BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF: ARTWERKS d/b/a FREMONT ABBEY ARTS CENTER 4272 FREEMONT AVE N SEATTLE, WA 98103-7279 APPLICANT LICENSE APPLICATION NO. 407087 UBI: 602-244-815-001-0002	LCB NO. 24,734 OAH NO. 2013-LCB-0048 FINAL ORDER OF THE BOARD

I. PROCEDURAL BACKGROUND

The Liquor Control Board Licensing Division issued a Statement of Intent to Deny Liquor License, dated April 8, 2013, under the provisions of RCW 66.08.010, 66.08.030(12), and 66.24.010 because every license must be issued in the name of the applicant and the holder there of may not allow any other person to use the license or have legal control over the licensed premises, particularly the area where liquor is sold.

1. The Applicant made a timely request for a hearing.
2. An administrative hearing was held on October 14, 2013 before Administrative Law Judge Terry A. Schuh with the Office of Administrative Hearings.
3. At the hearing, Senior Counsel Kim O'Neal represented the Licensing and Regulation Division of the Board. The Executive Director of Artwerks, Nathan Marion, represented the Applicant. Board Exhibits 1 through 4, and Applicant Exhibits A through I were admitted to the record.

4. The Licensing and Regulation Division presented the testimony of Eddie Cantu, Licensing Manager, Cheryl Foster, Licensing Lead, and Sherry Gutweiler, Licensing Investigator. The Applicant presented the Testimony of Deborah Ferguson, Artwerks' President of the Board, and Ivar Hillesland, Pastor of the Church of the Apostles.
5. On December 13, 2013, Administrative Law Judge Terry A. Schuh entered his Findings of Fact, Conclusions of Law and Initial Order in this matter, which set aside the denial of the application.
6. A timely petition for review was received from the Licensing Division. The applicant did not file a response to Licensing's Petition for Review.

II. FINDINGS OF FACT

The Board finds the following facts by a preponderance of the evidence:

1. Artwerks dba Fremont Abbey Arts Center("Artwerks"), 4272 Fremont Ave, N., Seattle, WA 98103-7279 applied for a nonprofit arts organization liquor license on September 25, 2012. Ex. 1, p. 2; Ex. F.
2. On April 8, 2013, the Liquor Control Board ("the Board") issued a Statement of Intent to Deny Liquor license, denying Artwerk's application. Ex, 1.
3. On April 26, 2013, Artwerks filed its appeal, and requested an administrative hearing. Ex. **H.** p. 2.
4. The Board denied Artwerks' application for a nonprofit arts organization liquor license because Artwerks does not have exclusive control over the premises where Artwerks intends to sell and serve liquor. In its denial of Artwerks' application, the Board listed as grounds RCW 66.08.010, RCW 66.08.030(12), RCW 66.24.010, WAC 314-02-010(16), and WAC 314-01-005(1). Ex. 1, p. 3.

5. Artwerks is located in the Fremont Abbey. The Mission Investment Fund of the Evangelical Lutheran Church in America owns the Fremont Abbey. The Mission Investment Fund of the Evangelical Lutheran Church in America leases the Fremont Abbey to the Church of the Apostles ("the Church"), and the Church subleases Fremont Abbey to Artwerks.
6. Testimony of Hillesland; Ex. 3, pp. 1, 4; Ex. D. The Mission Investment Fund of the Evangelical Lutheran Church in America has consented to and approved the Church's sublease to Artwerks. Ex. B, p. 2.
7. Exhibit 3 includes a description of areas of the Abbey that the Church has the exclusive control over, and the areas that Artwerks has exclusive control over. Artwerks has exclusive control only over the Artwerks Arts Center office, but the Church has a key to the office and the ability to access that space. Testimony of Hillesland. The Church has exclusive control over the Church Office, Worship area and the Music Director's Office, St. Paul's Chapel, the Organ Loft, and the fourth floor of the Abbey. Ex. 3, p. 5.
8. Except as noted in Finding of Fact No. 6, Artwerks and the Church share Fremont Abbey. Artwerks generally occupies, uses, and is responsible for, its exclusive space as well as the shared space, Monday through Saturday. On Sunday the Church occupies, uses and is responsible for its exclusive space as well as the shared space in Fremont Abbey. The Church occupies, uses, and is responsible for Fremont Abbey on specified religious holidays and events, as described in the lease. Ex. 3, p. 6.
9. The Church is legally entitled under the lease with Artwerks to use Fremont Abbey throughout the year on any day and at any time that Artwerks is not using the premises,

without prior notice or arrangement, including the areas where liquor is to be served if the license is granted. Exhibit 3, Exhibit E.

10. Artwerks is a nonprofit arts organization which hosts art and cultural events at Fremont Abbey throughout the year. Artworks intends to sell and serve liquor at certain, if not most, of the art and cultural events it hosts at Fremont Abbey.

11. Artwerks stores its left-over liquor in locked cabinets on the premises. Ex. C. The Church has access to the room housing the locked liquor cabinets, it does not have access to the locked liquor cabinets themselves. Testimony of Hillesland; Ex. 2, p. 1; Ex. G; Ex. E.

12. The Board previously issued Artwerks a nonprofit arts organization liquor license that was effective December 2010 through June 30, 2012. Ex. 1, p, 2. Artwerks let the license lapse, and applied for a new license on or about September 25, 2012.

13. The Board issued the prior liquor license to Artwerks because at that time Board licensing staff did not know that Artwerks lacked exclusive control over Fremont Abbey. Testimony of Cantu.

14. The Board requires the licensee to have exclusive control over the premises because otherwise the Board cannot be certain whether any potential liquor violation is the fault of the licensee, Testimony of Gutweiler; Testimony of Foster. Moreover, only licensees are required to know and follow the liquor laws. Testimony of Gutweiler. Further, exclusive control over the premises is essential in order to observe and deny access to alcohol; merely having control over the alcohol is insufficient. Testimony of Gutweiler; Testimony of Foster; Testimony of Cantu.

15. The licensee is licensed to operate at a given premises. Testimony of Foster; Testimony of Cantu. For purpose of control, the Board looks to the premises leased or owned by the prospective licensee. Testimony of Gutweiler. The Board will not grant a license to an entity that shares control over the premises. Testimony of Cantu.

III. CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board makes the following Conclusions of Law:

1. The Board has jurisdiction to decide this matter.
2. RCW 66.24.495(1), in pertinent part, provides:

> There shall be a license to be designated as a nonprofit arts organization license. This shall be a special license to be issued to any nonprofit arts organization which sponsors and presents productions or performances of an artistic or cultural nature in a specific theater or other appropriate designated indoor premises approved by the board. The license shall permit the licensee to sell liquor to patrons of productions or performances for consumption on the premises at these events."

3. Artwerks is a nonprofit arts organization that applied for a license to sell liquor to patrons at its events. Accordingly, Artwerks was an entity qualified to apply for a nonprofit arts organization license.
4. When considering the application for a new or renewal license, the Board may inspect and "inquire into all matters in connection with the ... operation of the premises." RCW 66.24.010(2). The review of the lease of the space that Artwerks proposes to occupy is appropriate.
5. When reviewing an application, the Board is not required to approve the application because a license was previously held at that location. In this case, the Licensing Division staff reviewed the lease in depth, and, in particular, reviewed the portions of the lease that

made it clear that the Church has access to, and utilizes, portions of the Fremont Abbey that would be subject to the liquor license.

6. The broad legal discretion granted to the Board by RCW 66.08.030(12) to determine whether to grant or deny a liquor license application, construed with RCW 66.08.010, supports the denial of the license for reasons of public safety. The requirement that the liquor license applicant have exclusive control over the areas where liquor is to be served furthers these goals.

7. RCW 66.24.010 (1) supports the denial of the license based on the facts presented at the hearing. This section of the statute requires that the license be issued in the name of the applicant, and the applicant must not permit any other person to use the license. Artwerks subleases the premises that it seeks to use under the license, and cannot exclude the building owners or other lessees from the areas where liquor will be stored and sold. This creates the potential for violation of RCW 66.24.010.

8. WAC 314-01-005, which defines "licensed premises" or "premises", supports the decision to deny the license, because the applicant does not control the premises where it proposes to sell liquor. This regulation also gives the Board the authority to approve, or disapprove, all areas where liquor will be consumed. By entering into a lease that allows the Church to have full access to the areas of the premises where the applicant seeks to be licensed, the applicant lacks control over the premises where it proposes to sell and serve liquor.

9. The Board has broad legal discretion to act on liquor license applications to protect the public welfare, health, peace, morals and safety. The Board applies these principles, as set out in RCW 66.08.010 in considering whether any license denial decision is legally

appropriate. The Board must be able to determine at all times who has control of the premises because without that information, the Board cannot determine who may be responsible for a violation of the liquor laws.

10. If the Board were required to adopt a specific rule for every possible reason it might need to deny a license application, the resulting rules would be unwieldy, burdensome and impractical. The Board has the authority to consider individual license applications based on its duty to protect public health and safety, and to closely regulate the sale of alcohol.

11. The licensed premises, as defined in WAC 314-02-010(16) and 314-01-005(1) includes the building where the proposed licensed business is located, and all areas where customers or employees of the business might access. The areas of the Fremont Abbey where liquor will be served and/or stored under the license would only periodically, and never exclusively, be under the control of the applicant. While the applicant and the building owners have the ability to create exclusive legal control for the applicant over the proposed license premises, they have not done so under the current lease. The Board has the authority to deny the license in these circumstances.

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 of the administrative law judge, issued on December 13, 2013, are REVERSED. The Statement of Intent to Deny Liquor License for License Application No. 407087, LCB Case No. 24,734 in this matter is ADOPTED, and the liquor license application is denied. This denial

shall be without prejudice to the applicant re-applying immediately, with changed circumstances. If Artwerks does submit a new application, the Board specifically waives the application of WAC 314-07-070(2) to this applicant.

DATED at Olympia, Washington this 18th day of March, 2014.

WASHINGTON STATE LIQUOR CONTROL BOARD

Sharon Foster

Ruthann Kurose

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.

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 20, 2014

Nathan Marion, Executive Director
Artwerks
d/b/a Fremont Abbey Arts Center
4272 Fremont Ave N
Seattle, WA 98103-7279

Kim O'Neal, AAG
GCE Division, Office of Attorney General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100

RE: ***FINAL ORDER OF THE BOARD***
APPLICANT: Artwerks
TRADE NAME: Fremont Abbey Arts Center
LOCATION: 4272 Fremont Ave N, Seattle, WA 98103
LICENSE APPLICATION NO. 407087
LCB HEARING NO. 24,734
OAH NO. 2013-LCB-0048
UBI: 602-244-815-001-0002

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: Alan Rathbun, Licensing and Regulation Director, WSLCB
Sharon Hendricks, Policy and Compliance Manager, WSLCB

WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF: ARTWERKS d/b/a FREMONT ABBEY ARTS CENTER 4272 FREMONT AVE N SEATTLE, WA 98103-7279 APPLICANT LICENSE APPLICATION NO. 407087 UBI: 602-244-815-001-0002	LCB NO. 24,734 OAH NO. 2013-LCB-0048 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:

NATHAN MARION, EXECUTIVE DIRECTOR ARTWERKS d/b/a FREMONT ABBEY ARTS CENTER 4272 FREMONT AVE N SEATTLE, WA 98103-7279	OFFICE OF THE ATTORNEY GENERAL MAIL STOP 40100, GCE DIVISION KIM O'NEAL, ASSISTANT ATTORNEY GENERAL

DATED this 20th day of March, 2014, at Olympia, Washington.

Kevin McCarroll, Adjudicative Proceedings Coordinator

RECEIVED
JAN 16 2014
Liquor Control Board
Board Administration

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

In the Matter of the Denial of the liquor license application for the privileges of a Non-Profit Art Organization license for: **ARTWERKS dba FREMONT ABBEY ARTS CENTER,** **4272 Fremont Ave. N.** **Seattle, WA 98103-7279,** **Respondent.**	**OAH Docket No. 2013-LCB-0048** **LCB No. 24,734** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND INITIAL ORDER**

I. ISSUE PRESENTED

Whether, as expressed in the Statement of Intent to Deny Liquor License, dated April 8, 2013, the Liquor Control Board correctly denied the application for a liquor license filed by Artwerks dba Fremont Abbey Arts Center.

II. ORDER SUMMARY

The Liquor Control Board, in its Statement of Intent to Deny Liquor license, dated April 8, 2013, did not correctly deny the application for a liquor license filed by Artwerks dba Fremont Abbey Arts Center.

III. HEARING

3.1 **Hearing Date:** October 14, 2013

3.2 **Administrative Law Judge:** Terry A. Schuh

3.3 **Respondent:** Artwerks, dba Fremont Abbey Arts Center

3.3.1 **Representative:** Nathan Marion, Executive Director, Artwerks

3.3.2 **Witnesses:**

3.3.2.1 Deborah Ferguson, Board President, Artwerks

3.3.2.2 Ivar Hillesland, Pastor, Church of the Apostles

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3.4 **Agency:** Liquor Control Board

3.4.1 **Representative:** Kim O'Neal, Senior Counsel, Office of the Attorney General

3.4.2 **Witnesses:**

3.4.2.1 Eddie Cantu, Licensing Manager, Liquor Control Board

3.4.2.2 Cheryl Foster, Licensing Lead, Liquor Control Board

3.4.2.3 Sherry Gutweiler, Licensing Investigator, Liquor Control Board

3.5 **Exhibits:** Agency Exhibits 1 through 4 and Respondent Exhibits A through I were admitted into the record.

IV. FINDINGS OF FACT

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

Jurisdiction

4.1 Artwerks dba Freemont Abbey Arts Center, 4272 Freemont Ave. N., Seattle, WA 98103-7279 ("Artwerks") applied for a nonprofit arts organization liquor license on September 25, 2012. Ex. 1, p. 2; Ex. F.

4.2 On April 8, 2013, the Liquor Control Board ("the Board") issued a Statement of Intent to Deny Liquor license, denying Artwerk's application. Ex. 1.

4.3 On April 26, 2013, Artwerks filed its appeal. Ex. H. p. 2.

The Board denied Artwerks application for a nonprofit arts organization liquor license

4.4 The Board denied Artwerks application for a nonprofit arts organization liquor license because Artwerks does not have exclusive control over the premises where Artwerks intends to sell and serve liquor. Testimony of Gutweiler; Testimony of Foster. In its denial of Artwerks's application, the Board listed as grounds RCW 66.08.010, RCW 66.08.030(12), RCW 66.24.010, WAC 310-02-010(16), and WAC 314-01-005(1). Ex. 1, p. 3.

4.5 The Board requires the licensee to have exclusive control over the

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premises because otherwise the Board cannot be certain whether any potential liquor violation is the fault of the licensee. Testimony of Gutweiler; Testimony of Foster. Moreover, only licensees are required to know and follow the liquor laws. Testimony of Gutweiler. Further, exclusive control over the premises is essential in order to observe and deny access to alcohol. Testimony of Gutweiler. Merely having control over the alcohol is insufficient. Testimony of Gutweiler; Testimony of Foster; Testimony of Cantu. The licensee is licensed to operate at a given premises. Testimony of Foster; Testimony of Cantu. For purpose of control, the Board looks to the premises leased or owned by the prospective licensee. Testimony of Gutweiler. The Board will not grant a license to an entity that shares control over the premises. Testimony of Cantu.

Artwerks lacks exclusive control over the premises

4.6 Artwerks is located in the Freemont Abbey. Testimony of Hillesland.

4.7 The Mission Investment Fund of the Evangelical Lutheran Church in America owns the Freemont Abbey. Testimony of Hillesland; Ex. 3, pp. 1, 4; Ex. D.

4.8 The Mission Investment Fund of the Evangelical Lutheran Church in America leases the Freemont Abbey to the Church of the Apostles ("the Church"). Testimony of Hillesland.

4.9 The Church subleases Freemont Abbey to Artwerks. Testimony of Hillesland.

4.10 The Church's sublease to Artwerks is consented to and approved by the Mission Investment Fund of the Evangelical Lutheran Church in America. Ex. B, p. 2.

4.11 The Church Office, Worship and Music Director's Office, St. Paul's Chapel, Organ Loft, and the fourth floor are exclusively controlled by the Church. Ex. 3, p. 5.

4.12 Artwerks's Arts Center Office is exclusively controlled by Artwerk's. Testimony of Hillesland.; Ex. 3, p. 5. However, the Church has a key and the ability to access that space. Testimony of Hillesland.

4.13 Except as noted above, Artwerks and the Church share Freemont Abbey. Ex. 3, pp. 5-6, 9. Generally, Monday through Saturday, Artwerk's occupies, uses, and is responsible for Freemont Abbey. Ex. 2, p. 1; Ex. 3, pp. 5-6. Generally, Sunday, the Church occupies, uses, and is responsible for Freemont Abbey. Ex. 2, p. 1. Ex. 3, pp. 5-6; Ex. E. The Church also occupies, uses, and

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is responsible for Freemont Abbey on specified religious holidays and events, as described in the lease. Ex. 3, p. 6.

Artwerks intends to sell and serve liquor

4.14 Throughout the year, Artwerks is a nonprofit arts organization which hosts art and cultural events at Freemont Abbey. Ex. E.

4.15 Artwerks wishes to sell and serve liquor at certain, if not most, of these events. Ex. E.

4.16 Neither Artwerks nor the Church intends that the Church will share or otherwise use the liquor license for which Artwerks applied. Testimony of Hillesland; Ex. C.; Ex. E.

4.17 Artwerks does not keep an inventory of liquor except for that left over following an event. Testimony of Ferguson. Artwerks stores its left-over liquor in locked cabinets. Ex. C. Although the Church has access to the room housing the locked liquor cabinets, it does not have access to the locked liquor cabinets themselves. Testimony of Hillesland; Ex. 2, p. 1; Ex. C; Ex. E.

4.18 Artwerks is willing to staff the building at all times it is open to the public in order to assure the security of its liquor inventory. Testimony of Ferguson; Ex. E.

Artwerks had a previous liquor license

4.19 The Board previously issued Artwerks a nonprofit liquor license that was effective December 2010 through June 30, 2012. Ex. 1, p. 2.

4.20 Artwerks control over the premises that comprise Freemont Abbey was essentially the same then as it is now. Testimony of Ferguson.

4.21 The Board issued the prior liquor license to Artwerks because it did not at that time know that Artwerks lacked exclusive control over Fremont Abbey. Testimony of Cantu.

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 314-07-070,

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chapter 34.05 RCW, and chapter 10-08-WAC.

The Board did not correctly deny Artwerks's Liquor License application

5.2 "There shall be a license to be designated as a nonprofit arts organization license. This shall be a special license to be issued to any nonprofit arts organization which sponsors and presents productions or performances of an artistic or cultural nature in a specific theater or other appropriate designated indoor premises approved by the board. The license shall permit the licensee to sell liquor to patrons of productions or performances for consumption on the premises at these events." RCW 66.24.495(1) (in pertinent part).

5.3 Artwerks is a nonprofit arts organization that applied for a license to sell liquor to patrons at its events. Accordingly, Artwerks was an entity qualified to apply for a nonprofit arts organization license.

5.4 When considering the application for a new or renewal license, the Board may inspect and "inquire into all matters in connection with the . . . operation of the premises." RCW 66.24.010(2).

5.5 Therefore, the Board's focus on the operation of Artwerks's premises was apt.

5.6 Moreover, the Board may make regulations under chapter 34.05 RCW in any of 20 different areas including, "prescribing the conditions, accommodation, and qualifications requisite for the obtaining of licenses to sell beer, wines, and spirits, and regulating the sale of beer, wines, and spirits". RCW 66.08.030(12).

5.7 The method by which an agency makes regulations under chapter 34.05 is to promulgate administrative code provisions. Here, the Board has done so, creating Title 314, including WAC 314-07-065, in which the Board provides a list of nine reasons for denying a liquor license application: "failure to meet [relevant] qualifications or requirements" expressed in Title 314 WAC or Title 66 RCW; failure to submit requested information or documentation; misrepresentation; criminal history; prior liquor law violations; questionable or unverified funding; objections from the local authority or public; objections from selected entities located within 500 feet of the applicant; and not in the best interests of the welfare, health, and safety of the public. The Board did not specifically rely on any provision in WAC 314-07-065 in its Statement of Intent to Deny Liquor License. Instead, the Board listed as grounds RCW 66.08.010, RCW 66.08.030(12), RCW 66.24.010, WAC 310-02-010(16), and WAC 314-01-005(1). Thus, the Board apparently relied upon WAC 314-07-065(1), which provides that the Board may deny a liquor license application for "failure to meet qualifications or requirements for the specific liquor license or privilege, as outlined in this Title

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314 WAC or Title 66 RCW." Accordingly, I will address each specific provision recited by the Board in its denial.

5.8 RCW 66.08.010 is the preamble to Title 66, and provides: "This entire title shall be 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." Nothing it that provision speaks specifically to the qualifications of a prospective licensee, much less to any qualification not met by Artwerks.

5.9 RCW 66.08.030(12), already recited above, provides that the Board is empowered to determine the basis for issuing licenses. It requires the Board to express those requirements in the form of codified regulations. Nothing in that provision speaks specifically to the qualifications of a prospective licensee, much less to any qualification not met by Artwerks.

5.10 RCW 66.24.010 covers several topics. The only provision in that section of relevance in this matter is the provision recited above in subsection (2) that the Board may inspect and inquire regarding the premises of the prospective licensee. Nothing in that provision speaks specifically to what aspects of the prospective licensee's premises should be considered; nothing in that provision suggests any aspect regarding premises that Artwerks arguably has failed to satisfy; nothing in that provision requires a prospective licensee to have control, much less exclusive control, over its premises.

5.11 WAC 310-02-010 is a definitions section created "to clarify the purpose and intent of the rules and laws governing liquor licenses and permits". In other words, it clarifies rules and laws by defining terms used in those rules and laws, and no more. Nevertheless, the Board relies on subsection (16): "'On-premises liquor licensed premises' means a building in which a business is located inside that is allowed to sell alcohol for consumption on the licenses premises." In other words, "premises" means where the alcohol is sold for consumption. That clarifies what it is that the Board considers when it considers "premises". However, nothing in that provision speaks specifically to what conditions about premises are considered when determining whether to grant a license, much less any conditions arguably not satisfied by Artwerks. It does not require the prospective licensee to have control, much less exclusive control, over its premises.

5.12 Finally, WAC 314-01-005 is another definitions section with effectively the same purpose and limitations attributed to WAC 310-02-010. The Board relies on subsection (1): "'Licensed premises' or 'premises' means all areas of a premises under the legal control of the licensee and available to or used by customers and/or employees in the conduct of business operations. Specific

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alcohol consumption areas of a licensed premises shall be approved by the board." This section makes clear that premises means that which is legally controlled by the licensee and available for operations and that the Board must approve of where on the premises alcohol may be consumed. Nothing in that provision requires the licensee to have "exclusive" legal control.

5.13 Here, the Board clearly is both privileged and responsible for determining that the character of a prospective licensee's premises is apt when determining whether to grant a license and what qualifications about that character apply. Further, the Board has clearly and persuasively argued why it requires the prospective licensee to have exclusive control over the premises. However, the legislature directed the Board, in exercising the authority granted to it by the legislature, to develop rules in the manner prescribed by the Administrative Procedures Act in chapter 34.05 RCW. The Board has adopted no such rule as to exclusive control over the premises. To be sure, the legislature also provided that the provisions of Title 66 are to be liberally construed. But one cannot liberally construe a provision that is not there, particularly when the legislature instructed the agency to makes its rules expressed.

5.14 Accordingly, I hold that the Board has not demonstrated that Artwerks's application for a nonprofit arts organization liquor license should be denied under any provision of WAC 314-07-065.

5.15 Therefore, the Board's denial of Artwerks's application for a nonprofit arts organization liquor license should be set aside.

INITIAL ORDER

IT IS HEREBY ORDERED THAT:

The Washington State Liquor Board's denial of the application for a Nonprofit Arts Organization Liquor License filed by Artwerks dba Fremont Abbey Arts Center, 4272 Fremont Ave. N., Seattle, WA 98103-7279, said denial as expressed in the Statement of Intent to Deny Liquor License dated April 8, 2013, is **SET ASIDE.**

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

Terry A. Schuh
Lead Administrative Law Judge
Office of Administrative Hearings

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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

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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 FOR OAH DOCKET NO. 2013-LCB-0048

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

Artwerks dba Fremont Abbey Arts Center 4272 Fremont Ave N Seattle, WA 98103-7279 ***Respondent***	☒ First Class US mail, postage prepaid ☐ Certified mail, return receipt ☐ Campus Mail ☐ Facsimile ☐ First Class, postage prepaid, Certified mail, return receipt
S. Kim O'Neal Senior Counsel Office of the Attorney General 1125 Washington St SE PO Box 40100 Olympia, WA 98504-0100 **Fax:** (360) 664-0229 ***Agency Representative***	☒ 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 Washington State Liquor Control Board 3000 Pacific Ave SE PO Box 43076 Olympia WA 98504-3076 **Fax:** (360) 586-3190 ***Department Representative***	☒ First Class US mail, postage prepaid ☐ Certified mail, return receipt ☐ Campus Mail ☐ Facsimile ☐ First Class, postage prepaid, Certified mail, return receipt

Date: Friday, December 13, 2013

OFFICE OF ADMINISTRATIVE HEARINGS

Audrey C. Chambers
Legal Secretary

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Liquor Control Board
Board Administration

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

In the Matter of the Denial of the liquor license application for the privileges of a Non-Profit Arts Organization license for: JUSTIN HARVEY ARTWERKS dba FREMONT ABBEY ARTS CENTER, 4272 Fremont Ave. N. Seattle, WA 98103-7279, Respondent.	LCB NO. 24,734 OAH Docket No. 2013-LCB-0048 LICENSING DIVISION'S PETITION FOR REVIEW

I. INTRODUCTION

The Licensing Division of the Liquor Control Board petitions for review of the Findings of Fact, Conclusions of Law, and Initial Order issued in this matter on December 13, 2013. The Division requests that the Board correct the determination that a nonprofit arts organization license can be issued to an organization that does not legally or in practice have exclusive control over the proposed licensed premises at all times. The Division believes that proper enforcement, supervision and control cannot be maintained over the licensed premises and the licensee under these circumstances and that the Board's broad legal discretion permits the license to be denied in this case. The Division urges the Board to uphold its longstanding policy that has been consistently applied to deny liquor licenses to applicants who do not possess the legal and physical exclusive control over the premises where the liquor license is being sought. The Division respectfully disagrees with the conclusions reached in the

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December 13, 2013, Initial Order and requests the Board to affirm its denial of the license in this case.

II. ASSIGNMENTS OF ERROR

1. The Division assigns error to Finding of Fact 4.13 only in that it does not include the facts that the Church is legally entitled under the lease with Artwerks to use Fremont Abbey throughout the year on any day and at any time Artwerks is not using it without prior notice or arrangement. Effectively the Church has as much or more control over Fremont Abbey, including the areas where liquor is to be served if the liquor license is granted as the license applicant has. Exhibit 3, Exhibit E. In all other respects the Division accepts Finding of Fact 4.13.

2. The Division assigns error to Conclusion of Law 5.8 only in that it does not acknowledge that the Board has broad legal discretion to act on liquor license applications to protect the public welfare, health, peace, morals, and safety which discretion must be applied in considering whether any license denial decision is legally appropriate. Because the last sentence of Conclusion of Law 5.8 concludes that RCW 66.08.010 does not apply to the decision to deny the liquor license in the absence of a specific reference to a regulation or statute speaking specifically to a licensee's qualification and fails to accept this statute's application in this case to support the license denial which was done for reasons of public welfare, health, peace, morals and safety, the Division assigns error to it.

3. The Division assigns error to Conclusion of Law 5.9 in that it does not construe RCW 66.08.030(12) to provide broad legal discretion to the Board to decide whether to grant or to deny a liquor license application. In conjunction with RCW 66.08.010, this statute should be construed to support the license denial in this case for reasons of public safety, and because Conclusion of Law 5.9 does not do so, the Division assigns error to it.

4. The Division assigns error to Conclusion of Law 5.10 because it incorrectly fails to recognize the several provisions in RCW 66.24.010 which support the denial of the

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license in this case as well as failing to correctly construe the breadth and reach of the legal authority this statute gives to the Board in license application decisions. RCW 66.24.010(1) states that a license must be issued in the name of the applicant which must not permit any other person to use the license. This license applicant subleases and could not exclude building owners or other lessees from the areas where liquor is stored and sold in potential violation of this legal requirement, which the Initial Order did not recognize. This statute also states, "Subject to the provisions of this section, the board, may in its discretion, grant or deny the renewal or license applied for." The Initial Order incorrectly limits the reach of this broad grant of authority to deny a license by requiring it to be exercised only through specific regulations.

5. The Division assigns error to Conclusion of Law 5.11 because it incorrectly fails to apply the definitions in WAC 310-02-010 to all statutes as well as to all regulations governing licenses and permits. Conclusion of Law 5.11 suggests that those definitions can apply only to specific regulations regarding specific license qualifications and does not recognize that it applies to all **laws** governing liquor licenses, including the Board's broad legal authority to decide whether to grant or deny liquor licenses. Furthermore, Conclusion of Law 5.11 incorrectly construes the language in WAC 310-02-010(16) which defines "on-premises liquor licensed premises" to be the building in which a business is located that is allowed to sell alcohol for consumption on the premises. That language supports the decision to deny the license in this case because the applicant did not control the premises for which it was applying for a license. Conclusion of Law 5.11 does not correctly apply this language to support the decision to deny the liquor license in this case, and the Division assigns error to it.

6. The Division assigns error to Conclusion of Law 5.12 because it misconstrues the language of WAC 314-01-005, which defines "licensed premises" or "premises" to mean all areas of a premises under the legal control of the licensee and available to or used by customers and/or employees in the conduct of business operations and gives the Board the

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legal right to approve all areas where alcohol will be consumed as not supporting the decision to deny the liquor license in this case where the areas where liquor is to be sold are not under the control of the applicant. Correctly understood, the language in this regulation supports the decision to deny the license in this case because the applicant does not control the premises where it proposes to sell liquor and also because this regulation provides authority to the Board to approve or disapprove the areas where liquor will be sold. Such approval cannot be given in this case because the applicant lacks control over the premises where it proposes to sell alcohol. Because such control is lacking throughout the areas where the applicant proposes to sell alcohol, the license application was properly denied. Because Conclusion of Law 5.12 does not recognize that WAC 314-02-01-(1) supports the decision to deny the license application in this case, the Division assigns error to it.

7. The Division assigns error to Conclusion of Law 5.13 because it concludes that the Board's broad legal discretion to grant or deny licenses for the public health and safety cannot be exercised except through specific regulations that enumerate each and every basis upon which it might conclude denying a license might be necessary. The conclusion that the Board cannot deny a license unless a specific regulation states each ground upon which the denial is appropriate incorrectly construes the broad legal discretion that the statutes discussed above provides to the Board in deciding whether to grant or deny a license. Conclusion of Law 5.13 recognizes and accepts the policy behind the license denial in this case and was persuaded the reasons for the denial would justify the decision. Conclusion of Law 5.13 incorrectly limits the scope of the Board's legal authority to decide to deny a license where public welfare, health, peace, morals and safety require it, and the Division assigns error to it.

8. The Division assigns error to Conclusion of Law 5.14 because it incorrectly holds that the Division was legally required to demonstrate that Artwerks' liquor license application should be denied under WAC 314-07-065, and that it failed to do so.

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9. The Division assigns error to Conclusion of Law 5.15 because it incorrectly holds that the denial of Artwerks' liquor license application should be set aside.

III. ARGUMENT

Under Liquor Board regulations, a liquor licensee must have exclusive control of the premises where liquor is to be sold and served. WAC 314-01-005(1). The licensee is responsible to the Board under its license for everything that occurs on the licensed premises, which is defined as all areas available to or used by customers. By definition, liquor licensed premises where liquor is sold for consumption on the premises means the building in which the business is located. WAC 314-02-010(16). The Board has statutory authority to prescribe and regulate the conditions and qualifications required of licensees who sell liquor. RCW 66.08.030(12). A licensee may not permit anyone else to use the license issued to it. RCW 66.24.010(1).

This applicant only periodically has legal control over the premises where it proposes to be licensed to sell liquor for consumption on the premises. The Board has not granted licenses to applicants for premises unless the applicants have exclusive control over the place where they propose to conduct the licensed business, which was confirmed by the Board witnesses who testified at the hearing. The Board witnesses testified that the reason for this requirement is so that liquor is served only by those licensed to do so, to protect public safety by controlling the licensee authorized to sell liquor on premises, and to make sure that if violations occur on the licensed premises, the Board will be able to hold the licensee responsible. If a violation were to occur at Fremont Abbey, this applicant could argue that others who have the legal and actual right to be there and to control the premises were responsible for the violation, and the Board would have no legal right to charge either the licensee or those responsible or hold them accountable for the violation.

The Board's regulatory control and its ability to hold the licensee responsible for what happens on the licensed premises would be impermissibly limited if a liquor license were

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granted to an entity that does not itself have legal control over the place it proposes to conduct the licensed business. Judge Schuh understood the policy reasons behind the requirement and agreed with the rationale behind having such a requirement. He concluded that the Board's legal authority to impose or enforce such a requirement could only be exercised if it had published a specific regulation stating that requirement in those words.

The Board's legal authority is extensive, and it is to be broadly construed, particularly in cases involving deciding whether to grant a liquor license. RCW 66.24.010. If the Board were required to publish a specific rule for every possible reason it might need to deny a license application, the resulting rules would be unwieldy, burdensome and impractical. In the same way that negligence standards are considered on a case-by-case basis in terms of what a reasonable person would do, the Board has authority to consider specific license applications based upon its duty to protect public health and safety and its duty to closely regulate the sale of alcohol. The Board's authority is not as limited as this hearing tribunal construed it in this case. As construed by the Initial Order, the Board's legal authority to deny a license application is as constrained or more constrained than its legal authority to suspend or revoke a license, which is an incorrect construction of that authority.

The definition of licensed premises in WAC 314-02-010(16) and in WAC 314-01-005(1) define the premises as the building where the business is located and includes all areas that customers or business employees might access. The areas of the Fremont Abbey where liquor will be served and/or stored were established at the hearing to be only periodically, and never exclusively, under the legal control of the license applicant. That is a sufficient basis for the Board's decision to deny this license application, and the Initial Order was incorrect in concluding a specific regulation was necessary. There simply is no substitute for holding the exclusive right to control all of the premises where liquor will be sold, served, and stored The applicant and the buildings' owners have the ability to create legal control for the applicant that would be sufficient, but they have not done so under their existing legal agreements. The

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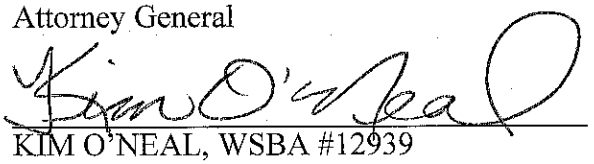
Board has the legal authority to deny this application, and the recommendation to deny should be upheld.

IV. CONCLUSION

The Initial Order found that the license applicant did not have exclusive control over the proposed licensed premises. It also accepted the Board witnesses' explanation of the policy reasons for requiring such exclusive control. The Order erred in concluding that the license application could not be denied because the Board's broad legal authority to consider and decide license applications must only be exercised when a specific regulation embodies the reason for denial. The Board's broad legal authority, when correctly construed along with the regulations the Board has adopted provides a sufficient basis for denying this application. The Initial Order should be revised to reflect that there is legal authority to deny, and that the application is denied.

DATED this 2nd day of January, 2014.

ROBERT W. FERGUSON
Attorney General



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