**BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD**

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|---|---|
| IN THE MATTER OF:<br><br>OLUT INC<br>d/b/a TAILGATOR<br>1805 HEWITT AVE<br>EVERETT, WA 98201-3610<br><br>LICENSEE<br><br>LICENSE NO. 352513<br>AVN NO. 3F3091A | LCB NO. 24,759<br>OAH NO. 2013-LCB-0032<br><br>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 May 20, 2013, alleging that on January 25, 2013 the above-named Licensee, or employee(s) thereof, allowed disorderly conduct by an apparently intoxicated person on the licensed premises which presented a threat to public safety resulting in an assault on a patron in violation of WAC 314-11-015(2), (3), and also in violation of WAC 314-16-150(2).
2. The Licensee made a timely request for a hearing.
3. An administrative hearing was held November 4-6, 2013 before Administrative Law Judge Lisa N.W. Dublin with the Office of Administrative Hearings.
4. At the hearing, Assistant Attorney General Kim O'Neal represented the Education and Enforcement Division of the Board and Attorney James H. Johanson represented the Licensee.
5. On January 3, 2014 Administrative Law Judge Lisa N.W. Dublin entered her Findings of Fact, Conclusions of Law and Initial Order in this matter, holding that the Licensee did not

violate WAC 314-11-015(2), (3), and also found no violation of WAC 314-16-150(2), and therefore assessed no penalty.

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 24,759 is DISMISSED.

DATED at Olympia, Washington this 4th day of February, 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.

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**

February 5, 2014

Jim Johanson
Johanson Law Group
7009 212th Street SW #203
Edmonds, WA 98026-7742

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

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***
***LICENSEE: Olut Inc***
***TRADE NAME: Tailgator***
***LOCATION: 1805 Hewitt Ave, Everett, WA 98201***
***LICENSE NO. 352513***
***LCB HEARING NO. 24,759***
***OAH NO. 2013-LCB-0032***
***AVN NO. 3F3091A***
***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**

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|---|---|
| IN THE MATTER OF:<br><br>OLUT INC<br>d/b/a TAILGATOR<br>1805 HEWITT AVE<br>EVERETT, WA 98201-3610<br><br>LICENSEE<br><br>LICENSE NO. 352513<br>AVN NO. 3F3091A | LCB NO. 24,759<br>OAH NO. 2013-LCB-0032<br><br>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:

| | |
|---|---|
| JIM JOHANSON<br>JOHANSON LAW GROUP<br>7009 212TH STREET SW #203<br>EDMONDS, WA 98026-7742 | OFFICE OF THE ATTORNEY GENERAL<br>MAIL STOP 40100, GCE DIVISION<br>KIM O'NEAL,<br>ASSISTANT ATTORNEY GENERAL |
| BOE LINDGREN<br>OLUT INC<br>d/b/a TAILGATOR<br>4411 CALIFORNIA AVE SW<br>SEATTLE, WA 98116-4108 | |

DATED this 5th day of February, 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
JAN 16 2014
Liquor Control Board
Board Administration

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

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|---|---|
| **In The Matter Of:**<br><br>**OLUT, INC.,**<br><br>**LICENSE NO. 352513**<br>**AVN NO.: 3F3091A**<br><br>**Appellant.** | **OAH Docket No. 2013-LCB-0032**<br>**LCB No. 24,759**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND INITIAL ORDER** |

## I. ISSUES PRESENTED

1.1 On or around January 25, 2013, did Appellant and/or it employee(s) allow disorderly conduct by an apparently intoxicated person on the licensed premises, presenting a threat to public safety resulting in an assault on a patron, in violation of WAC 314-11-015(2) and (3), and WAC 314-16-150(2)?

1.2 If so, what is the appropriate penalty?

## II. ORDER SUMMARY

On or around January 25, 2013, Appellant and/or its employees did not allow disorderly conduct by an apparently intoxicated person on the licensed premises, in violation of WAC 314-11-015(2) and (3), and WAC 314-16-150(2). No penalty is assessed.

## III. HEARING

3.1 **Hearing Date:** November 4-6, 2013[1]

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

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

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

3.3.2 **Witnesses:**

[1] The hearing in this matter took place concurrently with the hearing on OAH Case Nos. 2013-LCB-0031 and 2013-LCB-0057.



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3.3.2.1 Boe Lindgren, owner

3.3.2.2 Scott Milner, employee

3.3.2.3 Leroy "Brad" Barrows, employee

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

3.4.1 **Representative:** Kim O'Neal, Assistant Attorney General

3.4.2 **Witnesses:**

3.4.2.1 Officer Dwight D. Snyder, Everett Police Department

3.4.2.2 Detective Corey Barrows, Everett Police Department

3.4.2.3 Board Enforcement Officer Roxanne "Dee" Johnson

3.4.2.4 Cherish Hansen, patron

3.4.2.5 Jennifer Harvey, patron

3.5 **Exhibits:** Board Exhibits 1-25, as well as Appellant's Exhibit 1, 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 April 19, 2013, Liquor Enforcement Officer Roxanne (Dee) Johnson served Administrative Violation Notice (AVN) No. 3F3091A on Boe Lindgren, Owner of Appellant.

4.2 On or about April 29, 2013, Mr. Lindgren requested an administrative hearing.

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 has owned Tailgator since approximately 2009.



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4.4 Tailgator is a two-floor establishment, with a maximum total capacity of 203 people. According to the Everett Fire Department, each floor does not have a separate total capacity. The main floor consists of a bar and tables. On the upper floor, there is another bar, more tables, and a dance floor. Tailgator security personnel maintain a presence on both floors.

4.5 In approximately July 2010, the Board cited Tailgator for allowing an apparently intoxicated person to possess or consume liquor, in violation of State law. Following an administrative hearing, this violation was upheld, and Tailgator paid $500.00 in lieu of a 5-day suspension. Ex. 1. One year later, in approximately July 2011, the Board cited Tailgator for disorderly conduct. Tailgator did not contest this citation, and paid $500.00 in lieu of a 5-day suspension. *Id.*

4.6 In September 2011, Mr. Lindgren obtained his advanced certificate in the ServSafe Alcohol Responsible Alcohol Service Training and Certification Program, with a 100% score on the subject of "Handling Difficult Situations," and a nearly perfect score on the subject of "Assessing Intoxication". Ex. 5, p.5. Mr. Lindgren maintains a log of notable incidents that take place at Tailgator, and gives ready access to this log to Board enforcement officers.

Cherish Hansen

4.7 On Friday night, January 25, 2013, Tailgator was busy as usual on Friday evenings. Two Tailgator security personnel were upstairs; a third security employee was downstairs at the door. Patrons were upstairs dancing, and the dance floor was crowded such that patrons rubbed shoulders in passing.

4.8 Shortly after midnight that night, Cherish Hansen arrived at Tailgator with friends, and made her way upstairs, where she saw some other friends on the dance floor. Ms. Hansen went out to the dance floor to join these friends. Later, as she walked off the dance floor, Ms. Hansen bumped shoulders with a Tailgator patron named Mary, a Tailgator regular. Mary grabbed Ms. Hansen's arm, pulled her around, screamed and cussed at her, and hit her in the face with a beer glass, significantly injuring Ms. Hansen's mouth.

4.9 At this point, witness testimony conflicted on material points. Ms. Hansen's longtime friend, Jennifer Harvey, who was present upstairs at Tailgator at the time of this incident, testified that a fight ensued between Ms. Hansen and Mary. After Mary hit Ms. Hansen, Ms. Hansen hit Mary, and the two fell to the floor and fought until Tailgator security personnel separated them. Ms. Hansen, on the other hand, testified that she did not hit Mary back, and did not fight with Mary after Mary hit her.



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4.10 Having carefully considered and weighed all of the evidence, including witness demeanor (as determined by voice, attitude, straightforwardness, unreasonable hesitancy in responses), party motivations, the reasonableness and consistency of testimony throughout the hearing and as related to prior document submissions in connection with the benefits claim and claim response, and the totality of the circumstances presented, I resolve the conflicting evidence in favor of Ms. Harvey. Ms. Harvey's testimony about the incident is consistent with her prior written statement to EPD, and consistent with the testimony of Enforcement Officer Johnson and security personnel, whereas Ms. Hansen's testimony is contrary to the weight of evidence and self-serving.

4.11 Witness testimony also conflicted on the material issue of whether Mary displayed signs of intoxication on January 25, 2013. Ms. Hansen testified that Mary was very intoxicated. Ms. Hansen also told Enforcement Officer Johnson several weeks after the incident that Mary smelled like alcohol that evening, that her speech was slurred, and that she staggered when she walked. *See* Ex. 24, p.3. However, Mr. Lindgren testified that he did not observe any signs that Mary was apparently intoxicated when he saw her just after the incident. Nor did either of the two security guards testify that Mary was apparently intoxicated that evening. Rather, they and Mr. Lindgren testified that Mary had patronized Tailgator several times over the previous years, enjoyed dancing there, and had not previously displayed signs of intoxication nor ever started a fight.

4.12 Again, having carefully considered and weighed all of the evidence, including witness demeanor (as determined by voice, attitude, straightforwardness, unreasonable hesitancy in responses), party motivations, the reasonableness and consistency of testimony throughout the hearing and as related to prior document submissions in connection with the benefits claim and claim response, and the totality of the circumstances presented, I resolve the conflicting evidence in favor of Tailgator. The weight of evidence establishes that it was not apparent that Mary was intoxicated prior to, or at the time of, the altercation with Ms. Hansen.

4.13 Security personnel collectively responded swiftly to the fight between Mary and Ms. Hansen. They escorted both Ms. Hansen and Mary out of Tailgator, and permanently barred Mary from the premises. Throughout, Mary did not resist security personnel. Once outside, security personnel continued to direct Mary away from Tailgator. Because (1) the altercation was over, and (2) neither Tailgator security personnel nor Mr. Lindgren understood the extent of Ms. Hansen's injuries, Tailgator did not call law enforcement or medical aid to the scene. Nor did Mr. Lindgren enter this incident into his daily log.

4.14 The Board presented significant testimony regarding the extent of Ms. Hansen's mouth injuries, the oral and plastic surgery Ms. Hansen underwent



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and/or still needs, and that Tailgator did not call Ms. Hansen a cab, ambulance, or police support despite her repeated requests. While this testimony and related evidence may be relevant in other civil and/or criminal actions between Ms. Hansen, Mary, and/or Tailgator, it is outside the scope of the present matter.

4.15 Ms. Hansen drove herself to the hospital from Tailgator. While at the hospital, Ms. Hansen reported the incident to a police officer, and a criminal investigation ensued. *See* Ex. 25. On or around March 7, 2013, nearly six weeks after the incident, Mr. Lindgren attended a meeting with local law enforcement officers, which Enforcement Officer Johnson also attended. When Detective Barrows brought up the January 25, 2013 incident, Mr. Lindgren did not recall it. Nor did he recall it after this meeting when Enforcement Officer Johnson asked him about it. Later, Mr. Lindgren talked with staff who helped him remember the incident. On March 14, 2013, Detective Barrows found sufficient evidence to support probable cause to charge Mary with second degree assault (RCW 9A.36.021). *See* Ex. 25, p.9.

4.16 Enforcement Officer Johnson also investigated the January 25, 2013 incident and on April 19, 2013, served Mr. Lindgren with an Administrative Violation Notice (AVN) against Tailgator for allowing disorderly conduct in violation of WAC 314-11-015(2). *See* Exs 23 & 24.

4.17 On May 20, 2013, the Board issued a Complaint, alleging that on or about January 25, 2013, Tailgator allowed disorderly conduct by an apparently intoxicated person on the licensed premises which presented a threat to public safety resulting in an assault on a patron in violation of WAC 314-11-015(2), (3), and WAC 314-16-150(2).

## 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.

Tailgator did not permit disorderly conduct on the licensed premises.

5.2 Licensees have the responsibility to conduct the licensed premises in compliance with Chapter 9A RCW. WAC 314-11-015(2). Licensees also have the responsibility to control the conduct of patrons on the premises at all times. WAC 314-11-015(3). Except as otherwise provided by law, licensees or



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employees may not permit any disorderly person to remain on the licensed premises; nor may licensees or employees allow behavior that provokes conduct which presents a threat to public safety. *Id.*

5.3 No retail licensee shall permit any person apparently under the influence of liquor to physically possess liquor on the licensed premises. WAC 314-16-150(2). "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).

5.4 "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.

5.5 The weight of credible evidence establishes that Tailgator did not (1) permit a disorderly person to remain on the premises, (2) allow behavior that provoked conduct threatening public safety, nor (3) allow an apparently intoxicated person to possess liquor on the premises. Mary, a Tailgator regular, had not previously started fights or acted in a disorderly manner while at Tailgator. Nor is there evidence on record that she was behaving in a disorderly or threatening manner on January 25, 2013 prior to her fight with Ms. Hansen. There is insufficient evidence that Mary was apparently intoxicated up until the time she started the fight.

5.6 The night of January 25, 2013, upstairs at Tailgator, the number of people on and around the dance floor made it difficult to move around without touching others. When Ms. Hansen inadvertently bumped into Mary, Mary snapped and started a fight. Tailgator security personnel were stationed on the facility's upper level, responded appropriately, ushered Mary and Ms. Hansen out of Tailgator, and told Mary never to return. Because Appellant neither tolerated Mary's threatening behavior toward Ms. Hansen, nor allowed Mary to remain on the premises after she displayed it, Tailgator did not violate WAC 314-11-015(2) or (3), nor WAC 314-16-150(2). Consequently, no penalty is assessed.

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## INITIAL ORDER

IT IS HERBY ORDERED THAT:

Appellant did not violate WAC 314-11-015(2) or (3), and WAC 314-16-150(2) on January 25, 2013 by allowing disorderly conduct by an apparently intoxicated



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person on the licensed premises, presenting a threat to public safety resulting in an assault on a patron. No penalty is assessed.

**Signed and Issued** at Tacoma, Washington, on January 3, 2014.

L. Dublin

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

## 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.



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**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-0031 and 2013-LCB 0032

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

| | |
|---|---|
| **Olut Inc.**<br>**dba Tailgator**<br>**1805 Hewitt Avenue**<br>**Everett, WA 98201** | ☒First Class US mail, postage prepaid<br>☐Certified mail, return receipt<br>☐Campus Mail<br>☐Facsimile<br>☐1st Class, postage prepaid, Certified mail, return receipt |
| **Olut Inc.**<br>**dba Tailgator**<br>**4411 California Avenue SW**<br>**Seattle, WA 98116-4108** | ☒First Class US mail, postage prepaid<br>☐Certified mail, return receipt<br>☐Campus Mail<br>☐Facsimile<br>☐1st Class, postage prepaid, Certified mail, return receipt |
| **Jim Johanson**<br>**Johanson Law Group, Inc.**<br>**7009 – 212th Street SW #203**<br>**Edmonds, WA 98026** | ☒First Class US mail, postage prepaid<br>☐Certified mail, return receipt<br>☐Campus Mail<br>☐Facsimile<br>☐1st Class, postage prepaid, Certified mail, return receipt |
| **Kim O'Neal**<br>**Assistant Attorney General**<br>**Office of the Attorney General**<br>**Government Compliance & Enforcement Div.**<br>**PO Box 40100**<br>**Olympia, WA 98504-0100** | ☒First Class US mail, postage prepaid<br>☐Certified mail, return receipt<br>☐Campus Mail<br>☐Facsimile<br>☐1st Class, postage prepaid, Certified mail, return receipt |
| **Kevin McCarroll**<br>**Adjudicative Proceedings Coordinator**<br>**Washington State Liquor Control Board**<br>**P.O. Box 43076**<br>**Olympia, WA 98504-3076** | ☒First Class US mail, postage prepaid<br>☐Certified mail, return receipt<br>☐Campus Mail<br>☐Facsimile<br>☐1st Class, postage prepaid, Certified mail, return receipt |

Date January 3, 2013

Cyndi Michelena
Office of Administrative Hearings



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