BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF: OLUT, INC d/b/a TAILGATOR 1805 HEWITT AVE EVERETT, WA 98201 LICENSEE LICENSE NO. 352513-3E AVN 3S0184C	LCB NO. 23,736 OAH NO. 2010-LCB-0073 FINAL ORDER OF THE BOARD

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

1. The Liquor Control Board issued a complaint dated September 28, 2010, alleging that on or about July 3, 2010, the above-named Licensee, or employee(s) thereof, sold, supplied, or otherwise provided alcohol to a person apparently under the influence of liquor in violation of WAC 314-16-150.
2. The Licensee made a timely request for a hearing.
3. A hearing took place on April 18, 2011 before an administrative law judge with the Office of Administrative Hearings.
4. Boe Lindgren, President, represented Olut, Inc d/b/a Tailgator. The Education and Enforcement Division of the Board was represented by Assistant Attorney General Gordon Karg.
5. On June 10, 2011, Administrative Law Judge Jason H. Grover entered his Findings of Fact, Conclusions of Law, and Initial Order sustaining the complaint.
6. No petition for review was received.

7. The entire record in this proceeding was presented to the Board for final decision, and the Board having fully considered said record and being fully advised in the premises; NOW THEREFORE;

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Initial Order for case 23,736 is adopted, except that Conclusion of Law 5.17 is modified to read as follows: .

5.17 The Initial Order stated that "the Licensee has business policies and practices intended to reduce the risk of future violations." and refers to Finding of Fact 4.14. That Finding of Fact does not detail any clear policies or practices that the Licensee has adopted to reduce the risk of detecting and dealing with consumption or possession of alcohol by persons who are apparently intoxicated. In this instance, although the Board's enforcement staff were unable to identify which of the two bartenders actually sold the two beers to Mr. Thornton, at least one of the Licensee's employees had the opportunity to observe Mr. Thornton at the time he picked up the beers from the bar. This is an aggravating factor that, despite the Licensee's assertion that his staff are trained to avoid violations, the sale was made to an apparently intoxicated person. The Board declines to reduce the penaltyfrom the standard penalty.

IT IS HEREBY FURTHER ORDERED that the Complaint filed in case 23,736 is sustained and that the liquor license privileges granted to Olut, Inc d/b/a Tailgator at 1805 Hewitt Ave in Everett, Washington, License 352513, are hereby suspended for a term of five days (5) days; effective from 10:00 a.m. on August 19, 2011, until 10:00 a.m. on August 24, 2011; HOWEVER, the suspension shall be vacated upon payment of a monetary penalty in the amount of five hundred dollars ($500) 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

PO Box 43085

Olympia, WA 98504-3085

DATED at Olympia, Washington this 6 day of July, 2011.

WASHINGTON STATE LIQUOR CONTROL BOARD

Sharon Foster

Patricia Kelly

Chair

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 7, 2011

Boe Lindgren
Olut, Inc.
d/b/a Tailgator
4411 California Ave SW
Seattle, WA 98116-4108

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***
LICENSEE: Olut, Inc.
TRADE NAME: Tailgator
LOCATION: 1805 Hewitt Ave, Everett, WA 98201-3610
LICENSE NO. 352513-3E
ADMINISTRATIVE VIOLATION NOTICE NO: 3S0184C
LCB HEARING NO. 23,736
OAH NO. 2010-LCB-0073
UBI: 602 905 720 001 0001

Dear Parties:

Please find the enclosed Declaration of Service by Mail and a copy of the Final Order of the Board in the above-referenced matter along with a copy of the Stipulated Settlement Agreement.

The applicable monetary penalty is due by August 8, 2011. If payment is not received timely, then suspension will take place during the dates listed in the Final Order.

The address for payments is WSLCB, P.O. Box 43085, Olympia, WA 98504-3085. Please label the check with your License Number and Administrative Violation Notice Number listed above. If you have any questions, please contact me at (360) 664–1602.

Sincerely,

Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (2)
cc: Mt. Vernon Enforcement and Education Division, WSLCB
Amber Harris, WSLCB

WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF: OLUT, INC. d/b/a TAILGATOR 1805 HEWITT AVE EVERETT, WA 98201-3610 LICENSEE LICENSE NO. 352513-3E AVN NO. 3S0184C	LCB NO. 23,736 OAH NO. 2010-LCB-0073 DECLARATION OF SERVICE BY MAIL

I certify that I caused a copy of the FINAL ORDER OF THE BOARD in the above-referenced matter to be served on all parties or their counsel of record by US Mail Postage Prepaid via Consolidated Mail Service for Licensees, by Campus Mail for the Office of Attorney General, on the date below to:

OLUT, INC. d/b/a TAILGATOR 4411 CALIFORNIA AVE SW SEATTLE, WA 98116-4108	GORDON KARG, ASSISTANT ATTORNEY GENERAL, GCE DIVISION OFFICE OF THE ATTORNEY GENERAL MAIL STOP 40100
OLUT, INC. d/b/a TAILGATOR 1805 HEWITT AVE EVERETT, WA 98201-3610	

DATED this 21 day of July, 2011, at Olympia, Washington.

Kevin McCarroll, Adjudicative Proceedings Coordinator

Washington State Liquor Control Board
3000 Pacific Avenue SE
PO Box 43076
Olympia, WA 98504-3076
(360) 664-1602

RECEIVED
JUN 14 2011
LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

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

IN THE MATTER OF: OLUT INC. dba TAILGATOR 1805 HEWITT AVE. EVERETT, WA 98201-3610 Licensee. LICENSE NO. 352513-3E AVN 3S0184C	OAH DOCKET NO. 2010-LCB-0073 Agency Case No. 23,736 **PROPOSED** FINDINGS OF FACT, CONCLUSIONS OF LAW, AND INITIAL ORDER

I. ISSUES

1.1 Whether the Licensee permitted an apparently intoxicated person to consume and/or possess alcohol on a licensed premises on July 3, 2010, in violation of WAC 314-16-150, as alleged in the Complaint filed September 28, 2010?

1.2 Whether the assessment of a $500.00 penalty in lieu of a 5 day suspension by the Washington State Liquor Control Board is an appropriate penalty under WAC 314-29-020 for a first violation of WAC 315-16-150?

II. ORDER SUMMARY

2.1 The Licensee permitted an apparently intoxicated person to consume and/or possess alcohol on a licensed premises on July 3, 2010, in violation of WAC 314-16-150. The Board's Complaint issued September 28, 2010 is **SUSTAINED**.

2.2 On a date to be established in the Board's Final Order, the license privileges of Olut Inc. dba Tailgator, under License No. 352513-3E, 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 Five Hundred Dollars ($500.00).

III. HEARING

3.1 **Administrative Law Judge:** Jason H. Grover

3.2 **Appellant:** Olut Inc. dba Tailgator

3.2.1 **Appellant's Representative:** Boe Lindgren, president

3.2.2 **Appellant's Witnesses:** Christina Pietrone, Lead Bartender; and, Anitra Tiff, Bartender

3.3 **Agency:** Washington State Liquor Control Board's Education and Enforcement Division ("Board")

3.3.1 **Department Representative:** Gordon Karg, Assistant Attorney General

3.3.2 **Department Witnesses:** Lieutenant Kate Miyasato, Liquor Control Board; and, Sergeant Troy McCallister, Liquor Control Board

3.4 **Exhibits:** The Board's Exhibits 1 through 6 were admitted at the time of hearing.

3.5 **Date of Hearing:** April 18, 2011.

IV. FINDINGS OF FACT

I find the following facts more probable than not under the preponderance of the evidence standard:

4.1 The Licensee, Olut Inc. dba Tailgator (Licensee), operates a bar located at 1805 Hewitt Ave., Everett, Washington. The premises is licensed by the Board for the sale of

beer, wine and liquor for on-premises consumption pursuant to License No. 352513-3E.

4.2 The citation in the present case was issued on July 8, 2010, following a July 3, 2010 premises compliance check conducted by WSLCB Lt. Kate Miyasato and Sgt. Troy McCallister on the Licensee. Lt. Miyasato has twenty years experience as an officer. She attended a five-week training academy and has also attended numerous classes and training courses through the enforcement center. Lt. Miyasato has had experience in thousands of cases involving apparently intoxicated persons. Sergeant McCallister has fourteen years experience as an officer. He attended a two-hundred hour academy and has attended in service training. He has experience in more than one-hundred cases involving apparently intoxicated persons.

4.3 Signs of apparent intoxication include glassy eyes, staggering, swaying, slurring, mood swings, and being overly friendly or quiet and withdrawn.

4.4 The purpose of a compliance check is to ensure that licensees are compliant with the rules and regulations of the Washington State Liquor Control Board.

4.5 On July 3, 2010 at approximately 12:50 A.M., Lt. Miyasato and Sgt. McCallister entered the Licensee's premises. They began their compliance check in the downstairs area of the business. It was orderly and not particularly busy. They then proceeded up the interior stairway to the upstairs area.

4.6 In the upstairs area, there was a DJ playing music at the south end of the building. They observed that there were two female bartenders working at the bar. As

they observed the bar area, they noticed a male patron, later identified as Daniel Isaac Thornton. Mr. Thornton was standing with his back to them and he appeared to be unsteady on his feet.

4.7 Because Mr. Thornton was standing between Lt. Miyasato and Sgt. McCallister, they were unable to determine which of the two bartenders served him. However, when Mr. Thornton left the bar, he was carrying two bottles of beer. Lt. Miyasato noticed that he was unsteady on his feet and had glassy eyes. Sgt. McCallister noticed that he staggered as he walked. Mr. Thornton walked to the south side of the dance floor and gave one of the beers to another man.

4.8 Lt. Miyasato and Sgt. McCallister continued observing Mr. Thornton. Lt. Miyasato observed that he was loud, overly gregarious and had exaggerated movement. He had a loose grip on the beer bottle and almost dropped it at one point. Both officers observed Mr. Thornton as being unsteady on his feet when he attempted to dance. The officers observed Mr. Thornton for five to ten minutes and agreed that he was apparently intoxicated.

4.9 Sgt. McCallister left the upstairs area to get the bouncer. Lt. Miyasato contacted Mr. Thornton, displayed her badge and told him that she believed that he had too much to drink. She then took his drink from him. Mr. Thornton became upset and told Lt. Miyasato, "fuck you" as he tried to take his beer back. In response to Lt. Miyasato's statement that he had too much to drink, Mr. Thornton replied, "Duh, I'm in a bar. Of course I've had too much to drink."

4.10 Sgt. McCallister returned to the area with a bar employee. The employee tried to get Mr. Thornton to cooperate and calm down. Lt. Miyasato asked Mr. Thornton to come outside. Mr. Thornton was very angry and was yelling. Lt. Miyasato was concerned that there could be a fight, so as she was going down the stairs, she called 911 to request a standby officer from the Everett Police Department. Several were dispatched and stood by outside while Lt. Miyasato and Sgt. McCallister continued their interaction with Mr. Thornton.

4.11 After exiting the premises, Lt. Miyasato requested identification from Mr. Thornton, which he provided (Exhibit 6). He told her that he was a Marine and had just returned from two tours of duty in Iraq. He stated that he should be allowed to drink as much as he wanted. Lt. Miyasato gave Mr. Thornton's beer to Sgt. McCallister. Sgt. McCallister took a sample, photographed the bottle (Exhibit 4) and disposed of the remaining contents. These contents were later submitted to the Washington State Toxicology Laboratory for testing. A copy of the toxicology report (Exhibit 5) establishes that the sample contained 5.2% ethanol.

4.12 After obtaining Mr. Thornton's information, Lt. Miyasato let him go. During the interaction outside, she noted that his speech was slurred and his eyes were glassy.

4.13 Based on their observations, Lt. Miyasato issued an Administrative Violation Notice to Olut Inc. dba Tailgator (Exhibit 1). It was served on Boe Lindgren, president, on July 8, 2010.

4.14 At hearing, Boe Lindgren, president of Licensee Olut Inc. dba Tailgator, denied that Mr. Thornton was apparently intoxicated. He testified that the Licensee has

safeguards in place to prevent violations and employees are trained to detect intoxicated persons.

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

V. CONCLUSIONS OF LAW

5.1 The Office of Administrative Hearings has jurisdiction over the parties and subject matter pursuant to chapters 66.44, 34.12, and 34.05 RCW, and chapters 10-08, 314-11, 314-16, and 314-29 WAC.

5.2 As the holder of a liquor license, the licensee, Olut Inc. dba Tailgator, is subject to the jurisdiction of the Washington State Liquor Control Board. The license is subject to the conditions and restrictions imposed by Title 66 RCW, and chapters 314–11, 314-16, and 314-29 WAC. Proceedings involving agency action are adjudicative proceedings under chapter 34.05 RCW. The Board has authority to assign such proceedings to an administrative law judge pursuant to chapter 34.12 RCW. A proper hearing was provided in this case.

5.3 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."

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

5.5 The next issue to be determined is whether Mr. Thornton 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).

5.6 In the present case, Mr. Thornton exhibited several overt signs of intoxication. He staggered when he walked, he had glassy watery eyes; his speech was slurred and he swayed. Additionally, Mr. Thornton admitted to Lt. Miyasato that he had too much to drink.

5.7 Based on the testimony presented, I conclude that Mr. Thornton was apparently under the influence of liquor during all relevant times.

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

5.9 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).

5.10 In the present case, Mr. Thornton 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. Thornton while he was on the premises to ensure that he did not possess alcohol.

5.11 Based on the foregoing analysis, the Department has established all elements of the violation. The Board's Administrative Violation Notice should be sustained.

5.12 This violation constitutes a first violation in a twenty-four month period.

5.13 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. 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.

5.14 The standard penalty in this matter for a first 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 $500.00. WAC 314-29-020.

5.15 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).

5.16 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.

5.17 In the present case, as detailed in Finding of Fact 4.14, 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.

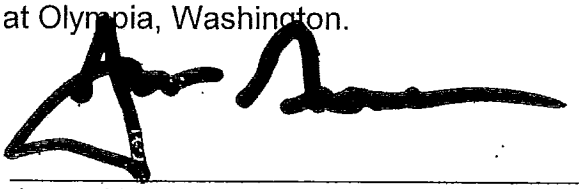
VI. INITIAL ORDER

From the foregoing Conclusions of Law, NOW THEREFORE:

6.1 The Licensee permitted an apparently intoxicated person to consume and/or possess alcohol on a licensed premises on July 3, 2010, in violation of WAC 314-16-150. The Board's Complaint issued September 28, 2010 is **SUSTAINED**.

6.2 On a date to be established in the Board's Final Order, the license privileges of Olut Inc. dba Tailgator, under License No. 352513-3E, 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 Five Hundred Dollars ($500.00).

SERVED on the 10th day of June 2011 at Olympia, Washington.



Jason H. Grover
Administrative Law Judge
Office of Administrative Hearings

NOTICE TO PARTIES

Either the licensee or permit holder or the assistant attorney general may file a petition for review of the initial order with the liquor control board within twenty (20) days of the date of service of the initial order. RCW 34.05.464, WAC 10-08-211 and WAC 314-42-095.

The petition for review must:

(i) Specify the portions of the initial order to which exception is taken;
(ii) Refer to the evidence of record which is relied upon to support the petition; and
(iii) Be filed with the liquor control board within twenty (20) days of the date of service of the initial order.

A copy of the petition for review must be mailed to all of the other parties and their representatives at the time the petition is filed. Within ten (10) days after service of the petition for review, any of the other parties may file a response to that petition with the liquor control board. WAC 314-42-095(2)(a) and (b). Copies of the reply must be mailed to all other parties and their representatives at the time the reply is filed.

The administrative record, the initial order, any petitions for review, and any replies filed by the parties will be circulated to the board members for review. WAC 314-42-095(3).

Following this review, the board will enter a final order. WAC 314-42-095(4). Within ten (10) days of the service of a final order, any party may file a petition for reconsideration, stating the specific grounds upon which relief is requested. RCW 34.05.470 and WAC 10-08-215.

The final decision of the board is appealable to the Superior Court under the provisions of RCW 34.05.510 through 34.05.598 (Washington Administrative Procedure Act).