

I. WORDS AND PHRASES

Agent

See *The Vault Bistro & Lounge*, OLCC-10-V-006/006A, December 2010.

Boisterous

"Boisterous conduct" (OAR 845-06-045) means "noisily turbulent, rowdy, or stormy conduct." *Columbia Café & 3C's Club*, February 1983.

Change

The term "change" means "different from what it is or from what it would be if left alone" and/or "to become altered or modified." It also means, to transform or to replace with another. *Webster's Unabridged Dictionary* (1996) at 344.
New Copper Penny Restaurant, OLCC-04-V-040/040A, October 2005.

Deliberate

A "deliberate" violation is one that is formed, arrived at, or determined upon as a result of careful thought and weighing of considerations. *OLCC Agency No. 169*, OLCC-86-RO-003, March 1987.

Directly

"Directly" is defined as "without any intervening space or time; next in order; * * * without any intervening agency or instrumentality or determining influence * * *." *Webster's Third New International Dictionary* 641 (2002). *The Raven Inn*, OLCC-07-V-021 and OLCC-07-V-026, November 2007.

Employee

A door checker who collected the cover charge for the band was not the licensee's employee where the band, not the licensee, employed the door checker and the evidence did not prove that licensee had the right or power to control or direct the door checker. *Satyricon*, OLCC-88-V-060, December 1988.

An employee, by definition, is subject to the supervision of his employer and is usually paid a wage. *Woahink Landing*, OLCC-86-V-052, January 1987.

A "full time, working partner" is not an employee. *Old Town Eatery*, OLCC-86-V-042, December 1986.

Substance rather than form determines whether an independent contractor relationship or an employment relationship exists. Person paid in the form of draws, which were equivalent to checks, and who was subject to being fired was an employee rather than an independent contractor, despite the lack of withholding and despite irregular pay periods. *Wells v. Carlson*, 78 Or App 536, 717 P2d 640 (1986).

Shareholder in a Subchapter S corporation, who had a right to share in the profits and losses of the corporation, who had a duty under shareholder's agreement to complete his last work assignment, and who worked without supervision, was a "co-partner" and not an "employee."

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Lamy v. Jack Jarvis & Company, Inc., 281 Or 307, 574 P2d 1107 (1978).

Equipment

A beverage cooler constitutes equipment under ORS 471.465(4). *Coca Cola Bottling*, OLCC-85-V-071, April 1987.

Good Cause

Good cause is generally an issue under the following topics:

- A.2.e.1. Late Request for Hearing
- A.2.m. Late Exceptions
- B.1.a.1 Adverse Recommendation by City or County
- B.1.a.2. School Objections
- B.1.a.3. Church Objections
- B.1.a.4. Hospital Objections
- B.1.a.5. Park Objections
- B.1.b.5. Insufficient Financial Responsibility
- B.1.b.6. Unable to Communicate in English
- B.1.b.7. Conviction History/Record of Abuse
- B.1.b.8. Habit of Using Alcohol or Controlled Substances to Excess (licensing)
- B.1.c.2. Failure to Operate as Proposed
- B.1.c.3. Illegal Activities, etc.
- B.2.b.9. Food Service (OAR 845-05-025(4))
- B.3.a. PS Licenses (OAR 845-05-025(9))
- B.4.d. Change of Operation: Location
- C.1.h. Habit of Using Alcohol or Controlled Substances to Excess (violations)

A person showed good cause for a late request for hearing where, although the request was filed later than the time allowed by rule, the request was filed within the time allowed by the Commission's staff. *Mr. C's Hippopotamus*, OLCC-85-L-047, July 1986.

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Good cause may be shown to overcome an adverse local government recommendation under OAR 845-05-025(1), where the recommendation is founded on reasons which conflict with the Commission's own criteria on the same subjects. *ARCO AM/PM Mini-Market*, OLCC-85-L-048, October 1986; Guy and Genevieve Fletchall, *Brownsboro Tavern*, OLCC-85-L-009, December 1985.

Good cause for overcoming a record of alcohol abuse under OAR 845-05-025(6) consists of evidence that the applicant is not a poor risk as to compliance with alcoholic beverage laws. David P. Jardine, *Nemo's Pizza & Spaghetti House*, OLCC-85-L-028, December 1985.

Intent

There is a presumption in the Rules of Evidence which states: "A person intends the ordinary consequences of a voluntary act." ORS 40.135. The ordinary consequences of Applicant's voluntary act of not providing complete information about his conviction record on his renewal applications was to have his license granted. On this basis, the Commission concludes that Applicant intended to mislead the Commission. *Yesenia Bakery & Meat Market*, OLCC-97-L-011, March 1998.

Investment

An "investment" is "the placing of capital or laying out of money in a way intended to secure income or profit from its employment." *Junction Inn*, OLCC-86-V-073, May 1987.

Knowledge/Knowing

An agent's knowledge may be imputed to the principal even if the agent does not communicate the information to the principal. However, the knowledge of an agent is imputable only if it is about matters within the agent's authority as agent. *Tri-Met, Inc. v. Odighizuwa*, 112 Or App 159 (1992).

The Commission may suspend or cancel provider certification if the provider or other program personnel knowingly violate any laws or Commission rules related to the program. The Commission need not prove the provider's actual knowledge but the Commission must show that a reasonable provider under the circumstances should know that they were committing acts that would be a violation. *William Strance, Alcohol Programs*, OLCC-87-MS-002, February 1988.

Knowledge may be inferred from the type and extent of the prohibited condition. *Taylor's Coffee Shop v. OLCC*, 28 Or App 701, 706, 560 P2d 693 (1977).

Lewd

OLCC definition of "lewd" as used in ORS 472.180(5) as meaning "lustful, indecent, lascivious or lecherous" is a proper interpretation. OLCC is allowed to interpret the term by rule or by contested case order. *Korgan v. OLCC*, 72 Or App 31, 695 P2d 81 (1985).

Licensed Premises

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Licensed premises in ORS 472.010(7) refers only to the area where refreshments or food are served. The licensee's office in *Parker's Place*, OLCC-88-V-035, October 1988, was not deemed to be part of the licensed premises because the evidence did not show that it was a place where refreshments or food were served to the public.

The term "licensed premises" in ORS 472.010(7) does not include an upstairs office area that is not open to the public, is not part of a hotel, and is not where food and refreshments are served. *The Peacock Tavern*, OLCC-88-V-048, October 1988.

Loan

A loan entitles the lender to a return of only principal and interest. A transaction was not a loan where it created a right to ownership in the licensed business, subject to the condition that the business become profitable. *The Village Idiot's Mexican Restaurant & Cantina*, OLCC-86-V-031, December 1986.

Maintain

"Maintain" means to keep in an existing state (as of repair, efficiency, or validity), to preserve, carry on or keep up, or to continue. *Webster's Third New International Dictionary* at 1362 (2002 ed.). *Santorini West and Kelen Tzakis*, OLCC-08-V-036/036A/036B, OLCC-09-V-026, June 2010.

Maintaining

Violation for "maintaining" a lewd establishment requires that there be evidence that could support an inference of continuity. One violation standing alone is not sufficient. *Neptune's Restaurant v. OLCC*, 15 Or App 16, 514 P2d 900 (1973).

There was sufficient continuity to prove that licensee "maintained" a lewd establishment where lewd activity occurred on two different dates that were two months apart. *Sandy Jug Tavern*, OLCC-87-V-022, OLCC-87-V-023, January 1988, affirmed without opinion *Sahli v. Oregon Liquor Control Commission*, 94 Or App 575, 767 P2d 934 (1989); *Don Juan's*, OLCC-88-V-003, May 1988, (noise and disorderly activities).

Evidence of one isolated instance does not establish that licensee maintained an insanitary establishment, as there must be evidence of other circumstances that supports an inference of continuity. *LaMar's Enterprises, Inc. v. OLCC*, 18 Or App 77, 524 P2d 336 (1974).

Make Available

"Available" means either "present and ready for use; at hand, accessible" or "capable of being gotten; obtainable." *The American Heritage College Dictionary* (Third Edition), Houghton Mifflin Company. From a temporal standpoint, the term is ambiguous because it can be construed either in the present tense as meaning "at hand" (i.e. "make available" means at the time of sale or initial possession of the drink by the VIP) or in the future tense as meaning "obtainable" (i.e. "make available" means whenever the VIP is known to have possession of a drink). Since the other active verbs in the statute, "sell" and "give" are both present tense, the Commission concludes that the use of the present tense is a significant indicator of the legislative intent and that "make available" should be construed to mean at the time of sale or initial possession of the drink by the VIP. See *Martin v. City of Albany*, 320 Or 175 (1994);

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Managed Hlth. Northwest v. Dept. of Commerce, 189 Or App 444 (2003).

Justin Scriber, (OLCC, Final Order, OLCC-04-V-050, August 2005).

Manage

Entity had contract to manage other than as an employee (under OAR 845-06-010(3)(a),(c)) where it had control over the daily operation and supervision of the premises, there was no provision for salary or terms of employment and where the licensee did not routinely supervise its operation of the premises. *Ski Bowl Beer Stube*, OLCC-85-V-024, August 1985.

Management

“Management” means the act or art of managing: the conducting or supervising of something (as a business). *Webster’s Third New Int’l Dictionary* at 1372 (2002 ed.). *CS Convenience Store*, OLCC09-V-059, June 2010.

Merger

Delivery and possession of a controlled substance which results from a single transaction should merge into one conviction for delivery of a controlled substance. Combining the two convictions into one is called "merger." The Oregon Courts have held that "[m]erger exists 'when the completion of one offense necessarily includes commission of acts sufficient to constitute violation of another statute.' (Citations omitted.) When there is a merger, a judgment of conviction on only one of the charges is proper." (Citation omitted.) *State v. Finn*, 79 Or App 439, 441, 719 P2d 898 (1986). OLCC-94-SPR-027, June 1994.

Noisy Conduct

Conduct is noisy where it interferes with sleep or is loud enough to be disturbing to neighboring residents in their homes. *Fleetwood Bar & Buffet*, OLCC-87-L-005, November 1985.

Operation

And the definition of “operation” includes a doing or performing especially of action, an exertion of power or influence and/or the quality or state of being functional. *Webster’s Third New Int’l Dictionary* at 1581 (2002 ed.). *CS Convenience Store*, OLCC09-V-059, June 2010.

Participate

“Participate” means to take part in something (as an enterprise or activity) or to have a part or share in something. *Webster’s Third New Int’l Dictionary* at 1646 (2002 ed.). *CS Convenience Store*, OLCC09-V-059, June 2010.

Pasteurized

The term "pasteurized" in ORS 471.260 does not include micro filtration. *Joint Council of Teamsters v. OLCC*, 46 Or App 135, 610 P2d 1250 (1980).

Permit

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Citing to the *Black's Law Dictionary* definition of "permit," the Commission reasoned that the licensee "acquiesced by failure to prevent" the employee from serving alcoholic beverages without a permit. See *Cal Sport*, OLCC-02-V-021, April 2003. *H2O Martini Bar & Restaurant*, OLCC-06-V-014/014A, December 2006, *affirmed without opinion*, 213 Or. App. 240 (2007).

Permitting

Where a licensee is charged with "permitting" criminal conduct on the licensed premises and the wrongdoer was an employee, the Commission does not need to consider whether the employee took steps to prevent the employee's own wrongful act. *Jiggles*, OLCC-88-V-004, August 1988.

Permitting involves two elements. First the evidence must prove that the licensee had knowledge of the proscribed activity. Second, the evidence must prove that the licensee failed to take reasonable steps to prevent or control the proscribed activity. *Don Juan's*, OLCC-88-V-003, May 1988.

Despite minor's efforts at concealment, licensees permitted her to enter, remain, and consume because she was in the premises for sufficient time to allow employee to detect her presence. *Cedar's Inn*, OLCC-85-V-013, August 1985.

The word "permit," as used in OAR 845-06-045, may mean "acquiescence in something by failure to prevent it" as well as the actual express assenting to something. *Columbia Café & 3C's Club*, February 1983.

"Permitting" requires proof of direct or imputed knowledge by licensee of particular condition. *Taylor's Coffee Shop v. OLCC*, 28 Or App 701, 706, 560 P2d 693 (1977).

Strong inference by court that word "permitting" requires knowledge by licensee. *Wheeler v. OLCC*, 28 Or App 455, 559 P2d 1328 (1977).

Persistent

"Persistent" is defined to mean continuing to exist in spite of interference or treatment. *Webster's Ninth New Collegiate Dictionary* (1985)." *Helena's Place*, OLCC-04-024/024A, June 2005.

Profit

Profits can be defined as the income in excess of the expenses of a business. *Columbia Café & 3C's Club*, OLCC-86-V-034, January 1987.

A profit is defined as the excess of revenue over expenses, or the gain realized from business or investment over and above expenses. *Woahink Landing*, OLCC-86-V-052, January 1987.

Rule

A rule is an agency directive of general applicability. ORS 183.310(8). An order not to award a subcontract to a particular minority business is directed to a specific person and is, therefore,

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not a rule because it pertains to only one set of facts and is not of general applicability. *Pen-Nor, Inc. v. Oregon Dept. Higher Ed.*, 84 Or App 502, 734 P2d 395 (1987).

Sale

Giovanni's Mountain Pizza, OLCC-03-V-013/018, February 2004.

Quincy Store OLCC-02-L-001, December 2002, *aff'd Ban v. OLCC*, 196 Or App 545 (2004).

A sale occurred where the licensee provided drinks with the expectation of payment, rather than purely gratuitously. *Frenchie's Tavern*, OLCC-88-ES-001, June 1988.

When a person furnishes drink to a minor, it is immaterial who pays. The transaction will be considered a sale to a minor if server knows drink is intended for person whom there is reasonable ground to believe is under 21. *East 20th Market*, OLCC-88-V-094, January 1989; *Frenchie's Tavern*, OLCC-88-ES-001, June 1988; *Sportsman Club*, September 1984.

A sale of alcoholic beverage was completed when the beverage was delivered to the purchaser, although the purchaser paid for the beverage at an earlier time. *Clide's Frolic Inn*, OLCC-84-V-041, March 1985.

A sale occurred where wine was included with meal at no extra charge because patrons were required to purchase a meal as a condition to the receipt of the wine. *Three Oaks Restaurant*, July 1984.

When bartender sold drink to adult, who then gave it to minor, bartender not guilty of selling to minor. Court specifically excludes situation in which bartender knew drink was intended for minor. *State v. Laughlin*, 148 Or 485, 36 P2d 350 (1934). Also see ORS 471.025 for charges arising under ch. 471.

Substantial Evidence

"Substantial evidence" is such proof as a reasonable mind would employ to support a conclusion. *Cook v. Employment Division*, 47 Or App 437, 614 P2d 1191 (1980).

Substantial Violation

A "substantial" violation is one that is of real worth and importance, as distinguished from something nominal or without value. *OLCC Agency No. 169*, OLCC-86-RO-003, March 1987.