

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

IN THE MATTER OF THE FULL ON-	) <b>FINAL FINDINGS OF FACT</b>
PREMISES LICENSE HELD BY:	) <b>CONCLUSIONS OF LAW</b>
	) <b>AND ORDER</b>
<b>Melanie M. Clark</b>	) OLCC-08-V-114
<b>Denise D. Olsen</b>	) OLCC-08-V-114A
<b>Gregory S. Rudolfs</b>	) OLCC-08-V-114B
	)
<b>dba MAK'S OLD CITY HALL LOUNGE</b>	)
<b>375 Central Avenue #202</b>	)
<b>Coos Bay OR 97420</b>	)
	)

**HISTORY OF THE CASE**

On November 19, 2008, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Cancellation to Melanie M. Clark, Denise D. Olsen, and Gregory S. Rudolfs, doing business as Mak's Old City Hall Lounge (Licensees), located at 375 Central Avenue #202, Coos Bay OR 97420. The Commission alleged that there was a history of serious and persistent problems either in the licensed premises or in the immediate vicinity of the licensed premises. The Commission also alleged that Licensee Gregory Rudolfs permitted disorderly activities on the licensed premises and in areas controlled by Licensee, in violation of OAR 845-006-0347(2)(a) and that Licensee Gregory Rudolfs drank an alcoholic beverage while on duty at the licensed premises, in violation of OAR 845-006-0345(1). Licensee timely requested a hearing.

On January 2, 2009, the Commission referred the request to the Office of Administrative Hearings (OAH). The case was assigned to Robert L. Goss, Administrative Law Judge (ALJ).

On March 17, 2009, the Commission issued an Amended Notice of Proposed License Cancellation to Licensees. In the Amended Notice, the Commission added the following allegations: that Licensees' employees permitted a minor to buy, be served or drink alcoholic beverages on the licensed premises, in violation of OAR 845-006-0335(3)(a) and that Licensees' employees permitted a minor to be on the licensed premises or an area of the licensed premises prohibited to minors in violation of OAR 845-006-0335(3)(b).

A hearing was held on April 20 through April 23, 2009 in Coos Bay, Oregon. Licensees were represented by attorney James Monsebroten. OLCC was represented by Becky Voelkel, Case Presenter. Witnesses for OLCC were: OLCC Inspector Gary Francis, Officer Jason Griggs of the North Bend Police Dept. and the following officers of the Coos Bay Police Dept.: Officer Darrel Babb, Sergeant Chris Chapanar, Officer Mark Ereth, Officer Aaron Gulbransen, Sergeant Hugo Hatzel, Office Specialist Mary Jenkins, Officer Teresa Jolley, Officer Pete Kirk, Sergeant

Robert Lounsbury, Captain Gary McCullough, Officer Robert Meincke, Sergeant Sean Merritt, Captain Cal Mitts, Officer Steven Myers, Officer Josh Scarbury, Officer Eric Schwenninger, Officer Mike Shaffer, Officer Randy Sparks, Officer Tim West, Officer Anthony Wetmore, Officer Mark Wheeling, Officer Jeffery Zavada and Officer Karlin Zunino. All the Licensees testified at hearing. Also testifying for Licensees were: Tejun Fowler, Daniel Ritalick, Jericho Clark, Doug Grey, Kerry Clark and Rebecca Clark.

A Proposed Order was issued following the initial hearing. Licensees filed Exceptions to the Proposed Order on July 10, 2009. Staff filed Comments on the Proposed Order on July 14, 2009. In July 2009, during the period for filing comments and exceptions, OLCC staff discovered evidence that it believed had been lost at the time of the original hearing. OLCC requested that the Commissioners remand the case to the OAH for further hearing to admit into the record an audio recording of a December 28, 2008 meeting between OLCC Inspector Gary Francis and Licensees and to issue an Amended Proposed Order. At its August 21, 2009 meeting, the Commission, pursuant to OAR 137-003-0655, voted to remand the case back to OAH for further hearing in accordance with that request. The Amended Proposed Order reflected the admission of the new evidence and the legal arguments made regarding that evidence. The Amended Proposed Order was mailed on October 8, 2009.

Licensees filed Exceptions to the Amended Proposed Order on November 9, 2009. Staff filed Comments on the Proposed Order on November 9, 2009. The Administrative Law Judge responded to Licensees' Exceptions and Staff's Comments on November 17, 2009.

On December 17, 2009, the Commission considered the record of the hearing, the applicable law, the Amended Proposed Order of the Administrative Law Judge, Licensees' Exceptions to the Amended Proposed Order, Staff's Comments on the Amended Proposed Order and the Administrative Law Judge's Response to Licensees' Exceptions and Staff's Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:

## **ISSUES**

1. Whether there is a history of serious and persistent problems at Licensees' premises based upon incidents occurring between August 10, 2007 and January 18, 2009.<sup>1</sup> ORS 471.315(1)(c).
2. Whether Licensees have demonstrated a willingness and ability to control the premises since August 10, 2007.

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<sup>1</sup> In their Comments to the Amended Proposed Order, staff noted that the last incident comprising the history should be modified from February 21, 2009 to January 18, 2009, and that the period comprising the history of serious and persistent problems be modified accordingly. In his response to Staff's Comments, the Administrative Law Judge concurred and suggested the Final Order be amended to so reflect.

3. Whether Licensee Gregory Rudolfs permitted disorderly activities in violation of 845-006-0347(2)(a), when, on July 12, 2008, Rudolfs pushed and bent a patron over the bar, grabbed the patron by the throat and pushed himself off of the patron's face.

4. Whether, on July 12, 2008, Licensee Gregory Rudolfs drank an alcoholic beverage while on duty at the licensed premises in violation of OAR 845-006-0345(1).

5. Whether, on January 18, 2009, Licensees' employees permitted a minor to buy, be served or drink alcoholic beverages on the licensed premises in violation of OAR 845-006-0335(3)(a).

6. Whether, on January 18, 2009, Licensees' employees permitted a minor to be on the licensed premises or an area of the licensed premises prohibited to minors in violation of OAR 845-006-0335(3)(b).

7. If any of the violations are proven, what is the appropriate penalty?

### **EVIDENTIARY RULING**

OLCC's Exhibits A1 through A103 and Licensee's Exhibits L101 through L106, L 120 and L204 were admitted to the record at the original hearing (April 20 to April 23, 2009).

Subsequent to the issuance of the original Proposed Order in this matter, the Commission ordered that the record be reopened for the admission of evidence that OLCC previously believed had been lost. Exhibit A104, an audio recording of a meeting between OLCC Inspector Gary Francis and Licensees on December 28, 2007, was admitted into the record without objection. Further testimony from Inspector Francis regarding the December 28, 2007 meeting was taken on September 9, 2009. The record closed after receiving supplemental briefs regarding the new evidence.

### **FINDINGS OF FACT**

1. Melanie M. Clark, Denise D. Olsen and Gregory S. Rudolfs, doing business as Mak's Old City Hall Lounge, have held a Full On-Premises Sales license since July 5, 2007. The premises are located at 375 Central Avenue #202, Coos Bay, Oregon. Licensees' license prohibits minors on the premises at all times. (Ex. A1; test. of Inspector Francis)

2. On August 17, 2007, the Coos Bay Police were contacted by two individuals that wished to report an assault that had occurred on August 10, 2007 at the licensed premises. Carrie Bohanan and Alicia Peterson told the officer that, on August 10, 2007, inside the premises, a male patron pulled down the shirt of a female patron, exposing her breasts. Peterson reported that, later that evening, she was punched in the head by a female patron, leaving a "large goose egg." Ms. Peterson later went to a local hospital for treatment for her injury. A Coos Bay officer investigated further, receiving statements from the persons reported by Bohanan and Peterson as being involved, denying any involvement. (Ex. A4; test. of Sergeant Merrit.)

3. On August 18, 2007, at approximately 1:12 a.m., a Coos Bay officer observed a couple in front of the licensed premises urinating and issued them a warning for urinating in public. (Ex. A5; test. of Officer Scarberry.)

4. On August 25, 2007, at approximately 2:01 a.m., a Coos Bay officer found an intoxicated patron of the licensed premises walking away from the premises. The patron had just been physically removed from the premises by security employees. (Ex. A6; test. of Officer Sparks and Schwenninger.)

5. On September 3, 2007, a Coos Bay officer spoke with a patron of the licensed premises, who reported an act of vandalism on his vehicle that occurred shortly after he was involved in a fight inside the licensed premises. The fight and vehicle vandalism occurred on or about September 1, 2007. The patron reported that when he left the premises after the fight, he saw that his vehicle had been “keyed.” The vehicle was located in the immediate vicinity of the licensed premises. A day later, the patron also noticed a dent and a footprint that had been left on his vehicle. The officer was unable to contact the suspect. (Ex. A7; test. of Officer Shaffer.)

6. On September 9, 2007, at approximately 1:09 a.m., the Coos Bay police responded to the licensed premises following a report of a “big” fight inside that location. When the officer arrived, he was told by the security personnel for the licensed premises that there had actually been two fights inside the licensed premises. (Ex. A8; test. of Officer Myers.)

7. On September 9, 2007, at approximately 1:41 a.m., the Coos Bay police responded to the premises on a report of a large fight inside the premises. An intoxicated patron had been struck on the head with a bottle, leaving a bleeding cut. Another patron received a broken tooth and two black eyes in the fight. The premises security also reported that when the two patrons left the premises, they were further assaulted in the parking lot. This fight was a separate incident than the fights reported in Finding #6 above. (Ex. A9; test. of Officer West.)

8. On September 23, 2007, at approximately 2:21 a.m., the Coos Bay police received a report of patrons of the premises throwing bottles in the premises parking lot. When they responded to the report, the police found that the premises’ security personnel were not fully cooperative with the police. (Ex. A10; test. of Officer Westmore.)

9. On September 23, 2007, at approximately 2:49 a.m., a Coos Bay police officer warned a patron of the premises for urinating in public in the immediate vicinity of the premises. The officer also observed at least six bottles and cans thrown about the premises parking lot. This was a separate incident than that described in Finding #8. (Ex. A11; test. of Officer Wetmore.)

10. On October 13, 2007, at approximately 1:30 a.m., a patron was assaulted as he was leaving the premises by four males who had pulled up in a vehicle. A Coos Bay officer subsequently contacted the victim at a hospital emergency room. The patron had numerous bruises and scrapes on his face and body and was in considerable pain when he decided to seek treatment at the hospital. The patron also fell down the stairs outside the premises as a result of the assault. (Ex. A12; test. of Officers Wetmore and Shaffer.)

11. On October 28, 2007, at approximately 1:06 a.m., a Coos Bay officer warned a person in the immediate vicinity of the premises for disorderly conduct. The officer who issued the warning did not recall the type of disorderly conduct that gave rise to the warning. (Ex. A13; test. of Officer Schwenninger.)

12. On November 11, 2007, at approximately 2:20 a.m., Coos Bay officers were dispatched to the premises on a report of a fight. The officers' investigation revealed that a patron became disorderly and assaultive inside the premises. A security employee of the premises intervened and as the employee was escorting the patron to the front door of the premises, the patron struck the employee, giving the employee a bloody nose. After the assault, just outside of the premises, the patron continued to threaten the security employees. (Ex. A14; test. of Officers West, Myers and Sergeant Hatzel.)

13. On November 17, 2007, at approximately 2:27 a.m., Coos Bay officers were dispatched to the premises on a report of a fight. There were several fights inside the premises that evening that were broken up by security employees. One of the fights involved two male patrons who were engaged in a "drunken brawl" as they left the premises. When one of the patrons tried to hit the other, he hit and broke the windshield of a taxi. One of the patrons was arrested for disorderly conduct and the other for disorderly conduct and criminal mischief. (Ex. A15; test. of Officers Zavada, Shaffer and Westmore.)

14. On November 17, 2007, at approximately 11:23 p.m., Coos Bay officers were dispatched to the premises on a report of an assault. An extremely intoxicated patron struck another patron in the nose, causing injury to the nose and damage to a cell phone that broke when the patron fell to the ground. When the aggressor was being escorted from the premises, he was assaulted by the earlier victim and several other patrons, causing facial wounds and loss of teeth. The aggressor was treated for his injuries. Three patrons were cited for disorderly conduct. This incident is separate from the incident cited in Finding #13. (Ex. 16; test. of Captain Mitts, Officers Shaffer and Wetmore.)

15. On November 24, 2007, at approximately 1:10 a.m., Coos Bay officers and an ambulance were dispatched to the premises on the report of a fight with injuries. A patron had been assaulted inside the premises, causing a bleeding wound to his hand. The patron was then moved outside of the premises. (Ex. A17; test. of Officer Scarberry.)

16. On December 9, 2007, at approximately 1:09 a.m., Coos Bay officers were called to the premises on a report of a fight. A patron had assaulted another patron inside the premises, causing an injury. The aggressor was escorted out of the premises. The aggressor reentered the premises and was confronted by security employees and a bartender. The patron struck the security employee on the side of the head and fighting with him and the bartender. During the ensuing fight, the patron bit the bartender on the wrist, causing it to bleed. The patron was charged with disorderly conduct, interfering with a 911 call and two counts of harassment. (Ex. A18; test. of Officer Ereth and Sgt. Merritt.)

17. On December 15, 2007, at approximately 2:11 a.m., Coos Bay officers responded to the premises on the report of a domestic disturbance. An intoxicated patron had just left the premises and was sitting in her vehicle when she began arguing with her mother-in-law. The

mother-in-law pulled the patron's hair. The patron's husband then attempted to remove the keys from the ignition of her vehicle, which was parked on the premises parking lot. The mother-in-law was warned for harassment. (Ex. A19; test. of Officers Schwenninger and Kirk.)

18. On December 23, 2007, at approximately 12:37 a.m., Coos Bay officers were called to the premises regarding a fight outside the front of the premises. The North Bend police were also asked to cover the call. The security personnel at the premises reported that the fight involved a father and daughter. (Ex. A20; test. of Captain McCullough.)

19. On December 23, 2007, at approximately 2:18 a.m., a Coos Bay officer observed a person urinating behind the premises. (Ex. A21; test. of Officer Kirk.)

20. On December 28, 2007, Licensees met with OLCC Inspector Gary Francis. At that meeting, Mr. Francis issued a Notice of Warning regarding a history of serious and persistent problems regarding the premises. From the time Licensees opened the business in July 2007 to the December 28 meeting, the OLCC counted approximately 18 to 20 incidents that it determined were serious. Also attending the meeting were representatives from the local police community, including Coos Bay Police Chief Eura Washburn and Coos Bay Police Captain Gary McCullough. They expressed concern about the resources it took for the police to respond to the many incidents that had occurred at or around the premises up to that point. Inspector Francis indicated to Licensees that reporting any further incidents to the police would be considered in Licensee's favor, but the incidents would still be considered as serious. Licensees indicated that they realized they were expected to contact the police when such problems occurred at the premises and added that they had been doing so even before the meeting. As a result of that meeting, Licensees developed and submitted a Compliance Plan in an attempt to remedy the recurring problems at the premises. The Plan included monthly training of employees, efforts to obtain DPSSST certification for security staff and installation of video cameras. Since then, Licensees also agreed to hire an EMT to have a medically trained person on staff on weekends. (Exs. A3 and A104; Test. of Inspector Francis, test. of Rudolfs.)

21. On January 1, 2008, at approximately 12:22 a.m., a Coos Bay officer was at the premises when a very intoxicated patron fell down the stairs. The patron subsequently left in a cab. (Ex. A22; test. of Officer Scarberry.)

22. On January 1, 2008, at approximately 1:16 a.m., Coos Bay officers were called to the premises on the report of a fight. The security employees of the premises requested police assistance help with multiple fights. However, the police subsequently cleared the location when it was reported that the "fights" were actually just "horseplay." This is a separate incident than that cited in Finding #21. (Ex. A23; test. of Sgt. Chapanar.)

23. On January 1, 2008, at approximately 1:27 a.m., Coos Bay police were conducting a check of the premises when a security employee told them of an altercation upstairs in the bar area. A patron pushed other patrons and a security employee inside the premises. The officers confronted a patron, who was verbally aggressive. The patron took a fighting stance, resisted arrest and was taken into custody for disorderly conduct. This is a separate incident than those cited in Findings #21 and 22. (Ex. A24; test. of Officers Meineck, Scarberry and Captain Mitts.)

24. On January 1, 2008, at approximately 2:06 a.m., an extremely intoxicated patron told a Coos Bay officer that she had been assaulted. The officer also personally observed two other patrons who were also extremely intoxicated. This is a separate incident from those described in Findings #21, 22 and 23. (Ex. A25; test. of Captain Mitts.)

25. On January 20, 2008, at approximately 1:47 a.m., Coos Bay police were dispatched to the premises. An intoxicated person who was refused entrance to the premises had threatened a security employee with a knife. When searched, the patron was also found to have an ice pick in his pocket. The patron was arrested on two counts of menacing and carrying a concealed weapon. (Ex. A26; test. of Officer Zavada and Captain Mitts.)

26. On January 27, 2008, at approximately 1:49 a.m., the Coos Bay police were called by a premises employee who reported that a patron inside the premises was on the ground and not responsive. A few minutes later, the employee called to say that the patron had just passed out and was coming around. (Ex. A27; test. of Captain Mitts.)

27. On February 3, 2008, at approximately 2:42 a.m., a Coos Bay officer observed a patron of the premises drive from a parking space in the premises parking lot, then wait for about a minute before pulling onto the street. No other traffic was in the area. The officer stopped the patron's vehicle and developed probable cause for DUII. The patron had slow and slurred speech and a strong odor of an alcoholic beverage on her breath. The patron exhibited indicia of intoxication on a Horizontal Gaze Nystagmus test, a Walk and Turn test and a One Leg Stand test. The patron was arrested for DUII. The patron's breath test disclosed a .22% blood alcohol content. (Ex. A28; test. of Officer Kirk.)

28. On February 9, 2008, at approximately 1:38 a.m., Coos Bay officers were conducting a bar check at the premises when they observed approximately 20 intoxicated persons fighting on the dance floor. One patron was arrested for disorderly conduct and criminal trespass. (Ex. A29; test. of Officer Scarberry.)

29. On February 9, 2008, at approximately 2:07 a.m., a Coos Bay officer observed a patron drive from the premises parking lot at a high rate of speed and closely following another vehicle. The officer stopped the vehicle, confirmed that the driver had been drinking at the establishment and that she was intoxicated. The patron had glassy, bloodshot eyes, thick, slow speech and an odor of an alcoholic beverage on her breath. The patron exhibited indicia of intoxication while performing field sobriety tests. The patron was arrested for DUII. Her breath test disclosed a blood alcohol content of .12 %. This is a separate incident than that cited in Finding #28. (Ex. 30; test. of Officer Kirk.)

30. On February 10, 2008, at approximately 1:05 a.m., a Coos Bay officer observed a person urinating outside the premises. The man was cited for indecent exposure. (Ex. A31; test. of Officer Kirk.)

31. On February 17, 2008, at approximately 2:25 a.m., a Coos Bay officer stopped a vehicle for crossing the fog line. When he contacted the driver, he recognized the driver as someone he had seen earlier that evening at the licensed premises. The driver was visibly intoxicated at the premises and still visibly intoxicated when stopped. The driver had glassy,

bloodshot eyes and a strong odor of an alcoholic beverage on his breath. The patron swayed while standing during the stop and exhibited indicia of intoxication during field sobriety tests. The patron admitted to consuming alcohol at the premises and was arrested for DUII. The patron's breath test discloses a blood alcohol content of .14%. (Ex. A32; test. of Officer Kirk.)

32. On February 20, 2008, at approximately 12:21 a.m., a highly intoxicated patron of the premises reported to a Coos Bay officer that she had been hit by another patron inside the premises. Licensee's security staff removed the alleged assailant before police arrived. (Ex. A33; test. of Sgt. Merritt.)

33. On February 23, 2008, at approximately 1:33 a.m., Coos Bay officers were sent to the premises regarding a reported fight in progress. When they arrived, the police observed two male patrons with bleeding injuries. One patron admitted to the police he was the instigator of the fight, which occurred in the immediate vicinity of the premises. The officer later observed a patron he had contacted his investigation walking down the road, extremely intoxicated and disoriented. (Ex. A34; test. of Officer Wheeling.)

34. On February 23, 2008, at approximately 1:53 a.m., a Coos Bay officer was conducting a bar check at the premises when he observed a person outside the premises with an open beer. The person also admitted to possessing marijuana. The officer cited the person with an open container violation and for possession of less than one ounce of marijuana. This is a separate incident from that cited in Finding #33. (Ex. 35; test. of Officers Scarberry and West.)

35. On February 24, 2008, at approximately 2:46 a.m., a Coos Bay officer observed a person urinating outside the premises. The person was cited for urinating in public. (Ex. A36; test. of Officer Wheeling.)

36. On February 29, 2008, a patron's purse was stolen from a vehicle parked at the premises. (Ex. A37; test. of Officer Scarberry.)

37. On March 1, 2008, at approximately 2:04 a.m., a Coos Bay officer observed a fight in front of the premises. One person was warned for disorderly conduct. (Ex. A38; test. of Officer Scarberry.)

38. On March 2, 2008, at approximately 1:28 a.m., Coos Bay police received a report from an extremely intoxicated person about a fight at the premises. When the police arrived and contacted the security employees of the premises, they were told that the fight had occurred outside the premises. The fight was over when the police arrived. (Ex. A39; test. of Officer Myers.)

39. On March 2, 2008, at approximately 2:24 a.m., Coos Bay police received a report from a patron that other patrons were shooting up crack cocaine in the women's restroom inside the premises. The report described what the patrons were wearing. No further evidence was obtained. This is a separate incident from that cited in Finding #38. (Ex. A40; test. of Myers.)

40. On March 2, 2008, at approximately 2:50 a.m., Coos Bay officers responded to the premises on the report of a fight. Neither party wished to press charges. This is a separate incident from that cited in Findings #38 and 39. (Ex. A41; test. of Officer West.)

41. On March 8, 2008, at approximately 1:17 a.m., Coos Bay officers were sent to the premises on a reported fight. A very intoxicated female patron reported being assaulted by another female patron. After the officers arrived, they observed the alleged victim and male patron just outside the bar. The officers then observed the alleged victim engage in a verbal altercation with a very intoxicated male patron. The male patron subsequently kicked the female patron, then resisted the officer's attempts to handcuff him. (Ex. A42; test. of Sgt. Merrit.)

42. On March 8, 2008, at approximately 11:39 p.m., Coos Bay police received a report of an assault at the premises. (Ex. A43; test. of Captain Mitts.)

43. On March 9, 2008, at approximately 3:50 a.m., Coos Bay police received a report of a fight in the street at the premises. (Ex. A44; test. of Captain Mitts.)

44. On March 22, 2008, at approximately 11:51 p.m., a Coos Bay officer was dispatched to the premises on a reported assault. According to Licensee Rudolfs, he and security employees were breaking up a fight when he saw a patron approaching him. Believing the patron was going to become involved in the fight, Rudolfs grabbed the patron and escorted him outside. The patron and a witness reported that Rudolfs grabbed the patron by the throat. The officer saw mild redness on the patron's throat. Rudolfs denied grabbing the patron by the throat. (Ex. A45; test. of Officer Ereth.)

45. On March 23, 2008, at approximately 12:48 a.m., a Coos Bay officer observed a person urinating in front of the premises. (Ex. A46; test. of Officer Myers.)

46. On April 5, 2008, at approximately 2:21 a.m., a Coos Bay officer observed an intoxicated patron driving from the vicinity of the premises. After observing the vehicle swerve, occasionally into the oncoming lane, and significantly vary its speed, the officer stopped the vehicle and contacted the patron. The patron admitted to drinking alcohol at the premises. After noting an odor of an alcoholic beverage coming from the vehicle, the officer asked the patron if he would perform field sobriety tests. On each test performed, the patron exhibited indicia of intoxication. The officer arrested the patron for DUII. The patron's breath test indicated a blood alcohol content of .11%. (Ex. A47; test. of Officer Schwenninger.)

47. On April 5, 2008, at approximately 11:48 a.m., Coos Bay officers responded to the premises on a reported fight in progress. Two female patrons, one of whom was very intoxicated, were allowed entrance to the premises after being previously permanently trespassed from the premises. One of the female patrons struck another patron several times in the women's restroom. When security escorted the patrons from the premises they began hitting the employee. Once outside the premises, the patrons continued to hit and kick the security employee. The employee was injured as a result of the assault. The two patrons were charged with assault and disorderly conduct. (Ex. A48; test. of Officer Myers and Sgt. Chapanar.)

48. On April 6, 2008, at approximately 1:57 a.m., Coos Bay police responded to the premises on a report of a fight. An intoxicated patron poured water on herself, and in doing so accidentally spilled water on other patrons. When another patron confronted the intoxicated patron, the intoxicated patron struck her with a closed fist. The intoxicated patron left the premises before the police arrived. (Ex. A49; test. of Officer Schwenninger.)

49. On April 6, 2008, at approximately 3:26 a.m., a Coos Bay officer contacted a very intoxicated person at the hospital. The patron told the officer that he had been involved in a fight while walking home from the premises. The patron earlier told a gas station attendant that the fight was inside the premises. The patron went to the emergency for treatment of his injuries. This is a separate incident from that cited in Finding #48. (Ex. A50; test. of Officer Schwenninger.)

50. On May 3, 2008, at approximately 2:06 a.m., Coos Bay officers observed a fight break out among intoxicated patrons leaving the premises. Two intoxicated patrons received injuries as result of the fight. One of the patrons had been previously trespassed from the premises. While the officers were attempting to investigate the incident, the security employees of the premises would not control the crowd that was gathering outside the premises. One intoxicated person was observed urinating against a tree. Three patrons were charged with disorderly conduct. (Ex. A51; test. of Officers Zavada, Shaffer and Wetmore.)

51. On May 31, 2008, at approximately 2:08 a.m., Coos Bay officers were called to the premises regarding a fight. Two patrons, one of whom was extremely intoxicated, fought inside the premises. The fight involved pushing and hitting. One of the patrons involved in the fight stole the purse of the other patron. (Ex. A52; test. of Officer Schwenninger.)

52. On June 15, 2008, at approximately 2:14 a.m., the Coos Bay police received a report from a patron regarding an assault. A patron reportedly became violent and hit another patron in the jaw in the parking lot of the premises. The reporting party gave the names of the involved patrons and other details of the incident, but the police did not file charges. (Ex. A53; test. of Sgt. Hatzel.)

53. On June 18, 2008, Licensee had a meeting with OLCC Inspector Francis. During the meeting the inspector issued a Notice of Violation ticket to Licensees for a history of serious and persistent problems. Ex. A86; test. of Inspector Francis.)

54. On July 6, 2008, at approximately 1:49 a.m., a Coos Bay officer was outside the premises with an intoxicated patron. (Ex. A54; test. of Officer Zavada.)

55. On July 6, 2008, at approximately 2:17 a.m., a Coos Bay officer observed an intoxicated patron outside the premises with a security employee. This is a separate incident from that cited in Finding #54. (Ex. A55; test. of Officer Zavada.)

56. On July 12, 2008, at approximately 11:51 p.m., Coos Bay police were dispatched to the premises on the report of a patron who was reporting being harassed while at the premises. After reviewing the video of the incident supplied by Licensees, the police determined that Randy Hines was playing pool when Licensee Rudolfs grabbed him by the neck, pushed him back about 10 feet, then bent Hines over the bar. Rudolfs shoved Hines' face with his hand. The video does not indicate anything that Hines might have said or did that would have provoked the physical assault by Licensee Rudolfs. Licensee Rudolfs had been drinking at the premises before the incident. Licensee Rudolfs asked security employees to escort Mr. Hines outside of the premises. (Ex. 87; test. of Sgt. Merritt.)

57. On July 12, 2008, at approximately 12:20 a.m., a Coos Bay officer conducting a bar check at the premises observed an intoxicated patron laying on a couch and vomiting on the floor. The officer also observed three other intoxicated patrons inside the premises. This is a separate incident from that cited in Finding #56. (Ex. A56; test. of Captain McCullough.)

58. On July 12, 2008, at approximately 1:28 a.m., Coos Bay police received a report regarding an intoxicated person lying along the street outside the premises. This is a separate incident from that cited in Findings #56 and #57. (Ex. A57; test. of Sgt. Merritt.)

59. On July 18, 2008, at approximately 11:23 a.m., Coos Bay police received a report that a patron of the premises fell down the stairs, and was transported to the hospital by ambulance. (Ex. A58; test. of Officer Wheeling.)

60. On July 19, 2008, at approximately 12:05 a.m., a Coos Bay officer found a very intoxicated patron in the alley beside the premises. The patron told the officer that he was looking for a friend that was just kicked out of the premises. (Ex. A59; test. of Wheeling.)

61. On July 19, 2008, at approximately 1:37 a.m., a Coos Bay officer was in the premises parking lot and observed open alcohol containers near a vehicle. This was a separate incident from that cited in Finding #59. (Ex. A60; test. of Officer Scarberry.)

62. On July 19, 2008, at approximately 2:12 a.m., a Coos Bay officer saw a patron drive the premises parking lot and turn the wrong way on a one way street. Upon stopping the vehicle, the officer noted that the patron had watery and glassy eyes. The officer also detected the odor of an alcoholic beverage. The patron said she was coming from the premises and knew that she was traveling the wrong way on the one way street. The patron told the officer that she had two beers. The patron exhibited indicia of intoxication on all the field sobriety tests. The patron was arrested for DUII. Her breath test disclosed a blood alcohol content of .16%. This was a separate incident than those cited in Findings #58 and 59. (Ex. A61; test. of Officer Scarberry.)

63. On August 8, 2008, at approximately 11:14 p.m., the Coos Bay police received a report regarding a person standing outside of the premises threatening to burn the premises down. The police later contacted the person. (Ex. A62; test. of Officer Shaffer.)<sup>2</sup>

64. On August 12, 2008, at approximately 12:08 a.m., a patron reported to a Coos Bay officer that his truck had been keyed on August 10, 2008 between 2:00 and 3:00 a.m. while parked in the premises parking lot. (Ex. A63; test. of Officer Zavada.)

65. On August 16, 2008, at approximately 2:30 a.m., Coos Bay officers saw a woman squatting behind a vehicle in a parking lot adjacent to the premises. The woman told the officers that she had been urinating on the ground. The woman was cited for public urination. (Ex. A64; test. of Officer Meincke.)

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<sup>2</sup> In their Comments to the Amended Proposed Order, staff noted that the time of occurrence was 11:14 p.m., rather than 11:14 a.m. In his response to Staff's Comments, the Administrative Law Judge concurred with amending the finding of fact to so reflect.

66. On August 25, 2008, at approximately 6:00 p.m., a patron reported to the Coos Bay police that, on the day before at about 4:00 a.m., her credit and insurance cards were stolen from her purse in the premises parking lot. The victim later decided to discontinue her cooperation with the investigation of the crime, as she feared for her safety. (Ex. A65; test. of Officer Gulbransen.)

67. On August 30, 2008, at approximately 2:12 a.m., a Coos Bay officer contacted a very intoxicated female in the immediate vicinity of the licensed premises. (Ex. A66; test. of Officer Scarberry.)

68. On September 7, 2008, at approximately 12:34 a.m., the Coos Bay police received a report of a person passed out and lying in a roadway near the premises. A later update indicated that the person was sitting on the curb and was now awake. (Ex. A67; test. of Officer Ereth.)

69. On September 12, 2008, at approximately 2:51 a.m., Licensee Rudolfs contacted a Coos Bay officer regarding a theft of beer from the premises the previous evening. Rudolfs told the officer that two patrons stole two cases of beer from the premises, and left by the side door. The patrons were chased by a security employee. The beer was recovered outside the premises. The police were unable to contact the suspects. (Ex. A68; test. of Sgt. Lounsberry.)

70. On September 13, 2008, at approximately 1:45 a.m., a Coos Bay officer saw two females leave the premises, walk to an underground parking lot near the premises, where one of the females, who was extremely intoxicated, urinated on the floor. Both patrons were under 21 years of age. The patrons told the officer that they had been drinking alcohol at the premises, that no one checked their identification, and that there were other minors drinking at the premises. The patrons were cited for Minor in Possession by Consumption. (Ex. A69; test. of Officer Kirk.)

71. On September 13, 2008, at approximately 2:34 a.m., a patron reported to the Coos Bay police dispatch that he was assaulted inside the premises at approximately 1:00 a.m., by two security employees. The patron reported that he had a black eye and a bruised nose. Further attempts to contact the patron for further information were unsuccessful. This was a separate incident from that described in Finding #69. (Ex. A70; test. of Dispatcher Jolley.)

72. On September 20, 2008, at approximately 1:43 a.m., an extremely intoxicated patron reported to the Coos Bay police dispatch that she had been slapped in the face while inside the premises. The patron reported that she was not in pain because she was intoxicated, and that her brother was also punched while trying to defend her. The police subsequently tried to locate the patron, but could not find her. (Ex. A71; test. of Officer Wheeling.)

73. On September 21, 2008, at approximately 1:12 a.m., a patron reported to the Coos Bay police dispatch that her purse and its contents were stolen inside the premises. (Ex. A72; test. of Dispatcher Jolley.)

74. On September 21, 2008, at approximately 2:14 a.m., a patron reported to the Coos Bay police that he had been punched in the face and assaulted at the premises. The patron had come to pick up another intoxicated patron who had been drinking at the premises and was later

found sleeping partially in a roadway. This was a separate incident than that described in Finding #72. (Ex. A73; test. of Officer Gulbransen.)

75. On September 21, 2008, at approximately 4:25 a.m., the Coos Bay police received a report of a very intoxicated patron sleeping in the doorway of a business across the street from the premises. The patron told the police that he had been drinking at the premises. This is a separate incident from those described in Findings #72 and 73. (Ex. A74; test. of Officer Wheeling.)

76. On October 4, 2008, at approximately 11:05 p.m., the Coos Bay police received a report that a patron hit another patron in the face inside the premises. The police were unable to further contact the victim. (Ex. A75; test. of Sgt. Lounsbury.)

77. On October 9, 2008, at approximately 11:50 a.m., the Coos Bay police investigated a report of a theft of a wallet stolen from a patron at the premises earlier on that day. After reviewing the videotapes provided by the premises, a suspect was identified and later charged with the theft of the wallet. The suspect, who was also a patron of the premises at the time of the theft, admitted stealing the wallet and the wallet was returned. (Ex. A76; test. of Officer Sparks.)

78. On October 11, 2008, at approximately 1:52 a.m., a Coos Bay officer contacted a very intoxicated person who was kicking a garbage can in the immediate vicinity of the premises. (Ex. A77; test. of Officer Scarberry.)<sup>3</sup>

79. On October 12, 2008, at approximately 8:06 p.m., a patron reported to the Coos Bay police that on the previous night a patron threatened and harassed her inside the premises and followed her when she left the premises. This was a separate incident from that described in Finding #75. (Ex. A78; test. of Officer Kirk.)

80. On October 12, 2008, at approximately 3:04 a.m., the Coos Bay police found an unconscious person in a car outside the premises. (Ex. A79; test. of Sgt. Hatzel.)

81. On October 13, 2008, at approximately 12:28 a.m., a Coos Bay officer was dispatched to a reported damaged vehicle. The vehicle belonged to a patron who had become intoxicated the night before. The patron left the vehicle in the parking lot and spent the night in a nearby apartment. When the patron went to pick up the vehicle the next day, it had been hit or kicked, causing estimated damages of \$2,000. (Ex. A80; test. of Officer Myers.)

82. On November 29, 2008, at approximately 3:56 a.m., a Coos Bay officer contacted an intoxicated patron in the emergency room of the hospital. The patron had consumed a large amount of alcohol at the premises, and then engaged in a fight while walking to a house. During the fight, the patron's finger was cut with a knife and required stitches. (Ex. A81; test. of Officer Kirk.)

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<sup>3</sup> In their Comments to the Amended Proposed Order, staff noted that the word "can" had been omitted from the finding. In his response to Staff's Comments, the Administrative Law Judge concurred with amending the finding of fact to insert the word "can" following the word "garbage."

83. On November 29, 2008, at approximately 11:45 a.m., the Coos Bay police were called to a reported fight inside the premises. After review of video from the premises and contact with one of the patrons involved, the police concluded that several patrons fought inside a restroom at the premises, and then in a hall at the premises. The fight continued outside the premises, where one of the patrons was struck on the cheek. One of the patrons involved was intoxicated. (Ex. 82; test. of Sgt. Hatzel.)

84. On December 7, 2008, at approximately 1:00 a.m., a person received a call that her minor son was at the premises and was very intoxicated. The woman went to the premises and determined that her son was not there, but she did see three of his minor friends drinking inside the premises. The woman told a security employee about the minors but the employee seemed disinterested. This incident was reported in a phone call to OLCC staff. (Ex. A83; test. of OLCC Office Specialist Jenkins.)

85. On January 1, 2009, at approximately 2:02 a.m., a Coos Bay officer heard a scream in the parking lot across the street from the premises and saw two patrons on the ground fighting. Injuries resulted from the fight. One of the patrons told the officer that the fight started inside the premises when the other patron had assaulted a friend. (Ex. A84; test. of Detective Babb.)

86. On January 18, 2009, at approximately 1:46 a.m., the Coos Bay police responded to the address of a private residence regarding a report of an unconscious, intoxicated patron. Upon contact by the officers, the patron told them that he had been drinking at the premises when he became semi-conscious, could not stand and could not answer questions. Two security employees of the premises called the patron a cab and had the patron taken to the residence. (Ex. A85; test. of Officer Schwenninger.)

87. On January 18, 2009, at approximately 1:52 a.m., Coos Bay officers were sent to the premises on a report of a disorderly patron. When they arrived, the police contacted the patron, who was highly intoxicated from drinking at the premises, and a 19 year old minor. The patron had attempted to attack and start fights with numerous other patrons in the premises. As reported to the police by an employee, the minor was inside the premises for several hours and was consuming alcohol during that time. The minor also told police that she had purchased her own alcoholic beverages at the bar in the premises, directly from the bartender. The police officer who saw the minor did not believe she appeared old enough to be drinking. The minor told the officer that she did not have any identification with her. The employee that observed the minor in the bar for several hours did not check her identification. (Ex. A93; test. of Officers Schwenninger and West.)

88. On March 1, 2009, a patron of the premises was assaulted inside the premises. The Coos Bay police investigated the incident and noted that the victim received a broken tooth during the assault. Security employees of the premises had, on an earlier date, trespassed the assailant, but he had gained entry to the premises on March 1 because he was not recognized.

89. On April 9, 2009, at approximately 12:32 p.m., an officer from the North Bend Police Dept. was dispatched to the premises regarding a report of an assault. The officer saw the victim being treated by medical personnel. Review of video supplied by the premises showed that the victim, who had earlier been drinking inside the premises, had been struck by a person

while sitting on the stairs outside the front entrance to the premises. The assailant had also been a patron of the premises. The assailant told the police that he and the victim got into a verbal altercation inside the premises, which led to the assault on the stairs. The assailant was charged with assault. (Exs. A94, A95; test. of Officer Griggs.)

90. On April 11, 2009, at approximately 1:36 a.m., the Coos Bay police observed a patron urinating in the alley behind the premises. The patron was cited for urinating in public. (Ex. 102; test. of Officer Myers.)

91. On April 12, 2009, at approximately 12:30 a.m., the Coos Bay police were dispatched to the premises on a reported fight. The police contacted the victim, who had suffered obvious injuries in the assault, which had occurred just outside the premises as the victim was walking towards the entrance to the bar. The victim saw a person urinating in a planter box. The person then tried to get into the victim's car. When the victim told the person that she was going to call the police, he struck her in the face. The suspect was located and charged with assault. The suspect also provided a breath sample, with a result of .22% blood alcohol content. (Ex. A97, 98; test. of Officer Myers.)

92. On April 12, 2009, the Coos Bay police contacted an intoxicated man outside of the premises at approximately 1:06 a.m. The person had been denied entry to the premises. This is a separate incident from that described in finding #90. (Ex. A100; test. of Officer Myers.)

93. On April 12, 2009, at approximately 1:40 a.m., Coos Bay police were advised that a security employee of the premises placed an intoxicated patron into a parked car and left the patron to sleep. This is a separate incident from those described in Findings #90 and 91. (Ex. A101; test. of Officer Scarberry.)

### **CONCLUSIONS OF LAW**

1. There is a history of serious and persistent problems at Licensees' premises based upon incidents occurring between August 10, 2007 and January 18, 2009.

2. Licensees have not demonstrated a willingness and ability to control the premises since August 10, 2007.

3. Licensee Gregory Rudolfs permitted disorderly activities in violation of 845-006-0347(2)(a), when, on July 12, 2008, Rudolfs pushed and bent a patron over the bar, grabbed the patron by the throat and pushed himself off of the patron's face.

4. On July 12, 2008, Licensee Gregory Rudolfs drank an alcoholic beverage while on duty at the licensed premises in violation of OAR 845-006-0345(1).

5. On January 18, 2009, Licensees' employees permitted a minor to buy, be served or drink alcoholic beverages on the licensed premises in violation of OAR 845-006-0335(3)(a).

6. On January 18, 2009, Licensees' employees permitted a minor to be on the licensed premises or an area of the licensed premises prohibited to minors in violation of OAR 845-006-0335(3)(b).

## OPINION

### 1. History of Serious and Persistent Problems

The Commission contends that, based on a series of problems at, or in the immediate vicinity of, the licensed premises over a 17 month period, from August 10, 2007 through January 18, 2009, it has grounds to cancel Licensee's license pursuant to ORS 471.315(1)(c).<sup>4</sup> ORS 471.315(1)(c) grants the Commission the authority to sanction a licensee if there has been a history of serious and persistent problems at the licensee's premises. The statute 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. Licensees may mitigate the penalty for the history by showing that the problems are no longer 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. 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).

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<sup>4</sup> 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 ground 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.

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), the Commission 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, the Commission held 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 Commission 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.

In *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 warranted cancellation of the license, even though there was a four month period in which there were no incidents.

Incidents involving minors are also considered to be serious. *Cisco & Pancho's* (OLCC, Final Order, 99-V-080ES, September 2000).

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. In *Cabana Club* (OLCC, Final Order, 03L-010, April 2005), the Commission confirmed that “an incident is serious when it involves violence or the threat of violence toward a person to any degree.” Final Order at 17, fn 6.

In this case, over the course of 17 months (from August 10, 2007 to January 18, 2009) there were at least 39 documented disturbances involving violence or the threat of violence (fights, altercations, assaults and/or harassment), unlawful activities (DUIIs), or violations concerning minors involving patrons of the licensed premises inside, or in the immediate vicinity of the premises:<sup>5</sup>

(1) August 10, 2007: A male patron pulled down the shirt of a female patron, exposing her breasts. A female patron punched another female patron in the head, causing injuries that were treated at a local hospital. These events occurred inside the premises.

(2) September 1, 2007: A fight occurred inside the premises during the evening.

(3) September 9, 2007: Two fights occurred inside the premises that evening.

(4) September 9, 2007: A large fight occurred inside the premises, resulting in one patron being struck on the head, leaving a bleeding cut, and another patron receiving a broken tooth and two black eyes. Security personnel for the premises also reported to the police that when the two patrons left the premises, they were further assaulted in the parking lot.

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<sup>5</sup> There were other alleged assaults and other serious incidents at the licensed premises during this time, but these reported incidents are not included on the list because, in the ALJ’s opinion, the evidence was insufficient to establish the incidents occurred as alleged. For example, on January 1, 2008, what was originally reported as a fight was subsequently reported as just “horseplay”. On September 13, 2008, the police received a report of a fight on the premises. The police were unable to contact the victim for further information. On September 20, 2008, the police received a report of a patron that had been slapped in the face. However, the police were unable to locate the patron to confirm the report. On October 4, 2008, the police were unable to contact the victim to confirm a report of a fight on the premises.

(5) October 13, 2007: A patron was assaulted as he was leaving the premises by four males that had pulled up in a vehicle. A police officer confirmed the injuries received by the patron upon contacting him at the hospital, including numerous bruises, scrapes on his face and body.

(6) November 11, 2007: A fight occurred at the premises and when security personnel intervened, a patron struck a security employee, causing a bloody nose. The patron continued to threaten the security employees after the patron was taken outside the premises.

(7) November 17, 2007: Security employees broke up several fights inside or in the immediate vicinity of the premises. In one of the fights, a patron broke the windshield on a taxi. One of the patrons was arrested for disorderly conduct and criminal mischief.

(8) November 17, 2007: Late in the evening, a patron was assaulted and injured at the premises. As the aggressor was being escorted from the premises, he was assaulted and injured by the victim and other patrons.

(9) November 24, 2007: A fight occurred on the premises, resulting in a bleeding wound to the hand of one of the patrons.

(10) December 9, 2007: A fight occurred inside the premises, causing an injury to one of the patrons. After being escorted out of the premises, the aggressor returned and struck a security employee on the side of the head, and then began to fight with that security employee and the bartender. During the fight, the patron bit the bartender on the wrist. The patron was charged with disorderly conduct and two counts of harassment.

(11) December 15, 2007: A domestic disturbance occurred just outside the premises soon after an intoxicated patron left the premises.

(12) December 23, 2007: A fight involving a father and daughter occurred just outside the licensed premises.

(13) January 1, 2008: A verbally aggressive patron pushed another patron and a security employee. When confronted by the police, the patron took a fighting stance, resisted arrest and taken into custody for disorderly conduct.

(14) January 20, 2008: An intoxicated patron threatened a security employee with a knife.

(15) February 3, 2008: An intoxicated patron was arrested for DUII upon leaving the premises parking lot. The patron's blood alcohol content was .22%.

(16) February 9, 2008: A fight occurred inside the premises involving approximately 20 patrons. One patron was arrested for disorderly conduct and criminal trespass.

(17) February 9, 2008: An intoxicated patron was arrested for DUII upon leaving the premises parking lot. A subsequent breath test indicated a blood alcohol content of .12 %.

(18) February 17, 2008: An intoxicated patron was arrested for DUII after leaving the premises. A subsequent breath test indicated a blood alcohol content of .14%.

(19) February 20, 2008: A patron was assaulted inside the premises.

(20) February 23, 2008: Two patrons were involved in a fight in the immediate vicinity of the premises. Both sustained injuries.

(21) March 1, 2008: A fight occurred in front of the premises. One person was warned for disorderly conduct.

(22) March 8, 2008: Patrons were fighting inside the premises. When the police arrived, they saw a female patron engage in a verbal altercation with an intoxicated male patron. The male patron kicked the female patron, then resisted arrest.

(23) March 22, 2008: Licensee Rudolfs and security employees were breaking up a fight when a patron approached him. Believing the patron was going to become involved in the fight, Rudolfs grabbed the patron by the throat and escorted him outside. The officer noted redness on the patron's neck.

(24) April 5, 2008: A patron of the licensed premises was arrested for DUII after driving from the premises. The patron indicated a .11% blood alcohol content on a breath test.

(25) April 5, 2008: A fight occurred on the premises when two female patrons, one whom was very intoxicated, were allowed entrance into the premises after being permanently trespassed. When a security employee was escorting the patrons outside, they struck the employee. Once outside the premises, the patrons continued to strike and kick the employee, who was injured in the assault. The two patrons were charged with assault and disorderly conduct.

(26) April 6, 2008: An intoxicated patron struck another patron with a closed fist after being confronted for spilling water on patrons.

(27) April 6, 2008: Police contacted a person at the hospital who reported being assaulted while walking home from the premises. The person earlier reported to a gas station attendant that the fight occurred inside the premises.

(28) May 3, 2008: A fight occurred among intoxicated patrons leaving the premises. Two patrons received injuries in the fight. One of the patrons had been previously trespassed from the premises. Security employees of the premises were unable or unwilling to control the crowd that was gathering outside the premises. Three patrons were charged with disorderly conduct.

(29) May 31, 2008: A fight occurred between two patrons inside the premises.

(30) June 15, 2008: In the parking lot of the premises, an intoxicated male patron hit an intoxicated female patron in the jaw after the female accused the male of taking her car keys and after her girlfriend tried to check his pockets for the keys.

(31) July 19, 2008: An intoxicated patron of the licensed premises was arrested for DUUI after leaving the premises. The patron subsequently indicated a .16% blood alcohol content on a breath test.

(32) September 13, 2008: Police observed two patrons leave the premises. One of the patrons urinated on the floor of a nearby underground parking lot. Both patrons were minors and who had been drinking at the premises. The patrons were cited for Minor in Possession (Consumption).

(33) September 21, 2008: A patron was punched in the face and assaulted at the premises.

(34) October 12, 2008: A patron reported having been threatened, harassed, and followed by a patron the previous night.

(35) November 29, 2008: Police contacted an intoxicated patron in the emergency room of the hospital. The patron told the officer that he had become very intoxicated at the premises, and then engaged in a fight while walking to his house. The patron had received injuries from a knife cut to his finger.

(36) November 29, 2008: Several patrons fought inside a restroom, and then in a hall at the premises. The fight continued outside of the premises, where one of the patrons was struck on the cheek. One of the patrons involved appeared to be intoxicated.

(37) December 7, 2008: After receiving a call informing her that her minor son was at the premises, the minor's mother went to the premises and observed three minor friends of her son drinking inside the premises. When she

reported the incident to a security employee of the premises, he was not interested in following up on her report.

(38) January 1, 2009: A police officer heard a scream outside the premises and observed two patrons on the ground fighting, which resulted in injuries. One of the patrons told the officer that the fight had started inside the premises when the other patron had assaulted a friend.

(39) January 18, 2009: An intoxicated and disorderly minor attempted to attack and start fights with numerous other patrons in the premises.

There were other serious incidents concerning the premises even after the cancellation notice was issued that are not included in the above list, because they were not included in the allegations contained in the notice. Those incidents are described in the section below concerning the willingness and ability of the Licensees to control the problems occurring at the premises.

In addition, over the same time period, there were at least 30 other instances of public drunkenness, public urination, criminal mischief, or theft related to Licensees' sale or service of alcohol:

(1) August 18, 2007: An officer observed person urinating in front of the licensed premises. The person was warned for public urination.

(2) August 25, 2007: An officer observed an intoxicated patron walking away from the premises after being physically removed from the premises by security employees.

(3) September 23, 2007: Security personnel from the premises did not cooperate with the police during an investigation of persons throwing bottles in the premises parking lot.

(4) September 23, 2007: An officer observed a patron urinating in public in the immediate vicinity of the premises. The officer also observed at least six bottles and cans thrown about the premises parking lot.

(5) December 23, 2007: An officer observed a patron urinating behind the premises.

(6) January 1, 2008: An officer observed a very intoxicated patron fall down the stairs at the premises.

(7) January 1, 2008: An officer observed three extremely intoxicated patrons at the premises.

- (8) January 27, 2008: Police were called by security employees of the premises, reporting that a patron inside the premises was on the ground and not responsive. A short time later the employee called back to report that the patron had passed out and was coming around.
- (9) February 10, 2008: An officer observed a person urinating outside the premises. The person was cited for indecent exposure.
- (10) February 23, 2008: An officer observed a person outside the premises with an open beer. The person also admitted to possession of marijuana.
- (11) February 24, 2008: An officer observed a person urinating outside the premises. The person was cited for urinating in public.
- (12) February 29, 2008: a patron's purse was stolen from the premises parking lot.
- (13) March 23, 2008: An officer observed a person urinating outside the premises.
- (14) July 6, 2008: An officer observed an intoxicated patron outside the premises.
- (15) July 6, 2008: An officer observed another intoxicated patron outside the premises with a security employee.
- (16) July 12, 2008: An officer observed an intoxicated patron laying on a couch and vomiting on the floor inside the premises. The officer also observed three other intoxicated patrons in the premises.
- (17) July 12, 2008: An intoxicated patron was reported lying along the street outside the premises.
- (18) July 19, 2008: An officer found a very intoxicated patron in the alley beside the premises. The patron said he was looking for a friend that was just kicked out of the premises.
- (19) July 19, 2008: An officer observed an open alcohol container in the premises parking lot.
- (20) August 12, 2008: a patron's vehicle was keyed while parked in the premises parking lot.
- (21) August 16, 2008: Officers saw a woman squatting behind a vehicle in the premises parking lot. The woman told the officers that she had been urinating. The woman was cited for public urination.

(22) August 25, 2008: A patron's credit and insurance cards were stolen from her purse in the parking lot of the premises.

(23) August 30, 2008: An officer observed a very intoxicated female outside the premises.

(24) September 12, 2008: Licensee Rudolfs reported to the police that two patrons stole two cases of beer from the premises. The beer was recovered outside of the premises after security employees chased the patrons from the premises.

(25) September 21, 2008: A patron reported that her purse and its contents had been stolen inside the premises.

(26) September 21, 2008: The police contacted a very intoxicated patron after receiving reports that he had been sleeping in a doorway across the street from the premises. The patron told the police that he had been drinking at the premises.

(27) October 9, 2008: A wallet was stolen from a patron at the premises. Police arrested a suspect, who admitted stealing the wallet.

(28) October 11, 2008: A very intoxicated patron was evicted from the premises and was observed kicking a garbage can in the immediate vicinity of the premises.

(29) October 13, 2008: A patron's vehicle left overnight in the premises parking lot sustained damage.

(30) January 18, 2009: Police contacted a patron who told them that he had become intoxicated at the premises, to the extent he was semi-conscious and unable to stand. Two security employees called the patron a taxi and had him taken to his residence.

In light of this history, the Commission has proven that the licensed premises had a history of serious and persistent problems between August 10, 2007 to January 18, 2009. *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).

Licenseses point out that less than 1% of the total patrons who have visited the premises have created the problems at issue here, and that none of the incidents involved the use of or the immediate threat of firearms, knives or weapons, none involved serious physical injuries and no

serious felony arrests were made. However, a review of the previous orders issued by the Commission regarding a history of serious and persistent problems, many of which are cited above, indicate that an incident does not have to involve a weapon, serious injury or result in a felony arrest for the incident to count as a serious incident. The incidents at issue here are all described as serious in ORS 471.315(1)(c) and in previous Commission orders. Licensee's argument is not persuasive.

## **2. Willingness and Ability to Control the Premises**

A mitigating factor under ORS 471.315(1)(c) is whether "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." The licensee has the burden of proving of establishing this mitigating factor. ORS 183.450(2); *Cisco & Pancho's*, (OLCC, Final Order, 99-V-080ES, September 2000).

The measures taken by Licensees (installing video cameras, adding security staff, having a medically trained staff person on the premises on weekends, more training for the security employees, etc.) may indeed show some willingness on their part to control the premises. However, this record shows that the measures have not succeeded in Licensees' ability to adequately control the premises. Even after the measures were undertaken, and after the last serious problem leading to the history of serious problem violation ticket, incidents continued to occur right up to the time of the hearing on April 20, 2009:

(1) March 1, 2009: A patron was assaulted outside the premises, receiving a broken tooth. Security employees of the premises had on an earlier date trespassed the patron, but he gained entry on March 1 because he was not recognized.

(2) April 9, 2009: A patron was assaulted by another patron on the licensed premises, causing injury. The assailant told the police that he and the victim were in a verbal altercation inside the premises which led to the assault on the stairs. The assailant was charged with assault.

(3) April 11, 2009: Police observed a patron urinating outside the premises.

(4) April 12, 2009: A person was assaulted and was injured while walking towards that entrance to the licensed premises. The victim had observed a person urinating in a planter box outside the premises. The person then attempted to get into the victim's car. The victim told the person that she was going to call the police and the person struck the victim on the face. The suspect was charged with assault. The suspect also provided a breath test sample, indicating a .22% blood alcohol level.

(5) April 12, 2009: An officer contacted an intoxicated person outside the premises. The person had been denied entry into the premises.

(6) April 12, 2009: A security employee put an intoxicated patron into a parked car and left the patron to sleep.

As the pattern of continuing incidents reveal, the measures taken by Licensees have not adequately slowed the rate or seriousness of incidents occurring on or near the premises. The problems continue to persist, despite the measures taken by Licensees. *See Helena's Place*, (OLCC, Final Order, 04-V-024, June 2005). Since August 2007, there have been no significant periods, such as found in *Girtle's Restaurant & Lounge*, (OLCC, Final Order, 08-V-079, November 2009), where Licensees were able to re-establish control of patron behavior for several months at a time, interrupted only by infrequent occurrences.

The Licensees, various employees and family members of the Licensees all testified at hearing that there are no longer problems at the premises. The Commission is not persuaded by that testimony, given the substantial evidence of the long list of incidents occurring at or near the premises, which have occurred unabated up to the time of the hearing in this matter.

**New evidence on remand (Audio recording of December 28, 2007 meeting between OLCC Inspector Gary Francis and Licensee.)**

As described more fully above, following the issuance of the Proposed Order in this matter, the Commission remanded the case back to OAH for admission of an audio recording of a December 28, 2007 meeting between OLCC Inspector Gary Francis and Licensees. Further testimony was also taken from Inspector Francis regarding that meeting on September 9, 2009.

Licensees, in their Supplemental Closing Argument regarding the new evidence, make two new arguments:

**Argument #1: By issuing a Notice of Warning at the December 28, 2007 meeting, relating to the incidences up to December 2007, the OLCC should be estopped from using the incidences in this license cancellation action.**

The Commission does not find this argument persuasive. It is entirely appropriate for the Commission to include all the problems occurring at the licensed premises in considering whether there has been a history of serious and persistent problems. The Notice of Warning did not include any sanction, and no litigation or settlement occurred regarding the incidents cited in the Notice, including these same incidents in the Notice of Proposed Cancellation at issue here. Consequently, the Commission finds no estoppel or issue preclusion theory applicable to the Notice of Warning.

**Argument #2: By promising Mak's that in consideration for contacting the police relating to public safety incidents the OLCC would not use these reports against Mak's, the OLCC modified the course of conduct with the Licensees and the OLCC should not be allowed to use the reports prior to December 2007 against Mak's in this licensee cancellation action.**

The Commission also finds this argument unpersuasive. The record indicates that OLCC Inspector Francis actually told Licensees that if they called the police regarding an incident, it would be considered in Licensee's favor that they called, but it would still be considered a

serious incident. The record here also demonstrates that Licensees only called the police regarding seven of the 80 or more incidents at issue here, even though Licensees stated at the meeting that they understood their obligation to report to the police and were doing so even before the meeting. Without notifying police as required, it cannot be said that Licensees took appropriate steps to deal with problem persons in the vast bulk of incidents cited herein. Licensees have not shown that their course of conduct was actually modified in any significant way by what they were told at the December 28, 2007 meeting.

### **3. Permitting Disorderly Activities (July 12, 2008)**

OAR 845-006-0347(1)(a) defines “disorderly activities” as those that harass, threaten or physically harm another person. The Commission has previously concluded that a licensee “permits” an activity when the licensee commits the activity. *See Jiggles* (OLCC, Final Order, 88-V-004, August 1988).

The Commission is persuaded by the evidence, particularly the video of the incident involving Licensee Rudolfs and patron Hines on July 12, 2008, that Rudolfs pushed the patron, bent him over the back of the bar, grabbed the patron the throat, then pushed himself off of the patron’s face. The video does not show any aggressive moves by the patron that would have justified the force used by Licensee Rudolfs. Licensee Rudolfs permitted disorderly activities on the premises on July 12, 2008.

### **4. Licensee Rudolfs Drinking on Duty (July 12, 2008)**

OAR 845-006-0345(1) defines “on duty” as controlling conduct on the premises among other activities. In *Foghorn Sports Pub & Grill* (OLCC, Final Order, 05-V-024, February 2006), the Commission held that a licensee has the authority to put himself on duty even when not scheduled to be on duty. If the duties he performs are done on behalf of the licensed premises, he has put himself on duty, even if he does so voluntarily.

The Public Safety Program has proven that Licensee Rudolfs was drinking on duty on July 12, 2008. Licensee Rudolfs testified that he had been drinking at the premises on that evening. Licensee Rudolfs put himself on duty that evening when, after causing an altercation with the patron described in the Disorderly Activity violation discussed above, he told security personnel to remove the patron after physically overpowering him. *See Cactus Bar & Grill* (OLCC, Final Order, 03-V-014, June 2004).

### **5. Permitting a Minor to buy, be served or drink alcoholic beverages on the licensed premises (January 18, 2009)**

OAR 845-006-0335(3)(a) provides that no licensee, permittee, or licensee's employee will permit a minor to buy, be served or drink any alcoholic beverage on licensed premises.

The evidence shows that a 19 year old minor was inside the premises for several hours and was served alcohol, which she consumed. An employee of the Licensees told the police that he saw the minor in the bar and believed she had been there for several hours. The minor also

told police that she had purchased her own alcoholic beverages at the bar in the premises, directly from the bartender.

The police officer who saw the minor did not believe she looked old enough to be drinking. The minor told the officer that she did not have any identification with her. The employee that saw the minor in the bar for several hours did not check her identification. The Commission is not persuaded by the testimony of the premises employee that the minor told him that she had a false identification.

Licensees argue that the Commission has not proven that Licensees' employees "knowingly" permitted a minor to consume alcohol on the premises, citing to ORS 471.315(1)(a)(G)<sup>6</sup>. However, Licensees were not charged with a violation of that statute, they were charged with violating the above-noted administrative rule, which was not promulgated through that statute. The relevant rule portion implemented ORS 471.430. There is no requirement that a Licensee or their employee, "knowingly" permit a minor to consume alcohol before a violation of that statute, or rule promulgated pursuant thereto, can be found.

The Commission has previously concluded that, to prove that a violation has occurred under this rule, all that is necessary is that the minor clearly appeared to be a minor, the minor was on the premises for a substantial amount of time, and the employees had an opportunity to observe both the minor's presence and/or consumption. *John Dough Pizza* (OLCC, Final Order, 90-V-161, August 1991). *See also Leipzig Tavern* (OLCC, Final Order, 94-V-012, August 1994).

The Public Safety Program has proven that a minor bought, or was served alcoholic beverages that she consumed on the premises.

## **6. Permitting a Minor to be on the Licensed Premises (January 18, 2009)**

OAR 845-006-0335(b) provides that no licensee, permittee, or licensee's employee will permit a minor to be on licensed premises or an area of the licensed premises prohibited to minors, except as provided in ORS 471.430, 471.480, 471.482, and this rule.

In this case, the entire premises was posted as prohibited to minors at all times.

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<sup>6</sup> **471.315 Grounds for cancellation or suspension of license or imposition of civil penalty.** (1) The Oregon Liquor Control Commission may cancel or suspend any license issued under this chapter, or impose a civil penalty in lieu of or in addition to suspension as provided by ORS 471.322, if it finds or has reasonable ground to believe any of the following to be true:

(a) That the licensee:

\* \* \* \* \*

(G) Knowingly has sold alcoholic liquor to persons under 21 years of age or to persons visibly intoxicated at the time of sale or has knowingly allowed the consumption of alcoholic liquor on the licensed premises by a person who is visibly intoxicated at the time of consumption.

A similar analysis applies as previously discussed in the minor consuming alcoholic beverages violation above. Licensees' employees were aware of the presence of the minor for several hours. The Commission has specifically held that it is not necessary to show that the licensee had knowledge of the presence of the minor on the premises. *Lava Lanes of Medford* (OLCC, Final Order, 04-V-007, February, 2005). All that is necessary is that the licensees' employees had sufficient time and opportunity to detect the minor. In *Lava Lanes*, thirty minutes was held to be a sufficient amount of time to detect a minor who was sitting at a booth waiting for service.

The Public Safety Program has proven that Licensees' employees permitted a minor to be inside the premises on January 18, 2009.

### **Penalty**

Generally, the Commission treats a violation of ORS 471.315(1)(c) as a Category I violation. *See Rastafarian Private Club* (April 1991). The standard penalty for a first Category I violation is cancellation of the license. OAR 845-006-0500. 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 845-006-0500(7)(c). In this case, citing to the history of fights, altercations and disturbances involving violence or threat of violence and other instances of visibly intoxicated patrons and public urination, the Commission seeks to cancel Licensees' license.

Licensees argue that a cancellation of the license is not warranted and that a fine would be a more appropriate penalty. In support of this argument, Licensees reiterate their previous argument regarding the lack of "serious" incidents (no firearms, or other weapons, no serious injuries, no serious felony arrests, etc.). The Commission has previously addressed why this contention is not persuasive.

As noted above, a demonstrated willingness and ability to control the premises provides a basis for mitigation. *See, e.g., New Copper Penny Restaurant* (October 2005); *Schooners* (OLCC, Final Order, OLCC-94-V-077, February 1996); *300 Club/A Change of Seasons Restaurant* (OLCC, Final Order, OLCC-99V-060, April 2001). Licensee again argues in mitigation of the penalty that they have shown such a willingness and ability and the Commission refers to the discussion above as to why the Commission does not find that argument persuasive. Where, as here, there is no such showing, mitigation is not warranted. Considering the circumstances of this case, cancellation is appropriate. *DiMarco's Restaurant* (October 2005).

As the Category I violation has been proven and therefore the license should be cancelled, no separate penalties are necessary for the other violations.

### **Effect of the Amended Proposed Order regarding the filing of exceptions and comments.**

Subsequent to the issuance of the Proposed Order, the parties submitted Exceptions and Comments to the Order. However, due to the Commission's subsequent remand of the case back to OAH for further evidence and issuance of an Amended Proposed Order, the ALJ did not file

any Response to the Exceptions and Comments to the Proposed Order. Some of the scrivener's errors noted in the staff Comments were addressed in the Amended Order, such as certain dates and listing of witnesses.

Because new evidence was admitted into the record for purposes of the Amended Proposed Order, and the ALJ allowed OLCC and Licensees the opportunity to resubmit all the Exceptions and Comments to the Amended Order that they believed were appropriate. This included any of the original Exceptions and Comments made to the Proposed Order, as well as any new Exceptions and Comments regarding the newly admitted evidence and the legal analysis of that evidence.

### **FINAL ORDER**

Licensees Melanie M. Clark, Denise D. Olsen and Gregory S. Rudolfs, dba Mak's Old City Hall Lounge, 375 Central Avenue #202, Coos Bay, Oregon, violated ORS 471.315(1)(c), OAR 845-006-0347(2)(a), OAR 845-006-0345(1) and OAR 845-006-0335(3)(a) and (b).<sup>7</sup>

The Commission Orders that the Full On-Premises Sales License held by Melanie M. Clark, Denise D. Olsen and Gregory S. Rudolfs, dba Mak's Old City Hall Lounge, 375 Central Avenue #202, Coos Bay, Oregon, be CANCELLED.

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

Dated this 23<sup>rd</sup> day of December, 2009.

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

Mailed this 23<sup>rd</sup> day of December, 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.

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<sup>7</sup> In his response to Staff's Comments, the Administrative Law Judge concurred with staff that the statutory reference in the Amended Proposed Order be corrected from 471.314(1)(c) to 471.315(1)(c) and a rule reference from OAR 845-006-0347(1)(a) to OAR 845-006-0347(2)(a).