

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

NORTHWEST LAND BROKERS, INC.
d/b/a ICEHOUSE BAR & GRILL
7804 NE HIGHWAY 99
VANCOUVER, WA 98665

LICENSEE

LICENSE NO. 358188
AVN NO. 1L0231C

LCB NO. 23,753
OAH NO. 2010-LCB-0080

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 October 18, 2010 alleging that on or about August 19, 2010, the above-named Licensee, or an employee(s) thereof, gave, sold and/or supplied liquor to a person under the age of twenty-one (21), contrary to RCW 66.44.270 and WAC 314-11-020(1); and that on or about August 19, 2010, the above-named Licensee, or an employee(s) thereof, allowed a person under twenty-one (21) years of age to enter and remain in an area classified as off-limits to any person under the age of twenty-one (21), contrary to RCW 66.44.310 and WAC 314-11-020(2).
2. The Office of Administrative Hearings conducted a hearing on August 2, 2011 at the Licensee's timely request.
3. At the hearing, the Education and Enforcement Division of the Board was represented by Assistant Attorney General Brian Considine. Attorney at Law William Baumgartner represented the Licensee.

4. On September 30, 2011, Administrative Law Judge Katherine A. Lewis entered her Findings of Fact, Conclusions of Law and Initial Order in this matter, which affirmed the Complaint.
5. The Licensee filed a Petition for Review on October 18, 2011.
6. Enforcement's Response to Licensee's Petition for Review was filed on October 24, 2011.
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 that the Administrative Law Judge's Findings of Fact, Conclusions of Law and Initial Order heretofore made and entered in this matter be, and the same hereby are, AFFIRMED and adopted as the Findings of Fact, Conclusions of Law and Final Order of the Board, except for the following modification:

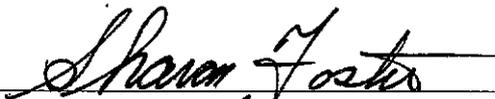
The Initial Order's Conclusion of Law No. 9 is MODIFIED to read as follows:

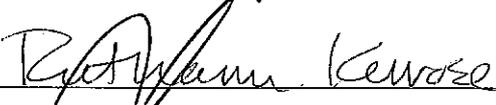
With regard to the licensee's objection to the use of pictures of the beer bottles rather than the bottles themselves, the undersigned notes that the actual penalty in this case is based on the "frequenting" allegation, not the service to the minor allegation. It is also noted that pursuant to RCW 34.05.452(1), evidence is admissible "if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." The undersigned finds no grounds to demand the Board produce the bottles themselves. They are not necessary, were not immediately available at the time of the hearing and would not be much more trustworthy than Officer Treco's testimony. Licensee's objection to Exhibit 7 is overruled.

IT IS HEREBY ORDERED that the liquor license privileges granted to Northwest Land Brokers, Inc. d/b/a Icehouse Bar & Grill, License No. 358188, are hereby suspended for a term of seven (7) days. Suspension will take place from 11:00 a.m. on December 8, 2011 until 11:00 a.m. on December 15, 2011. Failure to comply with the terms of this order will result in further disciplinary action.

DATED at Olympia, Washington this 1st day of NOVEMBER, 2011.

WASHINGTON STATE LIQUOR CONTROL BOARD







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**

November 3, 2011

William Baumgartner, Attorney for Licensee
112 West 11th Street, Ste 150
Vancouver, WA 98660-3359

Northwest Landowners Inc, Licensee
Icehouse Bar & Grill
9114 NE 40th Ave
Vancouver, WA 98665-3132

Brian Considine, 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: Northwest Landowners Inc
TRADE NAME: Icehouse Bar & Grill
LOCATION: 7804 NE Highway 99, Vancouver, WA 98665
LICENSE APPLICATION NO. 358188-1L
ADMINISTRATIVE VIOLATION NOTICE NO: 1L0231C
LCB HEARING NO. 23,753
UBI: 601 564 823 001 0003

Dear Parties:

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

If you have any questions, please contact me at (360) 664-1602.

Sincerely,

Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Tacoma and Vancouver Enforcement and Education Divisions, WSLCB
Teresa Young, WSLCB

WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

NORTHWEST LANDOWNERS INC
ICEHOUSE BAR & GRILL
d/b/a 7804 NE HIGHWAY 99
VANCOUVER, WA 98665

LICENSEE

LICENSE NO. 358188-1L
AVN NO: 1L0231C

LCB NO. 23,753
OAH NO. 2010-LCB-0080

DECLARATION OF SERVICE BY MAIL

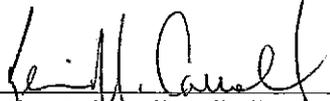
I certify that I caused a copy of the FINAL ORDER OF THE BOARD in the above-referenced matter to be served on all parties or their counsel of record by US Mail Postage Prepaid via Consolidated Mail Service for Licensees, by Campus Mail for the Office of Attorney General, on the date below to:

WILLIAM BAUMGARTNER,
ATTORNEY FOR LICENSEE
112 WEST 11TH STREET, STE 150
VANCOUVER, WA 98660-3359

BRIAN CONSIDINE, ASSISTANT ATTORNEY
GENERAL, GCE DIVISION
OFFICE OF THE ATTORNEY GENERAL
MAIL STOP 40100

NORTHWEST LANDOWNERS INC
d/b/a ICEHOUSE BAR & GRILL
9114 NE 40TH AVE
VANCOUVER, WA 98665-3132

DATED this 3rd day of November, 2011, at Olympia, Washington.


Kevin McCarroll, Adjudicative Proceedings Coordinator

DECLARATION OF SERVICE BY
MAIL

MAILED

SEP 30 2011

VANCOUVER OFFICE OF
ADMINISTRATIVE HEARINGS

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

In the Matter of:

NORTHWEST LAND BROKERS, INC.,
dba ICEHOUSE BAR & GRILL,

Respondent Licensee.

License No. 358188

OAH No.: 2010-LCB-0080

LCB No.: 23, 753

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND INITIAL ORDER**

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Liquor Control Board
Board Administration

TO: Northwest Land Brokers, Inc., License Holder
William Baumgartner, Attorney for License Holder
Brian Considine, Assistant Attorney General

PROCEDURAL HISTORY

Prior to hearing, the licensee filed a Motion to Suppress and Dismiss. The Liquor Control Board, through the Assistant Attorney General, thereafter filed a Reply to the licensee's Motion. Oral argument was made on April 20, 2011.

A Findings of Fact, Conclusions of Law and Order on the motions was issued on April 29, 2011 and is attached and incorporated by reference herein.

STATEMENT OF THE CASE

On August 26, 2010, the Washington State Liquor Control Board (Board) issued an Administrative Violation Notice (AVN) to Northwest Land Brokers, Inc. dba Icehouse Bar & Grill (Icehouse), 7804 NE Highway 99, Vancouver, Washington, 98665. In its notice, the Board made two allegations. The first was that on August 19, 2010, the Icehouse had violated the provisions of Revised Code of Washington (RCW) 66.44.270(1) by furnishing alcohol to a person under twenty-one (21) years of age. The second allegation was that a minor had been allowed to

frequent the premises in violation of RCW 66.44.310. (Exhibit 1).

The AVN assessed a penalty of a seven (7) day suspension of Icehouse's license as a penalty for the "minor frequenting" allegation and did not assess a separate penalty for the "sale and service" of alcohol allegation.

On October 18, 2010, the Board issued a Complaint in which it alleged that on or about August 19, 2010, the Icehouse, or an employee thereof, gave, sold and/or supplied liquor to a person under the age of twenty-one (21), contrary to RCW 66.44.270 and WAC 314-11-020(1). The Complaint also alleged that on or about August 19, 2010, the Icehouse, or an employee thereof, allowed a person under twenty-one (21) years of age to enter and remain in an area classified as off-limits to any person under the age of twenty-one (21), contrary to RCW 66.44.310 and WAC 314-11-020(2).

Following a timely appeal, hearing was held before Katherine A. Lewis, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), on August 2, 2011, in Vancouver, Washington. At hearing, the Board was represented by Brian Considine, Assistant Attorney General. The licensee, the Icehouse, appeared and was represented by William Baumgartner, Attorney at Law. Tony Plescia, Frank Rumble, Krista Call and Kathy Hunder appeared as witnesses for the licensee. Officer Kendra Treco and **UnderAgeOp** appeared as witnesses for the Board.

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

FINDINGS OF FACT

1. The licensee is Northwest Land Brokers Inc., doing business as the Icehouse Bar & Grill, a restaurant and lounge located at 7804 NE Highway 99, Vancouver, Washington 98665. It's license number issued by the Board is 358188.

2. Prior to the incident at issue, the Icehouse had incurred a prior violation and a few warnings.
3. On October 29, 2009, there was a written warning issued by the Board for sale or service to an apparently intoxicated person.
4. On February 27, 2010, the Icehouse incurred its first violation, No. 1L0058A, for sale or service to a minor and for a minor frequenting an area off-limits to minors.
5. On March 17, 2010, the Icehouse received a written warning for an employee consuming liquor while working on the premises.
6. On October 22, 2010, there was another written warning for allowing an apparently intoxicated person to consume alcohol on the premises.
7. These instances were each the result of compliance checks by Liquor Control Officers.
8. On Thursday, August 19, 2010, Liquor Control Officer Kendra Treco conducted a compliance check at the licensee's premises. Helping her with this check was **UnderAgeOp**, an 18-year-old investigative aide.
9. Prior to beginning the compliance check, Officer Treco searched **UnderAgeOp** and allowed her to have only her cell phone, cash given to her by the officer for making an alcohol purchase, and her identification, which showed her to be 18 years old on August 19, 2010. (Exhibit 3, page 1). Pictures of **UnderAgeOp** were also taken. (Exhibit 6).
10. At about 8:15 p.m., Officer Treco and **UnderAgeOp** entered the Icehouse, which was moderately busy that night, and sat at a table. Krista Call, a bartender working for the licensee approached the table and asked for their order.
11. **UnderAgeOp** ordered two beers. Ms. Call did not ask for her identification, but rather returned with two beers and took payment from **UnderAgeOp**.
12. Officer Treco took the beers from **UnderAgeOp** who then left the premises. She had spent

about ten minutes in the bar.

13. Ms. Call did not ask **UnderAgeOp** to prove her age as Ms. Call believed she had carded and served her earlier in the week.

14. In fact, **UnderAgeOp** had never been in the bar before.

15. Ms. Call also thought **UnderAgeOp** appeared to be 24-25 years old.

16. Later in the evening, Officer Treco poured out the beer from the bottles **UnderAgeOp** had purchased, marked and took pictures of them. (Exhibit 7).

17. The licensee objected to the introduction of these pictures of the bottles as not the best evidence, arguing the bottles themselves were the best evidence.

18. The Board, through the Assistant Attorney General, can provide the bottles if needed.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter pursuant to RCW 66.44, RCW 34.12, RCW 34.05, and WAC 10-08, WAC 314-11, WAC 314-16 and WAC 314.29.

2. As a licensed retail seller of liquor, the licensee is subject to the jurisdiction of the Washington State Liquor Control Board. The licensee is subject to the conditions and restrictions imposed by title 66 RCW and 314-11, 314-16 and 314-29 WAC.

3. Proceedings involving agency action are adjudicative proceedings under RCW 34.05. The Board has the authority to assign such proceedings to an administrative law judge pursuant to RCW 34.12. A proper hearing was provided in this case.

4. RCW 66.44.270 prohibits the sale of liquor to any person under the age of twenty-one years. The definition of liquor includes beer. RCW 44.04.010(20).

5. Chapter 314-11 WAC sets forth general requirements for liquor licenses and outlines the responsibilities of a liquor licensee. (WAC 314-005)
6. The Board, through its Liquor Enforcement Officers, conducts compliance checks to ensure individuals and establishments are complying with liquor regulations. These compliance checks involve sending a minor into a restricted premises, such as a bar, and having the minor attempt to buy or buy alcohol.
7. These minors are paid for their work and receive training from the officers. They engage in the compliance checks under the supervision of the officers. As ruled previously and reference herein, these compliance checks and the use of minors is not unlawful.
8. The Board has established by a preponderance of evidence that the Icehouse violated RCW 66.44.270 on August 19, 2010, by serving alcohol to the minor investigative aide, **UnderAge**
UnderAgeOp
9. With regard to the licensee's objection to the use of pictures of the beer bottles rather than the bottles themselves, the undersigned notes that the actual penalty in this case is based on the "frequenting" allegation, not the service to the minor allegation. It is also noted that pursuant to WAC 381-70-400, relevant evidence is the "best evidence reasonably obtainable, having due regard for its necessity, availability, and trustworthiness." The undersigned finds no grounds to demand the Board produce the bottles themselves. They are not necessary, were not immediately available at the time of the hearing and would not be much more trustworthy than the pictures and Officer Treco's testimony. Licensee's objection to Exhibit 7 is overruled.
10. The Board has also established by a preponderance of evidence that the Icehouse violated RCW 66.44.310 on August 19, 2010, by allowing **UnderAgeOp** to remain in an area classified by the Board as off-limits to anyone under 21 years of age.

11. The Board has the authority to establish an appropriate penalty as a matter of its discretion. Pursuant to RCW 66.24.010, the Board has the authority to suspend or cancel a Licensee's liquor license. Effective May 5, 2002, the Board has adopted as rules a set of "standard penalties" which may applied to certain offenses. WAC 314-29-015.
12. Because the violation by the Icehouse is its second within a two-year period, the mandatory penalty is a seven-day suspension of its license pursuant to WAC 314-29-020.

ORDER

IT IS HEREBY ORDERED THAT the Board's Complaint dated October 18, 2010, alleging violations of RCW 66.44.270 and RCW 66.44.310 on August 19, 2010 is **AFFIRMED**. The license privileges issued to Icehouse Bar & Grill, located at 7804 NE Highway 99, Vancouver, Washington 98665, license number 358188, shall be suspended for a period of seven (7) days on a date to be set by the Board in its final order.

DATED and mailed at Vancouver, Washington, this 30 day of Sept, 2011.

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS



Katherine A. Lewis
Administrative Law Judge
5300 MacArthur Blvd, Suite 100
Vancouver, WA 98661
Telephone: (360) 690-7189 or 1-800-243-3451
FAX: (360)

Mailed to:

Licensee:

Northwest Land Brokers, Inc
dba Icehouse Bar & Grill
7804 NE Highway 99
Vancouver, WA 98665

Licensee Representative:

William Baumgartner
Baumgartner, Nelson & Price, PLLC
112 West 11th Street, Suite 150
Vancouver, WA 98660

Assistant Attorney General:

Brian Considine, AAG
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100

Department Contact:

Kevin McCarroll
Adjudicative Proceedings Coordinator
Washington State Liquor Control Board
PO Box 43076
Olympia, WA 98504

INITIAL ORDER

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Docket: 2010-LCB-0080

Page 7

OFFICE OF ADMINISTRATIVE HEARINGS

5300 MacArthur Boulevard, Suite 100

Vancouver, Washington 98661

(360) 690-7189 or 1-800-243-3451

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 and WAC 314-42-095.

The petition for review must:

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

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

Address for filing a petition for review with the board:

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

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Liquor Control Board
Board Administration

Liquor Control Board
License Division

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

In the Matter of:

Northwest Land Brokers, Inc.,
dba Icehouse Bar & Grill,

Licensee.

License No. 358188

OAH Nos.: 2010-LCB-0080
LCB Nos.: 23,753

LICENSEE'S PETITION FOR REVIEW

Respondent Licensee Northwest Land Brokers, Inc. dba Icehouse Bar & Grill ("Licensee" or the "Icehouse Bar"), by and through its attorneys, William V. Baumgartner and Laurence R. Wagner, of Baumgartner, Nelson & Price, PLLC, submits this petition for review of the Office of Administrative Hearing Administrative Law Judge's Findings of Fact, Conclusions of Law and Initial Order entered in this matter on September 30, 2011 ("September Initial Order"). A copy of the September Initial Order is attached as Exhibit A. Licensee also appeals from the Findings of Fact, Conclusions of Law and Initial Order entered on April 29, 2011 ("April Initial Order"). A copy of the April Initial Order is attached as Exhibit B.

NATURE OF THE CASE

As is reflected in the Statement of The Case contained in the September Initial Order, this case arises out of a compliance check at the Icehouse Bar on August 19, 2010, conducted by the Washington State Liquor Control Board ("WSLCB" or the "Board"), Education and Enforcement Division ("Enforcement"). Enforcement used a minor investigative aide to conduct this compliance check on premises posted off-limits to minors. As a result of this

1 compliance check, on August 26, 2010, Enforcement issued the Icehouse Bar an Administrative
2 Violation Notice (“AVN”) for furnishing liquor to a minor in violation of RCW 66.44.270(1)
3 and allowing a minor to frequent an off-limits area in violation of RCW 66.44.310.

4 PROCEDURAL HISTORY

5 On October 18, 2010, the Board initiated this action by issuing a formal complaint
6 against the Icehouse Bar. On or about April 1, 2010, Licensee filed a motion to suppress and
7 dismiss this Complaint, on the grounds that the compliance check was unlawful for three
8 reasons. First, the compliance check utilized a minor investigative aide but was not conducted
9 pursuant to any rule adopted by the WSLCB as required by both RCW 66.08.030(1) and RCW
10 66.44.290. Second, the compliance check was unlawful because Enforcement used a minor to
11 enter into premises classified by the Board and posted as off-limits to minors. Third, the
12 compliance check was unlawful because the minor investigative aide used by Enforcement was
13 deceptively mature in appearance. Licensee moved to suppress all evidence gained through the
14 unlawful compliance check and to dismiss the complaint on the grounds that there was no
15 admissible evidence to support it. Enforcement opposed this motion. In her April Initial Order,
16 ALJ Katherine A. Lewis denied this motion. An administrative hearing was then conducted by
17 ALJ Lewis on August 2, 2011. By her September Initial Order, ALJ Lewis sustained the
18 Board’s Complaint.

19 STATEMENT OF EXCEPTIONS

20 Licensee takes exception to the following portions of the Initial Orders:

- 21 1. Licensee takes exception to the Conclusion of Law No. 7 in the September 2011
22 Initial Order holding that Enforcement’s use of minors in compliance checks is not unlawful.
- 23 2. Licensee also takes exception to Conclusions of Law Nos. 6 through 8 of the
24 April 2011 Initial Order holding that Enforcement has the legal authority to use minors in
25 compliance checks without the authority of a rule or regulation promulgated by the Board.
- 26 3. Licensee also takes exception to Conclusions of Law Nos. 10 and 11 of the April

1 2011 Initial Order holding that it would be impossible for Enforcement to check for violations
2 of RCW 66.44.270 without the assistance of a minor investigative aide.

3 4. Licensee also takes exception to Conclusion of Law No. 13 of the April 2011
4 Initial Order that whether the minor aide involved in the compliance check was deceptively
5 mature in appearance is irrelevant and that Licensee's objection that the minor aide was
6 deceptively mature in appearance is not valid.

7 **EVIDENCE OF RECORD RELIED ON**

8 Licensee relies on Findings of Fact Nos. 1, and 8 through 15 of the September Initial
9 Order and Findings of Fact Nos. 1 through 12 of the April Initial Order. In addition, Licensee
10 relies on the Declaration of William V. Baumgartner in Support of Licensee's Motion to
11 Suppress and Dismiss, dated March 31, 2011, and the exhibits attached to it: Exhibit A, a copy
12 of the Enforcement's investigative file for the compliance check giving rise to the citation
13 against the Icehouse Bar; Exhibit B, a copy of the AVN dated August 26, 2010 given by
14 Enforcement to the Icehouse Bar as a result of the compliance check; Exhibit C, a copy of the
15 Administrative Complaint made against the Icehouse Bar by Enforcement, dated October 18,
16 2010; and Exhibit D, a copy of the Clark County Superior Court's Memorandum Opinion in
17 Case Nos. 09-1-00725-0, 09-1-00724-1, and 09-1-00723-3.

18 The Icehouse Bar holds a liquor license and operates a facility located at 7804 NE
19 Highway 99, in Vancouver, Washington. These entire premises are restricted to people over 21
20 years of age. On August 19, 2010, at approximately 8:15 p.m., Enforcement Officer Kendra
21 Treco entered the Icehouse Bar with a minor investigative aide who was at that time 18 years
22 old. The two took a seat at a table. A bartender asked them for their order and the minor aide
23 ordered two beers. The bartender did not check the minor aide's identification. She then
24 served the aide and Officer Treco each a beer, taking payment from the aide. The aide left the
25 premises and Officer Treco cited the bartender for sale of alcohol to a person under the age of
26 21. Photocopies of a photograph of this minor investigative aide showing her appearance at the

1 time of this compliance check are contained in Enforcement's investigative file (Baumgartner
2 Dec., Ex. A) at Inv00016 and Inv.00017. These photographs show that the minor investigative
3 aide was deceptively mature in appearance at the time of the compliance check.

4 **POINTS AND AUTHORITIES**

5 **A. The Compliance Check Was Not Conducted Pursuant to Any Rule Adopted by the**
6 **WSLCB as Required by Both RCW 66.08.030(1) and RCW 66.44.290(1), and**
7 **Therefore Enforcement Unlawfully Employed a Minor to Purchase Liquor in**
8 **Violation of RCW 66.44.270 and RCW 66.44.290.**

9 As explained in *Hi-Starr, Inc. v. Washington State Liquor Control Bd.*, 106 Wn.2d 455,
10 458-59, 722 P.2d 808 (1986), while the Board has broad police powers with regard to enforcing
11 RCW Title 66.08, that power is not all inclusive and must be exercised consistently with the
12 statutory guidelines contained in this Title:

13 "The dominion of the Board is broad and extensive. *Quan v. State Liquor Control Bd.*,
14 69 Wn.2d 373, 379, 418 P.2d 424 (1966). The broad powers of the Board are, in part,
15 enumerated under RCW 66.08.050. The Board has the authority to make necessary and
16 advisable regulations consistent with the spirit of RCW 66. RCW 66.08.030(1); *see*
17 *State ex rel. Thornbury v. Gregory*, 191 Wash. 70, 78, 70 P.2d 788 (1937). However,
18 the broad and extensive powers given the Board are not all inclusive. Numerous
19 statutory guidelines have been provided which broadly define the authority and duty of
20 the Board and which insure procedural safeguards against arbitrary administrative action
21 and abuse of discretionary power. *See* in particular RCW 66.08.010; .030; .050; .150;
22 RCW 66.24.010; .400-.450; RCW 66.98.070; *see also* RCW 34.04."

23 The WSLCB's powers are generally subject to RCW 66.08.030(1), which requires that
24 the WSLCB exercise its powers through public regulations:

25 "(1) For the purpose of carrying into effect the provisions of this title according to their
26 true intent or of supplying any deficiency therein, the board may make such regulations
not inconsistent with the spirit of this title as are deemed necessary or advisable. All
regulations so made shall be a public record and shall be filed in the office of the code
reviser, and thereupon shall have the same force and effect as if incorporated in this
title. Such regulations, together with a copy of this title, shall be published in pamphlets
and shall be distributed as directed by the board."

RCW 66.44.290(1) provides specific statutory guidelines defining the authority and duty
of the Board with regard to the use of minors in compliance checks:

"(1) Every person under the age of twenty-one years who purchases or attempts to

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1 purchase liquor shall be guilty of a violation of this title. This section does not apply to
2 persons between the ages of eighteen and twenty-one years who are participating in a
3 controlled purchase program authorized by the liquor control board under rules adopted
4 by the board. * * *.”

5 Subparagraph (4) of RCW 66.44.290 then provides that: “Every person between the
6 ages of eighteen and twenty, inclusive, who is convicted of a violation of this section is guilty
7 of a misdemeanor punishable as provided by RCW 9A.20.021 * * *.” RCW 66.44.270(2)(a)
8 similarly provides that it is a gross misdemeanor for a minor to acquire any liquor.

9 WAC Chapter 314-21 contains the only rules formerly adopted by the Board concerning
10 the use of minors in controlled purchase programs. But the three regulations contained in this
11 chapter, WAC 314-21-005, WAC 314-21-055, and WAC 314-21-055, all only address an
12 in-house controlled purchase program conducted by a licensee employer.

13 Therefore, under the unambiguous language of RCW 66.44.290(1), in employing a
14 minor investigative aide to purchase alcohol in the compliance check, Enforcement was acting
15 without the authority of any statute or administrative regulation. Without such authority,
16 Enforcement exposed the minor investigative aide to criminal prosecution for purchasing
17 alcohol in violation of RCW 66.44.270 and RCW 66.44.290, and exposed the Enforcement
18 Officer conducting the compliance check to criminal prosecution under RCW 13.32A.080(4),
19 as an “adult responsible for involving a child in the commission of an offense”.

20 **B. Enforcement Also Unlawfully Caused a Minor to Commit a Misdemeanor Under
21 RCW 66.44.310, By Entering Into an Area Classified as Off-Limits to Minors in
22 the Compliance Check.**

23 RCW 66.44.310 provides that, except as otherwise provided by RCW 66.44.316, RCW
24 66.44.350, and RCW 66.24.590, it is a misdemeanor for any person under the age of twenty-
25 one years of age to enter or remain in any area classified as off-limits to such a person. There is
26 no exception in RCW 66.44.310 similar to the exception contained in RCW 66.44.290(1) for a
minor participating in a controlled purchase program authorized by the Board under rules
adopted by the Board .

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1 None of the exceptions provided for by RCW 66.44.316, 6.44.350, or 66.24.590, apply.
2 RCW 66.44.316 only creates an exception for professional musicians and band members,
3 janitors, amusement device company employees, security and law enforcement officers, and
4 firefighters. RCW 66.44.350 only creates an exception for restaurant employees. RCW
5 66.24.590 only creates an exception for hotel employees.

6 WSLCB Enforcement Policy #287 does purport to authorize Enforcement officers to
7 use minor investigative aides in compliance checks under certain conditions. However, Policy
8 #287 is not a formal rule published in the Washington Administrative Code. Under RCW
9 66.08.030(1), this policy therefore does not provide authority for Enforcement officers to use
10 minors in premises classified and posted as off-limits to minors. But even if it had the force of
11 a regulation adopted by the WSLCB pursuant to RCW 66.08.030(1), nothing in Enforcement
12 Policy #287 authorizes Enforcement officers to use minor investigative aides in compliance
13 checks on premises classified and posted as off-limits to minors. Indeed, in policy statement 5,
14 Policy #287 specifically states that:

15 “5. Investigative aide's safety is paramount. Enforcement officers shall not allow
16 investigative aides to engage in arguing or other actions with sales clerks.” (Wagner
17 Dec., Ex. E, pg. 2.)

18 Allowing minor aides to enter into bars posted off limits to minors is not conducive to
19 their safety. Bartenders and other staff in such premises are not commonly referred to as “sales
20 clerks.”

21 Enforcement argues that without the use of minor investigative aides, it would be
22 difficult for Enforcement to check for violations of the statutes prohibiting the sale of alcohol to
23 minors. ALJ Lewis specifically concluded in Conclusion of Law No. 10 in her April Initial
24 Order that: “It would be impossible for the Enforcement Officers to check for violations of
25 RCW 66.44.270 without the assistance of a minor investigative aide because if the aide was not
26 a minor no violation could occur.” But Enforcement Officers do not need minor investigative
aides to conduct compliance checks. Enforcement Officers may do so by simply entering into a

1 bar and asking for identification from anyone in the bar who appears to be underage. If they
2 discover an individual in a bar who is underage, they then unquestionably have the authority to
3 issue a citation to both the minor and the Licensee.

4 The controlled purchase in the present cases was, therefore, unlawful for the additional
5 reason that Enforcement caused a minor to commit a criminal offense by entering into and
6 remaining in premises designated by the WSLCB and posted as off-limits to minors.

7 **C. The Compliance Checks Were Unlawful for the Additional Reason that the Minor**
8 **Investigative Aide Used by the Enforcement Officers in the Compliance Check was**
9 **Deceptively Mature in Appearance.**

10 WAC 314-21-025 sets out the WSLCB's rules for in-house controlled purchase
11 programs conducted by liquor licensees. One of these rules is that:

12 “(4) the persons participating in the in-house controlled purchase program may not use
13 fraudulent identification and should not be deceptively mature in appearance.”

14 Enforcement Division Policy # 287 similarly provides that: “Investigative aides must
15 not be deceptively mature in appearance.”

16 Enforcement does not contend that the compliance check in the present case was
17 authorized by WAC Chapter 314-21 or Policy # 287. But this rule and policy illustrate why the
18 Legislature requires that compliance checks utilizing minors be conducted pursuant to rules
19 formally adopted and published by the Board, in order to prevent arbitrary and capricious action
20 by Enforcement in conduct compliance checks, and provides an additional reason why the
21 compliance check in the present case was unlawful as an abuse of Enforcement's discretionary
22 power.

23 The photographs of the minor investigative aide used in the subject compliance
24 contained in Enforcement's investigative file (Wagner Dec., Ex. A, Inv 000016 and Inv.
25 000017) show that she was deceptively mature in appearance at the time of the compliance
26 check.

RCW 9A.16.070 provides:

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1 “(1) In any prosecution for a crime, it is a defense that:

2 “(a) The criminal design originated in the mind of law enforcement officials, or
3 any person acting under their direction, and

4 “(b) The actor was lured or induced to commit a crime which the actor had not
5 otherwise intended to commit.

6 “(2) The defense of entrapment is not established by a showing only that law
7 enforcement officials merely afforded the actor an opportunity to commit a crime.”

8 This administrative proceeding involves a prosecution of Licensee under RCW
9 66.44.290 for furnishing liquor to a minor and under RCW 66.44.310 for allowing a minor to
10 enter and remain in an area classified as off-limits to minors. Violation of either statute is a
11 misdemeanor. This action therefore does involve prosecution for a crime in which the defense
12 of entrapment applies.

13 Without the guidelines of a regulation adopted by the Board pursuant to RCW
14 66.08.030, Enforcement is free to use minors in compliance checks without any safeguards for
15 the protection of either the minor or the licensee, who is engaged in a legitimate business that
16 generates substantial revenue for the State. Even if this tribunal concludes that the investigative
17 aide used in the subject compliance check was not deceptively mature in appearance, if as
18 Enforcement contends it is not bound by any statute or administrative regulation in using minor
19 investigative aides in compliance checks, nothing would prevent Enforcement from entrapping
20 a Licensee’s employee into a violation of RCW 66.44.290 or RCW 66.44.310 by using a minor
21 investigative aide who is an aspiring actor, who is already deceptively mature in appearance,
22 and who is then professionally made up to look and told to act 60 years old.

23 Governmental action is “arbitrary and capricious” if it is willful and unreasoning action
24 in disregard of facts and circumstances. *Norquest/RCA-W Bitter Lake Partnership v. City of*
25 *Seattle*, 72 Wn.App. 467, 476, 865 P.2d 18 (1994). Enforcement’s use of minor investigative
26 aides in compliance checks without any guidelines or limitation as to their appearance is
arbitrary and capricious governmental action. Therefore, in the present case, the compliance

1 check was unlawful for the additional reason that Enforcement used an excessively mature
2 appearing minor investigative aide in the sting operation.

3 **D. All Evidence Gained Through the Compliance Check is Inadmissible and This**
4 **Action Must Be Dismissed.**

5 Washington's Administrative Procedure Act governs this administrative proceeding.
6 The rule for admissibility of evidence in these proceedings is set out in RCW 34.05.452(1), as
7 follows:

8 "Evidence, including hearsay evidence, is admissible if in the judgment of the presiding
9 officer it is the kind of evidence on which reasonably prudent persons are accustomed to
10 rely in the conduct of their affairs. The presiding officer shall exclude evidence that is
excludable on constitutional or statutory grounds or on the basis of evidentiary privilege
recognized in the courts of this state. The presiding officer may exclude evidence that is
irrelevant, immaterial, or unduly repetitious."

11 The mandate of this statute is clear. Evidence that is excludable on constitutional or statutory
12 grounds cannot be admitted in administrative proceedings.

13 Bartenders and servers have no incentive to serve minors. They do not personally profit
14 from doing so and serving a minor both subjects them to criminal penalties and puts their
15 employment at risk. Owners of liquor establishments likewise have no incentive to serve
16 minors because doing so subjects them to possible fines and the potential loss of their liquor
17 license and livelihood.

18 Enforcement's use of minor investigative aides does not simply afford Licensee's
19 employee an opportunity to commit a crime. This is a case of entrapment where the criminal
20 design originates in the mind of the Enforcement Officers and the server is induced to commit a
21 crime he or she otherwise did not intend to commit and had every incentive not to commit.
22 Enforcement paradoxically argues that it has the police power to use minor investigative aides
23 in stings to entrap employees of licensees into criminal violations which may result in their
24 criminal prosecution on the one hand, while on the other hand arguing entrapment is not a
25 defense in the administrative proceedings it brings against the licensee employer for the
26 violation their employee was entrapped into committing. Enforcement also argues that it is not

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1 limited by any statute, regulation or even its own internal policy in using minor investigative
2 aides in compliance checks.

3 “[T]he Fourth Amendment's prohibition against unreasonable searches applies to
4 administrative inspections of private commercial property.” *Seymour v. Washington State*
5 *Dept. of Health, Dental Quality Assur. Com'*, 152 Wn.App. 156, 164-65, 216 P.3d 1039
6 (2009)(citing to *Donovan v. Dewey*, 452 U.S. 594, 598, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981)
7 (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978)). The
8 Fourth Amendment exclusionary rule applies in civil proceedings that are quasi-criminal in
9 nature. *McDaniel v. City of Seattle*, 65 Wn.App. 360, 363-64, 828 P.2d 81 (1992). The
10 present administrative case is quasi-criminal in nature. Licensee's business license is subject to
11 suspension as a result of an alleged criminal violation by its employee. Law enforcement
12 violations of statutes in other contexts have led to suppression of evidence. For example, if a
13 vehicle impound is not authorized by statute, evidence seized pursuant to an impound search
14 must be suppressed. *State v. Singleton*, 9 Wn.App. 327, 511 P.2d 1396 (1973).

15 Enforcement's use of minor investigative aides in compliance checks in premises posted
16 off-limits to minors without the authority of any statute or regulation is also an arbitrary
17 governmental action in violation of Licensee's right to substantive due process, guaranteed by
18 the Fifth and Fourteenth Amendments of the Federal Constitution and Article I, Section 3 of the
19 Washington State Constitution. *See Brown v. City of Seattle*, 117 Wn.App. 781, 798, 72 P.3d
20 764 (2003). “Under the APA, an agency acts arbitrarily and capriciously when its action is
21 willful, unreasoning, and taken without regard to facts or circumstances.” *Lawrence v.*
22 *Department of Health*, 133 Wn.App. 665, 672, 138 P.3d 124 (2006). The present case
23 particularly illustrates how Enforcement may arbitrarily decide whether to shut down a
24 legitimate business upon which numerous individuals depend for their livelihood by using
25 deceptively mature appearing and acting minors in undercover sting operations without the
26 authority and restraint of any publicly passed statute, rule or regulation.

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LICENSEE'S PETITION FOR REVIEW - Page 10

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Liquor Control Board
License Division

1 All of the evidence gathered by Enforcement in its compliance check of Licensee's
2 operation should be excluded, because the evidence was obtained unlawfully and is excludable
3 on constitutional or statutory grounds. Without this evidence, Enforcement cannot show any
4 administrative violations by Licensee.

5 **E. Conviction of Licensee Both for Allowing a Monitor to Frequent a Restricted Area**
6 **in Violation of RCW 66.44.310 and for Sale or Service to a Minor in Violation of**
7 **Rcw 66.44.270 Violates the Double-jeopardy Clause of the United States and**
8 **Washington State Constitutions.**

9 The AVN charges Icehouse Bar with two separate offenses arising out of the same
10 conduct: (1) allowing a minor to frequent a restricted area in violation of RCW 66.44.310, and
11 (2) sale or service to a minor in violation of RCW 66.44.270. Enforcement seeks a combined
12 penalty for conviction on these two separate counts of a 7-day suspension of the license with no
13 monetary option. (Baumgartner Dec., Ex. A, Inv 00010.)

14 "The double jeopardy clauses of the Fifth Amendment and Const. art. 1, § 9 protect a
15 defendant against multiple punishments for the same offense." *State v. Calle*, 125 Wn.2d 769,
16 772, 888 P.2d 155 (1995) (citing to *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991);
17 *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). This violation occurs even where
18 the sentences for the multiple convictions run concurrently. *State v. Calle*, 125 Wn.2d at 773.
19 As explained in *State v. Womac*, 160 Wn.2d 643, 652-53, 160 P.3d 40 (2007):

20 "Washington follows the 'same evidence' rule which this court adopted in 1896. *Calle*,
21 125 Wn.2d at 777, 888 P.2d 155. '[T]he defendant's double jeopardy rights are violated
22 if he or she is convicted of offenses that are identical both in fact and in law.' *Id.* at 777,
23 888 P.2d 155. The 'same evidence' rule is sometimes referred to as the 'same elements'
24 test.' See *Gocken*, 127 Wn.2d at 101, 896 P.2d 1267 (quoting *United States v. Dixon*,
509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993)). 'Washington's 'same
evidence' test is very similar to the rule set forth in *Blockburger v. United States*, 284
U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).' *Calle*, 125 Wn.2d at 777-78, 888
P.2d 155. The same evidence rule controls 'unless there is a clear indication that the
legislature did not intend to impose multiple punishment.' *State v. Gohl*, 109 Wn.App.
817, 821, 37 P.3d 293 (2001).

25 "[O]ffenses are not constitutionally the same if there is any element in one offense not
26 included in the other and proof of one offense would not necessarily prove the other.'
State v. Trujillo, 112 Wn.App. 390, 410, 49 P.3d 935 (2002) (citing *Calle*, 125 Wn.2d at

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1 777-78, 888 P.2d 155). Washington courts, however, have occasionally found a
2 violation of double jeopardy despite a determination that the offenses involved clearly
3 contained different legal elements. *State v. Schwab*, 98 Wn.App. 179, 184-85, 988 P.2d
4 1045 (1999) ('See *State v. Johnson*, 92 Wn.2d 671, 679-80, 600 P.2d 1249 (1979)
5 (examining convictions for first degree rape, first degree kidnapping, and first degree
6 assault and striking the kidnapping and assault convictions even though the offenses
7 involve different legal elements because the kidnapping and assault were incidental to,
8 and elements of, the first degree rape) ...; *State v. Potter*, 31 Wn.App. 883, 887-88, 645
9 P.2d 60 (1982) (concluding that convictions for reckless endangerment and reckless
10 driving violated double jeopardy despite differing legal elements where the reckless
11 endangerment conviction arose out of an act of reckless driving)'). See also *In re Pers.*
12 *Restraint of Burchfield*, 111 Wn.App. 892, 899, 46 P.3d 840 (2002) ('Although the
13 offenses do not contain identical legal elements, we conclude that the Legislature did
14 not intend to punish shooting a victim both as an assault and as a homicide.')."

9 In the present case, both the charge of allowing a minor to frequent a restricted area and
10 the charge of serving liquor to a minor arise out of the same facts. The charge of serving
11 alcohol to a minor arises out of a single undercover sting using a minor investigative aide to
12 enter onto premises posted off-limits to minors and purchase alcohol. Conviction of Licensee
13 on both counts therefore would violate his right not to be put into double jeopardy for the same
14 offense under the United States and Washington State constitutions.

15 CONCLUSION

16 The WSLCB unquestionably has broad regulatory and police powers in the area of
17 alcoholic beverage control. But even in this area, Enforcement's police powers are not
18 completely unfettered. Enforcement must conduct itself in compliance with the statutes
19 contained in RCW Title 66 and the rules adopted by the WSLCB pursuant to that Title.

20 The issue presented by this case is not whether the WSLCB has the authority to pass a
21 rule pursuant to RCW 66.08.030 allowing Enforcement to use minors in compliance checks at
22 facilities that are restricted to adults. The issue is whether, in the absence of a such a rule,
23 Enforcement may do so. Without the guidelines of a regulation adopted by the Board pursuant
24 to RCW 66.08.030(1), Enforcement is free to use minors in compliance checks without any
25 safeguards for the protection of either the minor or the licensee, who is engaged in a legitimate
26 business that generates substantial revenue for the State. Washington law is clear that, without

1 the authority of a rule formerly adopted by the WSLCB, Enforcement officers do not have the
2 legal authority to use minor investigative aides in compliance checks of establishments posted
3 off limits to minors.

4 The subject compliance check was not conducted according to any statutes contained in
5 RCW Title 66 or rules adopted by the WSLCB. The compliance check was, therefore,
6 unlawful, and Enforcement violated Licensee's constitutional rights in using the compliance
7 check to gather evidence against Licensee. All evidence obtained from this unlawful
8 compliance check should be excluded in this administrative proceeding. Without this evidence,
9 Enforcement has no evidence of any violation by Licensee of RCW 66.44.270 and this action
10 should be dismissed. In addition, conviction of Licensee for both violation of RCW 66.44.310
11 for allowing a minor to frequent and area off-limits to minors and RCW 66.44.270 for sale or
12 service to a minor is a violation of Licensee's right not to be put in double jeopardy for the
13 same offense.

14 DATED this 17 day of October, 2011.

15 BAUMGARTNER, NELSON & PRICE, PLLC

16
17 
18 William V. Baumgartner, WSBA #3727
19 Laurence R. Wagner, WSBA #17605
20 Attorneys for Licensee

21 Baumgartner, Nelson & Price, PLLC
22 112 West 11th Street, Suite 150
23 Vancouver, WA 98660

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26 Liquor Control Board
License Division

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

MAILED
SEP 30 2011
VANCOUVER OFFICE OF
ADMINISTRATIVE HEARINGS

In the Matter of:

**NORTHWEST LAND BROKERS, INC.,
dba ICEHOUSE BAR & GRILL,**

Respondent Licensee.

License No. 358188

OAH No.: 2010-LCB-0080

LCB No.: 23,753

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND INITIAL ORDER**

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TO: Northwest Land Brokers, Inc., License Holder
William Baumgartner, Attorney for License Holder
Brian Considine, Assistant Attorney General

PROCEDURAL HISTORY

Prior to hearing, the licensee filed a Motion to Suppress and Dismiss. The Liquor Control Board, through the Assistant Attorney General, thereafter filed a Reply to the licensee's Motion. Oral argument was made on April 20, 2011.

A Findings of Fact, Conclusions of Law and Order on the motions was issued on April 29, 2011 and is attached and incorporated by reference herein.

STATEMENT OF THE CASE

On August 26, 2010, the Washington State Liquor Control Board (Board) issued an Administrative Violation Notice (AVN) to Northwest Land Brokers, Inc. dba Icehouse Bar & Grill (Icehouse), 7804 NE Highway 99, Vancouver, Washington, 98665. In its notice, the Board made two allegations. The first was that on August 19, 2010, the Icehouse had violated the provisions of Revised Code of Washington (RCW) 66.44.270(1) by furnishing alcohol to a person under twenty-one (21) years of age. The second allegation was that a minor had been allowed to

INITIAL ORDER
F:\APPS\Specials\LCB\Northwest Land Brokers
Docket: 2010-LCB-0080
Page 1

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EXHIBIT
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frequent the premises in violation of RCW 66.44.310. (Exhibit 1).

The AVN assessed a penalty of a seven (7) day suspension of Icehouse's license as a penalty for the "minor frequenting" allegation and did not assess a separate penalty for the "sale and service" of alcohol allegation.

On October 18, 2010, the Board issued a Complaint in which it alleged that on or about August 19, 2010, the Icehouse, or an employee thereof, gave, sold and/or supplied liquor to a person under the age of twenty-one (21), contrary to RCW 66.44.270 and WAC 314-11-020(1). The Complaint also alleged that on or about August 19, 2010, the Icehouse, or an employee thereof, allowed a person under twenty-one (21) years of age to enter and remain in an area classified as off-limits to any person under the age of twenty-one (21), contrary to RCW 66.44.310 and WAC 314-11-020(2).

Following a timely appeal, hearing was held before Katherine A. Lewis, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), on August 2, 2011, in Vancouver, Washington. At hearing, the Board was represented by Brian Considine, Assistant Attorney General. The licensee, the Icehouse, appeared and was represented by William Baumgartner, Attorney at Law. Tony Plescia, Frank Rumpel, Krista Call and Kathy Hunder appeared as witnesses for the licensee. Officer Kendra Treco and **UnderAgeOp** appeared as witnesses for the Board.

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

FINDINGS OF FACT

1. The licensee is Northwest Land Brokers Inc., doing business as the Icehouse Bar & Grill, a restaurant and lounge located at 7804 NE Highway 99, Vancouver, Washington 98665. It's license number issued by the Board is 358188.

2. Prior to the incident at issue, the Icehouse had incurred a prior violation and a few warnings.
3. On October 29, 2009, there was a written warning issued by the Board for sale or service to an apparently intoxicated person.
4. On February 27, 2010, the Icehouse incurred its first violation, No. 1L0058A, for sale or service to a minor and for a minor frequenting an area off-limits to minors.
5. On March 17, 2010, the Icehouse received a written warning for an employee consuming liquor while working on the premises.
6. On October 22, 2010, there was another written warning for allowing an apparently intoxicated person to consume alcohol on the premises.
7. These instances were each the result of compliance checks by Liquor Control Officers.
8. On Thursday, August 19, 2010, Liquor Control Officer Kendra Treco conducted a compliance check at the licensee's premises. Helping her with this check was **UnderAgeOp** an 18-year-old investigative aide.
9. Prior to beginning the compliance check, Officer Treco searched **UnderAgeOp** and allowed her to have only her her cell phone, cash given to her by the officer for making an alcohol purchase, and her identification, which showed her to be 18 years old on August 19, 2010. (Exhibit 3, page 1). Pictures of **UnderAgeOp** were also taken. (Exhibit 6).
10. At about 8:15 p.m., Officer Treco and **UnderAgeOp** entered the Icehouse, which was moderately busy that night, and sat at a table. Krista Call, a bartender working for the licensee approached the table and asked for their order.
11. **UnderAgeOp** ordered two beers. Ms. Call did not ask for her identification, but rather returned with two beers and took payment from **UnderAgeOp**.
12. Officer Treco took the beers from **UnderAgeOp** who then left the premises. She had spent

about ten minutes in the bar.

13. Ms. Call did not ask **UnderAgeOp** to prove her age as Ms. Call believed she had carded and served her earlier in the week.

14. In fact, **UnderAgeOp** had never been in the bar before.

15. Ms. Call also thought **UnderAgeOp** appeared to be 24-25 years old.

16. Later in the evening, Officer Treco poured out the beer from the bottles **UnderAgeOp** had purchased, marked and took pictures of them. (Exhibit 7).

17. The licensee objected to the introduction of these pictures of the bottles as not the best evidence, arguing the bottles themselves were the best evidence.

18. The Board, through the Assistant Attorney General, can provide the bottles if needed.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter pursuant to RCW 66.44, RCW 34.12, RCW 34.05, and WAC 10-08, WAC 314-11, WAC 314-16 and WAC 314.29.

2. As a licensed retail seller of liquor, the licensee is subject to the jurisdiction of the Washington State Liquor Control Board. The licensee is subject to the conditions and restrictions imposed by title 66 RCW and 314-11, 314-16 and 314-29 WAC.

3. Proceedings involving agency action are adjudicative proceedings under RCW 34.05. The Board has the authority to assign such proceedings to an administrative law judge pursuant to RCW 34.12. A proper hearing was provided in this case.

4. RCW 66.44.270 prohibits the sale of liquor to any person under the age of twenty-one years. The definition of liquor includes beer. RCW 44.04.010(20).

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INITIAL ORDER
F:\APPS\Specials\LCB\Northwest Land Brokers
Docket: 2010-LCB-0080
Page 4

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5. Chapter 314-11 WAC sets forth general requirements for liquor licenses and outlines the responsibilities of a liquor licensee. (WAC 314-005)
6. The Board, through its Liquor Enforcement Officers, conducts compliance checks to ensure individuals and establishments are complying with liquor regulations. These compliance checks involve sending a minor into a restricted premises, such as a bar, and having the minor attempt to buy or buy alcohol.
7. These minors are paid for their work and receive training from the officers. They engage in the compliance checks under the supervision of the officers. As ruled previously and reference herein, these compliance checks and the use of minors is not unlawful.
8. The Board has established by a preponderance of evidence that the Icehouse violated RCW 66.44.270 on August 19, 2010, by serving alcohol to the minor investigative aide, **UnderAge**
9. With regard to the licensee's objection to the use of pictures of the beer bottles rather than the bottles themselves, the undersigned notes that the actual penalty in this case is based on the "frequenting" allegation, not the service to the minor allegation. It is also noted that pursuant to WAC 381-70-400, relevant evidence is the "best evidence reasonably obtainable, having due regard for its necessity, availability, and trustworthiness." The undersigned finds no grounds to demand the Board produce the bottles themselves. They are not necessary, were not immediately available at the time of the hearing and would not be much more trustworthy than the pictures and Officer Treco's testimony. Licensee's objection to Exhibit 7 is overruled.
10. The Board has also established by a preponderance of evidence that the Icehouse violated RCW 66.44.310 on August 19, 2010, by allowing Ms. Barnett to remain in an area classified by the Board as off-limits to anyone under 21 years of age.

11. The Board has the authority to establish an appropriate penalty as a matter of its discretion. Pursuant to RCW 66.24.010, the Board has the authority to suspend or cancel a Licensee's liquor license. Effective May 5, 2002, the Board has adopted as rules a set of "standard penalties" which may applied to certain offenses. WAC 314-29-015.

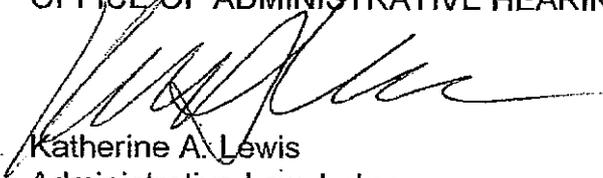
12. Because the violation by the Icehouse is its second within a two-year period, the mandatory penalty is a seven-day suspension of its license pursuant to WAC 314-29-020.

ORDER

IT IS HEREBY ORDERED THAT the Board's Complaint dated October 18, 2010, alleging violations of RCW 66.44.270 and RCW 66.44.310 on August 19, 2010 is **AFFIRMED**. The license privileges issued to Icehouse Bar & Grill, located at 7804 NE Highway 99, Vancouver, Washington 98665, license number 358188, shall be suspended for a period of seven (7) days on a date to be set by the Board in its final order.

DATED and mailed at Vancouver, Washington, this 30 day of Sept, 2011.

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS



Katherine A. Lewis
Administrative Law Judge
5300 MacArthur Blvd, Suite 100
Vancouver, WA 98661
Telephone: (360) 690-7189 or 1-800-243-3451
FAX: (360)

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Liquor Control Board
License Division

Mailed to:

Licensee:

Northwest Land Brokers, Inc.
dba Icehouse Bar & Grill
7804 NE Highway 99
Vancouver, WA 98665

Licensee Representative:

William Baumgartner
Baumgartner, Nelson & Price, PLLC
112 West 11th Street, Suite 150
Vancouver, WA 98660

Assistant Attorney General:

Brian Considine, AAG
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100

Department Contact:

Kevin McCarroll
Adjudicative Proceedings Coordinator
Washington State Liquor Control Board
PO Box 43076
Olympia, WA 98504

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 and WAC 314-42-095.

The petition for review must:

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

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

Address for filing a petition for review with the board:

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

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In the Matter of:

Northwest Land Brokers, Inc d/b/a
Icehouse Bar & Grill

Respondent/Licensee

OAH No.: 2010-LCB-0080

Agency No.: 23,753

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER ON
PRE-HEARING MOTIONS

STATEMENT OF THE CASE

On October 18, 2010, the Washington State Liquor Control Board's Education and Enforcement Division (Enforcement) served the above-identified Licensee, located at 7804 NE Highway 99, Vancouver, Washington, with an Administrative Violation Notice (AVN) alleging that on or about August 19, 2010, the Licensee or an employee allowed a person under the age of 21 years to frequent an off-limits area of the premises in violation of RCW 66.44.310 and WAC 314-11-020(2), and that a person under the age of 21 years was served alcohol in violation of RCW 66.44.270 and WAC 314-11-020(1).

The assessed penalty was a seven-day suspension.

The Licensee made a timely request for hearing.

On April 20, 2011, Administrative Law Judge (ALJ), Katherine A. Lewis heard oral arguments on the Licensee's Motion to Suppress and Dismiss.

The Licensee was represented by William Baumgartner, Attorney at Law. The Liquor Control Board was represented by Brian Considine, Assistant Attorney General.

DECISION SUMMARY

1. The Licensee's Motion to Suppress and Dismiss is Denied.
2. The case is currently set for hearing on May 4, 2011.

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Liquor Control Board
License Division

EXHIBIT
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351-8073-1
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FINDINGS OF FACT

1. The Washington State Liquor Control Board (Board) regulates the conduct of licensees to ensure compliance with applicable laws related to the serving of alcohol, including but not limited to ensuring the safety and protection of minors.
2. Northwest Land Brokers, Inc. is the licensee and does business as the Icehouse Bar & Grill, the licensed premises at issue in this matter, located at 7804 NE Highway 99, Vancouver, Washington.
3. The entire premises are restricted to people 21 years of age and over.
4. On August 19, 2010, Enforcement Officer Kendra Treco and **UnderAgeOp** conducted a compliance check at the Licensee's premises.
5. Office Treco is a liquor control officer with the Washington State Liquor Control Board's Enforcement and Education Division (Enforcement).
6. **UnderAgeOp** is an agent of Enforcement. She assists as a minor investigative aide. Her date of birth is November 11, 1991. She was 18 years old at the time of the compliance check.
7. On August 19, 2010, at approximately 8:15 p.m., Officer Treco entered the Icehouse Bar & Grill with **UnderAgeOp** and the two took a seat at a table.
8. A waitress or bartender, an employee of the premises, approached the table and asked for them for their order.
9. **UnderAgeOp** ordered two beers. The server did not ask for **UnderAgeOp** identification. She returned shortly with the beers and took payment from **UnderAgeOp**.
10. **UnderAgeOp** then left the premises and Officer Treco cited the bartender for the sale of alcohol to a person under 21 years of age.
11. On August 26, 2010, the Board served the Licensee with an Administrative Violation Notice (AVN) alleging that the Licensee sold or served liquor to a person under twenty years of age on or about August 19, 2010. The AVN cites a penalty of a seven-day suspension, which is the penalty for a second violation of this kind within a two-year penalty period.

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12. On October 18, 2010, the Liquor Control Board issued an administrative complaint to the Licensee for violation of RCW 66.44.270 and WAC 314-11-020(1) giving, selling and/or supplying liquor to a minor; and for violation of RCW 66.44.310 and WAC 314-11-020(2), allowing a person under age 21 to enter and remain in an area classified as off-limits to a person under 21 years of age.

From the foregoing Findings of Fact, the Administrative Law Judge now enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Washington State Liquor Control Board has jurisdiction over the Licensee, Northwest Land brokers, Inc., dba Icehouse Bar & Grill.
2. The undersigned Administrative Law Judge has jurisdiction in this matter pursuant to Revised Code of Washington (RCW) 34.12, Chapter 34.05, and Washington Administrative Code (WAC) 10-08 and WAC 314-42.
3. The Licensee makes four arguments: that the compliance check by Enforcement was not authorized by any rule adopted by the Washington State Liquor Control Board; that the compliance check was unlawful because Enforcement used a minor to enter premises classified by the Board and posted off-limits to minors; that the minor aide used by the Enforcement in the compliance check was deceptively mature in appearance; and that the action should be dismissed because all evidence gained in the compliance check is admissible because of unlawful nature of the compliance check.
4. Title 66 RCW covers the control of alcoholic beverages. The entire title is deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals and safety of the state and all of its provisions shall be liberally construed for the accomplishment of the purpose. RCW 66.08.010.
5. RCW 66.44.010(4) provides that the Liquor Control Board may appoint and employ officers to be designated as liquor enforcement officers. These officers have the power to enforce the penal provisions of this title including RCW 66.44.270 which prohibits the sale and distribution of alcohol to a person under the age of 21 years on the Licensee's

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premises.

6. The Board has interpreted the above statute as giving it the authority to enforce the statute's provisions without promulgating additional rules which specify how such enforcement should be accomplished; specifically, a rule that allows compliance checks using minors.

7. Where an agency's legal interpretation falls within the ambit of the agency's expertise in a particular area of law, substantial weight should be accorded the agency's legal interpretation. Jefferson County v. Seattle Yacht Club, 73 Wn.App. 576, 588, 870 P.2d 987 (1994).

8. There is no question but that the Liquor Control Board has expertise in the area of the law of liquor control. It has been designated by the legislature to inter alia, enforce the laws pertaining to alcohol and been given broad regulatory authority to do so. Its determination that it need not promulgate a regulation specifically allowing compliance checks using minors is accorded the substantial weight called for in Jefferson, *supra*.

9. The Licensee's second argument is that the compliance check was unlawful because Enforcement used a minor to enter premises classified by the Board and posted off-limits to minors.

10. As stated above, Enforcement officers do not need to have rules promulgated to perform the duties they are authorized to perform. To conduct a compliance check, Enforcement officers employ minor investigative aides to act as decoys. These aides are employed as agents of the Liquor Control Board and only enter liquor establishments at the direction of an Enforcement officer. The aides help the Enforcement officer simulate a typical scenario where a minor may try to enter an establishment that is off limits to persons under 21 years of age and purchase alcohol to determine if the Licensee is complying with the law. It would be impossible for the Enforcement officers to check for violations of RCW 66.44.270 without the assistance of a minor investigative aide because if the aide was not a minor no violation could occur.

11. Again, due to the broad police powers the Liquor Board enjoys, and the substantial weight its interpretation of its mandate is to be given, the use of minors has been determined

INITIAL ORDER

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Docket: 2010-LCB-0080

Page 4

to be the only realistic way to know if licensed liquor establishments are abiding the by law regarding serving liquor to minors. This activity is within the Board's discretion.

12. The Licensee need not worry that the aides are in danger of being prosecuted for their activities in helping Enforcement officers. The Board appoints these minors as "limited purpose law enforcement officers" and allows them to take part in these compliance checks, again, a decision within the Board's discretion to make. Further, as a practical matter, it is unlikely officers would use the minors in this fashion and then turn around and have them prosecuted for it. Even if this occurred, the minors would have the complete defense of entrapment.

13. The argument that the minor aide involved in the compliance check at issue was "deceptively mature" in appearance is not valid. The prohibition against using minors who are deceptively mature is with regard the in-house, that is licensee, compliance checks authorized by WAC 314-21-025. It is not relevant to nor binding on checks done by Enforcement officers.

14. Because the evidence gathered in this case is concluded to have been lawfully obtained, the Licensee's motion to dismiss the case based on it having been illegally obtained is denied.

15. The Licensee made some additional arguments regarding unlawful search and seizure under the Fourth Amendment to the U.S. Constitution. These issues were not part of the Licensee's Motion but only arose during oral argument. Consequently, the undersigned will make no ruling on those arguments at this time. If the Licensee wants to argue them at hearing, the undersigned will entertain that request at the time.

From the foregoing Conclusions of Law, NOW THEREFORE

INITIAL ORDER

IT IS HEREBY ORDERED that the Licensee's Motions to Suppress and Dismiss are denied.

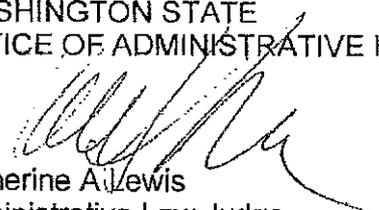
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Liquor Control Board
License Division

DATED and mailed at Vancouver, Washington, this 29 day of April 2011.

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS


Katherine A. Lewis
Administrative Law Judge
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Liquor Control Board
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FOR THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

NORTHWEST LAND BROKERS, INC.
d/b/a ICEHOUSE BAR AND GRILL

7804 NE Highway 99
Vancouver, WA 98665

LICENSEE

LICENSE NO. 358188
AVN NO. 1L0231C

OAH NO. 2010-LCB-0080
LCB NO. 23,753

ENFORCEMENT'S RESPONSE TO
LICENSEE'S PETITION FOR
REVIEW

I. INTRODUCTION

The Washington State Liquor Control Board (Board), Enforcement and Education Division (Enforcement) by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and BRIAN J. CONSIDINE, Assistant Attorney General, now hereby responds to the NORTHWEST LAND BROKERS, INC. d/b/a ICEHOUSE BAR AND GRILL (Licensee) Petition for Review (Petition) in the above-captioned matter.

Enforcement asserts that the Licensee's Petition lacks the force and merit necessary to overcome the reasoned opinion of the administrative law judge. The Initial Order issued by the administrative law judge is fully supported by the evidence in the record and the law and it should be upheld and adopted by the Board.

II. PROCEDURAL HISTORY

1 On August 26, 2010, Enforcement issued an Administrative Violation Notice (AVN) to
2 the Licensee for a violation of RCW 66.44.270(1) and RCW 66.44.310(1)(a). *See* Exhibit 1,
3 AVN. After the Licensee requested a formal hearing, the Board issued a Complaint to the
4 Licensee on October 18, 2010, for violations of RCW 66.44.270(1) and RCW 66.44.310(1)(a).
5 *See* Complaint. A prehearing conference was held on December 16, 2010, and a briefing
6 schedule for the Licensee's Motions was set.

7 The Licensee submitted its Motions and Enforcement submitted its Reply.
8 Administrative Law Judge (ALJ) Katherine Lewis heard oral arguments on the Licensee's
9 motions and issued a decision denying the Licensee's Motions on April 29, 2011. An
10 administrative hearing was held on August 2, 2011, and ALJ Lewis issued her Initial Order on
11 September 30, 2011. The Licensee submitted its Petition for Review of ALJ Lewis's Initial
12 Order on or about October 17, 2011, and Enforcement now responds.

III. FINDINGS OF FACTS

13 The Licensee does not take exception to the ALJ's Findings of Fact. *See* Petition at 3.
14 Consequently, the ALJ's Findings of Fact remain unchallenged by the Licensee, and they are
15 fully supported by the record. Therefore, the Board should adopt the Findings of Facts in the
16 Initial Order and Enforcement will not address these unchallenged findings.

17 Additionally, the Licensee attempts to rely on exhibits not admitted at the
18 administrative hearing in this matter. The Licensee cites to counsel's declaration and exhibits
19 offered in support of its motions for suppression and dismissal. *See* Licensee's Motion to
20 Suppress and Dismiss, Exhibits; Petition at 3. These exhibits were not offered by the Licensee
21 at the administrative hearing and are not part of the factual record established at the
22 administrative hearing. The Licensee is required to cite to the administrative record for support
23 of its Petition and it cannot submit additional exhibits and/or evidence once the administrative
24 record is closed. *See* RCW 34.05.464(5) and (7); *Towle v. Dep't of Fish & Wildlife*, 94 Wn.
25

1 App. 196, 205–06, 971 P.2d 591 (1999). (“[RCW 34.05.464] does not provide that the
2 reviewing officer may go outside the record to take additional evidence”). *See also*,
3 WAC 314-42-095 (the moving party is to refer to the *evidence of record*....). Therefore, the
4 Board should exclude these documents and disregard them as facts.

5 Lastly, any reliance by the Licensee on Superior Court Case Numbers 09-1-00725-9,
6 09-1-00724-1, and 09-1-00723-3, and District Court Case Number 13671 is misplaced.
7 Superior Court and District Court decisions have no precedential value and should not be cited
8 or relied upon in this administrative action. *See Yousoufian v. Office of Ron Sims*, 168 Wn.2d
9 444, 470, 229 P.3d 735 (2010). Therefore, the Board should strike reference to these matters
10 from the record and disregard the Licensee’s references to these orders.

11 IV. CONCLUSIONS OF LAW

12 The Licensee takes exception to Conclusion of Law Number 7 in ALJ Lewis’
13 September 30, 2011, Initial Order and to Conclusions of Law Number 6, 7, 8, 10, 11, and 13 in
14 ALJ Lewis’ April 29, 2011, ruling on the Licensee’s Motion to Suppress and Dismiss.
15 Consequently, the unchallenged Conclusions of Law in ALJ Lewis’ September 30, 2011,
16 Initial Order, are fully supported by the record. Therefore, the Board should adopt the
17 Conclusions of Law 1-6 and 8-12 in the September 30, 2011, Initial Order.

18 A. Enforcement has the authority to enforce all liquor laws and rules and engage 19 in compliance checks.

20 The Licensee argues that ALJ Lewis erred by concluding that Enforcement’s use of
21 compliance checks are lawful. Petition at 4-5. The Licensee argues that compliance checks
22 are unlawful because the Board has failed to promulgate a rule allowing Enforcement to
23 conduct compliance checks. Petition at 4-5. The Licensee’s argument is unsupported and the
24 ALJ’s Conclusion of Law should be adopted by the Board.

25 ALJ Lewis properly found that the Board’s Enforcement Division has the authority to
conduct compliance checks. *See* April 29, 2011, Initial Order at 4-5. The Washington State

1 Legislature granted the Board the power to “enforce the penal provisions of this title and the
2 penal laws of this state relating to the manufacture, importation, transportation, possession,
3 distribution, and *sale of liquor*.” RCW 66.44.010(2) (emphasis added). The Legislature also
4 has authorized the Board to “appoint and employ...liquor enforcement officers” who “shall
5 have the power, under the supervision of the board, to enforce the penal provisions of this title
6 and the penal laws of this state relating to the manufacture, importation, transportation,
7 possession, distribution, and *sale of liquor*.” RCW 66.44.010(4) (emphasis added). The
8 Legislature also ensured that licensees would comply with the conditions of their license by
9 allowing the Board to conduct, through its liquor enforcement officers, warrantless inspections
10 of their licensed premises. *See* RCW 66.28.090. RCW 66.28.090, states, in part, that:

11 All licensed premises used in the manufacture, storage, or sale of liquor, or any
12 premises or parts of premises used or in any way connected, physically or
13 otherwise, with the licensed business, and/or any premises where a banquet
permit has been granted, shall at all times be open to inspection by any liquor
enforcement officer, inspector or peace officer.

14 This statute is clear that the Board may inspect a licensed premise at any time, and a licensee’s
15 privileges are subject to the Board being able to have access to the licensed premises through
16 its Enforcement officers. *See* RCW 66.28.090(2).

17 In keeping with these responsibilities, liquor enforcement officers, similar to state,
18 county, and city law enforcement officers, utilize “compliance checks” to help them inspect
19 and regulate licensees in their interactions with minors¹. Enforcement conducts its compliance
20 checks by employing minor investigative aides to act as decoys. The minor investigative aides
21 help Enforcement simulate a typical scenario where a minor may try and enter an
22 establishment off limits to them and purchase alcohol. Any minor investigative aide that is
23

24 ¹ Law enforcement may use a decoy or informer when affording a person with an opportunity to violate the law.
25 *See State v. Gray*, 69 Wn.2d 432, 418 P.2d 725 (1966); *State v. Emerson*, 10 Wn. App. 235, 242, 517 P.2d 245
(1973); *City of Seattle v. Gleiser*, 29 Wn.2d 869, 189 P.2d 967 (1948); *See Also Playhouse Inc. v. Liquor Control
Board*, 35 Wn. App. 539, 667 P.2d 1136 (1983) (“deceitful practices . . . including the use of undercover agents
and limited police participation in unlawful enterprises, are not constitutionally prohibited.”).

1 utilized in a compliance check is employed as an agent of the Enforcement Division, and only
2 enters liquor establishments at the direction of a liquor enforcement officer. Furthermore, the
3 Board published WAC 314-29-005(1) that expanded its liquor officers' authority to enforce the
4 Board's administrative rules codified in Title 314 WAC. *See* WAC 314-29-005(1). Thus, a
5 liquor enforcement officer can cite a licensee with an administrative violation if he or she
6 believes a violation occurred.

7 Here, the Licensee was cited for violations of RCW 66.44.270(1) and
8 RCW 66.44.310(1)(a) after Enforcement conducted a compliance check at the Licensee's
9 premises and observed its minor investigative aide enter into the licensed premises, remain,
10 and be sold liquor by the Licensee's bartender. The statutes in Title 66 RCW are clear in that
11 the Board has the authority to enforce these provisions, and has the authority to employ liquor
12 enforcement officers to enforce the liquor laws. The Board's authority, through the use of its
13 Enforcement Division, to utilize compliance checks is derived through the Board's broad
14 regulatory authority along with the Legislature's authorization allowing the Board to employ
15 and use liquor enforcement officers. The Board, through its Enforcement Division, was well
16 within its authority to inspect the licensed premises and provide an opportunity for the
17 Licensee, through its employees, to either comply or not comply with the law. Therefore, the
18 Licensee's motions were properly denied and the Board should adopt the Initial Order in this
19 matter.

20 **1. RCW 66.08.030 does not require the Board to promulgate rules authorizing**
21 **Enforcement to utilize compliance checks.**

22 The Licensee also cites to RCW 66.08.030(1) as requiring the Board to promulgate
23 rules authorizing Enforcement to utilize compliance checks. Petition at 4. RCW 66.08.030
24 does not require the Board to promulgate rules authorizing Enforcement to utilize compliance
25 checks. Additionally, the statutory language found in Title 66 RCW must be analyzed in the
context of the entire statute, including the statute's purpose. *State v. Manro*, 125 Wn. App 165,

1 173, 104 P.3d 708 (2005). When looking at statutory language, courts should derive the
2 statute's purpose from its plain and unambiguous meaning. *Id.* The "plain meaning" of a
3 statute is determined by the ordinary meaning of its language, the general context of the statute
4 in which that provision is found, related provisions, and the statutory scheme as a whole. *State*
5 *v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); *See also, State v. Thorne*, 129 Wn.2d
6 736, 761, 921 P.2d 514 (1996); *State v. Nam*, 136 Wn. App. 698, 704, 150 P.3d 617 (2007).
7 When looking at a statute, "the fundamental objective is to ascertain and carry out the
8 Legislature's intent, and if the statute's meaning is plain on its face, then the court must give
9 effect to that plain meaning as an expression of legislative intent. *Dep't of Ecology v.*
10 *Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Also, the court should look
11 at related statutes when analyzing the purpose of a statute or regulatory structure. *See State v.*
12 *Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); *Washington Public Ports Ass'n v. Dept of*
13 *Revenue*, 148 Wn.2d 637, 645-46, 62 P.3d 462 (2003). Lastly, a court should construe agency
14 rules in a rational, sensible manner, giving meaning to the underlying policy and intent and
15 avoid interpretations that are unlikely or absurd. *See Odyssey Healthcare Operating BLP v.*
16 *Washington State Dept. of Health*, 145 Wn. App. 131, 185 P.3d 652 (2008) quoting *Mader v.*
17 *Health Care Auth.*, 149 Wn.2d 458, 70 P.3d 931 (2003).

18 The Licensee argues that RCW 66.08.030(1) requires that the Board publish rules
19 authorizing Enforcement to conduct premises checks, but the plain meaning of
20 RCW 66.08.030(1) does not create this requirement. Petition at 4-6. RCW 66.08.030(1)
21 asserts that: "[f]or the purpose of carrying into effect the provisions of this title according to
22 their true intent or of supplying any deficiency therein, the board may make such regulations
23 not inconsistent with the spirit of this title as are deemed necessary or advisable...."
24 (Emphasis added). This provision's plain meaning does not require the Board to publish rules
25 for any specific statute, and listing of areas the Board can specifically regulate in

1 RCW 66.08.030(2) does not limit the broad discretionary authority given to the Board in
2 RCW 66.08.030(1). *Compare* RCW 66.08.030(2) with RCW 66.08.030(1).

3 The context of the statute is also clear. RCW 66.08.030(1) is meant to be the general
4 mechanism that allows the Board to publish rules it deems necessary or advisable to administer
5 the sections of Title 66 RCW. It is not a mandate that the Board publish any particular rule,
6 but it is the authority allowing it to do so. Therefore, the Licensee is incorrect when it argues
7 that RCW 66.08.030(1) requires the Board to publish a rule on Enforcement's use of
8 compliance checks.

9 Moreover, each provision found in Title 66 RCW should not be read in isolation and
10 the court should look at related statutes when analyzing the purpose of one particular statute or
11 regulatory structure in Title 66 RCW. *See State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281
12 (2005); *Washington Public Ports Ass'n v. Dept of Revenue*, 148 Wn.2d 637, 645-46, 62 P.3d
13 462 (2003). RCW 66.08.010 asserts that "entire title shall be deemed an exercise of the police
14 power of the state, for the protection of the welfare, health, peace, morals, and safety of the
15 people of the state, and all its provisions shall be liberally construed for the accomplishment of
16 that purpose." RCW 66.08.020 charges the Board with the administration of Title 66 RCW.
17 *See* RCW 66.08.020. Likewise, RCW 66.44.010 allows the Board to enforce the penal laws of
18 Washington State and authorizes the Board to employ liquor enforcement officers to enforce
19 the provisions under Title 66 RCW. Part of that responsibility, along with county and
20 municipal law enforcement agencies, is to ensure that the Licensee is not violating the statutes
21 at issue in this matter, RCW 66.44.270(1) and RCW 66.44.310(1)(a). *See* RCW 66.44.010.
22 Looking at these provisions, it is clear that the legislature gave the Board, and its Enforcement
23 Division, broad penal and regulatory power in enforcing Title 66 RCW and did not require the
24 Board to publish rules allowing Enforcement to utilize compliance checks.

1 Additionally, the legislative history of RCW 66.44.290 provides insight into the
2 legislature's mind set when it looks at Enforcement's use of compliance checks. Though
3 RCW 66.44.290 is not applicable to Enforcement's use of compliance checks, its legislative
4 history does provide insight into the Legislature's knowledge of compliance checks.
5 RCW 66.44.290, with its current amendments, was introduced to the legislature as S.B. 5604
6 by Senators Spanel and Gardner. S.B. 5604, 57th Leg., Reg. Sess. (Wash. 2001). Senator
7 Harriet Spanel and the Senate Committee's nonpartisan staff, testifying at the Senate
8 Committee hearing on S.B. 5604, specified that the purpose of the Bill was solely to provide
9 licensees the ability to conduct internal controlled purchase programs. *See An Act Relating to*
10 *Allowing the Liquor Control Board to Authorize Controlled Purchase Programs and Amending*
11 *RCW 66.44.290: Hearing on S.B. 5604 Before the S. Comm. on Labor, Commerce and Fin.*
12 *Inst., 57th Leg. (2001) at 00:29:16 (audio recording of hearing)*². Larry Mount, representing a
13 licensee, and Jan Gee representing the Washington State Food Industry also testified at the
14 Senate Committee hearing. *Id.* at 00:30:00 (audio recording of hearing). Both individuals
15 indicated that they supported the Bill, not to replace liquor enforcement compliance checks,
16 but to allow licensee's to do their own internal checks to increase compliance with the law and
17 assist Enforcement's efforts. *Id.* at 00:30:02-00:33:01 (audio recording of hearing).

18 The House Committee on Commerce and Labor also held a hearing on S.B. 5604. *See*
19 *An Act Relating to Allowing the Liquor Control Board to Authorize Controlled Purchase*
20 *Programs and Amending RCW 66.44.290: Hearing on S.B. 5604 Before the H. Comm. on*
21 *Commerce and Labor, 57th Leg. (2001)*³. The House Committee's nonpartisan staff introduced
22 the bill to the committee pointing out that the Board enforcement officers currently conduct

23 _____
24 ² Available at Audio Recording of Senate Com. Hearing 2/26/01, <http://www.tvw.org> (go to "media archives";
then "audio/video archives"; then to "Senate Committees, 2001"; then to Audio Recording of Public Hearing on
February 26, 2001).

25 ³ Available at Audio Recording of House Com. Hearing 3/28/01, <http://www.tvw.org> (go to "media archives";
then "audio/video archives"; then to "House Committees, 2001"; then to "Commerce and Labor"; then to Audio
Recording of Public Hearing on March 28, 2001).

1 controlled purchases from Licensees as a part of its regulatory compliance program. *Id.* at
2 00:33:43-00:34:05 (audio recording of hearing)⁴. Then, Jan Gee, Larry Mount, Joe Daniels
3 representing the United Food and Commercial Workers, Michael Transue representing the
4 Washington Restaurant Association, and Larry Phillips representing the Liquor Control Board,
5 testified at the hearing. *Id.* at 00:33:43-00:45:30 (audio recording of hearing). All individuals
6 indicated that they supported the bill to allow liquor establishments to conduct their own
7 internal checks to self-regulate the sale of alcohol by their employees. *Id.* at 00:36:52-00:45:30
8 (audio recording of hearing).

9 Clearly, this legislative history shows that the legislature is aware of Enforcement's use
10 of compliance checks. If the legislature wanted to constrain law enforcement's use of
11 compliance checks, it could do so, but it has chosen to allow law enforcement to use its broad
12 police powers when enforcing provisions of Title 66 RCW. This history is further evidence
13 that the Board and its Enforcement arm have the authority to conduct compliance checks.

14 Therefore, considering the plain meaning of RCW 66.08.030(1), its context, related
15 statutes, and the legislative history of RCW 66.44.290, it is clear that the Board and its
16 Enforcement Division have the authority to enforce all liquor laws through the use of a
17 compliance check against the Licensee. Consequently, the Licensee's argument that
18 the Board must publish a rule authorizing Enforcement to utilize compliance checks is
19 incorrect, and it is not an avenue by which the Licensee may now avoid its responsibility to
20 follow the law and rules it voluntarily agreed to abide by when it chose to apply for and accept
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23 ⁴ The House nonpartisan staff gives a detailed description of the Board's current practice, current industry
24 practices, and a summary of how the bill will affect the current law. *See An Act Relating to Allowing the Liquor
25 Control Board to Authorize Controlled Purchase Programs and Amending RCW 66.44.290: Hearing on S.B. 5604
Before the H. Comm. on Commerce and Labor, 57th Leg. (2001), Available at Audio Recording of House Com.
Hearing 3/28/01, <http://www.tvw.org> (go to "media archives"; then "audio/video archives"; then to "House
Committees, 2001"; then to "Commerce and Labor"; then to Audio Recording of Public Hearing on March 28,
2001 at 00:33:43-00:35:33).*

1 a liquor license. Therefore, the Licensee's motions were properly denied and the Board should
2 adopt the Initial Order in this matter.

3 **2. RCW 66.24.290, RCW 66.44.310, and WAC 314-21 do not prevent**
4 **Enforcement from utilizing a minor investigative aide in a compliance check**
5 **and its use of compliance checks is not improper.**

6 Next, the Licensee argues that RCW 66.44.290, RCW 66.44.310, and/or WAC 314-21
7 prevents Enforcement from utilizing minor investigative aides in compliance checks. *See*
8 *Petition at 5-9.* The Licensee supports this conclusion by asserting Enforcement lacks that
9 ability because the pertinent statutes and rules only address the crime, punishment and possible
10 immunity for minors who purchase liquor, and no statute or rule addresses the conduct of
11 Enforcement. This argument is misguided and unsupported.

12 The plain meaning of RCW 66.44.290, RCW 66.44.310, and/or WAC 314-21
13 demonstrate that they are to only apply to minors who attempt to purchase liquor, and not to
14 the conduct of Enforcement. RCW 66.44.290's plain meaning demonstrates that its provisions
15 were clearly intended to address minors purchasing alcohol and private in-house controlled
16 purchase programs and not Enforcement's use of compliance checks. If the legislature had
17 intended for RCW 66.44.290 to pertain to Enforcement's use of compliance checks, it would
18 have directly addressed the use of compliance checks in the statute since it knew that the Board
19 conducted compliance checks when it amended RCW 66.44.290 in 2001⁵. Therefore, the plain
20 meaning and language of RCW 66.44.290 establishes that the statute is clearly meant to
21 regulate the conduct of minors and private in-house controlled purchase programs, and not the
22 conduct of Enforcement.

23 Similarly, RCW 66.44.310's plain meaning demonstrates that its provisions were
24 clearly intended to address situations where minors enter areas classified as off-limits to any
25 person under the age of twenty-one. If the legislature had intended for RCW 66.44.310 to

⁵ *See Supra*, Enforcement's discussion of the legislative history of RCW 66.44. The legislative history clearly shows that the legislature knew that the Board conducted compliance checks when it amended this statute in 2001.

1 pertain to Enforcement's use of compliance checks, it would have directly addressed the use of
2 compliance checks. Therefore, the plain meaning and language of RCW 66.44.310 establishes
3 that the statute is clearly meant to regulate the conduct of minors, and not the conduct of
4 Enforcement.

5 Also, the intent and plain meaning of WAC 314-21 clearly indicates that it was
6 published to address in-house controlled purchase programs carried out under RCW 66.44.290
7 and how a licensee must conduct an in-house controlled purchase program. The Board did not
8 intend to exclude Enforcement from utilizing compliance checks, and the Licensee's inference
9 that it did would ask for an absurd result. WAC 314-21 is clear that it only relates to a
10 Licensee's use of an in-house controlled purchase program and not Enforcement's use of
11 compliance checks.

12 Additionally, the Licensee misguidedly suggests the use of a minor investigative aide is
13 improper because the minor investigative aide violated the law. Petition at 5-7. The Licensee
14 also argues that the minor investigative aide and the liquor enforcement officers are now
15 exposed to criminal prosecution for participating in the compliance check. Petition at 5-8.
16 However, the Licensee has provided no authority to support these careless assertions, and the
17 Board should disregard these reckless arguments⁶.

18 Officers of the Washington State Liquor Control Board are limited purpose law
19 enforcement officers. See RCW 66.44.010. As such, they have broad police powers to enforce
20 the laws in Washington relating to the sale of liquor. Liquor enforcement officers are granted
21 the authority to conduct compliance checks on liquor retailers through the Board's
22 authorization to employ and use liquor enforcement officers⁷, authority derived from general
23 police powers, and Washington case law.

24
25 ⁶ *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) ("Courts may assume where no authority is cited in a
brief, counsel has been unable to find any.")

⁷ RCW 66.44.010(4)

1 Washington Courts are clear that law enforcement may run undercover operations and
2 use a decoy or informer when affording a person with an opportunity to violate the law. *See*
3 *State v. Gray*, 69 Wn.2d 432, 418 P.2d 725 (1966); *State v. Emerson*, 10 Wn. App. 235, 242,
4 517 P.2d 245 (1973); *City of Seattle v. Gleiser*, 29 Wn.2d 869, 189 P.2d 967 (1948).
5 Specifically, the courts have stated the use of a decoy or informer to present an opportunity for
6 commission of a crime is not improper.” *Gray*, 69 Wn.2d at 432; *see also Playhouse Inc. v.*
7 *Liquor Control Board*, 35 Wn. App. 539, 542, 667 P.2d 1136 (1983) (“deceitful practices . . .
8 including the use of undercover agents and limited police participation in unlawful enterprises,
9 are not constitutionally prohibited.”). The minor investigative aide or liquor enforcement
10 officers did not violate any law acting as agents of the Board. Additionally, Enforcement is
11 allowed to use compliance checks for the purpose of affording the Licensee with an
12 opportunity to violate the law in the furtherance of Enforcements well established duty to test
13 the Licensee’s compliance with liquor laws. *See* RCW 66.44.010(4); *Playhouse Inc.*, 35 Wn.
14 App. at 342; *State v. Athan*, 160 Wn.2d 354, 371-77, 158 P.3d 27 (2007).

15 Moreover, as an agent of Enforcement, the minor investigative aide is protected from
16 prosecution even if the liquor statutes and rules do not explicitly mention immunity for minor
17 investigative aides involved in Enforcement-run compliance checks. Law enforcement may
18 engage in limited criminal acts “in order to detect and eliminate criminal activity.” *State v.*
19 *Lively*, 130 Wn.2d 1, 20, 921 P.2d 1035 (1996). These practices, when part of a scheme of
20 crime detection by law enforcement officers, have not ordinarily been held improper.
21 *Playhouse*, 35 Wn. App. at 542; *See also, Emerson*, 10 Wn. App. at 242, *State v. Clark*, 34
22 Wn. App. 173, 175-76, 659 P.2d 554. Even if that reasoning did not apply to the minor
23 investigative aide here, he would be absolved from any criminal liability as he could claim a
24 complete defense of entrapment. *See* RCW 9A.16.070(1)(a).

1 Here, the minor investigative aide used in the Licensee's compliance check is an agent
2 of Enforcement, and is not subject to the provisions of RCW 66.44.290 or WAC 314-21.
3 Additionally, Enforcement is a law enforcement agency and has the ability to run compliance
4 checks as a part of its law enforcement duties. The Licensee fails to recognize Enforcement's
5 limited law enforcement jurisdiction, and its reckless assertions that liquor enforcement
6 officers and/or minor investigative aides committed crimes by conducting a compliance check
7 is not supported by law and is wholly illusory. Therefore, the Licensee's motions were
8 properly denied and the Board should adopt the Initial Order in this matter.

9 **3. The Licensee's mention of Enforcement Policy Number 287 is immaterial and**
10 **is not controlling in this administrative matter.**

11 The Licensee correctly contends that Enforcement's Internal Policy Number 287 is not
12 a rule adopted by the Board. Petition at 6. Enforcement Policy Number 287 is an internal
13 policy that has not been promulgated by the Board, and it is not relevant, nor controlling, in
14 this administrative matter.

15 In administrative law, a "rule" is any agency order, directive, or regulation of general
16 applicability that was formally promulgated according to RCW 34.05. See RCW 34.05 and
17 RCW 34.05.010(16); See also *Pierce County v. State*, 144 Wn. App. 783, 836, 185 P.3d 594
18 (2008). A "rule" includes the amendment or repeal of a prior rule, but "*does not include*
19 *statements concerning only the internal management of an agency and not affecting private*
20 *rights or procedures available to the public...."* RCW 34.05.010(16) (Emphasis added).

21 Unless formally promulgated by the Board, internal agency policies are not law nor do
22 they have the authority of law in an administrative hearing. See RCW 34.05.010(16); *Mills v.*
23 *Western Washington University*, 150 Wn. App. 260, 276-77, 208 P.3d 13 (2009) (Where an
24 internal policy was not a "rule" as that term is used in the Administrative Procedures Act and
25 could not be relied upon as authority by an adjudicative body). Furthermore, since internal
policies are not promulgated by the Board, they do not have the force of law. See *Joyce v.*

1 *Dept. of Corrections*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005) (“Unlike administrative rules
2 and other formally promulgated agency regulations, internal policies and directives generally
3 do not create law”). As a result, the only rules that have the authority of law in this instant
4 matter can be found in Title 314 WAC.

5 Here, Policy No. 287 was never formally promulgated by the Board according to
6 RCW 34.05 and RCW 66.08.030(1), and it is not a policy conceived by or even produced by
7 the members of the Board. It is an Enforcement internal policy, and it is merely a guideline for
8 employees of the Board’s Enforcement Division. As such, it is not law, nor does it have the
9 authority of law in this administrative matter, and the court should not consider it when
10 deciding whether or not a licensee committed an administrative violation. See
11 RCW 34.05.010(16); *Mills*, 150 Wn. App. at 276-77. Therefore, Enforcement’s internal
12 policies would not be determinative as to the admissibility or relevance of the evidence
13 gathered against the Licensee, and they have no relevancy as to whether or not the Licensee
14 furnished liquor to a minor.

15 Consequently, the Board and Enforcement have the statutory, regulatory, and case law
16 authority to conduct compliance checks on the Licensee’s premises. The Licensee’s reference
17 to Internal Policy Number 287 is immaterial and meant to cloud the issues in this matter. The
18 Licensee’s motions were properly denied and the Board should adopt the Initial Order in its
19 entirety.

20 **B. “Deceptively Mature in Appearance” is not a legal standard relevant to this**
21 **administrative matter.**

22 The Licensee argues that the ALJ erroneously determined that the minor investigative
23 aide was not “deceptively mature in appearance.” A minor investigative aide’s appearance is
24 immaterial in this matter and “deceptively mature in appearance” is not a legal standard that is
25 applicable in this case. The Licensee argues that Enforcement used a minor investigative aide
who was “deceptively mature in appearance.” Petition at 7-9. The Licensee fails to cite to

1 anything in the administrative record to support this factual assertion.⁸ The Licensee cites to
2 WAC 314-21-025 and Internal Policy No. 287. As previously stated, neither
3 WAC 314-21 nor Internal Policy No. 287 are relevant in this matter, and the Licensee has
4 provided no authority to the contrary⁹. Nevertheless, its argument is immaterial and
5 unsupported by the record and the ALJ's Order.

6 RCW 66.44.270 is clear—a person is prohibited from selling, giving, or supplying
7 liquor to a person under the age of twenty-one (21) years. The statute does not use the words
8 “knowingly” or “intend” and the violation is the *sale* of liquor and not the intent of the seller.
9 Therefore, the statute creates a strict liability on licensees and they have committed a violation
10 if they are found to have sold liquor to a person under the age of twenty-one (21). *See State v.*
11 *Moser*, 98 Wash. 481, 482, 167 P. 1101 (1917) (if a person sold liquor to minors, “he is guilty
12 of the crime charged, irrespective of his intention, knowledge, or belief...”); *State v. Catalino*,
13 118 Wash. 611, 612-13, 204 P. 179 (1922) *overruled on different grounds by State v.*
14 *Misetrich*, 124 Wash. 470, 215 P. 13 (1923). *See also State v. Nicolls*, 61 Wash. 142, 145, 112
15 P. 269 (1910); *State v. McCathern*, 211 Or. App. 171, 177-180, 154 P.3d 130 (2007).

16 Furthermore, under the Licensee's argument, a minor's actual age would be
17 meaningless. If the Licensee's argument was controlling, it would be a complete defense for
18 any person or licensee to argue that he/she/it is not responsible for the sale to a minor because
19 the minor looked of lawful age. This would create an absurd result, and the law was not
20 intended to have this subjective element.

21 Additionally, “deceptively mature in appearance” is not a legal standard that is
22 applicable in this administrative matter. The term “deceptively mature in appearance” can only
23 be found in WAC 314-21-025 and it is a standard for a retail liquor licensee when it conducts
24

25 ⁸ The Licensee cites to attachments to a declaration that are not a part of the factual record.

⁹ *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (“Courts may assume where no authority is cited in a brief, counsel has been unable to find any.”)

1 an in-house controlled purchase program. The term does not appear in any other statute or rule
2 and it is not a term defined in case law. Therefore, it only applies when a licensee utilizes an
3 in-house controlled purchase program, which is clearly not the circumstance in this matter.
4 Thus, the Licensee's argument is baseless and the Board should adopt the Initial Order in its
5 entirety.

6 **C. The Licensee failed to set forth viable legal grounds to dismiss the**
7 **administrative complaint.**

8 **1. The Licensee has failed to establish that the affirmative defense of**
9 **entrapment is applicable in this administrative matter.**

10 The Licensee asserts that ALJ Lewis should have found it had established an
11 affirmative defense of entrapment. *See* Petition at 9. The Licensee argues that the criminal
12 statute for entrapment applies in this civil administrative matter. Petition at 9. The Licensee's
13 argument is misguided and contrary to law.

14 Title 66 RCW is clear that the Board does not have the authority to conduct criminal
15 hearings and can only take administrative action against licensees. *See* RCW 66.44.010(2),(3);
16 RCW 66.08.150. Therefore, the administrative proceeding in this matter is not carried out
17 under RCW 66.44.290 or RCW 66.44.310. RCW 66.08.020 gives the Board the authority to
18 administer Title 66 RCW. RCW 66.24.010(3) allows the Board to impose sanctions against
19 licensees. RCW 66.08.150 provides that any action by the Board taken against a liquor license
20 is subject to the applicable provisions of Chapter 34.05 RCW. Therefore, any action taken
21 against a licensee is an administrative action under Chapter 34.05 RCW and not subject to Title
22 9 or Title 9A RCW.

23 Accordingly, the affirmative defense of entrapment is only available in a criminal
24 prosecution. RCW 9A.16.070(1) provides that entrapment is a defense "in any prosecution for
25 a crime." Overlooking the fact that Title 9A RCW is Washington's criminal code and this is
an administrative matter, the Licensee argues that these administrative matters are prosecutions

1 of a crime because a criminal violation of RCW 66.44.290 or RCW 66.44.310 is a
2 misdemeanor. Licensees' Response at 7. However, the Licensee overlooks the fact that it has
3 not been charged with a crime, and that the alleged violation in this matter is an administrative
4 violation. *See* AVN; Complaint. Moreover, if the Licensee had been charged with a crime,
5 these matters could not be before this administrative tribunal since it has no jurisdiction in
6 criminal matters. *See* RCW 34.12. Therefore, the clear and unambiguous language of
7 RCW 9A.16.070(1) demonstrates that the defense of entrapment is not available to the
8 Licensee in this administrative matter.

9 Nevertheless, even if the affirmative defense of entrapment were available to the
10 Licensee, they have not shown that it applies in these matters. The Licensee does not give a
11 clear basis for its entrapment argument, but the essence of its argument appears to be that the
12 appearance of the minor investigative aide tricked the Licensee into selling liquor to a minor
13 because the minor was "deceptively mature in appearance." Licensee's Response at 7-8. The
14 Licensee does not cite to any statutory or case law authority supporting this position, and it
15 should be precluded from arguing this affirmative defense at the administrative hearing. *See*
16 Licensee's' Response at 6-7.

17 Entrapment cannot be established if the law enforcement officials merely afforded the
18 actor an opportunity to commit a crime. *See* RCW 9A.16.070(2); *See also, State v. Swain*, 10
19 Wn. App. 885, 889, 520 P.2d 950 (1974) ("mere solicitation by a police officer or other state
20 agent to commit the crime is not entrapment"). Furthermore, in providing a person with the
21 opportunity to commit a crime, law enforcement may use a decoy or informer to assist them in
22 presenting a person with an opportunity to commit a crime. *See State v. Gray*, 69 Wn.2d 432,
23 418 P.2d 725 (1966); *See Also Playhouse Inc. v. Liquor Control Board*, 35 Wn. App. 539, 667
24 P.2d 1136 (1983).

1 In these matters, the courts look to see if the person was induced into committing the
2 crime, and if the person would not otherwise have committed the crime if he/she had not been
3 induced. *See State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996). Here, the Licensee was
4 merely afforded the opportunity to commit a crime. There was no resistance on the part of the
5 Licensee to sell liquor to the minor investigative aide, and the Licensee was not forced to sell
6 to the minor investigative aide. The Licensee had every opportunity to prevent the sale from
7 occurring by asking the investigative aide for her identification, which would have showed that
8 she was under the age of twenty-one (21), and they failed to take this simple step before selling
9 her liquor. Accordingly, the risk presented to the Licensee is no different than if the minor had
10 walked into the Licensee's establishment on her own and not as an agent of the Liquor Control
11 Board.

12 Therefore, the affirmative defense of entrapment is not available to the Licensee in this
13 administrative proceeding. Even if it were, the Licensee has failed to show that the evidence in
14 this matter is sufficient to show entrapment. Consequently, the Licensee's argument fails and
15 the Board should adopt the Initial Order in its entirety.

16 **2. The Licensee fails to set forth viable legal grounds to suppress any evidence**
17 **in this matter as a result of a "search" of its premise.**

18 The Licensee asserts that all evidence presented against it at the administrative hearing
19 was inadmissible and the administrative complaint should be dismissed. Petition at 10-11.
20 The Licensee appears to assert that the evidence in this matter should be suppressed because it
21 was attained through an unlawful search. Petition at 10. However, the Licensee fails to
22 engage in any analysis of how Enforcement engaged in an unlawful search. Instead, it asserts
23 that Enforcement's actions were arbitrary and capricious. Petition at 10. Regardless, the
24 Licensee runs a business it holds open to the public¹⁰ and the standard under RCW 34.05.570¹¹
25 is not applicable in this matter.

¹⁰ *See* WAC 314-11-072

1 The administrative record clearly establishes that the minor investigative aide entered
2 and remained in the public portion of the Licensee’s premise. *See* August 11, 2011, Order at 2-
3 3. While inside the public portion of the Licensee’s premises, the minor investigative aide
4 purchased a Corona beer. *See* September 30, 2011, Order at 3-4. The Licensee has presented
5 no evidence and no facts are found showing the minor investigative aide or any officer ever
6 entered a portion of the Licensee’s commercial property that was not open to the general public
7 or limited only to employees.

8 Therefore, the Licensee appears to ignore WAC 314-11-072—it must be open to the
9 general public whenever liquor is sold, served, or consumed—and RCW 66.04.010(35)—
10 “public place” includes “establishments where beer may be sold. . . restaurants”—in its attempt
11 to infer that an unlawful search occurred. This oversight is fatal to the Licensee’s argument
12 because expectation of privacy in commercial property does not extend to that which an owner
13 or operator of a business voluntarily exposes to the public. *See State v. Carter*, 151 Wn.2d
14 118, 126, 85 P.3d 887 (2004); *See v. City of Seattle*, 387 U.S. 541, 545, 87 S. Ct. 1737 (1967);
15 *State v. Young*, 123 Wn.2d 173, 182, 867 P.2d 593 (1994) (“what is voluntarily exposed to the
16 general public and observable without the use of enhancement devices from an unprotected
17 area is not considered part of a persons private affairs”).

18 Additionally, the Licensee invokes the exclusionary rule as the mechanism through
19 which the Board should suppress evidence because it asserts that administrative proceedings
20 before the Board are “quasi-criminal” in nature. *See* Petition at 12. However, the Licensee
21 fails to actually cite to any authority indicating that administrative proceedings before the
22 Board are quasi-criminal in nature.¹² Additionally, the Licensee has failed to provide any

23 ¹¹ The arbitrary and capricious test under RCW 34.05.570(3)(i) is a very narrow standard used on Judicial Review
24 and the one asserting it “must carry a heavy burden.” *Sheriff v. Civil Serv. Comm’n*, 98 Wn.2d 690, 695, 658 P.2d
648 (1983).

25 ¹² Administrative proceedings are not quasi-criminal when the potential penalties are remedial in nature. *See*
State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997). Here, the penalties found in WAC 314-29-020 are not
punitive in nature, and are meant to protect and promote the public’s health, safety, and welfare. RCW 66.08.010.

1 support for why the exclusionary rule should be a remedy in this administrative matter.
2 Although Enforcement assumes that the Licensee is attempting to invoke the exclusionary rule
3 because it feels that an unlawful "search" occurred in this matter, its reliance on the
4 exclusionary rule is based entirely on its own assumptions and it has failed to provide the
5 Board with any evidence that a "search" occurred.

6 Lastly, the Licensee's assertion of the arbitrary and capricious standard in
7 RCW 34.05.570 is not applicable here and Enforcement's actions were consistent with statute
8 and rule. Consequently, the Licensee's motions were properly denied and the Board should
9 adopt the Initial Order in its entirety.

10 **3. The Licensee has not established that this administrative matter is quasi-**
11 **criminal in nature.**

12 The Licensee asserts that this administrative matter is quasi-criminal in nature. Petition
13 at 10. The Licensee appears to support this conclusion by citing to cases that are not analogous
14 to this administrative matter. Petition at 10. Nevertheless, the Licensee's assertion is without
15 merit and this administrative matter is not quasi-criminal because these proceedings are
16 remedial and not punitive in nature.

17 In *Jow Sin Quan*, the court held that Board action towards a liquor licensee is not a
18 criminal proceeding. See *Jow Sin Quan*, 69 Wn.2d at 382. "It is an administrative regulatory
19 proceeding - civil and disciplinary in nature - the purpose of which is to protect the public
20 health, safety and morals from imprudent, improper, and/or unlawful actions of the board's
21 licensees in the exercise of the privilege conferred upon them." *Id.* Here, the Licensee is
22 involved in an administrative regulatory proceeding. Similar to *Jow Sin Quan*, the Licensee in
23 this matter faces possible penalties against their liquor license as a remedial measure to ensure
24 that minors do not have access to liquor at the Licensee's establishment.

25 Thus, absent any indication that a criminal purpose was intended the stated civil goals of the agency are
controlling. *Catlett*, 133 Wn.2d at 367 (citing *In re Young*, 122 Wn.2d at 23).

1 Additionally, administrative proceedings are not quasi-criminal when the potential
2 penalties are remedial in nature. *See State v. Catlett*, 133 Wn.2d 355, 945 P.2d 700 (1997).
3 Here, the penalties found in WAC 314-29-020 are not punitive in nature, and are meant to
4 protect and promote the public's health, safety, and welfare. RCW 66.08.010. Thus, absent any
5 indication that a criminal purpose was intended the stated civil goals of the agency are
6 controlling. *Catlett*, 133 Wn.2d at 367 (citing *In re Young*, 122 Wn.2d at 23).

7 Therefore, this is not a quasi-criminal matter, and the Licensee has not provided any
8 authority to the contrary. Additionally, the Licensee has failed to establish that a search
9 occurred, and analysis of Fourth Amendment jurisprudence is not applicable here and the
10 Board should adopt the Initial Order in its entirety.

11 **4. The Licensee fails to demonstrate the double-jeopardy clauses of the United**
12 **States and Washington State Constitutions are applicable in this matter.**

13 The Licensee argues that citation to RCW 66.44.270 and RCW 66.44.310 violates the
14 double jeopardy clause of the United States and Washington State Constitutions. Petition at
15 11. Enforcement is not prevented from citing a licensee for multiple administrative violations
16 based on the same incident, and the Licensee's argument is meritless and should be
17 disregarded.

18 The double jeopardy clause of the Fifth Amendment to the United States Constitution
19 protects against "multiple punishments for the same offense". *State v. McClendon*, 131 Wn.2d
20 853, 862, 935 P.2d 1334 (1997) (citing *U.S. v. Halper*, 490 U.S. 435, 440, 109 S. Ct. 1892,
21 104 L. Ed. 2d 487 (1989)). The double jeopardy clause is applicable to the states through the
22 Fourteenth Amendment. *State v. Knutsen*, 88 Wn. App. 677, 680, 946 P.2d 789 (1997). "The
23 Clause protects only against the imposition of multiple criminal punishments for the same
24 offense...." *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).
25

1 above, Enforcement respectfully requests that the Board adopt and affirm the findings of fact
2 and conclusions of law set forth in the Initial Order.

3 DATED this 21st day of October, 2011

4 ROBERT M. MCKENNA
5 Attorney General

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8 Assistant Attorney General
9 Attorneys for Enforcement
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