BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

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| In the Matter of the Application for a Dispenser Class A (DA) License by:<br><br>Phillip and Mary Setterlund<br>EASTSIDE LOUNGE<br>2207 E. Adams Avenue<br>La Grande, Oregon 97850<br>- - - - - - - - - - - - - - -<br>Union County | ) | FINAL<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER |

A hearing in the above matter was held on the 17th day of November, 1982, in La Grande, Oregon, before Hearings Examiner Douglas Crumme'. The Applicants appeared in person and were represented by Steven Joseph, Attorney at Law. The Commission was not represented by legal counsel. The Commission having considered the record of the hearing, the Proposed Order of the Hearings Examiner, and the entirety of the Criteria for the Issuance and Maintenance of Licenses and applicable statutes and regulations, enters the following:

## FINDINGS OF FACT

1. Phillip and Mary Setterlund have applied for a Dispenser Class A (DA) license at the EASTSIDE LOUNGE, 2207 E. Adams Avenue, La Grande, Oregon. The Applicants have held a Retail Malt Beverage (RMB) license at the Eastside Lounge since February, 1980.

2. The Commission's Licensing Staff has recommended that the Applicants' application be refused, citing the following:

a. ORS 472.160(1) and OAR 845-05-030(1) and OAR 845-05-040(2)(c) (sufficient licensed premises in the locality set out in the application and not demanded by public interest or convenience).

b. OAR 845-05-040(1) (an application for a dispenser license may be granted or denied on the basis of a comparison with existing dispenser licenses in the same city or county or with other pending applications).

c. OAR 845-05-040(3)(f) (unfavorable consideration may be given where applicant's premises will provide lesser services, facilities and economic benefit).

d. OAR 845-05-040(2)(b) (preference may be given where applicant's premises will provide dining service or atmosphere which is unique or substantially different).

e. OAR 845-05-040(3)(b) (unfavorable consideration may be given where the applicant will provide primarily fast foods, short order foods, such as hamburgers, sandwiches, pancakes, eggs, and pizza, or other foods with which distilled liquor drinks are not normally ordered).

f. OAR 845-05-040(3)(e)(A) and OAR 845-05-040(3)(e)(B) (unfavorable consideration may be given where applicant's premises will be operated primarily as a tavern rather than as a restaurant as indicated by factors emphasizing the sale of entertainment or by the sale of alcoholic liquor to a greater degree than food service).

g. ORS 472.110(4) (quota).

h. Battle Creek Golf Course, Inc. v. OLCC, 21 Or. App. 179, 183-84, 534 P2d 204 (1975).

i. ORS 472.114 (the importance of issuing dispenser licenses in incorporated communities with less than 25,000 persons and to premises located in such communities with fewer than 100 seats).

(Commission's Exhibit B.)

3. The Eastside Lounge is located on the south end of La Grande on East Adams Avenue, the main north-south street in La Grande.

4. The Eastside Lounge has a single room for the public with seating for 92 persons. Fourteen seats are available at the bar. Seventy-eight seats are available at tables.

5. The Eastside Lounge has two pool tables, one Pacman game, one other electronic game, a pinball machine, a 21 machine and a poker machine.

6. The Applicants offer live music at the Eastside Lounge approximately once every two months. In addition, jam sessions are held every other Sunday during the winter.

7. The various games in the Eastside Lounge are proximate to and in direct view of the various games in the premises.

8. The Eastside Lounge is open from 10:00 a.m. until 1:00 a.m. from Monday through Thursday. The premises is open from 10:00 a.m. until 2:00 a.m. on Friday and Saturday. The premises is open until midnight on Sunday.

9. The menu at the Eastside Lounge is offered during all operating hours. The menu includes the following items:

| | | |
|---|---|---|
| Salad Bar | | $ 2.25 |
| Soup and Salad Bar | | 2.75 |
| Chicken and JoJo's (fried potatoes) | | |
| | 2 pieces | 2.00 |
| | 4 pieces | 3.95 |
| | 8 pieces | 7.90 |
| | 12 pieces | 11.90 |
| | 16 pieces | 14.70 |
| Chili | Small | 1.25 |
| | Large | 1.50 |
| French Dip Sandwich | | 3.50 |
| Club House Sandwich | | 3.75 |
| Ham and Cheese Sandwich | | 3.25 |
| Roast Beef Sandwich | | 3.25 |
| Bacon, Lettuce and Tomato Sandwich | | 3.00 |

| | |
|---|---|
| Pizza (7 varieties in 2 sizes) | 4.00 to 7.00 |
| Luncheon Special (Monday thru Friday) | 3.75 |

10. In addition to the above items, the Eastside Lounge offers the following food items in the winter:

Baked ham and scalloped potatoes
Baked pork chop and mashed potatoes
Barbecued spare ribs
Lasagna
Beef stew

11. The Applicants plan to add a steak sandwich and an eight-ounce New York steak to their menu.

12. The Applicants' sales at the Eastside Lounge have been as follows:

ACTUAL SALES

| MONTH | BEER | WINE | SNACKS | FOOD | TOTAL |
|---|---|---|---|---|---|
| 1981 | | | | | |
| Jul | $6,609.30 | $311.25 | $379.15 | $2,579.72 | $ 9,879.42 |
| Aug | 7,386.20 | 288.20 | 380.20 | 3,557.05 | 11,611.65 |
| Sep | 7,253.70 | 323.40 | 331.55 | 3,102.15 | 11,010.80 |
| Oct | 7,090.20 | 423.70 | 360.70 | 3,564.90 | 11,439.50 |
| Nov | 7,335.75 | 348.10 | 297.25 | 2,846.57 | 10,827.67 |
| Dec | 7,317.80 | 455.85 | 345.80 | 2,841.15 | 10,960.60 |
| 1982 | | | | | |
| Jan | 8,075.15 | 455.30 | 353.00 | 2,865.35 | 11,748.80 |
| Feb | 8,173.45 | 590.70 | 305.55 | 2,281.90 | 11,351.60 |
| Mar | 9,677.75 | 655.20 | 375.35 | 2,905.50 | 13,613.80 |
| Apr | 8,336.40 | 374.40 | 324.85 | 2,854.80 | 11,890.45 |
| May | 7,252.85 | 357.60 | 366.00 | 2,692.30 | 10,668.75 |
| Jun | 6,812.60 | 331.10 | 406.55 | 2,635.15 | 10,185.40 |
| Jul | 8,127.35 | 347.35 | 359.35 | 2,198.50 | 11,032.55 |
| Aug | 8,875.40 | 356.20 | 366.20 | 2,911.75 | 12,509.55 |
| Sep | 7,630.85 | 351.50 | 345.10 | 2,543.25 | 10,870.70 |
| Oct | 7,064.90 | 248.25 | 241.90 | 2,543.20 | 10,098.25 |
| 1982 Monthly Average | 8,002.67 | | | 2,643.17 | 11,396.98 |

13. The Applicants project that with a DA license, their gross sales would increase by approximately $6,000 a month. The Applicants project that $3,500 of this increase would be due to distilled spirit sales. The Applicants project that $2,500 of the increase would be due to greater food sales.

14. The Commission takes official notice that the recent average monthly sales of DA outlets in La Grande and Union County have been as follows:

| AREA | FOOD SALES | TOTAL FOOD AND ALCOHOLIC BEVERAGE SALES |
|---|---|---|
| City of La Grande | $25,920 | $36,519 |
| Union County | 18,926 | 27,287 |

15. The following areas contain the populations and number of dispenser outlets indicated:

| AREA | POPULATION | POPULATION DIVIDED BY 2,000 | LICENSES COMMITTED AND IN OPERATION | | |
|---|---|---|---|---|---|
| | | | DA | DB | DC |
| City of La Grande | 11,625 | 5.81 | 6 | 3 | 0 |
| Union County | 24,450 | 12.23 | | 14 | 0 |

16. The nearest DA outlets to the Eastside Lounge are as follows:

| OUTLET | TYPE OF LICENSE | DISTANCE AND DIRECTION FROM EASTSIDE LOUNGE |
|---|---|---|
| The Wrangler | DA | 2 blocks west |
| Denny's | DA | 0.6 miles north |
| Tropadera | DA | 0.9 miles west |
| Longbranch | DA | 0.9 miles west |
| Dave's Woodshed | DA | 1.0 miles west |
| Fong's Tea House | DA | 1.0 miles west |

17. The Eastside Lounge is substantially different from other DA outlets in La Grande in the variety of people that eat there, but not in the dining service or atmosphere that the premises offers, as evidenced by the testimony of Applicant Phillip Setterlund.

18. The following persons testified in support of the issuance of a DA license at the Eastside Lounge:

Robert Miller, Owner and Operator,
Broken Arrow Lodge Motel

Ila Beth Rock, Owner and Operator,
La Grande Motel

Richard Staab, Employee, Wendell's Husky

Judy Johnson, Program Director, Eastern
Oregon Manpower Consortium

Fred Larrison, Insurance Agent

19. The Commission has received a letter in support of license issuance from Representative Robert A. Brogoitti, Oregon State Representative, District 58. (Applicants' Exhibit No. 2.)

20. The following motels are located within one block of the Eastside Lounge:

| MOTEL | NUMBER OF ROOMS |
|---|---|
| Broken Arrow Lodge Motel | 35 |
| Orchard Motel | 12 |
| Moon Motel | 9 |
| La Grande Motel | 11 |

21. The motels in the vicinity of the Eastside Lounge cater primarily to commercial travelers and truck drivers. These

guests often arrive late and are interested in locating a restaurant nearby for a meal and a cocktail. The truck drivers are not easily able to drive their trucks around La Grande or park downtown. Motel operators Robert Miller and Ila Beth Rock therefore believe that the issuance of a DA license at the Eastside Lounge would provide a needed service for their motel guests.

22. The supporters of license issuance listed in Finding of Fact No. 18 above have eaten at the Eastside Lounge and found the food service there very good.

23. Mr. Lin Helton owns Cornett Real Estate, located next to the Eastside Lounge. Mr. Helton has been in business at Cornett Real Estate over five years. Mr. Helton opposes issuance of a DA license to the Applicants. Mr. Helton has had disputes with the Applicants in the past about the customers of the two different business parking on the other's property. One storage building that sits on the property line at the back of Mr. Helton's lot has been damaged when Eastside Lounge patrons have apparently pulled up too close to the building and bumped it. Mr. Helton is also concerned that the various activities in the Eastside Lounge are not segregated between the lounge and dining room. Mr. Helton believes that the atmosphere at the Eastside Lounge and the Applicants' attitude have contributed to a littering problem caused by Eastside Lounge patrons.

24. The disputes between Mr. Helton and the Applicants about parking have subsided recently since some of the business

activities being conducted at Cornett Real Estate have been discontinued. The Eastside Lounge and Cornett Real Estate both have off-street parking. In addition, on-street parking is available in front of the Eastside Lounge.

25. The City of La Grande has recommended the issuance of a DA license to the Applicants.

27. The Applicants are proposing to do certain remodeling to the Eastside Lounge. The remodeling is planned to two phases.

Phase One would involve relocating the restrooms and expanding the size of the coolers. The larger coolers would allow more keg sales. Phase One would also involve constructing a second story for storage space.

The Phase One remodeling would not increase the seating from the present 92. The Phase One remodeling would not result in the separation of the pool tables, game machines and dancing from the seating areas. The Applicants would agree to complete the Phase One remodeling as identified in Applicants' Exhibit No. 1 prior to issuance of a DA license at the Eastside Lounge.

Phase Two of the remodeling would involve a major expansion of the premises. A separate lounge and dining room divided by a folding door would be constructed. Phase Two would provide lounge seating for 30 to 40 persons and dining room seating for 40 to 60. A banquet room for 80 persons would also be constructed. Under Phase Two the Applicants would separate the game activities from the dining. The Applicants do not

want to do the Phase Two remodeling however until at least one year after issuance of a DA license.

28. The Applicants have not submitted either Phase One or Phase Two of their proposed remodeling to the City of La Grande for approval.

29. At the date of the Applicants' hearing there were 80 DA and DB licenses available for issuance. On this same date there were 29 DA and one DB license applications pending before the Commission.

## DISCUSSION

The Applicants have proposed certain remodeling which they would agree to as a condition to the receipt of a DA license. (See Finding of Fact No. 27 above). Phase One of this remodeling would increase the size of the coolers and make possible a larger keg sale business. Applicants believe that the larger coolers would lead to approximately $1,800 more a month in beer keg sales for off-premises consumption. The Applicants also believe that the greater keg sales would lead to an increase in sales of food to go. The Commission notes however that a DA license does not allow keg sales for off-premises consumption. ORS 472.110(2). Thus this remodeling would not lead to greater keg sales under a DA license.

## ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The existence of sufficient licensed premises in the locality set out in an application shall weigh against granting the application. For purposes of this section, the applicant's community will be a 10-mile radius for dispenser licenses and a two-mile radius for other licenses, unless the

> applicant establishes that a substantial portion of the patronage of the premises is or would be from a larger or smaller area. OAR 845-05-030(1).
>
> Evidence that there is more than one dispenser license per 2,000 people in the applicant's city or county will be prima facie evidence that the applicant's community is being adequately served. OAR 845-05-040(2)(c).

The Applicants' community, the City of La Grande, contains substantially more than one dispenser outlet per 2,000 population. This is prima facie evidence under OAR 845-05-040(2)(c) that the Applicants' community is adequately served by existing dispenser outlets. This prima facie evidence has not been overcome despite the Applicants' showing that there are approximately 67 motel rooms within a one-block distance. The Wrangler, a DA outlet, is located within walking distance of the motels presently. The sufficiency of existing outlets in the Applicants' community weighs against issuance of a DA license at the Eastside Lounge under OAR 845-05-030(1).

> 2. An application for a DA license may be granted or denied on the basis of a comparison with existing DA licenses in the same city or county or a comparison with other pending dispenser's applications. OAR 845-05-040(1). Preference in licensing may be given to applicants providing greater economic benefit to the area or public as indicated by actual or reasonably projected number of patrons served, seating capacity, banquet facilities, hours of operation, number of employees, extent of investment in facilities, amenities, entertainment or such characteristics. Gross sales figures may be used as a basis for determining the number of patrons served. OAR 845-05-040(2)(a).

a. The Applicants' recent monthly sales have averaged $11,396.98. The Applicants have projected that with the issuance of a DA license and proposed remodeling, monthly sales would increase by $6,000 to $17,396.98. This projected sales average is much lower than the recent average being experienced by DA outlets in the City of La Grande of $36,519. The Applicants' food sales in particular would be much lower than the food sales of La Grande DA outlets. The Applicants' comparatively low gross sales indicate disfavor for the issuance of a DA license under OAR 845-05-040(2)(a).

b. The Eastside Lounge consists of a single room that houses all the premises' activities, including pool tables, game machines and tables for eating and drinking. There is no banquet room or separate dining room. The Applicants' limited facilities indicate disfavor for license issuance under OAR 845-05-040(2)(a).

> 3. Preference for issuance of a dispenser license will be given to applicants who provide dining service or atmosphere which is unique or substantially different in quality, quantity or type from that offered by other licensees within a 20-mile radius as indicated by menu, decor and amenities, entertainment or other characteristics. OAR 845-05-040(2)(b).

The Eastside Lounge does not offer dining service or atmosphere that is unique or substantially different from existing dispenser outlets within a 20-mile radius, as evidenced by the testimony of Applicant Phillip Setterlund. Therefore no preference for license issuance is shown under OAR 845-05-040(2)(b).

4. Unfavorable consideration may be given to an applicant if the applicant will provide primarily fast foods, short order foods, such as hamburgers, sandwiches, pancakes, eggs, and pizza, or other foods with which distilled liquor drinks are not normally ordered. OAR 845-05-040(3)(b).

The Applicants' winter menu includes five dinners, including ham and scalloped potatoes, pork chops, barbecued spare ribs, lasagna, and beef stew. In addition, the Applicants recently added a steak sandwich and a steak to their menu. When the winter menu is in effect, then, the menu does not emphasize fast foods, short order foods, or foods with which distilled spirits are not normally ordered.

The record does not indicate when the winter menu is discontinued in the spring. However, when the extra winter menu items are discontinued, the remainder of menu is generally limited to chicken, chili, six sandwiches and pizza. This constitutes an emphasis on fast or short order food as identified in OAR 845-05-040(3)(b). The limitation of the menu to these items during the non-winter months indicates a lack of preference for license issuance under OAR 845-05-040(3)(b).

5. Unfavorable consideration may be given to an applicant if the applicant's premises will be operated primarily as a tavern rather than as a restaurant, as indicated by factors emphasizing:

   (A) The sale of entertainment by means of pool tables, coin-operated game machines, legal card games or other games of chance. This provision will not apply if the premises offers food service conforming with OAR 845-08-015 in a dining room seating at least 40 persons which is separated from the area in which entertainment devices or games are located; or

(B) The sale of alcoholic liquor to a greater degree than food service.

OAR 845-05-040(3)(e).

a. The Applicants do not offer dining seating that is separated by walls or doors from their pool tables, coin-operated game machines and live music and dancing. The Applicants' proposed Phase One remodeling would still leave the dining seats in view of the pool tables, game machines, music and dancing. Phase One is the only remodeling that the Applicants would agree to as a condition precedent to licensure. They do not desire to institute the Phase Two remodeling until a year after issuance of a DA license. The Eastside Lounge, then, places an emphasis on the sale of entertainment by means of pool tables and coin-operated game machines and would be operated primarily as a tavern rather than as a restaurant, indicating disfavor for licensure under OAR 845-05-040(3)(e)(A).

b. Additionally, the Eastside Lounge presently sells much more in alcoholic beverages than food. This pattern is projected to continue by the Applicants after issuance of a DA license. See Findings of Fact Nos. 12 and 13. The Eastside Lounge, then, would appear to emphasize the sale of alcoholic liquor to a greater degree than food, indicating disfavor for license issuance under OAR 845-05-040(3)(e)(B).

6. The Commission must exercise caution in the grant of the limited number of dispenser's licenses available to insure that these licenses are distributed in a manner to best serve the state's population. ORS 472.110(4), Battle Creek citation (see Finding of Fact 2b).

7. Preference in licensing may be given to applicants where applicants' premises are located in an incorporated area with a population of less than 25,000 and where an applicant's premises in such an area has seating capacity for 100 or fewer persons. OAR 845-05-040(2) (d) and (e).

The Eastside Lounge is located in La Grande. La Grande has a population of less than 25,000. The Eastside Lounge has seating for 92 persons. Preference for license issuance is therefore shown under OAR 845-05-040(2)(d) and OAR 845-05-040(2)(e).

## ULTIMATE CONCLUSIONS OF LAW

The application by Phillip and Mary Setterlund for a DA license at the Eastside Lounge is not demanded by the public interest and convenience despite the preference for license issuance shown by the Applicants' location in an incorporated area with a population of less than 25,000 and by the Applicants' seating for fewer than 100 persons; because the Applicants' community is adequately served by existing outlets, because the Applicants' comparatively low sales indicate disfavor for license issuance, because the Applicants will emphasize fast or short order foods during the portion of the year that the winter menu is not in effect, and because the lack of separate seating from games and the relatively high alcoholic beverage sales indicate that the premises will be operated primarily as a tavern rather than as a restaurant. ORS 472.160(1).

## FINAL ORDER

It is hereby ordered that the application by Phillip and Mary Setterlund for a DA license at the Eastside Lounge, 2207 E. Adams Avenue, La Grande, Oregon, be DENIED.

It is further ordered that due notice of such action, stating the reasons therefor, be given as provided by law.

Dated this 25th day of April, 1983.

C. Dean Smith
Administrator
OREGON LIQUOR CONTROL COMMISSION

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