

**BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON**

In the Matter of the Full)	FINAL FINDINGS OF FACT
On-Premises Sales License Held By:)	CONCLUSIONS OF LAW
)	AND ORDER
Marbet, Inc.)	
Robert Girtle, Sr., Pres./Dir.)	
Robert Girtle, II, Sec./Treas./Dir.)	
dba GIRTLE'S RESTAURANT)	OLCC-08-V-079
& LOUNGE)	
311 Broadway)	
Seaside, OR 97136)	

HISTORY OF THE CASE

On August 29, 2008, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Cancellation to Marbet, Inc., Robert Girtle, Sr., President, Director, Stockholder and Robert Girtle, II, Secretary, Treasurer, Director, Stockholder (collectively referred to as Licensee). The Notice alleged that there is a history of serious and persistent problems involving disturbances, lewd or unlawful activities either in the premises or involving patrons of the establishment in the immediate vicinity of the premises, a violation of ORS 471.315(1)(c). Licensee timely requested a hearing.

The hearing request was referred to the Office of Administrative Hearings on October 2, 2009, and assigned to Administrative Law Judge Alison Greene Webster.

The Commission issued an Amended Notice of Proposed Cancellation and Proposed Refusal to Renew License on November 7, 2008. The Amended Notice proposed to refuse to renew Licensee's sales license based on Licensee's alleged poor record of compliance with the liquor laws. On June 25, 2008, the Commission issued a Second Amended Notice of Proposed Cancellation and Proposed Refusal to Renew License.

The hearing was held in Astoria, Oregon on July 13 and 14, 2009 before Administrative Law Judge Webster. OLCC was represented by Case Presenter Becky Voelkel. Licensee was represented by Attorney Michael Mills.

OLCC called the following witnesses: Former Seaside Police Officer Travis Caulder, Former Seaside Police Officer Toby Cook (now with the Hillsboro Police Department); Seaside Police Officer Mike Demagalski; Seaside Police Sergeant Jason Goodding; Seaside Police Lieutenant David Ham; Seaside Police Sergeant Bruce Holt; Seaside Police Officer James Jordan; Seaside Police Officer Steve Kuhl and former Seaside Police Officer Grant Shimer; and OLCC Inspectors John Eich and Leslie Kleinkopf.

Corporate Principal Robert Girtle II testified on behalf of Licensee.

The record remained open for written closing arguments, and closed on August 11, 2009, upon receipt of Licensee's Rebuttal Closing Argument.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed September 3, 2009.

Licensee filed Exceptions to the Proposed Order on September 17, 2009. Staff filed Comments on the Proposed Order on September 18, 2009. The Administrative Law Judge responded to Licensee's Exceptions and Staff's Comments on September 24, 2009.

On October 15 and 16, 2009, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Licensee's Exceptions to the Proposed Order, Staff's Comments on the Proposed Order and the Administrative Law Judge's Response to Licensee's Exceptions and Staff's Comments. Based on this review and the preponderance of the evidence, the Commission issued an Amended Proposed Order mailed November 3, 2009.

No Exceptions to the Amended Proposed Order were filed within the 15-day period specified in OAR 845-003-0590.

The Commission adopts the Amended Proposed Order as the Final Order of the Commission and enters the following based on the preponderance of the evidence:¹

EVIDENTIARY RULINGS

OLCC's Notice of Proposed License Cancellation, Amended Notice and Second Amended Notice were received as Pleadings A through C. OLCC Exhibits A1 through A28 and Licensee's Exhibits L23 through L29, L32 and L33, L35 and L36, L38 through L41 and L43 and L44 were admitted without objection. Licensee's Exhibits L1 through L22, L30 and L31, L34, L37 and L42 were withdrawn.

ISSUES

1. Whether there is a history of serious and persistent problems at Licensee's premises, based upon incidents occurring between February 4, 2007 and May 23, 2009. ORS 471.315(1)(c).

2. Whether Licensee has demonstrated a willingness and ability to control the premises. ORS 471.315(1)(c).

¹ The Commission has increased the penalty for the violation of ORS 471.315(1)(c) from that which was proposed by the Administrative Law Judge in the Proposed Order herein.

3. Whether, from about July 12, 2007 to about December 12, 2007, Licensee violated ORS 471.360(1)(b) by permitting employee Jessica Erin Jensen to mix, sell or serve alcoholic beverages, or supervise those who do, without a valid service permit.

Alternatively, whether Licensee violated OAR 845-009-0015(1) through (4) by failing to verify that employee Jensen took and passed an alcohol server education course and was issued a service permit.

4. If one or both of the violations are found, what is the proper penalty?

5. Whether Licensee's license should be renewed because Licensee has overcome the grounds to refuse to renew the license under ORS 471.313(4)(g) by showing it is not a poor risk for compliance with the liquor laws of this state.

FINDINGS OF FACT

1. Marbet, Inc., Robert Girtle, Sr., President, Director, Stockholder and Robert Girtle, II, Secretary, Treasurer, Director, Stockholder have held a Full On-Premises Sales license at the premises now known as Girtle's Restaurant and Lounge, located at 311 Broadway, Seaside, Oregon, since 1997.² Marbet, Inc., and its original corporate principals Robert Girtle, Sr. and Dale Fackrell, first obtained a liquor sales license in 1979. (Ex. A1.)

2. In 1999, Licensee received a Letter of Reprimand from the Commission because an employee allowed a visibly intoxicated person to consume alcoholic beverages. In 2002, Licensee received a Notice of Violation ticket when an employee sold alcoholic beverages to a visibly intoxicated person. In January 2007, Licensee received a Notice of Violation when an employee failed to verify the age of a person who reasonably appeared to be under 26 years of age. Licensee paid a fine of \$1,650 in lieu of a 10 day license suspension in June 2007. (Ex. A1.)

3. In 2004, OLCC became concerned about the number of fights occurring in, or in the immediate vicinity of, the licensed premises. OLCC Inspector Eich met with corporate principal Robert Girtle II (Girtle) and warned that Licensee could be facing a history of serious and persistent problems violation. Inspector Eich also offered to help Licensee create a compliance plan, to assist Licensee in reducing problems and better controlling the premises. Girtle said he would get back to the Commission. About a month and a half later, Inspector Eich recontacted Licensee. Girtle indicated that Licensee did not want or need to implement a compliance plan. Inspector Eich then spoke with Robert Girtle Sr. about the problems at the licensed premises. Following that meeting, on or about September 23, 2004, Girtle Sr. faxed Inspector Eich a letter outlining Licensee's planned and proposed operational changes. (Test. of Eich.) The letter stated, in part, as follows:

² Betty Girtle, listed on OLCC's records as a Vice President and Director of Marbet, Inc., passed away a few years ago. (Test. of Girtle.)

We have immeasurably increased our food services, to the point that our dining room is no longer large enough to accommodate the large groups of customers that want service. It is necessary for us to encompass most of our cocktail service area into our dining room seating. As our present arrangement doesn't lend itself properly, it will entail a major renovation to accomplish this. This is the planning that is underway. When we have accomplished this, our cocktail lounge will no longer have a dance floor and will close at an earlier hour as dictated by our food services.

Presently, we have rescheduled our entertainment to stopping at 1:00 AM on Friday and Saturdays. This allows us to close at that time, and therefore eliminates the late tavern crowd. The late crowd just doesn't blend well with our diners.

(Ex. A28.)

4. At the time he received this letter, Inspector Eich believed that, if Licensee implemented the described operational changes, problems at the premises would decrease. Licensee started closing earlier for about three weeks, but eventually returned to staying open as late as 2:30 a.m. on weekends. (Test. of Eich.) Also, due to issues with the building's owner, Licensee was unable to renovate or remodel the premises to expand the restaurant seating, so the large lounge area and dance floor remained intact. (Test. of Girtle; Ex. L44.) In 2005 and 2006, Licensee continued to experience periodic problems at the licensed premises. (Test. of Eich.)

5. Girtle's is located in the heart of downtown Seaside, on Broadway just west of Edgewood St. There are several other licensed premises located in the immediate vicinity, including Pudgy's Broiler & Bar at 227 Broadway, Dundee's Bar & Grill at 414 Broadway and the Beach N' Brew, around the corner at 405 A Avenue. While many of the other bars in the area close around 1:00 a.m., both Girtle's and Pudgy's stay open later, until 2:30 a.m. (Test. of Eich; test of Girtle; test. of Caulder; test. of Kuhl.)

6. At about 2:15 a.m. on February 4, 2007, officers responded to a disturbance at the licensed premises. Dispatch reported a woman had just had a glass broken over her head, and that the premises' owner was following the suspect, Aaron Shaughnessy, on foot. A short time earlier, a very intoxicated Shaughnessy began fighting with another male patron inside the licensed premises. Shaughnessy took a swing and missed the male patron, but struck a female patron, Jamie Johnson, on the cheek. Johnson was hit so hard that she fell to the ground. She experienced pain and swelling as a result. Shaughnessy also threw a beer glass during the fight, which struck another female patron, Shellyne Barrows, on the back of the head. Barrows sustained a laceration on her scalp. She was transported via ambulance to the hospital for treatment. Officers arrested Shaughnessy for Assault IV and Disorderly Conduct. While Shaughnessy was being lodged, he submitted to a breath test. The test disclosed a blood alcohol content of .19 percent. (Test. of Shimer; Ex. A4.)

7. At about 1:51 a.m. on March 3, 2007, officers responded to a fight in front of the licensed premises. The fight involved four females, Alisha Kulland, Sarah Simpson, Cassie Berg and Athena Dougherty. The women began arguing while inside the premises. Licensee's staff directed Berg and Dougherty to leave, and they did so. Soon afterwards, however, when Kulland and Simpson left the premises, the dispute continued and a physical altercation ensued. First, Dougherty and Simpson began fighting and then Kulland and Berg got involved. One of the four allegedly spit on another. Officers arrived to find the physical fight broken up, but the four women still yelling at each other. Kulland had a wad of hair in her hand, which she claimed Berg pulled from her head. Officers cited all four women for Disorderly Conduct. The fight stemmed from a long-standing feud between Kulland and Berg. (Test. of Shimer; test. of Caulder; Ex. A5.)

8. At about 12:52 a.m. on March 4, 2007, officers responded to a fight at the licensed premises. Two female patrons, Alisa Thompson and Jana Phoenix, began verbally arguing inside the lounge. As Licensee's employees were escorting Thompson from the lounge, Thompson broke free and began physically fighting with Phoenix. Phoenix was at the premises with her boyfriend, Seth Branton, who is also Thompson's ex-husband. During the scuffle, Thompson grabbed Phoenix by the throat, and pulled some hair from Phoenix's head. Officers arrested Thompson for Assault IV and Attempted Strangulation. During the booking process, Thompson submitted to a breath test. The test disclosed a blood alcohol content of .16 percent. (Test. of Shimer; test. of Caulder; Ex. A6.)

9. Between 2:40 a.m. and 3:00 a.m. on March 10, 2007, Officer Caulder was on patrol near the intersection of Broadway and Edgewood when he saw a fight between three men, brothers James and John Osburn and Samuel Lynch. Lynch instigated a physical altercation as the Osburn brothers were stepping into a cab. John Osburn jumped from the cab and put Lynch in a head lock. Lynch sustained a cut over his eye. All three men were charged with Disorderly Conduct. All three were intoxicated. The fight occurred on Broadway near the licensed premises, but the officers did not investigate which licensed premises the men had patronized before the fight. During the booking process, James Osburn submitted to a breath test. The test disclosed a .16 percent blood alcohol content. (Test. of Shimer; test. of Caulder; Ex. A7.)

10. At approximately 2:15 a.m. on March 22, 2007, Girtle called the police about a patron refusing to leave the premises. The patron, Peter Metzger, created a disturbance at the bar by walking through an area being painted. When Officer Jordan arrived at the licensed premises, Girtle directed him to a car turning right onto Edgewood from Broadway. Officer Jordan saw the driver, Metzger, commit a traffic violation. During the ensuing traffic stop, Officer Jordan observed indicia of intoxication on Metzger, leading to Metzger's arrest for driving under the influence of intoxicants (DUII). During the DUII investigation, Metzger admitted to drinking two rum and Coke drinks at the licensed premises. At 3:11 a.m., Metzger submitted to a breath test in connection with his DUII arrest. The test disclosed a blood alcohol content of .14 percent. (Test. of Jordan; Ex. A8.)

11. While on patrol in front of the licensed premises at about 2:15 a.m. on April 14, 2007, Officer Shimer observed two men shoving each other in the doorway as they exited the

premises. As Officer Shimer approached, one of the men punched the other in the face, causing a bloody nose. Officer Shimer broke up the fight, and arrested both men for Disorderly Conduct. A third patron was punched in the face during the scuffle, and attempted to strike back before being pulled away by officers. Both patrons involved in the fight were intoxicated. One admitted that he was fighting because he had too much to drink and was drunk. During the booking process, both patrons submitted to a breath test. One had a blood alcohol content of .13 percent, and the other had a blood alcohol content of .11 percent. (Test. of Shimer; Ex. A9.)

12. At around midnight on June 2, 2007, Inspector Eich visited the licensed premises. He saw two visibly intoxicated patrons in the bar. One, a male in his late thirties, almost fell as he stood up and staggered to the restroom. This patron then left the bar and fell asleep while standing against a light pole outside. Licensee's staff advised the inspector that the patron had been cut off. The second intoxicated patron repeatedly dozed off while seated, prompting his date to wake him. Inspector Eich did not see either intoxicated patron be served, or consume any alcoholic beverage during his visit. (Test. of Eich; Ex. A10.)

13. At around 1:50 a.m. on July 28, 2007, during another visit to the licensed premises, Inspector Eich stepped out the back door and saw a male urinating in the back alley between the licensed premises and Pudgy's. The inspector asked the man where he had been, and the man said he had been at Girtle's. (Test. of Eich; Ex. A11.)

14. At about 2:05 a.m. on August 19, 2007, Licensee's staff³ called officers to the licensed premises on a reported theft. A patron, Nathan Rossiter, angry about the charge for his drinks, grabbed a bottle of Grey Goose vodka from the bar and poured himself another drink without paying for it. Officers located Rossiter in the alleyway behind the premises and arrested him for Theft III. Rossiter was visibly intoxicated, and was booked on the theft charge and lodged for detoxification. Rossiter told the police that he took the vodka because he had been charged \$20 for two shots of alcohol. (Test. of Caulder; Ex. A12.)

15. At about 2:19 a.m. on September 22, 2007, officers responded to a reported DUI driver leaving the licensed premises. While at the premises, the patron, Paul Ydstie, appeared intoxicated. He fell asleep inside the lounge, and Licensee's staff called him a taxi. When the taxi arrived, Ydstie belligerently refused the ride. Instead, he got into his own car to drive home. The taxi driver followed him and called the police to report the DUI driver. Officers located Ydstie and arrested him for DUI. He refused to submit to a breath test following his arrest. (Test. of Shimer; test. of Jordan; Ex. A13.)

16. On October 13, 2007, Inspector Eich issued Licensee a Notice of Warning ticket based on the September 22, 2007 incident involving patron Ydstie. The warning charged Licensee with a violation of ORS 471.410(1)⁴ (selling alcoholic beverages to a visibly

³ Licensee excepted to the original finding which did not clearly indicate that it was Licensee's staff who had called the police. In her response to Licensee's exceptions, the Administrative Law Judge concurred and suggested that the finding be amended to so reflect.

⁴ In their Comments to the Proposed Order, staff noted that the reference in the original finding to "ORS

intoxicated person) or alternatively, a violation of ORS 471.412 (allowing a visibly intoxicated person to consume alcoholic beverages on the licensed premises). (Test. of Eich; Ex. A14.)

17. While performing a bar check in the early morning hours of October 5, 2007, Officer Jordan saw Marian Sleutel at the licensed premises. Sleutel, an employee of Licensee, was off-duty. She appeared intoxicated and was upset about her boyfriend. Officer Jordan advised Sleutel to wait until she was sober to confront her boyfriend about his alleged infidelity. Officer Jordan also contacted Girtle, and asked him to look after Sleutel, but she had already left Girtle's for Pudgy's when Girtle went to look for her. At approximately 2:10 a.m. that same date, Officer Jordan took Sleutel into custody on a non-criminal detox hold. At the time she was taken into custody, she was fighting with her boyfriend outside Pudgy's. At the police station after her arrest, Sleutel submitted to a breath test. The test disclosed a .16 percent blood alcohol content. (Test. of Jordan; test. of Girtle; Ex. A15.)

18. At approximately 1:15 a.m. on December 8, 2007, officers responded to an assault in front of the licensed premises. Earlier in the night, Girtle had ejected a patron, Ross Conrad, from the lounge because Conrad had been rude and disruptive to other patrons. Conrad returned to the premises after 1:00 a.m., seeking reentry. When he was denied entry, Conrad became angry and verbally abusive. He then "sucker punched" another patron, Tyler Johnson, as Johnson exited the premises through the front door. Tyler was knocked out, and sustained a bloody lip. Emergency medical personnel were called to the scene. Officers located Conrad in Quatat Park and arrested him for Assault IV and Criminal Trespass I. Conrad was visibly intoxicated at the time of his arrest. During the booking process, Conrad submitted to a breath test, which disclosed a blood alcohol content of .23 percent. (Test. of Kuhl; test. of Jordan; Ex. A16.)

19. At approximately 2:30 a.m. on December 13, 2007, officers responded to a fight in progress in front of the licensed premises. Officers arrived to find several people, at least three men and a woman, yelling at each other, and others trying to calm them down. Earlier, while inside the premises, the three men (two tourists and a local resident) began arguing. As they exited the premises, a physical altercation ensued. During the fight, the local resident, Frank Hernandez, removed his belt to swing at the others. He inadvertently struck his wife, Rachel Ramos, in the head. All three combatants and Ramos were intoxicated. Officers arrested the three combatants for Disorderly Conduct. (Test. of Cook; test. of Jordan; Ex. A17.)

20. During the fight investigation on December 13, 2007, officers interviewed Jessica Erin Jensen, a bartender at the licensed premises. Jensen said she saw Hernandez harassing the other two men inside the bar. She said that when she heard they were fighting, she went outside. She said she pushed the one without a shirt, and he swung around and grazed her in the cheek. She said she was not hurt. (Test. of Jordan; Ex. A17.)

471.410(3)" was in error, and that the statutory reference should be "ORS 471.410(1)." In her response to Staff's Comments, the Administrative Law Judge concurred and suggested that the finding be amended to so reflect.

21. Jessica Jensen began working as a bartender and/or server at the licensed premises in April 2007. She completed a service permit application on April 24, 2007, and OLCC received the application on April 26, 2007. Jensen did not complete and pass the alcohol server education class within the 45 day deadline. Therefore, on or about July 12, 2007, OLCC sent Jensen notice that her service permit had been refused for failing to complete the server education requirement. (Ex. A27.) Jensen also completed a second temporary service permit form on July 6, 2007, which Girtle signed on Licensee's behalf, but that document was never submitted to OLCC. (Ex. L23.) Jensen continued to work for Licensee as a bartender or server at the licensed premises until mid-December 2007. (Test. of Eich.)

22. At about 1:30 a.m. on January 13, 2008, officers responded to a fight in progress at the licensed premises. A group of patrons began arguing inside the bar. The dispute arose when the group's designated driver (Morehouse) started drinking, and others tried to take the car keys from him. During the argument, Morehouse pushed a female patron, causing the female patron's fiancé (Owens) to get angry. When the two men stepped outside, and their argument continued. Owens punched Morehouse on the side of the head. When interviewed by the police a short time later, Owens admitted to drinking about nine beers that night. Officers cited Owens for Harassment. (Ex. A18; test. of Shimer.)

23. On the night of July 18, 2008, OLCC inspectors Erickson and Kleinkopf went to the licensed premises in an undercover capacity. During their approximately one hour visit, they saw two visibly intoxicated patrons, a brunette female in her mid-20s and a blonde female in her late 30s or early 40s. The brunette appeared sleepy and, unless her friends were directly speaking with her or holding her, she slumped forward over the table. The blonde exhibited a lack of balance on her feet while dancing. As the blonde left the premises, Licensee's employee stopped her to ask if she was okay, and then allowed her to walk away. The inspectors did not see either of the two visibly intoxicated patrons consuming any alcoholic beverages. (Test. of Kleinkopf; Ex. A19.)

24. At about 2:25 a.m. on August 3, 2008, officers responded to a fight in front of the licensed premises. Officer Kuhl arrived to see Joshua Haston on the ground and Randall Landon attempting to help him up. An unknown male patron who had tried to start a fight with them inside the premises followed them outside and "sucker punched" Haston in the jaw, knocking him to the ground. Officers also interviewed Girtle, who handed them a hat he said belonged to Morgan Soller. Girtle said that Soller had started the disturbance with Haston and Landon inside the bar. Neither Haston nor Landon wanted to pursue charges, so officers did not follow up with Soller. (Test. of Kuhl; Ex. A20.)

25. At approximately 1:13 a.m. on August 8, 2008, officers responded to a fight in progress in front of the licensed premises. Officers arrived to find Justin Olsen agitated and pacing in the roadway. Olsen had a cut and some swelling and bruising on his face and a dislocated thumb. He reported that he had been "jumped by a couple of guys" as he left the licensed premises. Olsen was very intoxicated, and unable to describe how the fight began or how many people had assaulted him. Officers investigated and determined that, while inside the licensed premises, Olsen and another patron named Dylan began arguing and "getting into each

other's faces." One of Licensee's employees physically removed the two men from the premises and a physical fight ensued once they were outside. At one point, Olsen also took a swing at another patron, Zach Soller, as he got into a cab after leaving the licensed premises. (Test. of Demagalski; test. of Goodding; Ex. A21.)

26. At approximately 2:00 a.m. on August 9, 2008, Lt. Ham was on foot patrol in front of the licensed premises when he saw a visibly intoxicated male, later identified as Dino Valdez, exit the premises. Valdez had difficulty with his balance, and steadied himself by leaning against a door way. Valdez also had difficulty with his finger dexterity while attempting to make a call on his cell phone. Lt. Ham contacted Valdez and asked for his identification. Valdez had both his and his brother's Washington driver licenses in his wallet. Valdez's date of birth is May 8, 1989, making him 19 years old at that time. Valdez's brother's date of birth is October 3, 1982, making the brother over 21 years of age. Valdez had used the brother's identification to enter the licensed premises and consume alcohol. Lt. Ham arrested Valdez for using another person's identification to enter a liquor establishment and for minor in possession of alcohol by consumption. While in custody, Valdez submitted to a breath test, which disclosed a blood alcohol content of .24 percent. (Test. of Ham; Ex. A22.)

27. At about 2:40 a.m. on August 22, 2008, Sgt. Goodding and Officer Jordan observed a vehicle driving erratically on Avenue A and Holladay. The car made two wide turns, a sweeping correction and a slow, wide swerve, coming within two feet of the curb. The driver also failed to stop at a stop sign and sped along Holladay, traveling approximately 60 mph in a posted 25 mph zone. Officer Jordan initiated a traffic stop on the driver. Sgt. Goodding arrived to provide cover. Both officers recognized the driver as a woman they had seen at the licensed premises earlier in the night. Officer Jordan saw her during his bar check, and Sgt. Goodding saw her leaving the premises just minutes before the stop. Based on the driver's appearance and her erratic driving, Officer Jordan arrested her for DUII.⁵ The driver refused to submit to a breath test. (Test. of Jordan; test. of Goodding; Ex. A23.)

28. At approximately 11:20 p.m. on January 31, 2009, Inspector Eich visited the licensed premises. He saw a male patron fall off a chair and hit his head. The patron did not appear injured. That patron's female companion acknowledged that the patron had had too much to drink. Inspector Eich then saw the two leave the premises, with the male staggering as he walked. (Test. of Eich; Ex. A24.)

29. At about 1:38 a.m. on February 29, 2009, officers responded to a home at 713 Third Avenue on a report of an unwanted stranger pounding on the front door. Officers arrived and recognized the reported stranger as local resident Bruce Sacchetta. Sacchetta was visibly intoxicated. While doing a bar check earlier in the night, Sgt. Holt saw Sacchetta at the licensed premises. Sacchetta had been out celebrating his brother's birthday. Sacchetta already appeared intoxicated at that point. He had slurred speech and difficulty with his balance. He remarked to

⁵ Although Sgt. Goodding did not question Officer Jordan's decision to arrest the driver for DUII, he did not notice signs of visible intoxication during his contact with her subsequent to her arrest. (Test. of Goodding.)

Sgt. Holt at the bar that he was just being “a dumb ass.” (Test. of Holt; Ex. A25.)

30. At about 2:15 a.m. on May 23, 2009, officers were called to the licensed premises on a report of a female patron harassing other patrons. Upon his arrival, Lt. Ham found the described patron and her date getting into a cab to leave. Witnesses at the scene said that the woman had struck the male she was with along with another male who left the premises prior to the lieutenant’s arrival. Witnesses described the woman as “out of control.” Lt. Ham then contacted the couple in the cab. The female was highly intoxicated. Her date denied any injury, and no criminal charges were pursued. (Test. of Ham; Ex. A26.)

31. In the opinion of most Seaside police officers, Licensee’s employees and Girtle are generally cooperative with the police, and will call for police assistance when problems arise inside the licensed premises. (Test. of Calder; test. of Jordan; test. of Ham; test. of Goodding; test. of Holt.) Licensee is also willing to pursue criminal charges against patrons or persons who commit offenses in the premises. (Test. of Girtle.)

32. Licensee has an extensive menu and offers breakfast, lunch, dinner and late night dining. On week days, the licensed premises generally closes before midnight. On weekends, however, the premises generally stay open until 2:30 a.m. On weekends, the dining room is often busy with late night diners until after midnight. (Test. of Girtle; Ex. L25.)

33. Licensee has planned to remodel the premises since approximately 2006, but contract negotiations with the property owner’s estate to regain an ownership interest in the building and the current economic downturn have delayed the project. The remodel plan includes enlarging the dining area, adding seating, adding a fireplace and a wine bar. The plan also involves reducing the size of the lounge and removing the stage and dance floor. (Test. of Girtle; Ex. L44.)

34. Licensee has taken other measures to reduce problems at the premises including instituting a dress code (prohibiting, among other things, tank tops and baseball caps), reducing the number of nights per week with live music and dancing (from seven nights per week to weekend nights only), modifying the music format, improving the lighting in the lounge area, employing an additional alcohol monitor on weekend nights, and closing before 2:00 a.m. when the dining room is not busy. (Test. of Girtle.)

CONCLUSIONS

1. There is a history of serious and persistent problems at Licensee’s premises, based upon incidents occurring between February 4, 2007 and May 23, 2009.

2. Licensee has demonstrated a willingness and ability to adequately control the premises subsequent to mid-January 2008.

3. From about July 12, 2007 to about December 12, 2007, Licensee violated ORS 471.360(1)(b) by permitting employee Jessica Erin Jensen to mix, sell or serve alcoholic

beverages without a valid service permit. The alternative charge under OAR 845-009-0015 shall be dismissed.

4. The proper penalty for the violation of ORS 471.315(1) is a 37 day license suspension or a civil penalty of \$4,950 in lieu of 30 days, with a seven day mandatory suspension. The proper penalty for the violation of ORS 471.360(1)(b) is a 30 day license suspension or a civil penalty of \$4,950.

5. Licensee's license should be renewed with the restrictions described herein because Licensee has overcome a poor record of compliance when previously licensed by showing it has the willingness and ability to control the premises, and is therefore not a poor risk for future compliance with the liquor laws of this state.

OPINION

1. History of Serious and Persistent Problems

The Commission has charged Licensee with a history of serious and persistent problems at the licensed premises pursuant to ORS 471.315(1)(c).⁶ In the Second Amended Notice, the Commission asserts that 22 incidents have occurred inside or in the immediate vicinity of the premises since February 2007. The Commission alleges that 12 of these incidents involved fights, which resulted in injury or threat of injury to one or more patrons, and 17 incidents involved public drunkenness, one of which was an extremely intoxicated minor. As the proponent of these allegations, the Commission bears the burden to prove the violation. ORS 83.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position).

⁶ ORS 471.315(1)(c) states in relevant part:

(1) The Oregon Liquor Control Commission may cancel or suspend any license * * * if it finds or has reasonable grounds to believe any of the following to be true:
* * *

(c) That there is a history of serious and persistent problems involving disturbances, lewd or unlawful activities or noise either in the premises proposed to be licensed or involving patrons of the establishment in the immediate vicinity of the premises if the activities in the immediate vicinity of the premises are related to the sale or service of alcohol under the exercise of the license privilege. Behavior which is grounds for cancellation or suspension of a license under this section, where so related to the sale or service of alcohol, includes, but is not limited to obtrusive or excessive noise, music or sound vibrations; public drunkenness; fights; altercations; harassment or unlawful drug sales; alcohol or related litter; trespassing on private property; and public urination. Mitigating factors include a showing by licensee that the problems are not serious or persistent or that licensee has demonstrated a willingness and ability to control adequately the licensed premises and patrons' behavior in the immediate vicinity of the premises which is related to licensee's sale or service of alcohol under licensee's exercise of the license privilege.

ORS 471.315(1)(c) requires that the serious and persistent problems be related to the sale or service of alcohol. The problems may include fights, altercations, harassment, and public drunkenness, among other things. A Licensee may overcome the history by showing that the problems are not serious or persistent or by demonstrating a willingness and ability to adequately control the premises and patrons' behavior.

In interpreting ORS 471.315(1)(c), OLCC has found that a history of serious and persistent problems is based on the nature and circumstances of the incidents in each case. Incidents inside the licensed premises count, whether related to sale of alcohol or not. Incidents outside do not count unless the incident is related to the licensee's sale or service of alcohol. The Commission gives significant weight to severe crimes, such as those involving drugs, violence or the threat of violence to a patron or licensee, unless the incident was isolated and happenstance. Less severe crimes, such as shoplifting, will be given little weight, unless the crime is shown to be related to alcohol. *Handy Food Mart* (OLCC, Amended Final Order, 91-L-020, March 1994).

For example, in *DiMarco's Restaurant* (OLCC, Final Order, 04-V-043/04-V-062, October 2005), the Commission found that 11 instances of excessive noise over the course of 10 months, nine disturbances involving violence or threat of violence over the course of 13 months and three other instances of unlawful activity (*i.e.*, public drunkenness linked to the licensee's establishment) constituted a history of serious and persistent problems.

In *La Brisa* (OLCC, Final Order, 91-L-037, December 1992), OLCC found that incidents involving persons intending to go into the licensed premises are related to the exercise of the license privilege and count regardless of whether the persons consumed alcoholic liquor on the premises. In that case, OLCC found that the language "related to the sale or service of alcohol" does not require a showing that the patron involved purchased, was served or consumed alcohol in the licensed premises. The OLCC presumed that the persons are coming to the premises because the licensee has a license and for the purpose of consuming alcoholic liquor. *Id.*

In *Headless Horseman* (OLCC, Final Order, 92-L-016, June 1993), the OLCC found that the licensed premises had a history of serious and persistent problems where the number of incidents was not large, but most of the incidents involved fights. There, the licensed premises had a history of seven problems over 13 months: three assaults or fights outside the premises involving patrons of the premises, two instances of public urination, one instance of a patron damaging shrubbery, and one instance where a patron removed from the licensed premises returned and assaulted a bartender.

Similarly, in *Balzer's Pub & Grill* (OLCC, Final Order, 99-V-019, March 2001), the OLCC found a history of serious and persistent problems where there were five serious incidents within six months: two fights outside the premises, an assault on a security guard, the display of a gun by a patron who was denied entry to the premises, an assault and robbery upon a waitress by patrons inside the premises, and a very intoxicated person on the street outside the premises.

Furthermore, in *The Hydrant* (OLCC, Amended Final Order, 00-L-006, October 2001), the Commission held that incidents resulting from a licensee's appropriate steps to deal with

problem persons by refusing service and/or by removing them from the premises shall be counted among those comprising a history of serious and persistent problems. Although in cases such as *La Linda's* (OLCC, Final Order, OLCC-95-L-021ES, June 1996), the Commission had previously held that such instances should not count against the licensee, the Commission expressly overruled that approach in *The Hydrant*. It explained:

Accordingly, in the future, all such problem incidents will be counted among those compromising a history of serious and persistent problems. Each incident will be weighed according to its seriousness, as determined by the presence or absence of violence or the threat of violence directed toward persons (serious) or property (less serious). These security efforts will be considered in evaluating willingness and ability to control the problems associated with the licensed premises.

The Hydrant, Amended Final Order at 41.

As noted above, the Commission has alleged that there were 22 serious incidents inside or in the immediate vicinity of the premises over the course of 28 months, 12 incidents involving fights or threat of injury to patrons and 17 incidents involving public drunkenness. Licensee challenges the Commission's characterization of many of these incidents. Specifically, Licensee asserts that mere "over service" or the presence of visibly intoxicated patrons inside the premises does not constitute a serious problem under the statute. Licensee also contends that many of these 22 incidents should not count against Licensee because they did not involve patrons of the establishment in the immediate area of the premises and/or were not related to Licensee's sale or service of alcohol under Licensee's exercise of the license.

In describing what constitutes a history of serious and persistent problems, ORS 471.315(1)(c) specifically lists "disturbances" in the premises or involving patrons of the establishment in the immediate vicinity of the premises if the activity is related to the licensee's sale or service of alcohol under the exercise of the license privilege. As noted above, prior Commission cases hold that disturbances, *i.e.*, fights, altercations, harassment, or crimes involving violence or threat of violence (assault, disorderly conduct, etc.) constitute serious incidents. In this case, between February 2007 and May 2009 there were 10 such disturbances inside, or in the immediate vicinity of, the premises:

(1) February 4, 2007: A highly intoxicated patron began fighting with another patron inside the premises. Two female patrons were injured. One was hit in the cheek and the other struck on the back of the head with a beer glass. The instigator was arrested and charged with Assault and Disorderly Conduct. This incident counts against Licensee because it occurred inside the premises.

(2) March 3, 2007: A group of females began arguing while inside the licensed premises. A physical fight ensued in front of the licensed premises once the women were outside. All four women were cited for Disorderly Conduct. Although the fight was due in part to a longstanding feud between two of the

women, this incident counts against Licensee because the dispute began inside the premises and the physical altercation ensued in the immediate vicinity of the premises.

(3) March 4, 2007: Two female patrons were involved in a physical altercation inside the premises. Officers cited one for Assault and Attempted Strangulation. This fight counts against Licensee because it occurred inside the premises.

(4) April 14, 2007: Two intoxicated male patrons were involved in a physical altercation as they were exiting the premises. One patron punched the other, causing a bloody nose. Another male patron was punched in the face during the scuffle and attempted to strike back but was pulled away by officers. Both combatants were cited for Disorderly Conduct. This fight counts against Licensee because it involved violence among patrons leaving the premises and it occurred in the immediate vicinity of the premises.

(5) December 8, 2007: A patron who had been ejected from the premises earlier in the night became angry and combative when denied reentry hours later. He then punched another patron as the patron exited the premises, causing injury including a bloody lip. Officers arrested the former patron for Assault and Criminal Trespass. This incident counts against Licensee because it involved injury, it occurred in the immediate vicinity of the premises and it was related to Licensee's sale or service of alcohol.

(6) December 13, 2007: Three male patrons began physically fighting as they were leaving the premises. One patron inadvertently struck his wife while removing his belt to swing at the others. All three men were arrested for Disorderly Conduct. This incident also counts against Licensee because it involved injury, it occurred in the immediate vicinity of the premises and it was related to Licensee's sale or service of alcohol.

(7) January 13, 2008: A group of patrons began arguing inside the bar. During the argument, a male patron pushed a female patron, raising the ire of the woman's boyfriend. When the two men stepped outside, their argument continued. One then punched the other on the side of the head. This incident counts against Licensee because the dispute began inside the premises and the physical altercation ensued in the immediate vicinity of the premises.

(8) August 3, 2008: Following a verbal dispute inside the premises, an unidentified male patron sucker punched another patron in the jaw just outside the premises, knocking the patron to the ground. This incident counts against Licensee because the dispute began inside the premises and the physical altercation ensued just outside the premises.

(9) August 8, 2008: Two patrons began arguing inside the premises. When Licensee's employee physically removed them from the premises, a physical fight

ensued between the two men outside. At least one of the combatants sustained injury, including a cut, swelling and bruising on his face and a dislocated thumb. This incident counts against Licensee because the dispute began inside the premises and the physical altercation ensued in the immediate vicinity of the premises.

(10) May 23, 2009: A highly intoxicated female patron argued with and hit her boyfriend and another male patron inside the premises. The woman appeared out of control, but her date denied any injury. This incident counts against Licensee because the female patron created a disturbance involving violence or threat of violence inside the premises.

The Commission also cites to a physical fight that occurred in the area of the licensed premises on March 10, 2007, but as Licensee asserts, there is insufficient evidence to establish that any of the combatants had been patrons of the licensed premises just prior to the fight. Indeed, the officers who responded to the fight did not investigate which, if any, of the licensed premises in the area the three men had patronized. In the absence of any evidence linking this particular disturbance to Licensee's sale or service of alcohol, this incident does not count against Licensee.

Commission staff also asserts that a DUII arrest of a driver leaving the licensed premises is a serious problem because of the "threat of violence posed by the intoxicated driver." Licensee contends that Staff's argument is not logical and not supported by statute, rule or OLCC case law. Licensee notes that neither threat of violence nor intoxicated driving are listed as a behavior that gives rise to cancellation or suspension of a license under ORS 471.315(1)(c). Licensee is correct, but only to a point.

Driving under the influence of intoxicants is an unlawful activity. ORS 813.010. Under the plain language of ORS 471.315(1)(c), "unlawful activities" involving patrons of the establishment in the immediate vicinity of the premises count towards a history of serious and persistent problems if those unlawful activities in the immediate vicinity of the premises are related to the sale or service of alcohol under the exercise of the license privilege. Therefore, an intoxicated driver in the immediate vicinity of the licensed premises can provide grounds for cancellation or suspension under this provision if the unlawful activity is related to the licensee's sale or service of alcohol under the exercise of the license privilege.

In this case, during the time period in issue (February 2007 through May 2009), there were three patrons of the licensed premises arrested for DUII upon leaving the premises. But, as explained below, only two of these incidents are sufficiently related to Licensee's sale or service of alcohol to count against Licensee in determining whether there is a history of serious and persistent problems.

- March 22, 2007: An officer responded to a reported disturbance inside the premises. The patron who caused the problem was stopped and arrested for DUII as he drove from the premises. The patron admitted to drinking two rum and

Cokes at the licensed premises. His breath test disclosed a .14 percent blood alcohol content. This incident counts against Licensee because it involves a patron of the licensed premises who was served alcoholic beverages at the licensed premises and then engaged in an unlawful activity (DUII) in the immediate vicinity of the premises.

- September 22, 2007: A visibly intoxicated patron leaving the licensed premises belligerently refused to get into the cab that Licensee's staff had called for him. Instead, the patron got into his own car and drove off. An officer subsequently stopped the patron and arrested him for DUII. This incident counts against Licensee because it involves a visibly intoxicated patron of the licensed premises engaging in an unlawful activity (DUII) in the immediate vicinity of the premises.

The third incident occurred on August 22, 2008, when a female patron was stopped for erratic driving minutes after leaving the licensed premises. But, in this instance, unlike the two DUII arrests discussed above, the evidence falls short of proving unlawful activity in the immediate vicinity of the premises related to Licensee's sale or service of alcohol. There is no evidence (such as a breath test result) to establish that the driver was intoxicated, and no evidence that she was served alcoholic beverages at the licensed premises.⁷ Consequently, this DUII arrest does not count against Licensee.

In addition to the DUII arrests discussed above, there have been two other instances of "unlawful activities" involving patrons in the premises or in the immediate vicinity of the premises related to Licensee's sale or service of alcohol during the time period in issue:

- August 19, 2007: A visibly intoxicated patron, angry about paying for his drinks, took a bottle of vodka from behind the bar and poured himself another drink without paying for it. He was cited for Theft and lodged for detox. This incident counts against Licensee because theft is a crime, the crime occurred inside the premises and the crime was related to Licensee's sale or service of alcohol.

- August 9, 2008: Licensee had a visibly intoxicated minor in the bar. The minor used his brother's identification to gain access to the licensed premises. The minor exhibited a lack of balance and poor dexterity upon leaving the premises. Following his arrest, the minor submitted to a breath test, which disclosed a .24 percent blood alcohol content. This incident counts against Licensee because it involved a minor in a prohibited area and was related to Licensee's sale or service of alcohol.

Under the plain language of ORS 471.315(1)(c), 14 of the 16 incidents discussed above

⁷ Although the woman had been to the licensed premises, there is no persuasive evidence that she was visibly intoxicated when she left the premises. As noted previously, Sgt. Goodding testified that although he did not question Officer Jordan's decision to arrest the driver, he did not notice signs of visible intoxication on her. As Officer Jordan noted in his report, he arrested the driver primarily on her erratic driving.

constitute serious problems in the premises or in the immediate vicinity of the premises and are related to Licensee's sale or service of alcohol under the exercise of the license privilege. In addition, during the same time period, there have been six less serious instances of public drunkenness and/or public urination related to Licensee's sale or service of alcohol:

- June 2, 2007: Licensee had two visibly intoxicated patrons in the bar. One patron left the premises, and then fell asleep while standing against a light pole outside. This incident counts against Licensee as an instance of public drunkenness based on the intoxicated patron who fell asleep outside standing against a light pole.
- July 28, 2007: A person, who admitted patronizing the licensed premises, urinated in the back alley between the premises and Pudgy's. Based on the person's admission to patronizing the licensed premises, this counts against Licensee as a less serious incident.
- October 5, 2007: Licensee had a visibly intoxicated female patron in the lounge. She was later taken into custody for detox after an officer found her fighting with her boyfriend in front of Pudgy's. Because the patron was visibly intoxicated while patronizing the licensed premises earlier in the night, this incident counts against Licensee as an instance of public drunkenness.
- July 18, 2008: Licensee had two visibly intoxicated patrons in the bar. Licensee's employees stopped one as she was leaving to ask if she was okay, and then allowed her to walk away. This counts against Licensee as an instance of public drunkenness.
- January 31, 2009: Licensee had a visibly intoxicated patron in the lounge. The patron fell off a chair and hit his head, but was not injured. The patron then left the premises, staggering as he walked. This also counts against Licensee as an instance of public drunkenness.
- February 29, 2009: Licensee had a visibly intoxicated patron in the bar. Later that same night, the patron was taken into custody for detox, after creating a disturbance by pounding on the door of a home at 713 Third Avenue. Because the patron was visibly intoxicated while patronizing the licensed premises earlier in the night, this incident counts against Licensee as an instance of public drunkenness.

Although the Commission considers problems involving public drunkenness and public urination as "less serious" than those involving violence or threat of violence, such incidents nevertheless count in determining whether a licensee has a history of serious and persistent problems. *See, e.g., DiMarco's Restaurant* (20 serious incidents and three less serious incidents over 13 months); *Felipe's Finest Mexican & Seafood Restaurant* (OLCC, Final Order, 06-V-016, February 2007) (23 serious incidents and five less serious incidents over a 24 month period).

To summarize, the record establishes that between February 4, 2007 and May 23, 2009, there were 10 disturbances involving violence or threat of violence, 4 instances of unlawful activities by patrons of the premises related to Licensee's sale or service of alcohol and 6 "less serious" incidents involving public drunkenness and/or public urination related to Licensee's sale or service of alcohol. This record of 20 incidents over 28 months constitutes a history of serious and persistent problems under ORS 471.315(1)(c). See *Balzer's Pub & Grill* (five serious incidents within six months constitutes a history of serious and persistent problems); *Rastafarian Private Club* (OLCC, Final Order, 90-V-059, April 1991) (eight serious incidents during a one year period); *Headless Horseman* (seven serious incidents within 13 months); *New Copper Penny Restaurant* (OLCC, Final Order, 04-V-040, October 2005) (eight incidents involving violence or threat of violence in less than seven months); see also *Dr. Feelgood's Pub* (OLCC, Final Order, 08-V-052, -074, June 2009) (11 disturbances involving violence or threat of violence plus six other instances of public drunkenness and/or public urination related to the licensee's sale or service of alcohol over 13 months).

2. Willingness and Ability to Control the Premises

Having found that Licensee has a history of serious and persistent problems, the next issue is whether Licensee has demonstrated a willingness and ability to control the premises. As noted above, the willingness and ability to control the licensed premises and patrons' behavior in the immediate vicinity of the premises is a mitigating factor in assessing a history of serious and persistent problems. Licensee has the burden of establishing a willingness and ability to control the premises. ORS 183.450(2); *Cisco & Pancho's* (OLCC, Final Order, 99-080ES, September 2000).

Licensee argues that because the premises is in Seaside, Oregon, a coastal town where tourism drives the economy, alcohol consumption by both tourists and locals is "common, expected, and condoned to a greater degree than probably any other city in Oregon." Licensee notes that there are more liquor establishments per capita in Seaside than in the Portland Metropolitan area, and that it is common for persons to "bar hop" among the bars in the downtown area. Licensee maintains that an assessment of its willingness and ability to control the premises must be considered in this context.

Commission staff argues that because problems continued at the premises even after Licensee was first charged with the violation (in late August 2008), Licensee has not demonstrated a willingness and ability to control the premises.

Over the course of 12 months, from February 4, 2007 to January 13, 2008, Licensee had 10 serious problems related to the licensed premises (7 disturbances and 2 instances of unlawful activity) and 3 "less serious" problems. After these 13 incidents, Licensee did not have any significant problems at the premises for nearly seven months, until August 3, 2008 when two patrons got into a dispute that culminated with one "sucker punching" the other just outside the premises. Within a week of that incident, however, there were two more serious incidents (fighting patrons on August 8, 2008 and an intoxicated minor on August 9, 2008). Then, there were no serious problems attributable to the licensed premises for nearly six months, until late

January and late February 2009, when there were two instances of public drunkenness by patrons of the licensed premises related to Licensee's sale or service of alcohol. Three months later, an intoxicated patron created a disturbance inside the premises.

This record indicates that, after frequent serious problems at the licensed premises between February 2007 and mid-January 2008 (13 problems in 12 months), Licensee was able to adequately control the licensed premises and patrons' behavior in the immediate vicinity of the premises for seven months, until the first week of August 2008. Then, after a string of three problems in that one week, Licensee again regained control the premises and patrons' behavior for nearly six months until problems with patrons' public drunkenness returned in late January 2009. Clearly, compared to Licensee's record of serious problems in 2007, Licensee maintained better control of the premises and patrons' behavior after mid-January 2008 and up to the time of the hearing in mid-July 2009. Indeed, although there were additional serious problems at, or related to, the premises after January 2008, these problems were more sporadic than persistent. And, for more than eight months, between August 9, 2008 and May 23, 2009, Licensee did not have any serious incidents involving violence or threat of violence at the licensed premises.

Licensee maintains that it has a willingness and ability to control the premises because, in many of the incidents discussed above, corporate principal Robert Girtle and/or other employees responded appropriately to the situation by contacting the police, removing problem patrons from the premises and cutting off patrons who showed signs of intoxication.⁸ Licensee also notes that Girtle, who takes an active role in managing the premises and, has always cooperated with the police. Licensee cites to measures it has taken to reduce problems at the premises including: instituting a dress code; reducing the number of nights per week with live music and dancing from seven to two; modifying the music format; changing the lighting; hiring an additional alcohol monitor; and closing earlier than 2:00 a.m. when the dining room is not busy. Finally, Licensee notes that although circumstances beyond Girtle's control have impeded plans to remodel the premises, the planned remodel will improve Licensee's ability to control the premises and patrons' behavior.

The Commission has, in the past, mitigated the penalty from cancellation to a suspension or fine where the licensee demonstrates a willingness and ability to adequately control the premises. *See, e.g., New Copper Penny Restaurant* (OLCC, Final Order, 04-V-040, October 2005) (mitigation was appropriate because, subsequent to having a history of serious and persistent problems, the licensee made significant changes in operation and demonstrated the willingness and ability to control the premises); *Balzer's Pub & Grill* (licensees continuing and

⁸ For example, in the February 4, 2007 incident, Girtle chased down Shaughnessy. In the March 22, 2007 incident, Girtle called the police when Metzger created a disturbance at the bar. And, in the August 3, 2008 incident, Girtle identified Soller as the one who had started the disturbance.

While incidents resulting from licensee's appropriate steps to deal with problem persons (by refusing them service and/or by removing them from the premises) may count as serious incidents, these same security efforts are to be considered in evaluating willingness and ability to control the problems associated with the licensed premises. *The Hydrant* (OLCC, Amended Final Order, 00-L-006, October 2001). Based on the ultimate conclusion that Licensee had the willingness and ability to control the premises after mid-January 2008, additional analysis of the mixed record concerning appropriateness of the steps taken by security prior to that date is unnecessary.

remedial steps after the violation justified mitigation); *300 Club/A Change of Seasons* (OLCC, Final Order, OLCC-99-V-060, April 2001) (after 20 incidents over a one year period, 14 of which involved violence or threat of violence, licensee demonstrated a willingness and ability to adequately control the premises; the extensive nature and degree of licensee's efforts to prevent violations justified substantial mitigation of the penalty).

Here, subsequent to the string of serious problems at the licensed premises between February 2007 and mid-January 2008, Licensee has demonstrated both a willingness and ability to adequately control the premises. Although there were three serious problems over a one week period in August 2008, and a few incidents involving intoxicated patrons in the first few months of 2009, Licensee has, overall, been better able to control the premises and patrons' behavior since January 2008. Consequently, mitigation to sanction other than cancellation is warranted.

3. Employee Jensen's Lack of Service Permit

The Commission also alleges that from about July 12, 2007 to December 13, 2007, Licensee violated ORS 471.360(1)(b) by permitting employee Jessica Jensen to mix, sell or serve alcoholic beverages, or manage those who mix, sell or serve alcoholic beverages on the licensed premises without a valid service permit. Alternatively, the Commission alleges that Licensee violated OAR 845-009-0015(1)-(4) by failing to verify that employee Jensen had taken and passed the alcohol server education class and been issued a valid service permit.

ORS 471.360(1)(b) requires any person employed by an OLCC licensee who mixes, sells or serves alcoholic beverages on a licensed premises to have a valid service permit issued by the Commission. The statute provides, in pertinent part, as follows: "(1) Except as otherwise provided in ORS 471.375 * * * (b) No licensee of the Commission shall permit any person to mix, sell or serve any alcoholic liquor for consumption on licensed premises unless such person has a valid service permit issued by the commission."

The Commission employs two tests to determine whether a licensee "permitted" the prohibited activity. A licensee may acquiesce by failing to prevent the employee from working without a permit. *See, e.g., Cal Sport* (OLCC, Final Order, 02-V-021, April 2003). In that case, the licensee failed for several months to verify whether an employee had a service permit. The Commission has also used a knowledge attribution analysis to find that a licensee permitted certain conduct. In this context, "permitting" involves two elements: knowledge and the failure to take reasonable steps to prevent or control the prohibited activity. With respect to the knowledge element, the Commission imputes an employee's knowledge to the licensee. If the licensee fails to take reasonable steps to verify the existence of a permit or prevent the employee from serving without one, the licensee has violated ORS 471.360(1)(b). *Cal Sport*, Final Order at 5; *see also Tony's Tavern* (OLCC, Final Order, 06-V-012, August 18, 2006).

Here, the record establishes that Jessica Jensen began working for Licensee as a bartender and/or server in April 2007. The Commission received her service permit application, signed by Girtle on Licensee's behalf, on April 26, 2007. The record also establishes that because Jensen did not complete the alcohol server course within 45 days, the permit was denied. On or about July 12, 2007, the Commission notified Jensen that her permit had been refused. Jensen

continued to work as a server or bartender for Licensee without a valid permit until she quit sometime in December 2007.

Because Licensee failed to verify whether Jensen obtained her service permit and allowed her to continue working as a server or bartender for several more months (from mid-July 2007 to December 2007), Licensee permitted the prohibited activity. *Tony's Tavern*, Final Order at 4-5. The violation of ORS 471.360(1)(b) has been proven.

Because the violation of ORS 471.360(1)(b) has been proven, the alternative charge under OAR 845-009-0015 shall be dismissed.

4. Sanction

1. Penalty for violation of ORS 471.315(1)(c). The Commission treats a violation of ORS 471.315(1)(c) as a Category I violation. OAR 845-006-500(7), Exhibit 1. *See also Rastafarian Private Club* (OLCC, Final Order, OLCC-90-V-059, April 1991). The standard penalty for a first Category I violation is cancellation of the license. OAR 845-006-0200. The Commission also has the discretion to take into account the particular circumstances of each case, and increase or decrease the sanction where there are aggravating or mitigating circumstances. OAR 845-006-0200(7)(c).

As discussed above, subsequent to the history of serious and persistent problems between February 2007 and mid-January 2008 (10 serious and 3 less serious incidents over 13 months), Licensee has demonstrated the willingness and ability to adequately control the premises. Therefore, mitigation of the standard sanction is appropriate.

Recently, in *Downtown Deli & Greek Cusina* (OLCC, Final Order, 08-V-028, August 2009), the Commission expressed an intention to impose an appropriate period of mandatory suspension (not less than one day and no more than 30 days) where a licensee has had a history of serious and persistent problems, but there are grounds to mitigate the standard penalty of cancellation. The Commission noted that giving a licensee the option of paying a civil penalty in lieu of any suspension period is insufficient to deter violations of this magnitude and does not encourage rapid resolution of the underlying problems. The Commission also recognized that the number and nature of incidents giving rise to a history of serious and persistent problems impacts the surrounding community and can disproportionately strain law enforcement resources. Thus, some period of mandatory suspension is appropriate. Moreover, in addition to a fine or suspension, the Commission found that license restrictions may prevent the recurrence of problems that lead to a violation of ORS 471.315(1)(c).⁹ Final Order at 26.

Consequently, based upon the Commission's pronouncement and reasoning in *Downtown Deli & Greek Cusina*, a 37 day suspension or a civil penalty of \$4,950 in lieu of 30 days, with a mandatory 7 day suspension is an appropriate sanction in this case. In addition to the fine and suspension, it is appropriate to impose restrictions on the license to prevent a recurrence of

⁹ Pursuant to OAR 845-005-0355(1), the Commission may restrict a license when, in the absence of a restriction, the Commission has a basis to cancel, suspend/fine or deny the license or when a restriction may prevent the recurrence of problems that caused the violation.

problems that led to the violation. OAR 845-005-0355(1). Many of the disturbances involving violence or threat of violence at, or in the immediate vicinity of, the licensed premises occurred after 12:00 a.m. and involved intoxicated patrons. The proposed restrictions, which are designed to address these problems, are discussed and set out below in the License Renewal section.

2. Penalty for the violation of ORS 471.360(1)(b). The Commission treats a violation of ORS 471.360(1)(b) (allowing sale without a service permit) as a Category III violation. The standard penalty for a first Category III violation is a 10-day suspension or a fine of \$1,650. The standard penalty for a second Category III violation within a two year period is a 30-day suspension or fine of \$4,950. OAR 845-006-0500(7), Exhibit 1.

The service permit violation proved in this case is Licensee's second Category III violation within two years. As noted above, in January 2007, Licensee received a Notice of Violation when an employee failed to verify the age of a person who reasonably appeared to be under 26 years of age. Licensee paid a fine of \$1,650 in lieu of a 10 day license suspension. Because this is Licensee's second Category III violation within two years, the standard penalty of a 30-day suspension or fine of \$4,950 is appropriate.

5. License Renewal

The Commission proposed to deny renewal of Licensee's liquor license on two alternate bases, ORS 471.313(4)(g) and ORS 471.313(5).¹⁰

Pursuant to ORS 471.313(4)(g), the Commission "may refuse to license any applicant * * * if the Commission has reasonable grounds to believe any of the following to be true":

(4) That the applicant:

* * *

(g) Did not have a good record of compliance with the alcoholic liquor laws of the state and the rules of the Commission when previously licensed.

The Commission may count as evidence of a poor record of compliance charges that are proved for the first time during the license refusal contested case, as long as the Commission gives reasonable notice of the charges and provides the applicant an opportunity to contest the charges. *Riverside Restaurant & Lounge* (OLCC, Final Order, 94-L-008, December 1996).

As found above, the Commission has proven the history of serious and persistent problems violation (ORS 471.315(1)(c)) and the service permit violation (ORS 471.360(1)(b)). Licensee also had the service to a minor violation (OAR 845-006-0335(1)) in 2007. But, despite this violation record, the Commission finds, for the reasons set out below, that Licensee's license

¹⁰ In the licensing context (as contrasted with the violation context of ORS 471.315(1)(c)), a finding that Licensee has the willingness and ability to control the premises and patrons' behavior in the immediate vicinity of the premises, overcomes the license refusal basis for a history of serious and persistent problems. ORS 471.313(5). Because such a finding has been made in this matter, the alternate alleged renewal refusal basis under ORS 471.313(5) need not be addressed.

renewal should be granted with restrictions on the license.

A poor record of compliance may be overcome as a ground for refusal where the evidence shows that despite the violation record, the applicant would not be a poor risk for future compliance with the alcoholic beverage laws. *See, e.g., Crane Supply Tavern* (OLCC, Final Order, 85-L-019, August 1985); *see also Hale's Tavern* (OLCC, Final Order, 85-L-010, June 1985). The burden is on the licensee to demonstrate that it is a good candidate for future compliance with the liquor laws. *See Dad's Restaurant & Lounge* (OLCC Final Order, 06-V-029, December 2007). As discussed in *Quincy Store* (OLCC Final Order, 02-V-008/L-001, December 2002), factors to be considered in determining whether good cause exists include the period of time without violations as a licensee, the nature and seriousness of the violations, whether the violations were mitigated or aggravated, and acceptance of responsibility for the violation.

In *Cabana Club* (OLCC, Final Order, OLCC-03-L-010, April 2005), the licensee had two history of serious and persistent violations over the course of five years. On the first violation, the licensee entered into a settlement agreement and agreed to operate under a compliance plan with restrictions on the license. On the second violation, three years later, the licensee demonstrated a willingness and ability to control the premises after a string of five serious incidents over a one year period. Despite Licensee's poor compliance history, the Commission decided to renew the license with restrictions because, in the interim, the licensee had demonstrated a willingness and ability to control the premises and patrons' behavior in the immediate vicinity of the premises.

Just recently, in *Downtown Deli & Greek Cusina*, Final Order at 28-31, the Commission again decided to renew a licensee's license despite a history of serious and persistent problems at the licensed premises. The Commission found good cause to overcome the violation as a ground for refusal where the licensee adopted and adhered to new policies and procedures that significantly reduced the number of serious problems and demonstrated a willingness and ability to control the premises and patrons' behavior in the immediate vicinity. But, to ensure the licensee's future compliance and reduce the likelihood of future disturbances, the Commission imposed restrictions on the licensee's sale and service of alcohol and requirements for the licensee's control of the premises.

In this case, as discussed above, subsequent to the string of 13 problems over 12 months at, or in the immediate vicinity of, the licensed premises between February 2007 and mid-January 2008, Licensee has been better at controlling the premises and patrons' behavior in the vicinity of the premises. Licensee has also implemented new measures designed to reduce the number and frequency of serious problems, including reducing the number of nights per week with live music and dancing, employing an additional alcohol monitor and closing earlier than 2:00 a.m. when the dining room is not busy. Given these circumstances, Licensee has shown it is not a poor risk for future compliance. As with the licensees in *Downtown Deli* and *Cabana Club*, Licensee's license should be renewed despite Licensee's history of violations and serious problems.

FINAL ORDER

The Commission orders that, for the violation of ORS 471.315(1)(c), the Full On-Premises Sales license of Marbet, Inc., Robert Girtle, Sr. and Robert Girtle, II, dba Girtle's Restaurant and Lounge, 311 Broadway, Seaside, Oregon be SUSPENDED for 37 days or that Licensee PAY A FINE of \$4,950 in lieu of 30 days license suspension, plus seven days MANDATORY SUSPENSION.

In addition to the fine and suspension for the violation of ORS 471.315(1)(c), the Commission orders that the following license restrictions be imposed:

1. Licensee shall prohibit the sale or service of alcoholic beverages from 12:30 a.m. until 7:00 a.m., and shall prohibit patrons from possessing or consuming alcoholic beverages from 1:00 a.m. until 7:00 a.m.
2. Licensee shall limit each patron to possessing no more than one container of alcohol at a time, except that Licensee may allow the sale of a bottle of wine per two or more patrons in conjunction with a meal.
3. Licensee shall limit the amount of alcohol in a container served to a patron to no more than 16 ounces of malt beverage, 6 ounces of wine, or 2 ounces of distilled spirits, except in the instance in which Licensee has sold a bottle of wine to two or more patrons in conjunction with a meal.
4. On Friday and Saturday nights, Licensee shall have at least two Department of Public Safety Services and Training (DPSST) certified security staff on duty on the premises from 10:00 p.m. until closing.

The Commission orders that, for the violation of ORS 471.360(1)(b), the Full On-Premises Sales license of Marbet, Inc., Robert Girtle, Sr. and Robert Girtle, II, dba Girtle's Restaurant and Lounge, 311 Broadway, Seaside, Oregon Licensee's license be SUSPENDED for 30 days or that Licensee PAY A FINE of \$4,950 in lieu of the license suspension.

The Commission also orders that the application for renewal of the Full On-Premises Sales license filed by Marbet, Inc., Robert Girtle, Sr. and Robert Girtle, II, dba Girtle's Restaurant and Lounge, 311 Broadway, Seaside, Oregon, be GRANTED WITH THE FOLLOWING RESTRICTIONS:

1. Licensee shall prohibit the sale or service of alcoholic beverages from 12:30 a.m. until 7:00 a.m., and shall prohibit patrons from possessing or consuming alcoholic beverages from 1:00 a.m. until 7:00 a.m.
2. Licensee shall limit each patron to possessing no more than one container of alcohol at a time, except that Licensee may allow the sale of a bottle of wine per two or more patrons in conjunction with a meal.

3. Licensee shall limit the amount of alcohol in a container served to a patron to no more than 16 ounces of malt beverage, 6 ounces of wine, or 2 ounces of distilled spirits, except in the instance in which Licensee has sold a bottle of wine to two or more patrons in conjunction with a meal.

4. On Friday and Saturday nights, Licensee shall have at least two Department of Public Safety Services and Training (DPSST) certified security staff on duty on the premises from 10:00 p.m. until closing.

If you choose to pay the fine, it must be paid within ten (10) days of the date of this Order; otherwise, the full suspension must be served.

It is further ordered that notice of this action, including the reasons for it, be given.

Dated this 21st day of December, 2009.

/s/ Stephen A. Pharo
Stephen A. Pharo
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 21st day of December, 2009.

THIS ORDER IS EFFECTIVE ON THE DATE MAILED. Any monetary fine or civil penalty set out in the order shall be due and payable 10 days after the date of mailing.

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for judicial review within 60 days from the service of this Order. Judicial review is pursuant to the provisions of ORS Chapter 183.