BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF: MCKAY INVESTMENTS, INC d/b/a THE PUB 7001 W CLEARWATER KENNEWICK, WA 99336 LICENSEE LICENSE NO. 360487 AVN NO. 4K1070A	LCB NO. 23,840 OAH NO. 2011-LCB-0039 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 June 14, 2011, alleging that on March 11, 2011 the above-named Licensee, or employee(s) thereof, sold, served, gave, provided or otherwise supplied alcohol to an apparently intoxicated person(s) on the licensed premises, contrary to WAC 314-16-150(1)
2. The Licensee made a timely request for a hearing.
3. An administrative hearing was held on December 22, 2011 before Administrative Law Judge Randolph F. Bolong with the Office of Administrative Hearings in Kennewick, Washington.
4. At the hearing, the Education and Enforcement Division of the Board was represented by Assistant Attorney General Gordon Karg. Attorney at Law Scott W. Johnson represented the Licensee.

5. On February 22, 2012, Administrative Law Judge Randolph F. Bolong entered his Findings of Fact, Conclusions of Law and Initial Order in this matter, which sustained the administrative violation.
6. The parties filed no petitions for review.
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 Administrative Law Judge's Findings of Fact, Conclusions of Law and Initial Order are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law and Final Order of the Board, with the following correction:

In Finding of Fact 1, the d/b/a (trade name) is corrected to read "The Pub" not "Village Bar & Grill (Hideaway)".

Having affirmed the Initial Order, with a correction, IT IS HEREBY ALSO ORDERED that the liquor license privileges granted to McKay Investments, Inc. d/b/a The Pub, License No. 360487, are hereby suspended for a term of five (5) days. In lieu of a license suspension, the Licensee may pay a monetary penalty in the amount of five-hundred dollars ($500.00) due within 30 days of this order. If timely payment is not received, suspension will begin at 10:00 a.m. on May 10, 2012 until 10:00 a.m. on May 15, 2012. 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

Financial Division

PO Box 43085

Olympia, WA 98504-3085

DATED at Olympia, Washington this 20th day of March, 2012.

WASHINGTON STATE LIQUOR CONTROL BOARD

Sharon Foster

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

March 22, 2012

McKay Investments Inc
d/b/a The Pub
7001 W Clearwater Ave
Kennewick, WA 99336-1721

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: McKay Investments Inc
Trade name: The Pub
Location: 7001 W Clearwater Ave, Kennewick, WA 99336-1721
License No. 360487
LCB Hearing No. 23,840
AVN: 4K1070A

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 April 23, 2012. If payment is not received timely then suspension will take place from 10:00 a.m. on May 17, 2012 until 10:00 a.m. on May 22, 2012.** 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: Spokane and Pasco Enforcement and Education Divisions, WSLCB
Teresa Young, WSLCB

WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF: MCKAY INVESTMENTS INC d/b/a THE PUB 7001 W CLEARWATER AVE KENNEWICK, WA 99336-1721 LICENSEE LICENSE NO. 360487 AVN NO. 4K1070A	LCB NO. 23,840 OAH NO. 2011-LCB-0039 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:

MCKAY INVESTMENTS INC d/b/a THE PUB 7001 W CLEARWATER AVE KENNEWICK, WA 99336-1721	OFFICE OF THE ATTORNEY GENERAL MAIL STOP 40100, GCE DIVISION GORDON KARG, ASSISTANT ATTORNEY GENERAL

DATED this 22nd day of March, 2012, 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

MAR 01 2012

Liquor Control Board
Board Administration

FEB 22 2012

YAKIMA OAH

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

In the Matter of: **McKAY INVESTMENTS, INC., dba THE PUB** **Licensee** **License No. 360487**	**OAH Docket No. 2011-LCB-0039** **LCB Case No. 23,840** **FINDINGS OF FACT, CONCLUSIONS OF LAW AND INITIAL ORDER**

STATEMENT OF THE CASE

The hearing was held before Randolph F. Bolong, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), on December 22, 2011, in Kennewick, Washington. The Washington State Liquor Control Board (Board or LCB), Education and Enforcement Division (Enforcement), was represented by Gordon Karg, Assistant Attorney General. Lieutenant Kent Williams, and Officers Marie Reddout and Caine Hilario, Liquor Enforcement Officers, appeared as witnesses for the Board. The Licensee, McKay Investments, Inc., dba The Pub, was represented by Attorney at Law Scott W. Johnson. The owner of The Pub, Tim McKay, was present at the hearing but did not testify.

Based on the record presented, the ALJ makes the following Findings of Fact:

FINDINGS OF FACT

1. The Licensee, McKay Investments, Inc., dba Village Bar & Grill (Hideaway), is a restaurant and lounge located in Kennewick, Washington. The premises have been licensed by the Board for the sale of spirits, beer and wine pursuant to License Number 360487.

2. The Licensee has had no previous administrative violations in its history.

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3. On the evening of March 11, 2011, at approximately 10:30 p.m., Officers Marie Reddout and Caine Hilario, LCB enforcement officers, performed an inspection of the Licensee's premises. Accompanying them on the inspection was Lt. Kent Williams. The lighting was fair and there were approximately 70 patrons on the premises. Music was playing at a moderate to loud level.

4. Soon after entering, Lt. Williams observed an individual, later identified as Thomas Matthews II, seated at a table approximately six to ten feet away, showing signs of intoxication. His speech was loud, boisterous and slurred. His eyes were droopy and he had trouble handling a shot glass in one hand. In the other hand he held a Coors Light bottle. Mr. Matthews would hold the shot glass up as if poised to drink from it, and then drink from the beer bottle or continue to converse. He swayed in his seat. The security guard was approximately five to ten feet away from Mr. Matthews and there was a waitress on duty in close proximity to Mr. Matthews' table, which he shared with a small group of individuals. Lt. Williams pointed out Mr. Matthews to the other officers, who also observed Mr. Matthews' droopy eyes and slow movements. Mr. Matthews appeared happy. The Pub's security guard was directed to stop Mr. Matthews from continuing to drink. When the security guard contacted Mr. Matthews and attempted to take away his drinks, Mr. Matthews pulled away and resisted giving up his drink and leaving the table. When contacted by the enforcement officers, Mr. Matthews' breath smelled of alcohol to the officers. They also heard him slurring his words and noticed his eyes were bloodshot and watery when contacted. When they asked to talk to him at the bar, Mr. Matthews walked to the bar, swaying as he walked, his movements slow and sluggish. At the bar, they observed his eyes were heavy and bloodshot. He would repeat questions asked of

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him. When interviewed, Mr. Matthews admitted that he had purchased two beers and two shots at The Pub. Prior to arriving at The Pub, he had consumed five beers at home. The officers had to explain to him twice that he was not in trouble when he continued to question why he was in trouble. However, he was compliant and not aggressive.

5. Lt. Williams spoke to the waitress in the area, Leah Wallace. She informed Lt. Williams that she had served Mr. Matthews, and that he had had two beers and two shots of whiskey while on the premises. Mr. Matthews had arrived at The Pub between 9 p.m. and 9:30 p.m., and she had just delivered a shot of cinnamon whiskey to him when the enforcement officers entered the premises at 10:30 p.m. She told Lt. Williams that she had been friends with Mr. Matthews since they were children and "he always looks drunk", because of his eyes. She confirmed that Mr. Matthews was the person that the enforcement officers had identified as the person appearing intoxicated.

6. On March 14, 2011, the Washington State Liquor Control Board (Board) served an Administrative Violation Notice (Notice) to The Pub by personally delivering a copy upon the owner, Tim McKay, on March 23, 2011. In its Notice, the Board alleged that on March 11, 2011, the Licensee had violated the provisions of Washington Administrative Code (WAC) 314-29-020 by the "[s]ale or service to apparently intoxicated person, or permitting consumption or possession by an apparently intoxicated person". The penalty for the administrative violation sought by the Board against the Licensee is a five day suspension or $500.00 fine in lieu of suspension. The Administrative Violation Notice (AVN) number of this alleged violation is 4K1070A.

7. The Licensee made a timely request for a formal administrative hearing.

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CONCLUSIONS OF LAW

1. As the holders of a retail liquor license, McKay Investments is subject to the jurisdiction of the Washington State Liquor Control Board. The Board has the authority pursuant to RCW 66.24.010 to suspend or cancel a license so long as the Licensee is afforded an opportunity for a hearing. RCW 66.08.150, WAC 314-29-010. A proper hearing was provided in this case.

2. The provision of WAC 314-16-150 are applicable and provides as follows:

> (1) No retail licensee shall give or otherwise supply liquor to any person under the age of twenty-one years, either for his/her own use or for the use of his/her parent or of any other person; or to any person apparently under the influence of liquor; nor shall any licensee or employee thereof permit any person under the said age or in said condition to consume liquor on his/her premises, or on any premises adjacent thereto and under his/her control.
>
> (2) No retail licensee shall permit any person apparently under the influence of liquor to physically possess liquor on the licensed premises.

3. The opposing parties obviously disagree on the issue of whether Mr. Matthews was "apparently under the influence of liquor". Different degrees of alcohol intoxication are defined by the standards "apparently under the influence" and "obviously intoxicated." *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259,267 (2004) A determination that a person is "apparently under the influence" requires at least some reflection and thought. "Apparently" means in an apparent manner, seemingly, or evidently, i.e., readily perceptible to the senses or capable of being readily perceived by the sensibilities or understanding as certainly existent or present. "Obviously" means in an obvious manner, certainly, or unmistakably, i.e., readily

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perceived by the senses or readily perceived by the sensibilities or mind. "Apparently" implies less certainty than "obviously." *Id.* at 268. The current statutory standard is "apparently under the influence of liquor." "Apparently under the influence of liquor" means "seemingly" drunk, as opposed to the higher standard of "unmistakably" or "certainly" drunk. *Barrett,* 152 Wn.2d at 264, 268. " '[E]vidence of the amount of alcohol consumed is not sufficient by itself to establish that a person was furnished intoxicating liquor while [apparently under the influence].' *Christen v. Lee,* 113 Wn.2d 479, 487, 780 P.2d 1307 (1989). To meet the legal standard, the plaintiffs needed to present evidence concerning whether the individual was "seemingly" drunk at the time served alcoholic beverages. If evidence does not show that the individual appeared intoxicated to those around him, the evidence is insufficient to raise an issue of fact as to overservice. *Faust v. Albertson*, 143 Wn. App. 272 (2008). Whether a person is obviously intoxicated or not is to be determined by the person's appearance to others around him or her at the time the intoxicating liquor is furnished to that person." *Christen* at 487.

4. The preponderance of evidence in the hearing record establishes that in the late evening of March 11, 2011, Thomas Matthews II, a patron of The Pub, was consuming alcohol on a licensed premise. The evaluation of whether a person is "apparently under the influence of liquor" is subjective. The unrebutted testimony was that Mr. Matthews appeared to be intoxicated. The law is clear that intoxication need not be unmistakable or certain, but may require some reflection and thought in the determination. In describing Mr. Matthews' condition, the undersigned concludes that the enforcement agents were able to describe through reflection why they believed that he was under the influence of alcohol. While counsel's argument that this literal interpretation of the statutes would mean that any person, whether due

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to illness or physical impairment, could not be served alcohol, is thought-provoking, this is not the case here. No evidence was presented here that Mr. Matthews was not actually under the influence. Rather, he appeared to be under the influence of intoxicants due to various observable factors, and this was verified after further observation and conversation with him.

5. The undersigned, therefore, concludes that Mr. Matthews was in physical possession of liquor on the licensed premises while under the influence of liquor on March 11, 2011.

6. The Board has the authority to establish an appropriate penalty as a matter of its discretion. RCW 66.24.010. The Board, in suspending any license, may further provide in the order of suspension that such suspension shall be vacated upon payment to the Board by the licensee of a monetary penalty in an amount then fixed by the Board. RCW 66.24.120. Pursuant to RCWs 66.24.010 and 66.240.120, the Board adopted as rules a set of "standard penalties" which may apply to certain offenses. WAC 314-29-015.

7. WAC 314-29-020 contains the public safety violations, which includes the violation by permitting possession of liquor by an apparently intoxicated person. The standard penalty for a first violation of WAC 314-16-150(2) is a five (5) day license suspension or five hundred dollars ($500.00) fine in lieu of suspension. WAC 314-29-020.

8. In the matter of penalties, WAC 314-29-015(4) sets forth certain examples of mitigating or aggravating circumstances which the Board may wish to consider; however, it does not appear that these examples are exclusive. An example of mitigating circumstances is "[h]aving an employee training plan that includes annual training on liquor laws." WAC 314-29-015(4)(a). One example of an aggravating circumstance is "committing the violation

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willfully." WAC 314-29-015(4)(b). Mitigation or aggravation of the standard suspension period or fine in lieu of suspension may be granted at the discretion of the Board.

9. In this case, the undersigned cannot conclude that there was any mitigating or aggravating circumstances. Accordingly, this tribunal concludes that it is appropriate to recommend a penalty to the Board consisting of a five day suspension of the Licensee's liquor license or, in lieu thereof, a civil monetary penalty option in the amount of $500.00.

INITIAL ORDER

IT IS HEREBY ORDERED: that the Board's alleged administrative violation is Sustained. On a date to be established in the Board's Final Order, the license privileges of McKay Investments, Inc., dba The Pub, under License Number 360487, shall be suspended for a period of five (5) days. In lieu of such suspension, the Licensee may pay a civil monetary fine of five hundred dollars ($500.00).

Dated and Mailed this 22nd day of February 2012 at Yakima, Washington.

Randolph Bolding
Administrative Law Judge
Office of Administrative Hearings

Copies mailed to:

Tim McKay, McKay Investments, Inc., dba The Pub, Respondent
Scott W. Johnson, Respondent Representative
Gordon Karg, AAG

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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 and 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 fled. Within (10) ten 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 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).

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