similarly, regulations are inconsistent with a statute or legislative
25 intent when they impose a duty on a class of people not identified in the statute or impose a broader
26 duty than the statute allows. The court compared a Department of Revenue regulation with the
27 enabling statute in Lone Star Industries v. Dept of Revenue, 92, Wn.2d 630, 647 P.2d 1013 (1982).
28
29

1
2
3 RCW 82.12.020 imposed a tax on personal property purchases. But the statute included an
4 “ingredient or component” exemption: if the property was consumed and became an “ingredient or
5 component” of new personal property for sale, the tax did not apply. The Department of Revenue
6 made a “primary purpose” rule. Under the Department’s rule, the personal property was taxed unless
7 its “primary purpose” was as an “ingredient or component.” The Washington State Supreme Court
8 declared the “primary purpose” regulation invalid as inconsistent with the statute: “RCW 82.04.050
9 does not require that the tangible personal property so purchased be acquired primarily for the
10 purpose of such consumption in order to avoid taxation as a ‘retail sale’” *id.* at 634. Because the
11 regulation imposed an additional condition not contained in the legislature’s exemption, the
12 regulation was invalid.
13

14
15 In Burton v. Lehman, 153 Wn.2d 416, 103 P.3d 1230 (2005), the Supreme Court struck down
16 a Department of Corrections rule because it imposed a responsibility on inmates not found in the
17 enabling statute. The enabling statute gave prison superintendents possession of all inmate personal
18 property but provided that upon transfer or discharge, all “personal property in the possession of the
19 superintendent belonging to such convicted persons shall be delivered to them.” 153 Wn.2d at
20 420, *citing* RCW 72.02.045(3). The Department of Corrections, however, enacted a rule that
21 required transferring inmates with more than two boxes of property to pay for shipment. The court
22 held the rule to be invalid because it conflicted with the legislature’s dictate that the superintendent
23 “shall” deliver all property to a transferring inmate: “Nothing in the statute indicates that only some
24 of an inmate’s property shall be delivered, nor does it state that the property shall be delivered *at*
25 *such convicted person’s expense.*” *Id.* at 425 (emphasis added). The rule was invalid because the
26
27
28

29 ² RCW 66.08.030; see also RCW 66.98.070, which also empowers the Board to make regulations “carrying into effect the provisions of this act” but disapproving regulations “inconsistent with the spirit of this act.”

1
2 Department imposed a duty on a class of persons upon whom the legislature had not imposed a duty.
3

4 In Duncan Crane Service v. State Department of Revenue, 44 Wn. App. 684, 688, 723 P.2d
5 480 (1986), Duncan, in the course of business, purchased cranes for the purpose of leasing them out
6 to other businesses. Duncan did not pay either retail sales tax or use tax on his purchases, relying on
7 an exemption for "a person who...purchases for the purpose of resale....without intervening use."
8 RCW 82.04.050(1)(a) (retail sales tax) and RCW 82.12.020 (use tax). According to the statutes,
9 "resale" included subsequent lease to consumers without intervening use. Despite Duncan's resale
10 by lease of the cranes, an auditor of the Department assessed a deficiency for use tax against Duncan
11 finding that Duncan was in fact a "user" of the cranes because it had provided the services of a crane
12 operator to some of its lessees. In assessing the deficiency, the auditor relied upon WAC 458-20-
13 178, which included in its definition of user, "a lessor who leases equipment with an operator."
14
15
16

17 In analyzing whether the Department had authority to enforce the regulation, the Court read
18 the exemption narrowly, construing the statute in favor of imposing the tax. However, the Court
19 found that the usual definition of a lease included a situation where a lessor provides an operator
20 who is to work under control of the lessee. Because the legislature had not qualified its use of the
21 word "lease," the Court took the use tax statute to include all leases within its definition of resale.
22 The Court found that by excluding a particular category of leases from the exemption, and thus
23 imposing the tax on a broader category of lessors and in a broader set of situations than under the
24 statute, the Department contravened the legislative intent. The Court concluded that "if a regulation
25 taxes more broadly than does the statute it purports to implement, it is invalid." 44 Wn. App. at
26 688, *citing Lone Star Indus., Inc. v. Dept. of Revenue*, 97 Wn.2d 630, 634, 647 P.2d 1013 (1982).
27
28
29

1
2
3 **(3) WAC 314-16-150 Is Inconsistent With RCW 66.44.200 And The Legislature's Intent.**

4 **(a) WAC 314-11-035 Is Inconsistent With The Plain Language Of RCW**
5 **66.44.200 Because It Imposes A Duty On A Separate Class Of Persons**
6 **And It Imposes A Penalty That Contradicts The Fine Imposed By The**
7 **Legislature.**

8 WAC 314-16-150, which predates and does not recognize RCW 66.44.200, imposes a wide-
9 ranging duty on licensees: licensees cannot "permit any person apparently under the influence of
10 liquor to physically possess liquor on the licensed premises." But the regulation certainly cannot be
11 construed as one that carries out any provision of RCW 66.44.200. In fact, WAC 314-16-150
12 substantially expands the duty imposed by the legislature on licensees in RCW 66.44.200(1) and
13 entirely changes the class of persons to whom the RCW 66.44.200(2) applies.
14

15 RCW 66.44.100(1) prohibits licensees from selling liquor to a person apparently under the
16 influence.

17 RCW 66.44.200(2)(a) prohibits apparently intoxicated persons from purchasing or
18 consuming liquor.

19 RCW 66.44.200(2)(b) imposes a fine of \$500 or less for violating subsection 2(a).

20 RCW 66.44.200(2)(c) eliminates intoxication as a defense for violating subsection 2(a).

21 RCW 66.44.200(2)(d) requires licensees to post signs telling their patrons about (2)(a).

22 RCW 66.44.200(3) states that violations of subsection (1) and (2) are "separate actions" even
23 if they arise out of the same incident.

24 RCW 66.44.200(2) does not impose a duty on a licensee to prevent an apparently intoxicated
25 person from possessing or consuming. Nor do any other the forty-two other statutes cited as
26 authority for WAC 314-16-150. The only place a licensee's duty vis-à-vis an apparently intoxicated
27 person is explicitly spelled out is in RCW 66.44.200(1); the duty is limited to not selling liquor to an
28
29

1
2 intoxicated person. Thus, WAC 314-16-150 imposes a substantial duty on licensees that has never
3 been approved by the legislature.
4

5 The inconsistency between WAC 314-16-150 and RCW 66.44.200 is apparent from reading
6 RCW 66.44.200 in its entirety. The legislature certainly did not intend that RCW 66.44.200(2)(a)
7 would apply to licensees; if it had, it would not have eliminated intoxication as a defense because
8 intoxication can only apply to a natural person, not a corporation. In RCW 66.44.200(2)(d), the
9 legislature imposed a specific duty on licensees, the duty to post signs informing the public of the
10 legislature's imposition of personal liability for buying or consuming while intoxicated. The
11 legislature established a \$500 civil fine as the penalty for violating subsection (2) because it is an
12 "infraction." Finally, the legislature specifically declared that a licensee's violation of subsection (1)
13 [do not sell] is a "separate action" from an individual's violation of subsection (2) [do not buy or
14 consume]. WAC 314-16-150 is inconsistent with RCW 66.44.200 because the regulation imposes a
15 duty on licensees that the statute does not. The regulation's imposition of a duty to prevent
16 possession on a different class (licensees) than the class identified by the legislature (individuals)
17 does not carry out the intent of the statute, is contrary to the statute, and is *ultra vires*.
18
19
20

21 Further, the duty imposed by the rule contradicts a long standing principle of liquor law: a
22 licensee does not have a duty to remove an intoxicated person from the premises. It would be
23 against public policy to require licensees to remove intoxicated persons from the premises because it
24 would likely increase drunk driving. What is more, the duty imposed by the rule is impractical. Bars
25 serve liquor and virgin drinks in a variety of glassware, frequently using the same glass. The
26 licensee cannot easily determine from the glassware whether an intoxicated person has a virgin drink
27 or an alcoholic drink. It is extremely difficult for a licensee to prevent an intoxicated person who has
28
29

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
been refused service from picking up someone else's drink or persuading a friend to buy him one more. The legislature drew the line at prohibiting sales by the licensee to an apparently intoxicated person, not requiring the licensee to prevent an intoxicated person from possessing or consuming alcohol.

(b) **WAC 314-16-150 Is Inconsistent With Legislative Intent, Which Was To Impose Personal Responsibility On People Drinking Liquor.**

The Senate. SSB 5582 started as Senate Bill 5582 in 1997. Senate Bill 5582 prohibited an intoxicated person from purchasing or consuming liquor on a licensed premises: "No person who is under the influence of liquor to the extent that he or she is intoxicated may purchase or consume liquor on any premises licensed by the board." "A violation of this subsection is a misdemeanor punishable by a fine of not more than five hundred dollars." Although the bill passed, the governor vetoed it, concerned that a handicapped or geriatric person might be mistakenly believed to be intoxicated.

In 1998, the Senate Committee on Law & Justice approved Substitute Senate Bill 5582 in place of SB 5582. Although the text of SB 5582 and SSB 5582 had substantial similarities, the titles are different. Senate Bill 5582 was "an act relating to liquor sales to persons apparently under the influence of liquor." SSB 5582 was changed to "an act relating to liquor purchases by persons apparently under the influence of liquor." Substitute Senate Bill 5582 also changed the penalty for violating the new statute from a misdemeanor to an infraction: "A violation of this subsection is an infraction punishable by a fine of not more than five hundred dollars." When the Senate Committee on Law & Justice reported on the substitute senate bill in March 1997, it gave the following background:

**LICENSEE'S EXCEPTIONS TO FF&CL
AND INITIAL ORDER - 10**

DAVID R. OSGOOD
LAW OFFICES OF DAVID OSGOOD, P.S.
1411 FOURTH AVENUE, SUITE 1506
SEATTLE, WASHINGTON 98101
TEL: (206) 838-8777
FAX: (206) 838-8778

1
2
3 It is a misdemeanor to sell alcohol to an apparently intoxicated person. However, it is not a
4 crime for the intoxicated person to purchase or consume liquor on any premises licensed by the
5 Liquor Control Board.

6
7 The committee described the bill as one "prohibiting the purchase of liquor by intoxicated
8 persons" and the penalty as an "infraction." The Washington State Licensed Beverage Association
9 and the Washington Public Employees association testified in favor of the bill: "This bill will send
10 a message to those who purchase liquor." The Liquor Control Board testified against the bill:
11 "This bill shifts responsibility from liquor licensees to the intoxicated person."

12 On the senate floor, Senator Roach opined that SSB 5582 "puts some responsibility on the
13 people who are actually buying liquor." Senator Fairly concurred: "And I agree that this does put
14 some responsibility on the person who is intoxicated." The floor notes identified one of the main
15 points of the bill: "People who consume liquor should be aware that it is not acceptable for them to
16 purchase or consume liquor when they are intoxicated. This bill makes that clear." SSB 5582
17 passed 36-13.
18

19 **The House.** In its report, the House Committee on Law & Justice described the statutory
20 backdrop. Although state law prohibited the sale of liquor to an apparently intoxicated person, the
21 law included no provision prohibiting the purchase by the individual:
22

23 Although it is a crime for a person to *sell* liquor to a person who is under the influence, it is not a
24 crime for the person who is under the influence to *buy* liquor. It has been the declared statutory
25 policy of the state since 1972 that "alcoholics and intoxicated persons may not be subject to
26 criminal prosecution solely because of their consumption of alcoholic beverages.

27 The House's committee summarized SSB 5582 as follows: "It is a civil infraction for a person
28 apparently under the influence of liquor to purchase or consume liquor on a licensed premises. The
29

1
2
3 maximum penalty for the infraction is a fine of \$500." The House committee also substituted
4 "apparently under the influence" for the senate's complex definition of "intoxicated." During a
5 public hearing on SSB 5582, Representative Sterk stated his understanding of the bill: "I like the
6 intent of the bill because I think it does give responsibility to the person that's drinking, but I have
7 real questions about the enforceability of it and who's going to enforce it. I think it's going to - I
8 think it's going to end up being a law on the books that doesn't get enforced." Representative
9 Constantine's comments similarly reflected his understanding that the bill was directed only at the
10 person doing the drinking:
11

12 The other issue is whether uh, we want to criminalize intoxication in the absence of some, uh,
13 threat to public safety like driving while intoxicated and, uh, or - or make a civil infraction
14 out of it. And the example that was given to me by one legislator, uh, was, uh, a person who
15 contracts with a limousine to drive them to a party at the Space Needle on New Year's Eve
16 and has their, uh, champagne and as they order another glass of champagne are suddenly
17 exposing themselves to, uh, \$500 plus the additional penalties Representative Robertson
18 referred to, even though they're going to then get in the limousine and be driven home, uh,
19 causing no apparent problems to society other than the possibility they will be less efficient
20 the following day. *Id.*

21 The legislative history surrounding the adoption of subsection two demonstrates that the
22 legislature's intent was precisely *not* to impose greater duties on licensees, but solely on apparently
23 intoxicated persons. Furthermore, the legislative history demonstrates that LCB was fully aware of
24 the legislature's intent and objected to the amendment knowing that it would not impose greater
25 duties on licensees. Liability for a licensee cannot be premised on the Liquor Control Board's
26 continued adherence to a regulation that clearly had been supplanted by, and conflicts with, the
27 enabling statute.

28 **The Fiscal Notes.** The Liquor Control Board and the Department of Community, Trade and
29 Economic Development prepared Fiscal Notes analyzing SB 5582 and SSB 5582. Fiscal Notes
**LICENSEE'S EXCEPTIONS TO FF&CL
AND INITIAL ORDER - 12**

DAVID R. OSGOOD
LAW OFFICES OF DAVID OSGOOD, P.S.
1411 FOURTH AVENUE, SUITE 1506
SEATTLE, WASHINGTON 98101
TEL: (206) 838-8777
FAX: (206) 838-8778

1
2 estimate the cash receipts and expenditures that would be received by and expended by various
3 governmental entities if a bill becomes a law.
4

5 The Liquor Control Board has a "liquor revolving fund" into which all "license fees, permit
6 fees, penalties, forfeitures, and all other moneys, income, or revenue received by the board" must be
7 deposited.³ Nevertheless, the Liquor Control Board's Fiscal Note does not estimate that its revolving
8 fund would receive a single dollar from SSB 5582 because "the Liquor Control Board is not
9 identified to receive any of the funds collected under this legislation." Instead, the civil infraction
10 would result in \$500 fines being collected by district and municipal courts: "Fines collected under
11 this legislation will go to the local authorities (courts) hearing the cases before them." (This
12 completely conflicts with the current proceeding in which the Board seeks a \$5,000 penalty payable
13 to the Board that, if collected, will be deposited into the Board's revolving fund.) The Local
14 Government Fiscal Note similarly anticipates revenue to local courts. The Liquor Control Board's
15 Fiscal Note indicates the Board's intention to make a new rule "in order to insure WAC matches
16 RCW."
17
18
19

20 The House Bill report succinctly sums up the legislature's intent when it enacted SSB 5582:
21 "Servers are now being held responsible for the behavior of their customers. It's time that the
22 customers are made responsible as well." In enacting SSB 5582, the legislature could have, but
23 refused to increase the duties of licensees to monitor inebriated patrons. The legislature enacted
24 SSB 5582 to do precisely the opposite: impose a civil infraction fine on an apparently intoxicated
25 person who purchased or consumed liquor on a licensed premises. Even though the Liquor Control
26
27

28
29 ³ RCW 66.08.170.

1
2 Board understood the legislature's intent, it made a rule that shifted responsibility from the
3 purchaser back to the licensee.
4

5
6 **C. The Board Cannot Rely on WAC 314-16-150.**
7

8 The Board should not rely upon WAC 314-16-150 for another very good reason. After the
9 passage of RCW 66.44.200, the Board enacted WAC 314-11-035 to govern instances precisely like
10 the present action. WAC 314-11-035 provides, in relevant part:
11

12 Per RCW 66.44.200, licensees or employees may not supply liquor to any person apparently
13 under the influence of liquor, *or allow an apparently intoxicated person to possess or*
14 *consume liquor on the licensed premises.*

15 (emphasis added).

16 The Board's purpose for the enacting regulation was ostensibly that Governor Locke issued
17 an executive order requiring all agencies to evaluate and/or revise their rules. But Governor Locke
18 directed all agencies to make rules that were consistent "with legislative intent and statutory
19 authority." The governor instructed agencies to ask "Is the rule consistent with legislative intent of
20 the statutes that authorize it? Is the rule based upon sufficient statutory authority?" The only
21 purpose for making WAC 314-11-035 was to carry out RCW 66.44.200. Both WAC 314-11-035
22 and WAC 314-16-150 contain the exact same operative language.
23
24

25 WAC 314-11-035 has been struck down by the King County Superior Court as being ultra
26 vires on at least one occasion. In Jolan, Inc., d/b/a J&M Hotel & Bar v. Washington State Liquor
27 Control Board, King County Superior Court No. 06-2-19646-8SEA, the Court found that a violation
28 based upon RCW 66.44.200 requires a transaction in which the licensee, through direct interaction
29

1
2 with the apparently intoxicated person, can evaluate inebriation and decline to sell or serve liquor,
3 and that WAC 314-11-035, by imposing additional duties not imposed by the legislature on
4 licensees, is inconsistent with the legislature's intent, and therefore invalid. Although the Board
5 does not attempt to rely on either RCW 66.44.200 or WAC 314-11-035 in this instance, the language
6 of the regulation is the same, RCW 66.44.200 postdates WAC 314-16-150; and nothing in the
7 statutes cited by the Board as authority for WAC 314-16-150 empowers the Board to ignore
8 subsequent, issue-specific legislation in favor of an older more general and non-specific grant of
9 authority.
10
11

12 3-5. Licensee excepts to Conclusions of Law No. 3-5, insofar as neither Lieutenant Miyasato or Sgt.
13 McCallister took steps to identify possible non-alcohol related causes for the patron's symptoms,
14 she did not witness the bartender serving the patron, and thus did not see how the patron presented
15 himself to the bartender. Licensee disagrees with the Conclusion of Law as far as it reasserts the
16 erroneous factual finding that Mr. Hoff "admitted" that he was intoxicated.
17

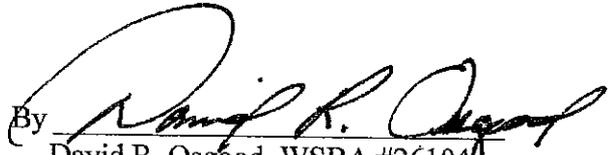
18 7-8. Licensee excepts to Conclusions No. 7-8, insofar as the Administrative Law Judge reaches an
19 overly broad interpretation of *Oscar's v. Washington State Liquor Control Board*, and *Reeb v.*
20 *Washington State Liquor Control Board*. Mr. Wildrick showed that the Licensee has safeguards in
21 place to prevent violations, including employee training to detect intoxicated persons, remove
22 unattended drinks, remove the drinks of intoxicated persons, to pace service and have drinks ordered
23 from the bar. Enforcement has not proved that the Licensee turned a blind eye to its
24 responsibilities—the interpretation given by the ALJ imposes an unwarranted strict liability standard
25 on a licensee—just because it happened, the Licensee therefore "permits" it to happen.
26
27
28
29

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

9. Because WAC 314-16-150(b) is in direct conflict with the Washington State Legislature and law as set forth in RCW 66.44.200(2), the Board's Complaint should be dismissed.

DATED this 27th day of May, 2010.

LAW OFFICE OF DAVID OSGOOD, P.S.

By 
David R. Osgood, WSBA #261040
Attorney for Licensee Cuttercrest, LLC.

RECEIVED

JUN 07 2010

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

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

IN THE MATTER OF:

CUTTERCREST L.L.C.
d/b/a SPORTS PAGE GRILLE &
BAR
907 1ST STREET
SNOHOMISH, WA 98296-2906

LICENSEE

LICENSE NO. 356164-3F

OAH NO. 2009-LCB-0044
NO. 23,557

ENFORCEMENT'S REPLY TO
LICENSEE'S PETITION FOR
REVIEW

The Washington State Liquor Control Board Education and Enforcement Division (Enforcement), by and through its attorneys, ROBERT M. MCKENNA, Attorney General and GORDON KARG, Assistant Attorney General now replies to the Licensee's Petition for Review of Findings of Fact, Conclusions or Law and Initial Order (Licensee's Petition) in the above-captioned matter, filed by CUTTERCREST L.L.C. d/b/a SPORTS PAGE GRILLE & BAR (Licensee) of Snohomish, Washington, by and through its representative DAVID OSGOOD, Attorney at Law.

I. INTRODUCTION

On July 20, 2009 Enforcement issued an Administrative Violation Notice (AVN) to the Licensee for allegedly permitting a person who was apparently intoxicated to possess or consume alcohol in violation of WAC 314-16-150. The Licensee requested a formal hearing

1 on the matter. Prior to the scheduled hearing the Licensee filed with the Administrative Law
2 Judge (ALJ) a Motion for Summary Judgment; in response Enforcement filed a response and a
3 Cross Motion for Summary Judgment. Both motions were denied. On March 9, 2010 a formal
4 hearing was held. On May 10, 2010 the ALJ issued an initial order in the matter, finding in
5 that the Licensee committed the violation alleged. The Licensee filed its Petition for Review
6 and Enforcement now replies to the Licensee's exceptions.

7 **II. REPLY TO EXCEPTIONS**

8 Licensee's Petition raises exceptions to only three of the ALJ's findings of fact. The
9 Licensee Petition, on its face, appears to raise exceptions to eight of the ALJ's conclusions of
10 law. However, instead of pinpointing and evaluating individual conclusions of law, the
11 Licensee appears to make three main legal assertions and sweeps each within multiple
12 conclusions of law made by the ALJ. Enforcement now responds to the Licensee's exceptions
13 to the three findings of fact and its three legal assertions.

14 **A. Reply To Licensee's Exceptions To Findings Of Fact**

15 **1. Testimony of Sgt. McAllister and Lt. Miyasato**

16 The Licensee takes exception to the ALJ finding conflicts of testimony in favor of the
17 two liquor officers who testified at the hearing. Licensee's Petition at 3. The Licensee asserts
18 that the two officer's testimony was inconsistent with each other. *Id.* The Licensee's
19 exception consists of two sentences and provides no guidance for the Board as to what result it
20 seeks, or what result it thinks the ALJ should have reached. *Id.* The Licensee cites to no
21 specific portion of the record to support its assertion that the officer's testimony was
22 "inconsistent with each other in major respects". *Id.* Nor does the Licensee cite to any portion
23 of the record which would support a finding in favor of the testimony of the single witness
24 provided by the Licensee at hearing. *Id.*

25 Enforcement is not responsible for articulating or interpreting the Licensee's arguments
26 in a Petition for Review, and it declines to do so now. The Licensee cannot assert an

1 incomplete argument coupled with an unsupported assertion of fact and expect it to be
2 sufficient to overcome an ALJ's initial finding.

3 A reviewing agency or officer must give due regard to the initial presiding officer's
4 opportunity to observe the witnesses. RCW 34.05.464(4); *Towle v. Washington State Dept. of*
5 *Fish and Wildlife*, 94 Wn. App. 196, 205, 971 P.2d 591(1999). Additionally, a reviewing
6 agency or officer is generally discouraged from disregarding an ALJ's credibility
7 determinations based on speculation when it was the ALJ who observed the witnesses at
8 hearing. See e.g. *Oscar's, Inc. v. Washington State Liquor Control Board* 101 Wn. App. 498,
9 507-08, 3 P.3d 813 (2000). Here, the ALJ had all of the evidence in the record before it and
10 made a credibility determination. Initial Order, Finding of Fact (FOF) No. 1. The License has
11 presented no substantial argument or any citation to the record, such that the Board should be
12 compelled to disregard the ALJ's findings.

13 **2. Specific inconsistency between Enforcement's witnesses testimony**

14 The Licensee takes exception to Finding of Fact No. 5 on the grounds that
15 Enforcement's two witnesses had inconsistent testimony as to why an individual bumped into a
16 door frame. Licensee's Petition at 3. Initially, we note that the ALJ's challenged finding, in
17 relevant part, concluded only that "As he [Mr. Hoff, the apparently intoxicated patron] passed
18 through the door frame, he bumped into it and stumbled inside." Initial Order, FOF No. 5.
19 There is no argument from the Licensee that Mr. Hoff did not bump into the doorframe and
20 therefore it does not dispute the ALJ's actual Finding No. 5. *Id.*

21 What the Licensee is really asserting is that Lt. Miyasato's credibility is questionable.
22 See *Id.* However, because there is no conflict of testimony as to the fact that Mr. Hoff bumped
23 into the doorframe, and that was the only fact found by the ALJ, any inconsistency as to why
24 he bumped into the door frame is immaterial to the actual finding the Licensee takes exception
25 to.
26

1 It also appears that the Licensee insinuates that *all* of Lt. Miyasato's testimony is not
2 credible. *Id.* Such an argument fails. The Licensee cites to no portion of the record, no
3 authority, and makes no substantial argument that a single minimal inconsistency between two
4 different witnesses is valid legal or factual grounds to conclude the entirety of one or both of
5 the witness's testimonies are not credible. *Id.*

6 **3. Exception to Finding of Fact No. 7**

7 The Licensee asserts "while Mr. Hoff may have apologized to Agent Miyasato, it was
8 not for being intoxicated." Licensee's Petition at 3. The actual portion of the Finding the
9 Licensee appears to be disputing is "Mr. Hoff said he was sorry and that he was intoxicated."
10 Initial Order, FOF No. 7. First, it is not clear what Mr. Hoff was apologizing for as the finding
11 clearly states he apologized *and* admitted he was intoxicated. *Id.* More importantly, the
12 Licensee does not dispute the finding that Mr. Hoff admitted he was intoxicated they only
13 dispute what he apologized for. Licensee's Petition at 3. The Licensee provides no citation to
14 the record indicating anything contrary to the ALJ's findings and it does not dispute the portion
15 most relevant to the instant case-the admitted intoxication of Mr. Hoff.

16 **B. Reply To Licensee's Exceptions To The Validity Of WAC 314-16-150**

17 The Licensee claims that WAC 314-16-150 is invalid as a matter of law. This is the
18 same argument it raised in its failed summary judgment motion and it appears to be essentially
19 unchanged from the argument now presented in its petition for review. *See* Licensee's Motion
20 for Summary Judgment. The Licensee's assertion is incorrect and its legal arguments are
21 unsound. Enforcement has responded to this issue in its response to the Licensee's Petition for
22 Summary Judgment and incorporates by reference those arguments in their entirety herein.
23 However, for the convenience of the Board, those arguments are reproduced below.

24 **1. Intent, purpose and applicability of RCW 66.44.200 And WAC 314-16-150**

25 WAC 314-16-150 is a valid exercise of the Board's statutory rulemaking authority.
26 Licensee's initial argument asserts that WAC 314-16-150 shifts a responsibility to licensees

1 that was intended only for consumers of alcohol. Licensee's Petition at 5. A review of the
2 history and purpose of both rule and statute demonstrate the Licensee's argument is
3 unsupportable.

4 a. **History and purpose of RCW 66.44.200(1)**¹

5 RCW 66.44.200(1) was part of the original Liquor Control Act enacted by the
6 legislature in 1933. Laws of 1933, Ex. Sess., ch. 62, p. 173. First codified in the session law at
7 Chapter 62, Section 36 the original statute read "No person shall sell any liquor to any person
8 apparently under the influence of liquor." *Id.*; *See also Purchase v. Meyer*, 108 Wn.2d 220,
9 737 P.2d 661 (1987) (recognizing the equivalent of RCW 66.44.200(1) has existed since
10 1933).

11 The statute has also always included the word "sell" from its inception. Laws of 1933,
12 Ex. Sess., ch. 62, §36, p. 173. The term "sell" is defined in RCW Title 66, in pertinent part, as
13 to "include exchange, barter, and traffic; and also include the selling or supplying or
14 distributing, *by any means whatsoever*, of liquor, or of any liquid known or described as beer
15 or by any name whatever commonly used to describe malt or brewed liquor or of wine, by any
16 person to any person" (emphasis added). RCW 66.04.010(38).

17 The statute must be read with the explicit definition of "sell." The purpose of RCW
18 66.44.200(1), then, is reasonably construed as being intended to prevent an apparently
19 intoxicated person from having alcohol supplied or distributed to them, "by any means", from
20 another licensed person. RCW 66.04.010(38) also provides that "'Sale' and 'sell' shall not
21 include the giving, at no charge, of a reasonable amount of liquor by a person not licensed by
22

23 ¹ Current RCW 66.44.200 provides: "(1) No person shall sell any liquor to any person apparently under
24 the influence of liquor. (2)(a) No person who is apparently under the influence of liquor may purchase or consume
25 liquor on any premises licensed by the board. (b) A violation of this subsection is an infraction punishable by a
26 fine of not more than five hundred dollars. (c) A defendant's intoxication may not be used as a defense in an
action under this subsection. (d) Until July 1, 2000, every establishment licensed under RCW 66.24.330 or
66.24.420 shall conspicuously post in the establishment notice of the prohibition against the purchase or
consumption of liquor under this subsection. (3) An administrative action for violation of subsection (1) of this
section and an infraction issued for violation of subsection (2) of this section arising out of the same incident are
separate actions and the outcome of one shall not determine the outcome of the other."

1 the board to a person not licensed by the board, for personal use only.” Again, read in
2 conjunction with the definition of sell, RCW 66.44.200(1) is not applicable to non-licensed
3 persons. The duty to make sure alcohol is not supplied or distributed to apparently intoxicated
4 persons rests squarely with a Licensee and its employees. RCW 66.44.200(1); RCW
5 66.04.010(38).

6 **b. History and purpose of RCW 66.44.200(2)**

7 In 1998 Substitute Senate Bill 5582 was approved by the Senate Committee on Law
8 and Justice. Licensee’s Summary Judgment Motion (Licensee’s Motion), Osgood Declaration,
9 Exhibit Three. Ultimately, SSB 5582 would become RCW 66.44.200(2) amending the original
10 1933 statute. *Id.* The Licensee’s Petition has characterized the legislative intent of this
11 amendment as to shift responsibility in monitoring apparently intoxicated patrons away from
12 the Licensee to the patrons themselves. Licensee’s Petition at 12. This is incorrect.

13 It is a misdemeanor crime for any person² to sell, as that term is defined by statute,
14 alcohol to any person apparently under the influence of alcohol. RCW 66.44.180; RCW
15 66.44.200(1). SSB 5582 amended RCW 66.44.200 to also make it a civil infraction for an
16 apparently intoxicated person to purchase or consume alcohol on any premises licensed by the
17 Board. Licensee’s Motion, Osgood Declaration, Exhibit Three, Pg. 70-71. Nowhere in SSB
18 5582 does the Bill, by design or intent, lessen or alter the responsibility of a licensee, or any
19 other person, to not supply or distribute alcohol to an apparently intoxicated person. *Id.*

20 In the related senate floor debate, Senator Roach introduced the bill noting that it “puts,
21 uh, some responsibility on the people who are actually buying liquor.” Licensee’s Motion,
22 Osgood Declaration, Exhibit Four, Pg. 73. Nowhere in the debate is there any mention of
23 lessening or altering any existing duty to licensee’s or servers, only adding “some
24
25

26 ² A person is defined by statute as: “an individual, co-partnership, association, or corporation.” RCW
66.44.010(31).

1 responsibility” on the part of individuals acquiring liquor.³ *Id.* Similarly, the House Report on
2 the Bill, which the Licensee incorrectly asserts is evidence of legislative intent⁴, is also devoid
3 of any indication that this amendment altered any existing duty on the part of Licensees or
4 servers. Licensee’s Motion, Osgood Declaration, Exhibit Five, Pg. 82-83.

5 In the ensuing House floor debate, there was again no discussion of eliminating any
6 already existing duty on the part of licensees, but only to impose a new duty on the part of
7 those purchasing alcohol. Licensee’s Motion, Osgood Declaration, Exhibit Six. Indeed,
8 Representative Constantine expressed reservations about imposing any duty on patrons:
9 “whether a person who’s-who’s drunk is in a condition to make a rational decision about
10 whether they’re now going to break the law by ordering another drink. Which is, of course,
11 one of the reasons why you want a sober person, a bartender, to cut them off.” Licensee’s
12 Motion, Osgood Declaration, Exhibit Six, Pg. 91. In doing so, Representative Constantine
13 reasserted the intent of making licensees and servers responsible for keeping alcohol away
14 from the inebriated.

15 The very language of the current statute in sub-part three highlights the nature of a
16 licensee’s duties as opposed to a patrons: “An administrative action for violation of subsection
17 (1) of this section and an infraction issued for violation of subsection (2) of this section arising
18 out of the same incident are separate actions and the outcome of one shall not determine the
19 outcome of the other.” RCW 66.44.200(3). The statute contemplates and demands that not
20 only can a licensee be held administratively responsible for subsection one, but that the
21
22

23 ³ The Liquor Control Board testified in committee that they opposed the Bill because it shifted
24 responsibility from the licensee to the intoxicated person. The Licensee’s Petition has insinuated that this
25 indicates the intent of the Legislature. Licensee’s Petition at 12. Testimony of outside parties is not legislative
26 intent.

⁴ House and Senate bill reports are also not legislative history, as is evidenced by the disclaimer that
appears on all current reports: “This analysis was prepared by non-partisan legislative staff for the use of
legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a
statement of legislative intent.”

1 | licensee's responsibilities are separate from a patron's and one is not altered or subjugated by
2 | the other.

3 | There is no evidence that the purpose of SSB 5582 was to shift responsibility away
4 | from licensees or servers. Its intent, as demonstrated by the legislative and rule making
5 | history, was to simply create a concurrent responsibility on the part of patrons. The
6 | responsibility of a licensee under RCW 66.44.200(1) remains unchanged.

7 | **c. History and purpose of WAC 314-16-150**

8 | The Licensee's Petition asserts that "WAC 314-16-150 . . . predates and does not
9 | recognize RCW 66.44.200." Licensee's Petition at 8. This assertion is inaccurate. WAC 314-
10 | 16-150 was first promulgated in 1963 as "Rule 30" and does not predate RCW 66.44.200(1).
11 | *See* WSR 94-08-030. In its original form the rule in pertinent part, stated:

12 | "No retail licensee shall give or otherwise supply liquor . . . to any person
13 | apparently under the influence of liquor; or to any interdicted person (habitual
14 | drunkard); nor shall any licensee or employee thereof permit any person . . . in
15 | said condition or classification to consume liquor on his premises, or on any
16 | premises adjacent thereto and under his control, except where ."

16 | *Id.*

17 | The rule was subsequently amended in 1994 to include a subsection two that read: "No
18 | class A, B, C, D or H licensee shall permit any person apparently under the influence of liquor
19 | to physically possess liquor on the licensed premise."⁵ WSR 94-08-030. In proposing this
20 | amendment, the Board stated that the purpose of the amendment was to include permitting
21 | physical possession of liquor by the persons described in the rule as being prohibited. WSR
22 | 94-05-093. The Board's stated intent was to "enable local law enforcement and/or liquor
23 | control agents to better control the problem of over-service of liquor." *Id.*

24 | _____
25 | ⁵ The 1994 amendment also included some word changes and eliminated "habitual drunkard" language.
26 | The rule was amended one final time in 1998; but the change was not substantive and merely eliminated the
reference to letter based license classifications which were removed from the entirety of WAC Title 314 after the
license type scheme changed. WSR 98-18-097, Pg. 416, 432. The rule has never been altered pursuant to the
1998 SSB 5582 amendment to RCW 66.44.200.

1 WAC 314-16-150, in its current form, came into existence long after the enactment of
2 RCW 66.44.200(1) and several years prior to the statutory amendment that was codified as
3 RCW 66.44.200(2)-(3). The rule, and its subsequent 1994 amendment, was in pertinent part
4 intended to control the problem of a person being “over-served”, that is, acquiring alcohol
5 while apparently intoxicated. In short, the rule serves as an administrative tool to carry out the
6 intent and spirit of RCW 66.44.200(1): to prevent an apparently intoxicated person from
7 having alcohol supplied or distributed to them, “by any means”. RCW 66.44.200(1); RCW
8 66.08.010(38).

9 **2. WAC 314-16-150 is valid and consistent with both the intent, spirit and**
10 **authority provided in RCW 66.08.010, RCW 66.08.030 and RCW 66.44.200**

11 RCW 66.44.200(2) does not alter the responsibility of Licensee’s under RCW
12 66.44.200(1). The Licensee’s argument is derived largely from the false conclusion that RCW
13 66.44.200(2) limits duties of a licensee, and consequently, what the Board has authority to
14 regulate.⁶ However, the Licensee’s Petition also argues that WAC 314-16-150 is a nullity as it
15 is inconsistent with RCW 66.44.200(1) in that it “substantially expands the duty imposed by
16 the legislature on licensees.” Licensee’s Petition at 8. The Licensee’s argument ignores the
17 legal tenants governing the authority of agencies to promulgate rules, the tenants of statutory
18 construction generally and the purpose and specifications of RCW Title 66.

19 **a. Express and implied authority of the Board**

20 Administrative agencies have those powers expressly granted to them and those
21 necessarily implied from their statutory delegation of authority. *Association of Washington*
22

23 ⁶ The Licensee also states that the fiscal note attached to SSB 5582 indicates that the \$500 fine for an
24 individual’s civil infraction of RCW 66.44.200(2) by a person purchasing alcohol was never identified as being
25 funds to be received by the Board. Licensee’s Petition at 12-13. The penalty amount in RCW 66.44.200(2)
26 clearly applies only to persons who purchase alcohol while apparently intoxicated. The Licensee goes on to make
a confused argument that this is inconsistent with the penalty being assessed against the Licensee in this matter.
Licensee’s Petition at 13. The Licensee fails to demonstrate how this line of argument is even relevant to the
instant matter as no party here has been charged with a violation of RCW 66.44.200(2) nor has the Board levied
any monetary fine based on a violation of RCW 66.44.200(2).

1 *Business v. State of Washington, Dept. of Revenue*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005).
2 When a power is granted to an agency, “everything lawful and necessary to the effectual
3 execution of the power” is also granted by implication of law. *Tuerk v. Washington State*
4 *Dept. of Licensing*, 123 Wn.2d 120, 125, 864 P.2d 1382 (1994). Likewise, implied authority is
5 found where an agency is charged with a specific duty, but the means of accomplishing that
6 duty are not set forth by the Legislature. *Id.* Agencies also have implied authority to
7 determine specific factors necessary to meet a legislatively mandated general standard. *Id.* An
8 administrative rule will be found valid so long as it is “reasonably consistent” with the statutes
9 it implements. *Anderson, Leech & Morris, Inc. v. Washington State Liquor Control Board*, 89
10 Wn.2d 688, 695, 575 P.2d 221 (1979).

11 The Board has been expressly granted the authority to effect and enforce the provisions
12 of RCW Title 66. RCW 66.08.030(1); RCW 66.07.020; *See Cosro, Inc. v. Washington State*
13 *Liquor Control Board*, 107 Wn.2d 754, 757, 733 P.2d 539 (1987) (recognizing the Board is
14 charged with administering the Liquor Act). Specifically, the legislature has provided that “for
15 the purpose of carrying into effect the provisions of this title according to their *true intent* or of
16 *supplying any deficiency therein*, the board may make *such regulations not inconsistent with*
17 *the spirit of this title* as are deemed necessary or advisable” (emphasis added.) RCW
18 66.08.030(1).

19 Furthermore, both the Legislature and Washington Court’s have long held that without
20 doubt the Board has broad constitutional and statutory authority to regulate and control the
21 dispensation of alcoholic beverages. RCW 66.08.050; *Cosro Inc.*, 107 Wn.2d at 757;
22 *Anderson, Leech & Morris, Inc.*, 89 Wn.2d at 694; *Jow Sin Quan v. Washington State Liquor*
23 *Control Board*, 69 Wn.2d 373, 379, 418 P.2d 424 (1966) (The Supreme Court recognizes that
24 the Board possesses broad constitutional and statutory authority to enact rules to protect the
25 “public health, safety and morals.”); *Sukin v. Washington State Liquor Control Board*, 42 Wn.
26 App. 649, 653, 710 P.2d 814 (1985) (“The dominion of the Board over the regulation,

1 supervision and licensing of liquor is broad and extensive”); *Corral Inc., v. Washington State*
2 *Liquor Control Board*, 17 Wn. App. 753, 760-761, 566 P.2d 214 (1977) (recognizing the broad
3 rule making authority of the Board given the nature of the attendant danger to the community
4 the sale of alcohol may pose).

5 Washington State courts have continually held the equally important ruling that a liquor
6 license is not a vested property right but merely representative of a privilege granted by the
7 state. *Jow Sin Quan*, 69 Wn.2d at 382; *Scottsdale Insurance Co. v. Intl. Protective Agency,*
8 *Inc.*, 105 Wn. App. 244, 249, 19 P.3d 1058 (2001). As a result, the liquor business has
9 historically been subject to close regulation, supervision and inspection. *Washington Massage*
10 *Foundation v. Nelson*, 87 Wn.2d 948, 951, 558 P.2d 231 (1976), citing *Colonnade Catering*
11 *Co. v. United States*, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 60 (1970); *Jow Sin Quan*, 69 Wn.2d
12 at 382.

13 The Board, then, has authority both express and implied, to promulgate rules and
14 regulations. Specifically, the Board may enact rules that not only put into effect RCW Title 66
15 according to its true intent and spirit, but may also make rules addressing any deficiencies in
16 the statute. RCW 66.08.030(1). The Board also has broad authority to make any other rule
17 regulating the dispensation of alcohol or any rule deemed necessary so long as it is not in
18 conflict with the spirit of RCW Title 66. RCW 66.08.030(1); see also *Jow Sin Quan*, 69
19 Wn.2d at 382. More importantly, the Board has implied authority to establish rules enabling it
20 to accomplish the duty of preventing alcohol from being supplied by licensee’s to apparently
21 intoxicated persons and preventing apparently intoxicated persons from acquiring alcohol.
22 RCW 66.44.200; *Tuerk*, 123 Wn.2d at 125.

23 **3. Enactment of WAC 314-16-150(1)-(2) is within the Board’s statutory**
24 **authority.**

25 The Licensee concedes that the Board has the authority to prohibit a licensee from
26 selling alcohol to an apparently intoxicated person through RCW 66.44.200(1). Licensee’s

1 | Petition at 8. The Licensee's contention, though, is the Board's authority does not extend to
2 | prohibiting licensees' from permitting apparently intoxicated persons to possess or consume
3 | alcohol on the licensee's premise.⁷ Licensee's Petition at 8-10. In doing so, the Licensee fails
4 | to engage in any statutory interpretation of RCW Title 66 as a whole.

5 | **a. The Licensee's interpretation of RCW 66.44.200(1) renders it**
6 | **meaningless.**

7 | An administrative rule or regulation is invalid if it exceeds the enacting agency's
8 | statutory authority. RCW 34.05.570(2)(c). When reviewing the meaning of a statute, to
9 | determine an agency's authority or for any other purpose, the first step is to look to the plain
10 | meaning of the statute's terms. *See Thurston County v. Cooper Point Association*, 148 Wn.2d
11 | 1, 12, 57 P.3d 1156 (2002).

12 | The plain meaning of a statute should be "discerned from all that the Legislature has
13 | said in the statute and related statutes which disclose legislative intent about the provision in
14 | question." *Cooper Point Association*, 148 Wn.2d at 12, *quoting Dep't of Ecology v. Campbell*
15 | *& Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). Under this approach, an act is to be
16 | construed as a whole, giving effect to all of the language used. *Cooper Point Association*, 148
17 | Wn.2d at 12. The Washington State Supreme Court has held that this "formulation of the plain
18 | meaning rule provides the better approach because it is more likely to carry out legislative
19 | intent." *Id.* Additionally, in considering an agency's interpretation of statute, substantial
20 | weight is given to the agency's interpretation when that agency is in charge of administering
21 | the statute. *Cosro, Inc.*, 107 Wn.2d at 757; *See also Edleman v. State Public Disclosure*

22 |
23 |
24 | ⁷ Inexplicably, the Licensee also briefly argues that WAC 314-16-150 imposes a duty which "contradicts
25 | a long standing principle of liquor laws: a licensee does not have a duty to remove an intoxicated person from the
26 | premises." Licensee's Petition at 8. The Licensee fails to provide any authority for this "long standing principle."
Bizarrely, the Licensee provides no explanation whatsoever as to how WAC 314-16-150 imposes such a duty,
when it clearly requires that a Licensee monitor its apparently intoxicated patrons very closely, *while on the*
premises but imposes no requirement that a licensee must remove an apparently intoxicated person. Nothing in
WAC 314-16-150 indicates it creates this complained of duty.

1 *Commission*, 152 Wn.2d 584, 590, 99 P.3d 386 (2004) (an agency may interpret ambiguities in
2 a statute through the rulemaking process).

3 Accordingly, in reviewing the meaning of RCW 66.44.200, and any authority the Board
4 derives from it, the statute must be examined in relation to the Liquor Control Act under Title
5 66 as a whole and deference given to the Board's interpretation of that title. The overriding
6 intent of RCW Title 66, and the primary guidance for the Board in all administrative agency
7 matters, was clearly set forth by the Legislature in RCW 66.08.010: "This entire title shall be
8 deemed an exercise of the police power of the state, for the *protection of the welfare, health,*
9 *peace, morals, and safety of the people of the state*, and all its provisions shall be *liberally*
10 *construed for the accomplishment of that purpose*" (emphasis added.) *See e.g. Cosro Inc.*, 107
11 Wn.2d at 757 (where the Supreme Court recognized the definition of "wine" was to be
12 liberally construed pursuant to RCW 66.08.010).

13 Had the legislature sought to restrict the Board, and any reviewing court, to a narrow
14 reading and interpretation of the Board's authority under Title 66, it presumably would have
15 specified as such. On the contrary, the legislature has specified the exact opposite in RCW
16 66.08.010. Indeed, as has already been noted, the Washington State Supreme Court has
17 previously held the Board has authority to closely regulate liquor licensees. *Jow Sin Quan*, 69
18 Wn.2d at 382. As a result, the Board's authority to enact regulations under RCW 66.08.030
19 and the duties it may impose on licensees through RCW 66.44.200(1) are to be liberally, not
20 narrowly, construed for the welfare, health and safety of the people of the state. RCW
21 66.08.010; *See Estate of Kelly v. Falin*, 127 Wn.2d 31, 39, 896 P.2d 1245 (1995) (recognizing
22 that RCW 66.44.200 was enacted to protect the "welfare, health, peace, morals and safety of
23 the people of the state.")

24 The Licensee's implied interpretation of RCW 66.44.200(1) is so narrow that it argues
25 a licensee's responsibility does not extend to preventing an apparently intoxicated person from
26 acquiring alcohol on the licensed premise by means other than a direct employee to patron

1 exchange of alcohol for money. Licensee's Petition at 8-9. Under this interpretation, a
2 licensee, or its employees; would be free to supply alcohol to a person who appeared to be
3 sober, only to then observe them hand it to an apparently intoxicated person. A licensee or its
4 employees could serve a pitcher of beer to a table with one sober person paying for it, and then
5 be absolved of any responsibility as they watch an apparently intoxicated person at the same
6 table partake in that pitcher of beer. A licensee or its employees would be free to ignore an
7 apparently intoxicated person who, over the course of an evening is observed possessing
8 multiple drinks which are mysteriously never "sold" to them. In short, the Licensee's
9 proffered interpretation means an apparently intoxicated patron is free to continue to acquire
10 alcohol on the licensed premise and the licensee has no duty to interfere or "cut off" that
11 person. This is not a liberal construction of RCW 66.44.200.

12 On the contrary, any benefit RCW 66.44.200 holds for the welfare of the people is
13 largely defeated if a licensee is free to allow an apparently intoxicated person to continue to
14 possess and consume alcohol on its licensed premise. The License's interpretation of RCW
15 66.44.200(1), and what duties it authorizes the Board to impose upon licensees through rule,
16 renders the statute meaningless. A statute is not to be interpreted in such a way that it produces
17 an absurd result or renders meaningless its enactment. *Pasco v. Napier*, 109 Wn.2d 769, 773,
18 755 P.2d 170 (1988).

19 A reviewing court must give substantial weight to the Board's interpretation of RCW
20 66.44.200(1) that in order to fulfill its purpose it may also prohibit licensees from permitting
21 apparently intoxicated individuals from possessing or consuming alcohol. *See Cosro Inc.*, 107
22 Wn.2d at 757. A liberal construction of RCW 66.44.200(1) would include requiring a licensee
23 ensure apparently intoxicated patrons are not allowed to possess or consume alcohol on the
24 licensed premise. *Id.* The enactment of WAC 314-16-150 is within the Board's authority to
25 interpret and make rules consistent with the spirit and intent of ensuring the safety of the public
26 as authorized in RCW 66.08.030 and the purpose of RCW 66.44.200(1).

1 **b. The Licensee fails to recognize the definition of sell as used in RCW**
2 **66.44.200(1).**

3 While the Licensee's Petition insists that its duty as set forth in RCW 66.44.200(1) is
4 narrowly confined to prohibiting it from "selling" alcohol to an apparently intoxicated person.
5 Licensee's Petition at 8-9. The Licensee fails to apply the statutory definition of the term sell
6 to the context of RCW 66.44.200(1).

7 It is appropriate to give a nontechnical statutory term its dictionary meaning when
8 engaging in statutory construction and interpretation. *Cooper Point Association*, 148 Wn.2d at
9 12. However, here, "sale" and "sell" are technical terms specifically defined by statute and
10 not, therefore, susceptible to their dictionary or common law definitions when used in the
11 context of RCW 66.44.200(1) or any other provision of Title 66. *See Id.*

12 As already noted above, the term "sale" or "sell" is defined in RCW Title 66 in
13 pertinent part as to "include exchange, barter, and traffic; and also include the selling or
14 supplying or distributing, *by any means whatsoever*, of liquor, or of any liquid known or
15 described as beer or by any name whatever commonly used to describe malt or brewed liquor
16 or of wine, by any person to any person" (emphasis added). RCW 66.04.010(38). This
17 definition must be read with RCW 66.44.200(1) and the Legislative intent that all portions of
18 the Title are to be liberally construed as codified at RCW 66.08.010. *Cosro, Inc.*, 107 Wn.2d
19 at 757. This proper reading demonstrates that under RCW 66.44.200(1) a licensee⁸ is
20 prohibited from supplying or distributing alcohol, by any means, to a person apparently under
21 the influence of alcohol. Additionally, as has been set out above, both RCW 66.44.200(1) and
22 RCW 66.04.010(38) have been included in Title RCW 66 since its inception, there is no
23 authority indicating they should not be read together.

24 There are means, other than direct sale, by which a licensee or its employees could,

25 _____
26 ⁸ Enforcement notes again that under RCW 66.04.010(31) a person includes co-partnerships, associations
and corporations, thus a licensee is a "person" as defined by statute whether the license is held by a sole proprietor
or some other business entity.

1 purposefully or inadvertently, supply or distribute alcohol to an apparently intoxicated person:
2 An apparently intoxicated person could pick up an alcoholic drink left unattended; alcoholic
3 drinks could be left unattended by both a licensee's patrons and its employees; a licensee's
4 employees could simply give alcohol to a patron "on the house"; a patron could purchase
5 alcohol and then provide it to a apparently intoxicated person. These events could reasonably
6 occur with or without the full knowledge of the licensee or its employees.

7 In order to prevent the Licensee from supplying or distributing alcohol to an apparently
8 intoxicated person through these and other means, the Board has enacted a rule prohibiting
9 licensees from permitting such persons to even consume or possess alcohol on the licensed
10 premise: WAC 314-16-150. The rule helps control the very means by which an apparently
11 intoxicated patron could be supplied alcohol on a licensed premise. *See also* WSR 94-05-092.

12 There is no doubt, and the Licensee effectively concedes, that the Board may make
13 rules consistent with the intent and spirit of RCW 66.44.200(1). Licensee's Petition at 5; RCW
14 66.08.030. The Board is also free to make rules that liberally construe the statute for the
15 purpose of ensuring the health, welfare and safety of the public. RCW 66.08.010; RCW
16 66.08.030; *see also Cosro, Inc.*, 107 Wn.2d at 757. A rule, liberally construing RCW
17 66.44.200(1) and 66.04.010(38), prohibiting licensees from permitting direct service of alcohol
18 to apparently intoxicated persons or permitting such person to possess or consume alcohol on
19 the licensed premise, is within the spirit and intent of RCW 66.44.200(1).

20 **4. The Jolan Opinion is not Binding or Persuasive Authority**

21 The Licensee's Petition also asserts the Board should be swayed by the King County
22 Superior Court's unpublished opinion in *Jolan Inc., d/b/a J&M Hotel & Bar v. Washington*
23 *State Liquor Control Board*. Licensee's Petition at 14. In *Jolan* the Superior Court held that
24 WAC 314-11-035 was invalid as the rule exceeded the Board's statutory authority. *See*
25 *generally* Licensee's Motion, Osgood Declaration, Exhibit Nine. The Licensee now requests
26

1 the Board accept the reasoning of the superior court in this matter because WAC 314-11-035 is
2 similar to the rule at issue here, WAC 314-16-150.

3 Unpublished opinions are not a part of Washington's common law, they are not
4 considered as authority in the court of appeals and, as Division 2 of the Washington State
5 Court of Appeals has stated, "they should not be considered in the trial court". *Johnson v.*
6 *Allstate Ins. Co.*, 126 Wn. App. 510, 519, 108 P.3d 1273 (2005). Even to the extent a trial
7 court's opinion may be considered, "trial judges can be presumed to know that other trial court
8 rulings are not precedential." *Oltman v. Holland America Line USA*, 163 Wn.2d 236, 248, 178
9 P.3d 981 (2008). Furthermore, it is even more fundamental that an unpublished appellate
10 opinion cannot be cited to for authority. GR 14.1; *see also State v. Kirwin*, 165 Wn.2d 818,
11 831 n.3, 203 P.3d 1044 (2009); *Oltman*, 163 Wn.2d at 248 n.9; *Johnson*, 126 Wn. App. at 519;
12 *State v. Olsson*, 78 Wn. App. 202, 207 n.2, 895 P.2d 867 (1995).

13 The *Jolan* opinion cannot be followed as authority by the Board, either as a trial court
14 or as a superior court sitting in an appellate capacity, as the opinion is unpublished.
15 Additionally, *Jolan* reviewed the validity of a different rule than the one at issue in this instant
16 matter. Thus, to the extent the *Jolan* opinion has any authority, it is not applicable here.

17 *Jolan* analyzed WAC 314-11-035, which also prohibits a licensee from permitting an
18 apparently intoxicated person from possessing or consuming alcohol, per RCW 66.44.200(1).
19 Licensee's Motion, Osgood Declaration, Exhibit Nine at 5-6. Respectfully, Enforcement must
20 disagree with the conclusion and reasoning of the Superior Court's opinion in *Jolan*.

21 While the court recognized the term "sell" is defined in RCW Title 66, it did not apply
22 the entire statutory definition. Licensee's Motion, Osgood Declaration, Exhibit Nine at 5. The
23 Court then concluded that RCW 66.44.200(1) "requires a transaction in which the licensee,
24 through direct interaction with the apparently intoxicated person, can evaluate inebriation and
25 decline service." *Id.* This interpretation is directly contrary to the actual definition of "sell"
26 found at RCW 66.04.010(38) which specifies the term includes "selling or supplying or

1 distributing, *by any means whatsoever.*” Nothing in RCW 66.44.200(1) or the broad definition
2 of sell under RCW 66.04.010(38) indicates this interpretation is accurate. The term “sell”, by
3 its statutory meaning, does not require a direct transaction and does not require the person
4 being supplied alcohol be directly observed. RCW 66.04.010(38).

5 The courts extremely narrow ruling on RCW 66.44.200(1) is also contrary to the plain
6 legislative intent that the entire title be interpreted liberally, for the health, safety and welfare
7 of the people. RCW 66.08.010; *Cosro Inc.*, 107 Wn.2d at 757. The court’s ruling also appears
8 to not give the great deference that should be accorded to the Board’s interpretation of RCW
9 66.44.200 or RCW 66.04.010(38). *Cosro Inc.*, 107 Wn.2d at 757. Instead, the court’s
10 interpretation would make it such that a licensee could allow an apparently intoxicated person
11 on its premise to be continually supplied with the licensee’s alcohol so long as there is no
12 “direct transaction”. Licensee’s Motion, Osgood Declaration, Exhibit Nine at 5. Enforcement
13 argues that this conclusion appears contrary to both liberally construing the statute and equally
14 contrary to the health, safety and welfare of the people of the state.

15 Finally, the court’s opinion notes there is a “safe harbor” in the definition of “sell.” *Id.*
16 The “safe harbor” it refers to is the second portion of the definition which states: “Sale and sell
17 shall not include the giving, at no charge, of a reasonable amount of liquor by a person not
18 licensed by the board to a person not licensed by the board, for personal use only.” *Id*; *see also*
19 RCW 66.04.010(38). This provision, by its plain terms does not apply to licensees. RCW
20 66.04.010(38). Nor does it alter the rest of the definition as it applies to licensees: “sell” is the
21 selling or supplying or distributing of alcohol by any means whatsoever. *Id.*

22 **C. Reply To Licensee’s Exceptions To The ALJ’s Conclusion That Mr. Hoff Was**
23 **Apparently Intoxicated**

24 The Licensee’s exception to Conclusions of Law No.’s 3-5 is not entirely clear. The
25 Licensee asserts the officer’s did not take steps to “identify possible non-alcohol related causes
26 for the patron’s symptoms” and “did not witness the bartender serving the patron, and thus did

1 not see how the patron presented himself to the bartender.” The Licensee’s Petition provides
2 no further argument or authority challenging the ALJ’s conclusions.

3 The ALJ’s Conclusions of Law No.’s 3-5 pertain only to the conclusion that Mr. Hoff
4 was “apparently under the influence”. A person is “apparently under the influence of liquor”
5 when they are “seemingly drunk” to those observing them. *Barrett v. Lucky Seven Saloon Inc.*
6 152 Wn.2d 259, 268, 96 P.3d 386 (2004). There is no statute or rule that creates a legal
7 defense to a violation of WAC 314-16-150 based upon an apparently intoxicated person having
8 a physical or mental condition. The Licensee provided no evidence to support an affirmative
9 defense that Mr. Hoff had a specific, diagnosable physical or mental condition. Enforcement
10 does not have to prove the lack of a physical or mental condition in demonstrating a violation
11 of WAC 314-16-150. The Licensee’s assertion has no relevance to the law or the facts as
12 found. Similarly, Enforcement does not have to prove a bartender served Mr. Hoff or what his
13 condition was at that time to demonstrate a violation of WAC 314-16-150.

14 The element of WAC 314-16-150 that the ALJ addressed in its Conclusions of Law No.
15 3-5 is whether or not Mr. Hoff was apparently under the influence of liquor, such that he was
16 seemingly drunk. The Licensee does not challenge the evidence that Mr. Hoff was “seemingly
17 drunk”. All of the facts as found demonstrate Mr. Hoff was “seemingly drunk” when he was
18 on the Licensed premise. *See* Initial Order, FOF No. 4-7.

19 **D. Reply To Licensee’s Exceptions To The ALJ’s Application Of The Term Permit Is**
20 **Defined In Binding Case Authority**

21 The Licensee’s Petition asserts the ALJ erred in utilizing an “overly broad
22 interpretation of *Oscar’s, Inc. v. Washington State Liquor Control Board*”. Licensee’s Petition
23 at 15. The ALJ did not proffer an “interpretation” of the appellate court’s opinion in *Oscar’s*.
24 The ALJ simply set out the language that the court has set forth as the lawful definition of the
25 term “permit” and then correctly applied to the facts as found.
26

1 The term “permit” as applied to liquor laws and rules has been defined as
2 “acquiescence of or failure to prevent not only prohibited activity but also circumstances of
3 which the licensee has at least constructive knowledge that would foreseeably lead to
4 prohibited activity.” *Oscar’s, Inc. v. Washington State Liquor Control Board*, 101 Wn. App.
5 498, 505, 3 P.3d 813 (2000). The Board has also previously held the appropriate test for
6 whether a licensee permitted an apparently intoxicated person to possess alcohol is set forth in
7 *Oscar’s. In the Matter of Family Legacy Restaurants LLC*, LCB No. 22, 838; OAH No. 2008-
8 LCB-0027, Final Order of the Board, Pg. 3, §5 (Attachment A).

9 Here, the ALJ found that the Licensee’s premise had substantial staff, and that the
10 primary owner/member of Cutter Crest LLC, Mr. William Wildrick was also on duty the night
11 of the violation. Initial Order, FOF No. 4. The ALJ found that Mr. Hoff approached and
12 stopped at the bar, which had two employees stationed at it, while showing signs of apparent
13 intoxication. *Id.* The ALJ found that Mr. Wildrick also had an opportunity to observe Mr.
14 Hoff. *Id.* at FOF No. 5. The ALJ concluded that the Licensee failed to adequately monitor its
15 patron. Initial Order, Conclusion of Law No. 8.

16 The facts support the conclusion that the Licensee’s employees had ample opportunity
17 to observe Mr. Hoff and, based on his appearance and that he had a drink in his hand, had at
18 least constructive knowledge of circumstances which could foreseeable lead to prohibited
19 activity. The Licensee’s employees failed to prevent the circumstances or intervene to
20 eliminate them. Therefore, the Licensee permitted the prohibited conduct in this matter as the
21 term “permit” is defined in *Oscar’s, Inc.* 101 Wn. App. at 505.

22 ///

23 ///

24 ///

III. CONCLUSION

1 For the reasons set forth above, Enforcement respectfully requests the Board deny the
2 Licensee's Petition and issue a final order adopting the ALJ's Initial Order in its entirety.

3 Dated this 7 day of June, 2010.
4

5 ROBERT M. MCKENNA
6 Attorney General

7 
8 GORDON KARG, WSBA #37178
9 Assistant Attorney General
10 Attorneys for Washington State Liquor Control
11 Board, Education and Enforcement Division
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26