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BEFORE THE LIQUOR CONTROL COMMISSION  
OF THE STATE OF OREGON

In the Matter of the	)	
Application for Renewal of a	)	
Retail Malt Beverage (RMB)	)	
License by:	)	FINAL
	)	FINDINGS OF FACT,
Sharon Ann Stopyak	)	CONCLUSIONS OF LAW,
ELK CITY TAVERN	)	AND ORDER
Route 1, Box 532	)	
Elk City, OR	)	
- - - - -	)	
Lincoln County	)	

A hearing in the above matter was held on the 19th day of October, 1982, in Newport, Oregon, before Hearings Examiner Douglas Crumme'. The Applicant appeared in person and was represented by Scott Fewell, Attorney at Law, Corvallis, Oregon. 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. Sharon Ann Stopyak has applied for the renewal of a Retail Malt Beverage (RMB) license at the ELK CITY TAVERN, Route 1, Box 532, Elk City, Oregon. Mrs. Stopyak continues to operate the Elk City Tavern under temporary authority from the Commission, pending an outcome on her hearing.

2. The Elk City Tavern is located in the same building as the Elk City Store, where Mrs. Stopyak has held a Package Store (PS) license since July, 1979. The Store and Tavern are separated by a wall. The Store has existed for at least 90

years. Mrs. Stopyak received an RMB license and opened the Elk City Tavern in March, 1980.

3. Mrs. Stopyak's application was referred by the Commission's Licensing Staff to the Commission without recommendation at the Commission's June 21-22, 1982 meeting. At that meeting the Commission directed that a public hearing be held on the merits of the application, and that the Applicant's qualifications for licensure be considered under OAR 845-05-025(1) (adverse recommendation by local government). (Commission's Exhibit C.)

4. The Lincoln County Board of Commissioners voted to recommend on May 26, 1982 that Mrs. Stopyak's application for renewal of an RMB license at the Elk City Tavern be refused. The evidence of the Board's refusal recommendation includes the renewal application form, on which the Board put a check in the "refuse" recommendation box. (Commission's Exhibit B.) The evidence of the Board's refusal recommendation also includes the minutes of the Board's May 26, 1982 and June 9, 1982 meetings. (Applicant's Exhibits Nos. 1 and 2.) The grounds for the County's refusal recommendation have not been set forth for the OLCC.

5. At its May 26, 1982 meeting, the Lincoln County Board of Commissioners considered Mrs. Stopyak's applications for renewal of her RMB and PS licenses as well as an application that Mrs. Stopyak had made for a Special Retail Beer (SRB) license. Mrs. Stopyak sought the SRB license for a Bullhead Fishing Derby that she planned to sponsor in Elk City on the weekend of July 4, 1982.

6. The Lincoln County Board of Commissioners did not give Mrs. Stopyak any particular notice about charges or issues to be considered during the Board's May 26, 1982 consideration of her renewal and SRB applications. Mrs. Stopyak was aware, however, that there was a potential the Board might issue a refusal recommendation on her license applications. Mrs. Stopyak attended the meeting along with several supporters.

7. At the Lincoln County Board of Commissioner's May 26, 1982 meeting, Mrs. Stopyak acknowledged to the Board that there was some local opposition to her operations. She stated that she did not believe there had been any particular problems though, and that the opposition was personal. She presented a petition in her support signed by 94 people who had been in the Store and Tavern but who did not live in the Elk City area. She presented another petition signed by 38 persons who live in the Elk City area.

Three persons were present with Mrs. Stopyak at the Board's May 26, 1982 meeting. Two of these persons testified before the Board that they live in Elk City and hear very little noise from the Tavern.

At the May 26, 1982 meeting, the Board noted it had received a petition signed by 14 persons in opposition to Mrs. Stopyak's application for an SRB license for the Bullhead Fishing Derby on the weekend of July 4, 1982. There were no persons who spoke at the meeting in opposition to Mrs. Stopyak's applications. After the witnesses spoke, the Board voted to

recommend denial not only on Mrs. Stopyak's SRB license application, but also on her applications for renewal of her PS and RMB licenses.

8. After the Board made its decision at its May 26, 1982 meeting, Mrs. Stopyak asked Board Chairman Albert R. Strand why the Board voted denial on her applications. Mr. Strand said the reason was because of the 14-person petition against the SRB application and because there had been a lot of "oral talk."

9. Mrs. Stopyak was not represented by legal counsel before the Lincoln County Board of Commissioners on May 26, 1982.

10. After the May 26, 1982 meeting, Mrs. Stopyak received a phone call from Lincoln County advising her that on June 9, 1982 the Board of Commissioners would reconsider its recommendation on her PS license application. The caller advised Mrs. Stopyak though that the Board was not likely to change its refusal recommendation on the RMB license application.

11. Mrs. Stopyak appeared at the Lincoln County Board of Commissioner's June 9, 1982 meeting. At the meeting she was represented by Jeff Hollen, Attorney at Law. Mr. Hollen requested that the Board reconsider its recommendations on both the PS and RMB applications. Eight persons, including Mrs. Stopyak, testified before the Board in support of renewal of Mrs. Stopyak's licenses. There were also about 10 persons in attendance at the Board meeting who supported renewal of Mrs. Stopyak's licenses but who did not testify.

OLCC Sr. Inspector Ernie Fraser testified that the Elk City Tavern first received an RMB license in 1980, and that no

complaints had been received until April, 1982. (This was when Mrs. Stopyak put up the posters for her proposed July 4, 1982 Bullhead Derby.)

Four persons testified in support of the PS license but made statements in opposition to the RMB license for the Tavern.

12. The four witnesses' testimony against the renewal of the RMB license at the Lincoln County Board of Commissioner's June 9, 1982 meeting was brief. Two of the witnesses stated simply that the tavern was not needed. The third witness stated that Elk City did not have facilities such as a church or post office and did not need a tavern. The fourth witness said simply that he did not need men urinating on his property. All four of these witnesses testified in favor of a PS license for the Elk City Store.

13. Mrs. Stopyak argued to Lincoln County that the Tavern has not been shown to cause any problems, that the profits from the Tavern enable Mrs. Stopyak to continue operating the grocery store, which customarily shows a loss, and that her grocery store and tavern meet a need in the community.

14. At the end of the discussion the Board voted to recommend approval of the PS license application. The May 26, 1982 refusal recommendation on the RMB license application was not amended or withdrawn. (Applicant's Exhibit No. 2.)

15. Mrs. Stopyak has experienced the following monthly sales in the Elk City Store and Tavern:

ACTUAL SALES

<u>MONTH</u>	<u>TAVERN SALES</u>	<u>GROCERY STORE SALES</u>
<u>1980</u>		
March	\$ 286.30	\$ 2,245.76
April	474.76	2,648.55
May	530.58	3,197.43
June	457.99	2,841.55
July	976.61	6,156.51
August	1,074.90	6,001.26
September	942.28	5,752.60
October	407.20	5,030.13
November	316.14	3,480.38
December	175.51	2,636.40
<u>1981</u>		
January	237.40	2,966.87
February	153.95	2,974.17
March	216.50	2,406.71
April	254.00	2,433.63
May	337.34	2,710.10
June	439.50	2,717.75
July	665.79	5,300.08
August	722.85	4,764.26
September	1,135.03	5,946.11
October	759.19	5,102.34
November	370.20	3,391.61
December	235.30	2,361.32
<u>1982</u>		
January	252.00	2,312.04
February	257.65	1,863.14
March	335.40	2,735.16
April	835.25	3,395.30
May	1,028.65	4,208.52
June	556.65	3,598.76
July	1,943.14	8,166.96
August	1,079.45	5,892.00
September	1,185.05	6,721.86

16. The profit, loss and net at the Elk City Store and Tavern in 1980 and 1981 were as follows:

<u>YEAR</u>	<u>TAVERN</u>	<u>STORE</u>	<u>NET</u>
1980	\$2,351.52	\$(2,350.52)	\$ 1.00
1981	2,199.67	(7,383.67)	(5,184.00)

17. Mrs. Stopyak supplements her income from the Store and Tavern by three rentals that she owns in Elk City and by doing crocheting.

18. The Elk City Store and Tavern are located in Elk City, population 18. Elk City is located at the confluence of the Big Elk and Yaquina Rivers. Elk City is not located on a major highway. The nearest major road is Highway 20, located five miles by gravel road north of Elk City. The nearest town to Elk City is Toledo, located nine miles to the west.

19. The Elk City Store and Tavern serve as a meeting place for the residents of the surrounding rural community.

20. There are a number of hunters and fishermen who travel through Elk City and patronize the Elk City Store and Tavern.

21. The Elk City Tavern has seating for 14 persons.

22. The Elk City Tavern does not have live music or dancing. The premises has a Space Invader game, a pinball machine and a juke box.

23. The Elk City Tavern normally operates 365 days a year. The Tavern opens sometime after 8:00 a.m. and generally closes by 11:00 p.m.

24. The Elk City Store sells beer and wine in individual cans and bottles only.

25. A busy night at the Elk City Tavern would be eight or nine patrons. An average crowd would be four or five persons, although frequently the Tavern is empty of patrons. An exceptional occasion such as the Elk City Boat Races held on Labor Day might find 20 to 30 persons patronizing the Tavern at

once. (Mrs. Stopyak founded and sponsored the Boat Races to raise funds for local projects such as the maintenance of the old covered bridge at Elk City.)

26. The nearest grocery store to the Elk City Store is approximately 10 miles away.

27. The nearest tavern west of the Elk City Tavern is in Toledo, nine miles away. The nearest tavern to the east is in Wren, 45 miles away.

28. Mrs. Stopyak had not received any complaints about the Elk City Store or Tavern until she put up posters in April, 1982 for the Bullhead Fishing Derby that she planned to sponsor over the weekend of July 4, 1982. The Bullhead Derby posters generated the petition signed by 14 Elk City residents who opposed the event.

29. The July 4, 1982 Bullhead Derby took place without an SRB license. The beer garden that Mrs. Stopyak had proposed with the license was therefore not offered. The Derby lasted six hours a day for three days. The Derby included a bullhead fishing contest and different events located behind the Elk City Store. These events included arm wrestling, a greased pig contest, tug of war, horse shoe games and live music.

30. Mrs. Stopyak received three complaints about the Elk City Tavern during 1982. One complaint came from the County Sheriff that a patron made excessive noise after leaving the Tavern. A second complaint made in 1982 was that a patron urinated in public after leaving the Tavern. A third complaint concerned an incident involving the service of minors in the

Tavern. The minors were asked for identification and required to sign S-146 Statement of Age forms. An investigation and resolution of this incident by the Commission's Enforcement Division was pending at the date of Mrs. Stopyak's October 19, 1982 hearing.

31. Mrs. Stopyak believes that the opposition to her from some community residents is based on personalities and on those residents' attempt at keeping tourists and outsiders away from Elk City. Mrs. Stopyak has been the subject of some personal harassment, including receiving phone calls in the middle of the night, having rocks thrown at her and being called foul names by some community residents.

32. Mrs. Stopyak has upgraded the physical premises of the Elk City Store and Tavern. She recently completed work on the roof and the chimney.

33. Mrs. Stopyak has relocated the parking area for the Elk City Store and Tavern to a position behind the building and further away from most of the residents of Elk City. The new parking area is located so as to divert traffic away from the road that most of the Elk City residents live on.

34. Before Mrs. Stopyak opened the Elk City Tavern, individuals would frequently purchase beer at the Elk City Store and drink the beer outside, creating more noise for the community than after the Tavern was opened and persons could drink inside.

35. The Applicant collected petitions in the Elk City Tavern from May to October, 1982 in support of the renewal of

her RMB license. Separate petitions were collected for local residents versus tourists and visitors. Sixty-seven local residents from Elk City, Blodget, Eddyville and Harlan Road signed a petition in support of license issuance. (Applicant's Exhibit No. 10.) Five hundred and seven persons who reside outside of the Elk City area also signed a petition in support of the Tavern. (Applicant's Exhibit No. 9.)

36. Mrs. Stopyak would agree to close the Elk City Tavern at 11:00 p.m. as a condition to renewal of an RMB license.

#### DISCUSSION

1. OLCC Commissioner W.E. Ouderkirk was a member of the Lincoln County Board of Commissioners at the time the Board made its recommendation on May 26, 1982 that Mrs. Stopyak's RMB renewal application be denied. Consequently Mr. Ouderkirk abstained from voting at the OLCC's June 21, 1982 meeting where the OLCC ordered that a public hearing be held on the merits of Mrs. Stopyak's RMB renewal application. (Commission's Exhibit A.)

2. Some questions were raised at the Applicant's hearing about whether the Elk City Tavern's water supply is in compliance with applicable health and sanitation requirements. The Applicant does not have an approved water source at the Elk City Tavern of the type required by the State Health Division for a food service establishment. However, since the Applicant serves only bottled beer and wine, licensing as a food service

establishment by the Health Department is not necessary. (Applicant's Exhibit No. 15.) The Elk City Tavern's present operation does not violate Health Division requirements for water supply.

3. The evidence about what occurred in the May 26, 1982 and June 9, 1982 proceedings before the Lincoln County Board of Commissioners was limited to the Board's minutes and the testimony of Mrs. Stopyak. A transcript of the meetings was not submitted. The Board's minutes were abbreviated. A representative of the Board did not testify at the OLCC's hearing. The only evidence about why the Board recommended refusal on the RMB license was Commissioner Strand's reported comment to Mrs. Stopyak that the refusal was based on the 14-person petition against the SRB license application and on "oral talk" received sometime before the May 26, 1982 meeting.

#### CONCLUSIONS OF LAW

The sole basis cited by the OLCC in deferring Mrs. Stopyak's RMB renewal application to a hearing was the adverse recommendation of the Lincoln County Board of Commissioners.

The license criterion cited by the Commission, OAR 845-05-025(1), states as follows:

The following criteria will be given sufficient consideration so that a license will not be issued unless good cause which outweighs the criteria involved is shown by the applicant:

(1) An adverse recommendation by the governing body of the appropriate city or county, after due consideration. The recommendation may be disregarded by the Commission if the body has failed to give to the applicant and

to interested members of the public both reasonable notice of the proceedings at which the application was considered and reasonable opportunity to be heard. OAR 845-05-025.

The Commission may only deny an RMB license renewal application under grounds set forth in ORS 471.295. ORS 471.301(1)(c).

Although the Commission may require of a license applicant the recommendation of the local city or county under ORS 471.210(3), the local government recommendation itself is not a grounds for license refusal under ORS 471.295.

The Oregon Attorney General has advised the OLCC that the OLCC may not deny a license renewal application based solely upon an adverse recommendation by local government. 35 Opinions of Oregon Attorney General 25 (1970), 28 Opinions of Oregon Attorney General 205 (1958). At least one member of the Oregon Court of Appeals has noted and indicated support for this position. Morishige v. Oregon Liquor Control Commission, specially concurring opinion of Chief Justice Schwab, 29 Or. App. 651, 659, 564 P2d 1359 (1977).

The Attorney General advised as follows in 35 Opinions of Oregon Attorney General 25 (1970):

Since these statutes [ORS 471.295(1), ORS 471.301(1)(c)] enumerate the grounds upon which a license or renewal of a license may be refused, and those grounds do not include an adverse recommendation by the city or county government, the Commission may not refuse a license solely because of opposition of the local government. ORS 471.210(2) permits the Commission to consider the local recommendation in determining whether the Commission has reasonable

ground to believe any of the stated conditions of ORS 471.295 is true. An adverse local recommendation may be considered by the Commission on the question of public demand, or the Commission may consider any specific information contained in the recommendation. However, the ultimate finding of fact or exercise of discretion is the responsibility of the Commission, and the Commission cannot delegate its licensing power to the cities or counties.

It is therefore our opinion that while the Oregon Liquor Control Commission may consider a negative local recommendation in deciding whether to issue a license, the Commission may not refuse to issue or renew a license solely upon adverse recommendation by the city or county government. 35 AG 25 (1970).

The Attorney General gave the Commission the same advice as above in counseling against denying a license solely because an applicant's premises were located in a campus "dry zone" that was created either by the Commission or local government rather than by statute:

. . . In giving consideration to local conditions the Commission may require the recommendation of the county court or city commission. ORS 471.210(2). Licenses are granted or denied upon statutory grounds. The grounds for refusal have been expressly set out in ORS 471.295. Within the enumerated grounds for refusal of a license the Commission may act. To deny or refuse a license by creating an arbitrary zone would be exercising powers exclusively granted to the legislature under the Constitution. 28 AG 205, 207 (1958).

In his specially concurring opinion in Morishige supra at 659, Chief Justice Schwab indicated that a Commission license denial based solely on an unexplained recommendation by local

government would constitute an unauthorized delegation of the Commission's licensing power:

. . . The city's letter gave no reason for its position. The Commission's power to consider and give weight to the recommendations of the city does not authorize the Commission to make an unqualified delegation of its licensing power to the city. To act solely on the basis of an unreasoned recommendation is, in effect, to so do. Morishige supra at 659."

The Lincoln County Board of Commissioners did not express to the OLCC the Board's reasons for recommending refusal of Mrs. Stopyak's RMB license renewal. There is no letter from the County explaining its adverse recommendation. The minutes of the County's May 26, 1982 meeting do not set forth the County's reasons, since there was no information against the RMB license presented at the May 26, 1982 meeting. The record does not show that the County reconsidered the RMB license when it reconsidered the PS license at the County's June 9, 1982 meeting. There was not a witness from the County at the Commission's October 19, 1982 meeting to give the reasons for the County's recommendation. Mrs. Stopyak presented evidence that the County's reasons for recommending against the RMB license were based on "oral talk" that the County received prior to the May 26, 1982 meeting. However, the record does not disclose the substance of these oral communications or what factors cited by the communicants were relied on by the County in recommending against the RMB license.

As no basis for license denial was cited by the OLCC in the October 19, 1982 hearing other than the unexplained refusal

recommendation of Lincoln County, the record does not bring into issue or set forth whether there are sufficient independent statutory grounds for license denial under ORS 471.295. Thus, under the Attorney General's Opinions and the specially concurring opinion in Morishige cited above, the record does not afford the OLCC an adequate basis to decide whether Mrs. Stopyak's RMB license should be renewed or denied in light of the County's adverse recommendation.

The Commission takes official notice that following the Licensee's hearing, the Commission requested the County to set forth the reasons for its adverse recommendation. In response, the County advised that its recommendation was based on the evidence at its two public meetings. However, the County did not state the particular reasons that came out in the evidence that the County found persuasive for license denial. Because of the passage of time and changes in membership of the Board, the County indicated it was not in a position to elaborate further on the grounds for its refusal recommendation.

As such, the Commission concludes that there is no longer a reasonable possibility that the record may be reopened and supplemented to set forth sufficient grounds for license refusal under the Attorney General opinions and the specially concurring opinion in Morishige cited above.

#### ULTIMATE CONCLUSIONS OF LAW

The application by Sharon Stopyak for renewal of an RMB license at the Elk City Tavern, Elk City, Oregon, should be

granted despite the refusal recommendation of the Lincoln County Board of Commissioners because the record does not set forth sufficient information to deny the application based on the Lincoln County recommendation, as explained in the Conclusions of Law above. ORS 471.295.

FINAL ORDER

It is hereby ordered that the application by Sharon Stopyak for the renewal of the RMB license at the Elk City Tavern, Route 1, Box 532, Elk City, Oregon be GRANTED.

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.

  
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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.