BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF: OLUT, INC d/b/a TAILGATOR 4411 CALIFORNIA AVE SW SEATTLE, WA 98116-4108 LICENSEE LICENSE NO. 352513-3F AVN NO. 3F2330A	LCB NO. 24,724 OAH NO. 2013-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 6, 2013, alleging that on November 25, 2012 the above-named Licensee, or employee(s) thereof, served and/or sold liquor to an apparently intoxicated person on the licensed premises, and/or allowed an apparently intoxicated person(s) to consume liquor on the licensed premises, contrary to RCW 66.44.200 and WAC 314-16-150.
2. The Licensee made a timely request for a hearing.
3. An administrative hearing was held on December 4, 2013 before Administrative Law Judge Lisa N.W. Dublin with the Office of Administrative Hearings.
4. At the hearing, the Education and Enforcement Division of the Board was represented by Assistant Attorney General Isaac Williamson. Attorney at Law James H. Johanson represented the Licensee, Olut Inc d/b/a Tailgator.

5. On February 5, 2014, Administrative Law Judge Lisa N.W. Dublin entered her Corrected Findings of Fact, Conclusions of Law and Initial Order in this matter, holding that the Licensee did not violate RCW 66.44.200 or WAC 314-16-150.
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,

IT IS HEREBY FURTHER ORDERED that the charge in the Complaint filed in case 24,724 is DISMISSED.

DATED at Olympia, Washington this 3rd day of March, 2014.

WASHINGTON STATE LIQUOR CONTROL BOARD

Ruthann Kurose

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).

March 6, 2014

James H. Johanson
Attorney for Licensee
7009 212th Street SW Ste 203
Edmonds, WA 98026-7742

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

Isaac Williamson, 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 Avenue, Everett, WA 98201-3610
LICENSE NO. 352513-3F
LCB HEARING NO. 24,724
OAH NO. 2013-LCB-0039
AVN NO. 3F2330A
UBI: 602-905-720-001-0001

Dear Parties:

Please find the enclosed Final Order of the Board and Declaration of Service by Mail in the above-referenced matter. If you have any questions, please contact me at (360) 664–1602.

Sincerely,

Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Mt. Vernon Enforcement and Education Division, WSLCB
Jamie Marshall, WSLCB Enforcement

WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF: OLUT, INC. d/b/a TAILGATOR 1805 HEWITT AVENUE EVERETT, WA 98201-3610 LICENSEE LICENSE NO. 352513-3F AVN NO. 3F2330A	LCB NO. 24,724 OAH NO. 2013-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 applicants and licensees, by campus mail for state offices, on the date below to:

JAMES H. JOHANSON ATTORNEY FOR LICENSEE 7009 212TH STREET SW STE 203 EDMONDS, WA 98026-7742	OFFICE OF THE ATTORNEY GENERAL MAIL STOP 40100, GCE DIVISION ISAAC WILLIAMSON, ASSISTANT ATTORNEY GENERAL
BOE LINDGREN OLUT, INC. d/b/a TAILGATOR 4411 CALIFORNIA AVE SW SEATTLE, WA 98116-4108	

DATED this 6th day of March, 2014, 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
FEB 25 2014
Liquor Control Board
Board Administration

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

In The Matter Of: **OLUT, INC.,** **LICENSE NO. 352513** **AVN NO.: 3F2330A** **Appellant.**	**OAH Docket No. 2013-LCB-0039** **LCB No. *24,724*** ***CORRECTED* FINDINGS OF FACT, CONCLUSIONS OF LAW, AND INITIAL ORDER**

This is a corrected order to accurately reflect the Liquor Control Board Case Number that appears in the caption above. There is no difference in content between the Findings of Fact, Conclusions of Law, and Initial Order issued earlier and the present Corrected Findings of Fact, Conclusions of Law, and Initial Order other than the Liquor Control Board Case Number in the caption above. All modifications to the Findings of Fact, Conclusions of Law, and Initial Order issued earlier appear in this Corrected Findings of Fact, Conclusions of Law, and Initial Order in italics.

I. ISSUES PRESENTED

1.1 On or around November 25, 2012, did Appellant and/or it employee(s) serve alcohol to an apparently intoxicated person, in violation of RCW 66.44.200 and WAC 314-16-150?

1.2 If so, what is the appropriate penalty?

II. ORDER SUMMARY

1.1 No. On or around November 25, 2012, Appellant and/or its employees did not serve alcohol to an apparently intoxicated person, in violation of RCW 66.44.200 and WAC 314-16-150. No penalty applies.

III. HEARING

3.1 **Hearing Date:** December 4, 2013

3.2 **Administrative Law Judge:** Lisa N. W. Dublin

Office of Administrative Hearings
949 Market Street, Suite 500
Tacoma, WA 98402
Tel: (253) 476-6888 • Fax: (253) 593-2200

3.3 **Appellant:** Olut, Inc., dba Tailgator (herein "Tailgator")

3.3.1 **Representative:** James H. Johanson, Esq.

3.3.2 **Witnesses:**

3.3.2.1 Boe Lindgren, owner

3.3.2.2 Gabrielle Burton, bartender
3.3.2.3 Ken Smith, customer

3.3.2.4 Heath Dorn, security officer

3.4 **Agency:** Liquor Control Board ("Board")

3.4.1 **Representative:** Isaac Williamson, Assistant Attorney General

3.4.2 **Witnesses:**

3.4.2.1 Roxanne "Dee" Johnson, Liquor Enforcement Officer

3.4.2.2 Kate Miyasato, Lieutenant, Liquor Control Board

3.5 **Exhibits:** Board Exhibits 1-5, as well as Appellant's Exhibit A, were admitted into the record.

IV. FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

Jurisdiction

4.1 On or around December 6, 2012, Liquor Enforcement Officer Roxanne (Dee) Johnson served Administrative Violation Notice (AVN) No. 3F2330A on Appellant. (Ex. 1)

4.2 On or around December 15, 2012, Mr. Lindgren requested an administrative hearing. *Id.*

Tailgator

4.3 Tailgator is a restaurant/lounge located in Everett, Washington that is licensed with the State of Washington to serve spirits, beer and wine. Mr. Lindgren is President of Tailgator, and serves at various times as bartender, door

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security, personnel scheduler, cook, and advertiser. Mr. Lindgren obtained advanced Alcohol Service Training, and learned to observe signs of intoxication including slurred speech, unbalanced gait, sleeping, looking confused, talking loudly, and/or fumbling with identification or money. Mr. Lindgren regularly reminds staff to cut patrons off early from alcohol. Those who appear intoxicated are escorted out of Tailgator, where taxis regularly line up for hire, and the bus stop is nearby.

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November 25, 2012

4.4 On the evening of November 24, 2012, the Everett Police Department (EPD) notified Tailgator that it was conducting Target Zero enforcement (TZE) patrols that night. At approximately 10:30 p.m., Mr. Ken Smith, a Tailgator patron, approached Gabrielle Burton, the bartender at the upstairs bar in Tailgator, and ordered a bottle of Bud Light beer. Mr. Smith was approximately 6'1" tall, and weighed approximately 230 pounds. Although Ms. Burton thought Mr. Smith seemed tired, she did not observe any signs of intoxication. About a half hour later, Mr. Smith ordered another bottle of Bud Light beer from a different bartender. Later, Mr. Smith ordered a third bottle of Bud Light from Ms. Burton that served him. She believed Mr. Smith was appropriately pacing himself, especially given his size, and did not appear intoxicated. She served him the beer. Later still, Mr. Smith ordered a fourth Bud Light beer from a different bartender. At approximately 12:25 a.m. on November 25, 2012, two law enforcement officers walked through Tailgator, talked with Mr. Lindgren, and told him that all looked well.

4.5 At approximately 1:00 a.m. on November 25, 2012, Liquor Enforcement Officer Dee Johnson and Board Lieutenant Kate Miyasato arrived at Tailgator to conduct a compliance check. They made contact with Mr. Lindgren at the door, then entered Tailgator and went upstairs. As she crossed the floor, Officer Johnson observed Mr. Smith approximately two feet away, slumped in his chair with his eyes closed. Mr. Smith's fourth Bud Light was full on the table in front of him. Mr. Smith opened his eyes, noticed Officer Johnson, and took a couple sips of beer. Mr. Smith's eyes were red and bloodshot. Tailgator security officer Heath Dorn approached Officer Johnson and greeted her. Lieutenant Miyasato observed Mr. Smith with his eyes open, and saw that his eyes were glassy and his facial features slack. It appeared to Lieutenant Miyasato that Mr. Smith did not seem fully aware of his surroundings. Officer Johnson told Mr. Dorn to take Mr. Smith's beer away. Mr. Dorn did so, and escorted Mr. Smith out of Tailgator.

4.6 When Mr. Lindgren learned that Officer Johnson intended to issue Tailgator an AVN for overserving Mr. Smith, he located Mr. Smith outside Tailgator and made contact with him. At that time, Mr. Smith worked as an

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airplane mechanic at Boeing. Mr. Lindgren introduced himself, asked Mr. Smith questions, and determined he did not appear intoxicated; Mr. Lindgren could not detect any slurred speech, bloodshot eyes, or unsteady gait. Mr. Smith explained that he started work at Boeing early the morning of November 24, 2012, and had not slept since. Mr. Smith stated he was tired, and had three beers during the two and a half hours he was at Tailgator. Mr. Smith denied drinking any alcoholic beverages before coming to Tailgator on November 24, 2012. Mr. Smith was waiting for his wife to pick him up when Mr. Dorn took his beer away and escorted him out the door. Mr. Smith denied being intoxicated or sleeping; he stated he was sitting quietly, observing the crowd, and watching people dance.

4.7 Mr. Smith walked back with Mr. Lindgren to Tailgator to speak with Officer Johnson. At this point, the testimony of the parties conflicted on material points. Officer Johnson testified that Mr. Smith raised his voice to her, and in an aggravated, aggressive manner, stated the AVN was not fair and repeatedly asked why she singled him out. She testified that when she told him she would issue him a ticket for drinking alcohol while intoxicated if he did not calm down, Mr. Smith told her to give him the fucking ticket and he would fight it in court. Officer Johnson testified that Mr. Smith's speech was slurred, his face was flushed, his breath smelled of alcohol, and he was unsteady on his feet. Mr. Lindgren, on the other hand, testified that Mr. Smith talked to Officer Johnson in a calm but stern voice. Mr. Lindgren also testified he did not observe Mr. Smith with bloodshot eyes or swaying, or hear him slurring his speech. Mr. Lindgren interpreted Mr. Smith's repetitive questioning was not due to intoxication, but rather due to frustration, embarrassment, and not getting an answer.

4.8 The undersigned, having carefully considered and weighed all of the evidence, including witness demeanor (as determined by voice, attitude, straightforwardness), party motivations, the reasonableness and consistency of testimony throughout the hearing, and the totality of the circumstances presented, resolves conflicting testimony in favor of Appellant. In the brief video footage Mr. Lindgren captured of Mr. Smith communicating with Officer Johnson, Mr. Smith did not talk in an inappropriately raised voice or behave aggressively.

4.9 Later, outside Tailgator, as Officer Johnson continued to talk with Mr. Lindgren, Mr. Smith approached Officer Johnson, apologized for his behavior, and stated he did not in fact want a ticket. Based on her observations and interactions with Mr. Smith, and with Lieutenant Miyasato's support, Officer Johnson issued Tailgator an AVN for serving Mr. Smith alcohol while he was apparently intoxicated, in violation of RCW 66.44.200 and WAC 314.16.150. Ex. 1.

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V. CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I make the following Conclusions of Law:

Jurisdiction

5.1 I have jurisdiction to hear and decide this matter under WAC 314-29-010(1)(c); chapter 34.05 RCW, and chapter 10-08 WAC.

Appellant Did Not Overserve Mr. Smith in Violation of Washington State Law.

5.2 No person shall sell any liquor to any person *apparently* under the influence of liquor. RCW 66.44.200. Nor shall any licensee give or otherwise supply liquor to any person *apparently* under the influence of liquor. WAC 314-16-150. (Emphasis added) "Apparently" is defined as "in an apparent manner: *seemingly*, evidently," "readily perceptible to the senses," and capable of being readily perceived by the sensibilities or understanding as certainly existent or present." *Barrett v. Lucky Seven Saloon, Inc.,* 152 Wn.2d 259, 268, 96 P.3d 386 (2004).

5.3 "Licensee" means any person or entity that holds a liquor license or permit, or any person or entity who is a true party of interest in a liquor license or permit, as outlined in WAC 314-07-035. WAC 314-07-010.

5.4 In the early morning hours of November 25, 2012, Officer Johnson and Lieutenant Miyasato observed Mr. Smith at Tailgator on two occasions looking and behaving in an apparently intoxicated manner. When they initially observed him, Mr. Smith was sitting upstairs at a table dozing and sipping a fourth bottle of beer; when later observed, Mr. Smith was downstairs interacting with them and Mr. Lindgren. Altogether, Mr. Smith's speech, balance, and eyes along with his repetitive questioning led Officer Johnson and Lieutenant Miyasato to determine Mr. Smith was intoxicated and had been overserved. Yet, as of 1:00 a.m. on November 25, 2012, Mr. Smith had been awake nearly 24 hours, and had worked a full day before coming to Tailgator. Given Mr. Smith's relatively large size, and the time between his beer orders, Ms. Burton justifiedly determined Mr. Smith was apparently tired, not apparently intoxicated, when she served him. No evidence was presented that the bartender that served Mr. Smith his fourth beer felt any differently about Mr. Smith when serving him. Although Officer Johnson and Lieutenant Miyasato may have felt justified in citing Appellant for overserving Mr. Smith, the weight of evidence establishes that Mr. Smith was not apparently intoxicated at the time Appellant served him beer, and that Appellant did not violate RCW 66.44.200 on March 30, 2012, when serving Mr. Smith.

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INITIAL ORDER

IT IS HERBY ORDERED THAT:

Appellant did not violate RCW 66.44.200 or WAC 314-16-150 in serving Mr. Smith alcohol on or around November 25, 2012. No penalty shall be assessed.

//

Signed and Issued at Tacoma, Washington, on the date of mailing.

Lisa N. W. Dublin
Administrative Law Judge
Office of Administrative Hearings

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Tacoma, WA 98402
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NOTICE OF APPEAL RIGHTS – PLEASE READ CAREFULLY

Petition for Review of Initial Order

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; 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 the all other parties and their representatives at the time the reply is filed.

Address for filing a petition for review with the board:

Washington State Liquor Control Board
Attention: Kevin McCarroll
3000 Pacific Avenue, PO Box 43076
Olympia, Washington 98504-3076.

Final Order and Additional Appeal Rights: 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 with the board, stating the specific grounds upon which relief is granted. RCW 34.05.470; 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).

CERTIFICATION OF MAILING IS ATTACHED

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CERTIFICATE OF SERVICE – OAH DOCKET NO. 2013-LCB-0039

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated:

Boe Lindgren Olut Inc d/b/a Tailgator 1805 Hewitt Avenue Everett, WA 98201-3610	☒ First Class US mail, postage prepaid ☐ Certified mail, return receipt ☐ Campus Mail ☐ Facsimile ☐ First Class, postage prepaid, Certified mail, return receipt
James H. Johanson Attorney at Law Law Office of Jim Johanson PLLC 7009 212th Street SW, Ste 203 Edmonds, WA 98026-7742	☒ First Class US mail, postage prepaid ☐ Certified mail, return receipt ☐ Campus Mail ☐ Facsimile ☐ First Class, postage prepaid, Certified mail, return receipt
Isaac B. Williamson Assistant Attorney General Office of the Attorney General PO Box 40100 Olympia, WA 98504-0100	☒ First Class US mail, postage prepaid ☐ Certified mail, return receipt ☐ Campus Mail ☐ Facsimile ☐ First Class, postage prepaid, Certified mail, return receipt
Kevin McCarroll Adjudicative Proceedings Coordinator Liquor Control Board PO Box 43076 Olympia, WA 98504-3076	☒ First Class US mail, postage prepaid ☐ Certified mail, return receipt ☐ Campus Mail ☐ Facsimile ☐ First Class, postage prepaid, Certified mail, return receipt

Date: February 5, 2014

OFFICE OF ADMINISTRATIVE HEARINGS

By: Cyndi Michelena

Cyndi Michelena

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