

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

<b>In the Matter of the Full On-Premises</b>	)	<b>FINAL FINDINGS OF FACT</b>
<b>Sales License Held by:</b>	)	<b>CONCLUSIONS OF LAW</b>
	)	<b>AND ORDER</b>
<b>ERB, Inc.</b>	)	<b>OLCC-08-V-054</b>
<b>Robert “RC” Greenough, Pres/Dir.</b>	)	<b>OLCC-08-V-054A</b>
<b>Lynn Greenough, Sec/Treas/Dir.</b>	)	<b>OLCC-08-V-054B</b>
<b>dba LOTSА LUCK</b>	)	
<b>2136 SE Powell Blvd.</b>	)	
<b>Portland, OR 97202</b>	)	

**HISTORY OF THE CASE**

On May 28, 2008, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Cancellation to ERB, Inc., Robert “RC” Greenough, President/Director/Stockholder and Lynn Greenough, Secretary/Treasurer/Director/Stockholder (collectively Licensee), dba Lotsa Luck, located at 2136 SE Powell Blvd., Portland, Oregon.<sup>1</sup> The Notice charged Licensee with a violation of OAR 845-005-0355, based on corporate principal Robert “RC” Greenough’s violation of a license restriction and proposed cancellation of the license. Licensee timely requested a hearing.

The Commission referred Licensee’s hearings request to the Office of Administrative Hearings on July 7, 2008. On December 19, 2008, the Commission issued Licensee an Amended Notice of Proposed License Cancellation and Notice of Proposed Refusal to Renew License. The Commission proposed to refuse renewal of the license based on Licensee’s compliance record, specifically corporate principal Robert Greenough’s violation of OAR 845-005-0355(5).

A contested case hearing was held in this matter in Portland, Oregon, on February 20, 2009, before Administrative Law Judge Alison Greene Webster. Licensee was represented by Michael Mills, Attorney at Law. Kelly Routt presented the case for the OLCC.

OLCC Inspector Peggy Mullen testified on the Commission’s behalf. Corporate principals Robert Greenough and Lynn Greenough testified on Licensee’s behalf. The record closed on February 20, 2009, at the conclusion of the hearing.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed March 17, 2009.

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<sup>1</sup> In November 2008, subsequent to the alleged violations, Mr. Greenough resigned as an officer and director of ERB, Inc., and transferred his shares to Lynn Greenough. Ms. Greenough became the president and sole shareholder of ERB, Inc. as of November 5, 2008.

Licensee filed Exceptions to the Proposed Order on March 30, 2009. Staff filed Comments on the Proposed Order on March 31, 2009. The Administrative Law Judge responded to Licensee's Exceptions and Staff's Comments on April 1, 2009.

On April 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 enters the following:

### **EVIDENTIARY RULINGS**

OLCC Exhibits A1 through A5 and Licensee's Exhibits L1, L3 and L6 were admitted at hearing. Licensee's Exhibit L4 was received for purposes of Licensee's offer of proof.<sup>2</sup>

### **ISSUES**

1. Whether corporate principal Greenough violated a restriction on the license that required him to abstain from the consumption of alcohol at all times. OAR 845-005-0355(5).
2. If so, what is the appropriate sanction for this violation?
3. Whether the Commission has grounds to refuse to renew Licensee's license under ORS 471.313(4)(g) because Licensee did not have a good record of compliance with the liquor laws of this state while licensed.
4. If so, whether Licensee has shown good cause to overcome the Commission's refusal to renew the license.

### **FINDINGS OF FACT**

1. On July 11, 2005, ERB, Inc., doing business as Lotsa Luck, was granted a full on-premises sales license for premises located at 2136 SE Powell Blvd. in Portland. At that time, and at the time of the alleged violation at issue, Robert Charles Greenough was the President of ERB, Inc. and Lynn Greenough was the corporation's Secretary and Treasurer. (Ex. A1.) Although Mr. Greenough was the corporation's president, he had little to do with the day-to-day operation of the licensed premises. Mrs. Greenough was responsible for running the business. (Test. of L. Greenough.)

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<sup>2</sup> Licensee proffered evidence pertaining to the Commission's failure to act on the October 2008 application for licensure and change of ownership filed by Anna's Dream, Inc. The OLCC case presenter objected to the evidence on relevancy grounds. The ALJ determined that this evidence was not relevant to the charges and agency action at issue. Licensee asked to make an offer of proof, which was accepted pursuant to OAR 137-003-0610(5).

2. Robert Greenough has two convictions for Driving Under the Influence of Intoxicants. The most recent conviction, on May 1, 2007, arose from a December 19, 2006 arrest. (Test. of R. Greenough; Ex. L6 at 20.)

3. In August 2007, in connection with the annual renewal of ERB's liquor license, the Commission placed restrictions on the license. By letter dated August 8, 2007, the Commission proposed to renew the license with the following restrictions: (1) Mr. Greenough will not sell or serve alcoholic beverages nor participate in the management of the premises; and (2) Mr. Greenough may only enter the premises to make repairs and perform routine maintenance. (Ex. L6.)

4. Licensee questioned these restrictions and, upon further investigation, on October 12, 2007, the Commission issued an amended restriction letter that superseded the previous notice granting the license with restrictions. Licensee's license was then renewed with the following two restrictions:

(1) Mr. R.C. Greenough will not sell or serve, or manage the service of, alcoholic beverages.

(2) Mr. R.C. Greenough shall abstain from the consumption of alcohol at all times.

(Ex. A2.)

5. The license restrictions were based on the Commission's determination that Mr. Greenough had a recent history of using alcohol to excess. The restriction letter also noted (erroneously) that Mr. Greenough had a record of three incidents of using alcohol to excess in the past seven years. Although Mr. Greenough had only two DUII convictions on his record, Licensee did not request a hearing to dispute the license restrictions or to correct the erroneous representation in the restriction letter. The restrictions therefore became permanent as of December 12, 2007. (Ex. A2; test. of R. Greenough.)

6. ERB, Inc. owns four tax lots on SE Powell Blvd. in Portland, including the lot on which the licensed premises is located. Just adjacent to the licensed premises, on one of the other tax lots owned by ERB, Inc., Mr. Greenough owns and operates an automobile repair business, Andy's Auto Supply and Repair. Mr. Greenough has owned and worked at Andy's for more than 30 years. For much of that time, Mr. Greenough has been a regular lunch customer at the licensed premises. Before Licensee took over the business in 2005, it was a bar and grill known as "2 x 6 North." (Test. of L. Greenough; test. of R. Greenough.)

7. On the morning of April 24, 2008, Mr. Greenough consumed alcoholic beverages on the licensed premises. (Test. of R. Greenough.)

8. At approximately 11:00 a.m. on April 24, 2008, an unidentified person called the Commission and left a message that Mr. Greenough was drinking alcohol in the licensed premises and was intoxicated. The caller also added that the bartender had called Ms.

Greenough about serving alcoholic beverages to Mr. Greenough, but Ms. Greenough did not direct the bartender not to serve him. (Test. of Mullen; Ex. A3.)

9. OLCC Inspector Mullen received the anonymous voice mail message shortly after she arrived at work at 11:30 a.m. About 45 minutes later, she entered the licensed premises and saw Mr. Greenough seated at the bar. He had a tumbler-type glass with liquid and a plate of food on the bar in front of him. (Test. of Mullen; Ex. A3.)

10. Inspector Mullen interviewed the bartender on duty, Jennifer Schoen, the earlier shift bartender, Anna Nadeau, and Mr. Greenough. The inspector learned that Mr. Greenough had been served, and had consumed, three Seagram's VO and water drinks at the licensed premises that morning. Mr. Greenough admitted that he was not supposed to be drinking at the licensed premises, and acknowledged that he had "screwed up." (Test. of Mullen; Ex. A3.)

11. Inspector Mullen noted that Mr. Greenough had slightly slurred speech, bloodshot eyes and a moderate odor of alcoholic beverage on his breath. But, because these were the only signs of intoxication Mr. Greenough displayed and the servers indicated that they did not intend to serve him any more alcohol, Inspector Mullen did not issue a violation ticket for serving a visibly intoxicated person. (Test. of Mullen; Ex. A3.)

12. On April 25, 2008, Licensee applied for renewal of its license. (Ex. A4.) On May 6, 2008, the Commission issued Licensee a "Conditional Letter of Authority to Operate" effective through June 30, 2009 or the date the Commission takes final action on the renewal application, whichever comes first. (Ex. A5.)

13. On May 28, 2008, the Commission issued Licensee a Notice of Proposed License Cancellation based on Mr. Greenough's violation of the restriction on the license requiring him to abstain from the consumption of alcohol at all times. (Pleading A.)

14. In November 2008, Mr. Greenough resigned as an officer and director of ERB, Inc., and transferred his shares to Lynn Greenough. Ms. Greenough became the president and sole shareholder of ERB, Inc. as of November 5, 2008. (Ex. L6.) In January 2009, Licensee closed the business. (Test. of L. Greenough.)

## CONCLUSIONS

1. Mr. Greenough violated a restriction on the license when he consumed alcoholic beverages on the licensed premises. OAR 845-005-0355(5).

2. The appropriate sanction for this violation is cancellation of the license currently held by Licensee ERB, Inc. and Lynn Greenough, President, Secretary, Treasurer and Stockholder; and a Letter of Reprimand to former Licensee Robert "RC" Greenough.<sup>3</sup>

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<sup>3</sup> Lynn Greenough and Robert "RC" Greenough were named as parties because they were corporate principals, and therefore Licensees, at the time of the violation. In November 2008, subsequent to the alleged violations, Mr. Greenough resigned as an officer and director of ERB, Inc., and transferred his shares to Lynn Greenough. Ms. Greenough became the president and sole shareholder of ERB, Inc. as of

3. The Commission has grounds to refuse to renew Licensee's license under ORS 471.313(4)(g) because Licensee did not have a good record of compliance with the liquor laws of this state while licensed.

4. Licensee has not shown good cause to overcome the Commission's refusal to renew the license.

## OPINION

### 1. Violation

As set out above, the Commission asserts that Licensee violated OAR 845-005-0355(5) when Mr. Greenough consumed alcoholic beverages on the licensed premises. As the proponent of this contention, the Commission bears the burden of proof. 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).

OAR 845-005-0355(5) provides as follows:

A licensee or permittee who has a restricted license or permit must exercise license or permit privileges only in compliance with the restriction(s). Failure to comply with the restriction(s) is a Category I violation.

Licensee acknowledges the restrictions on the license<sup>4</sup> and admits that corporate principal Greenough failed to comply with the restriction when he consumed alcoholic beverages on the licensed premises on April 24, 2008. Thus, Licensee's violation of OAR 845-005-0355(5) has been established.<sup>5</sup>

### 2. Penalty

As set out above, the violation of a restriction on the license is a Category I violation. A

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November 5, 2008. Since Robert "RC" Greenough is no longer a Licensee, the appropriate penalty as to him is a Letter of Reprimand. *Omar's* (OLCC, Final Order, 04-V-031, August 2005).

<sup>4</sup> At hearing, Licensee questioned the legality of the restriction requiring Mr. Greenough to abstain from the consumption of alcohol at all times. Licensee asserts that the restriction is overly broad and outside the OLCC's authority because it requires total abstinence by Mr. Greenough. As set out above, however, Licensee did not request a hearing to dispute the license restrictions, and they became permanent by operation of law in December 2007. The Commission declines to consider Licensee's collateral attack on the validity of this restriction.

<sup>5</sup> Under OAR 845-006-0301, a "licensee" includes the corporation and the officers and directors of the corporation. The Commission considers both the corporate entity and individual corporate principals equally responsible for violations committed by any licensee (corporate or individual) holding the license. See *Omar's* at fn. 9.

Category I violation is one that makes the licensee ineligible for a license. OAR 845-006-0500(7)(a)(A). Under the Commission's guidelines, the standard penalty for a first Category I violation is cancellation of the license. OAR 845-006-0500(7), Exhibit 1.

In prior cases, the Commission has held that cancellation of a license may only result from substantial violations of license conditions and restrictions. In *Oceanside Restaurant & Lounge* (OLCC, Final Order, 88-V-123, August 1989), the Commission identified the following factors to consider in determining whether a violation of license restrictions is substantial:

- (a) the timing of the violation, with breaches early in the contract considered more likely to be substantial;
- (b) whether the violation was willful;
- (c) the number of violations;
- (d) whether the hardship on the licensee outweighs the importance of the conditions in ensuring compliance with the license condition.

Applying the *Oceanside Restaurant & Lounge* factors in this case demonstrates that the restriction violation was substantial. First, the violation occurred approximately six months after Licensee received the Amended Notice Granting License with Restrictions. This factor weighs against Licensee. Second, Mr. Greenough was aware of the restriction when he chose to consume alcoholic beverages at the licensed premises. Therefore, the violation was willful, which weighs against Licensee. The third factor, the number of violations, is neutral because it is Licensee's first violation. Although Mr. Greenough had more than one drink at the premises that morning, the incident should only count as one violation of the license restriction. Finally, as explained below, The Commission is persuaded that the hardship on Licensee does not outweigh the importance of the restrictions in ensuring compliance with the liquor laws.

In *Dad's Restaurant & Lounge* (OLCC Final Order, 06-V-029, December 2007), citing to *La Macarena* (OLCC Final Order, 00-V-116, August 2002), the Commission found that the fourth *Oceanside* factor counts against a licensee where "the breach strikes at the very heart of the restriction or condition placed on the licensee, as the licensee would not be a good risk for compliance with alcoholic beverage laws without the restriction." *Dad's*, Final Order at 15.

In this case, the restriction prohibiting Mr. Greenough from consuming alcoholic beverages was placed on the license due to his recent history of using alcohol to excess. He had two incidents within the past seven years, the most recent, a December 2006 DUII arrest resulting in a May 2007 conviction. Without placing such a restriction on the license, the Commission had grounds to refuse to renew the license in 2007 under OAR 845-005-0325(4)(a).<sup>6</sup> Corporate principal Greenough's consumption of alcoholic beverages on the premises strikes at the very heart of the license restriction requiring his abstinence.

In short, Mr. Greenough's consumption of alcoholic beverages on the premises constitutes a substantial violation of a restriction on the license and warrants cancellation of the license

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<sup>6</sup> Under OAR 845-005-0325(4)(a), the Commission will deny a license if "[t]he applicant has a recent history of using alcohol or controlled substances to excess" unless the applicant shows good cause to overcome this criterion.

currently held by ERB, Inc. and Lynn Greenough, President, Secretary, Treasurer, Stockholder; and a Letter of Reprimand against Robert “RC” Greenough.<sup>7</sup>

### **3. License Refusal**

#### **a. Record of Compliance When Previously Licensed.**

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).

In this case, Licensee was given reasonable notice of the charge and an opportunity to contest it. In the course of this contested case, the Commission has proved that Licensee, through Mr. Greenough, violated a restriction on the license. The next question is whether this one violation gives the Commission “reasonable grounds to believe” that Licensee “did not have a good record of compliance” sufficient to justify the refusal to renew the license.

As discussed above, the Commission has made the failure to comply with a restriction on the license a Category I violation, one that renders the licensee ineligible for a license. Here, the restriction violation was willful and committed by a licensee. It occurred only six months after the restriction was imposed. Although it was only one incident, it was a substantial and serious breach of the manner in which Licensee was licensed to operate, and it provides the Commission with reasonable grounds to believe that Licensee did not have a good record of compliance while licensed. The Commission is therefore entitled to refuse to renew Licensee’s license.

#### **b. Good Cause Exception.**

The Commission has held that a prior record of violations may be overcome as a grounds 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) (evidence established that future violations were unlikely and the area had a need for the license); *Hale’s Tavern* (OLCC, Final Order, 85-L-010, June 1985) (good cause shown where applicant had only one violation in nine years as a licensee, the violation was committed by applicant’s employee rather than the

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<sup>7</sup> See footnote 3, above.

applicant personally and the applicant took swift action to prevent recurrence of violation). Factors to be considered in determining the existence of good cause 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. *See, e.g., Quincy Store* (OLCC Final Order, 02-V-008/L-001, December 2002.)

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 at 23. In this case, Licensee asserts that future violations would be unlikely because: (1) Mr. Greenough's violation of the license restriction was an isolated incident; (2) Mr. Greenough is no longer a principal of the corporation and has no role in the day to day operations of the business; and (3) Mr. Greenough has abstained from consuming alcoholic beverages since the April 24, 2008 violation.

While Mr. Greenough's violation may have been an isolated incident it was, as explained above, a willful and substantial breach of the license restriction. The violation occurred on the eve of Licensee's application for renewal, and only six months after the restriction was imposed. Mr. Greenough's status as a licensee at the time of the violation is an aggravating factor. And, although Mr. Greenough is no longer a licensee, he is still, as licensee Lynn Greenough's spouse, a person with a financial interest in the licensed business under OAR 845-005-0311(4)(d). Finally, although Mr. Greenough's abstinence from alcohol since the violation is commendable, it alone is insufficient to establish good cause to overcome the prior violation. For the forgoing reasons, the Commission is entitled to refuse to renew Licensee's license application.

**FINAL ORDER**

The Commission orders that the Full On Premises Sales License held by ERB, Inc., Lynn Greenough, President, Secretary, Treasurer and Stockholder, dba Lotsa Luck, 2136 SE Powell Blvd., Portland, Oregon, be CANCELLED for violation of OAR 845-005-0355(5).

The Commission orders that a Letter of Reprimand be issued to Robert "RC" Greenough for violation of OAR 845-005-0355(5).

The Commission orders that the application to renew the Full On Premises Sales License held by ERB, Inc., Lynn Greenough, President, Secretary, Treasurer and Stockholder, dba Lotsa Luck, 2136 SE Powell Blvd., Portland, Oregon be REFUSED.

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

Dated this 22<sup>nd</sup> day of April, 2009.

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

Mailed this 22<sup>nd</sup> day of April, 2009.

THIS ORDER IS EFFECTIVE ON THE DATE MAILED.

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.

## LIST OF EXHIBITS CITED

<b>Exhibit</b>	<b>Description</b>
A1	OLCC License History Records for ERB, Inc. and Lotsa Luck
A2	Amended Notice Granting License with Restrictions, dated 10/12/2007
A3	OLCC Intake/Compliance Action Report by Inspector Mullen, dated 5/2/2008
A4	OLCC License Renewal Application for ERB, Inc. and Lotsa Luck, received 4/25/2008
A5	Conditional Letter of Authority to Operate, dated 5/6/2008
L6	Robert Greenough DUII Treatment Reports and Correspondence from OLCC to Licensee regarding license restrictions, various dates.