

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the)	
Application for a)	
Dispenser Class A (DA))	
License by:)	FINAL
)	FINDINGS OF FACT,
Robert L. and Susan L. Dempster)	CONCLUSIONS OF LAW,
AUSTIN HOUSE)	AND ORDER
N/S Highway 26 at Austin Junction)	
P.O. Box 8)	OLCC-84-L-019
Bates, Oregon 97817)	
- - - - -)	
Grant County)	

A hearing in the above matter was held on the 29th day of August, 1984, in Prairie City, Oregon, before Hearings Examiner Allen R. Scott. The Applicants appeared in person and were not represented by legal counsel. The Commission was not represented by legal counsel.

On December 17, 1984, the Commission considered the record of the hearing, the Proposed Order of the Hearings Examiner, Exceptions to the Proposed Order of the Hearings Examiner, and applicable statutes and regulations. Pursuant to this review, the Commission enters the following:

BACKGROUND

Applicants seek a Dispenser Class A license at the AUSTIN HOUSE, which is located at the junction of US Highway 26 and Oregon Highway 7, approximately 14 miles east of Prairie City, Oregon. Applicants presently hold a Seasonal Dispenser license and Retail Malt Beverage license at the restaurant and lounge. Applicants also operate at this location a grocery store, which has a Package Store license, and a service station. Applicants have operated the premises for approximately eight years.

ISSUES

I. The Staff claims that Applicants have not shown that the area is not adequately served. (OAR 845-05-040(2)(c)). This criterion is not a basis for denial of an application.

II. The Staff claims that Applicants have not shown that the dining service or atmosphere are unique in the area. (OAR 845-05-040(2)(b)). This criterion is also not a basis for denial of an application.

III. The Staff claims that Applicants will provide lesser services, facilities, and economic benefit. (OAR 845-05-040(3)(f)).

IV. The Staff claims that the application should be given unfavorable consideration because Applicants have not established that the premises will offer greater services, facilities or economic benefit and Applicants have failed to show that the premises will provide unique dining service or atmosphere. (OAR 845-05-040(3)(a)).

V. The evidence makes relevant the provisions of ORS 472.114, which gives preference for applicants located in rural areas and for applicants having seating for fewer than 100.

The staff also cited ORS 472.110(4) (quota), and Battle Creek Golf Course, Inc. v. OLCC, as bases for denial. However, neither provides a specific ground for denying an application. The specific grounds for denying an application such as this are found in the Commission's criteria, which incorporate concepts based upon the "Quota" and the Battle Creek case.

I. ADEQUACY OF SERVICE IN THE AREA

Preference in licensing may be given to applicants showing any one or more of the following. The applicant shall have the burden of showing that these provisions apply:

. . . .

The public is not being adequately served by dispenser outlets, if any, in the applicant's community, as defined in 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).

Findings of Fact

1. Applicant's premises is located in Grant County, which has a population of 8,000.
2. Grant County presently has eight dispenser outlets.
3. The nearest dispenser outlet to Applicant's premises is the Fireside (holding a Seasonal Dispenser license), which is located seven miles away on Highway 26.
4. Summer and early fall have traditionally been the primary times for tourism in the area in which Applicant's premises is located. However, in recent years, snowmobiling, cross-country skiing and other winter activities have increased the number of visits by tourists. For example, snowmobile clubs from Sumpter and Baker have made snowmobile trips to Applicant's premises in recent winters and have had banquets there. During the winter of 1982-83, Applicant held a cross-country skiing race in the area. Applicant and others in the

area reasonably hope that this type of activity will increase as more trails are prepared for snowmobiling and cross-country skiing.

Conclusions of Law

The above criterion makes the area within ten miles of Applicant's premises the relevant area. There is only one dispenser outlet within that ten mile radius, a premises holding a seasonal dispenser license seven miles from Applicant's premises.

Applicant has made a convincing case, through his own testimony, the testimony of others, and through written evidence, that winter time activity in the area has increased and has a potential for further increases. For example, State Representative Max Simpson wrote a letter to the Commission stating, in part:

"Due to the increasing traffic and full use now of the Whitney cutoff as a through-main state highway, there is steady year-round use and a 12-months license for Austin House, in my view, would be the appropriate way to acknowledge this economic activity in a positive way.

"As a matter of fact, the tourist and recreation business, which used to level off after elk season now enjoys renewed vitality through the snow-mobile clubs. Since my home in Sumpter Valley is accessed by Hi-Way 7 I am aware of the heavy steady stream of traffic over this route, which was not the case in prior years. So, although it may be gradual, things do change in Eastern Oregon, and I think it is time that Austin House had a 12-month license."

The evidence also indicates that Applicant's premises is well situated to provide service to people visiting the area in

connection with the activities noted above and that many people in the area see the need for increased service during the winter time.

The Commission concludes that Applicants have established a need for additional winter dispenser services in the area, and have therefore overcome the prima facie evidence provided by the population and number of dispenser outlets in the area. Applicants are therefore entitled to some preference under this criterion.

II. UNIQUENESS

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).

5. Applicants serve lunch and dinner six days a week.
6. Applicants' lunch menu contains several hamburgers, eight other sandwiches, soup, salad, side dishes and desserts. In addition, Applicants provide the following four "brunch" specials: charboiled chicken-fried steak; smoked pork chops; chorizo sausages; and french toast. Each brunch special contains appropriate side dishes.
7. Applicants' dinner menu contains the following steaks: T-bone steak; New York Steak; pepper steak; Austin House Steak; and steak and lobster dinner. The pepper steak is unique within 20 miles in that it is prepared with green peppers. The steak dinners range in price from \$8.95 to \$11.95,

with the steak and lobster dinner priced according to cost. In addition, Applicants' dinner menu contains the following house specialties: Rocky Mountain Oysters; fresh broasted chicken; smoked pork chop dinner; meat loaf dinner; ham steak; and chicken fried steak. These dinners are priced from \$5.95 to \$7.95. Smaller versions of the house specialty dinners are also available.

8. Some of the dishes served by Applicants and the preparation of certain dishes are unique within 20 miles. For example, the Rocky Mountain Oysters (calves testicles) are not found on other menus within 20 miles. The preparation of the pepper steak with green peppers is distinctive. Furthermore, Applicants make their own homemade bread and pastries, something other restaurants in the area do not do.

9. Applicants also provide weekend specials nearly every weekend. On occasion, Applicants obtain Florida Scallops and other seafoods, which they serve as specials. Other specials served are ribs and crawdads. Applicants do not charge for the crawdads, as they are not federally inspected.

10. Some of the house specials are unique in the area.

11. The decor in Applicants' premises is unique within 20 miles in some respects. For example, the back bar was built in 1866 and shipped to Oregon from the East Coast. No other premises in the area has a bar as old or one which resembles this bar. Also, Applicants have many old or unusual glasses and bottles which they use in their service.

12. Applicants have an extensive drink menu, featuring good quality drinks and unusual drinks. Among those offered that are not otherwise found within 20 miles are "Monk's Delight," "Mexicoffee," spiced Bloody Mary with Dilly Beans, Blue Margaritas, and Green Melonritas, and the "Blue Mountain Brothel," a drink made from rums, juices and liqueurs and served in a fish bowl. Applicant Susan L. Dempster is an experienced "mixologist," and her drink preparations are distinctive in the area.

13. Informal entertainment is available at Applicants' premises most nights, with local people playing various instruments. This style of entertainment is not featured at other DA premises within 20 miles.

14. Applicants presented several witnesses who testified that the atmosphere at Applicants' premises is more "friendly" than that at the four other dispenser premises within 20 miles.

Conclusions of Law

Applicants make a good case that the total dining service and atmosphere provided by their restaurant and lounge are unique within 20 miles. For example, although their menu is for the most part a "typical American" menu, testimony of witnesses and written evidence indicates that some of the dishes and type of preparation are unusual in this area. For example, U.S. Representative Bob Smith states in a letter to the Commission:

"I would like to take this opportunity to ask that you give every consideration possible to the greater privilege license. I

have been a customer of the Austin House for many, many years, and find the quality of food and service outstanding.

"I must also tell you, that there are very few locations in the western United States that serve 'rocky mountain oysters' and other homemade delicacies that are provided by the Austin House."

The evidence also indicates that the decor of the premises is different from that at any of the other four dispenser outlets within 20 miles. Furthermore, witnesses describe the atmosphere and entertainment as being distinctive in the area. While features such as an unusually "friendly" atmosphere are not of great weight, they do add some substance to Applicants' claim of uniqueness.

The Commission concludes that Applicants have established that their dining service and atmosphere are unique within 20 miles and that they are entitled to preference under this criterion.

III. LESSER SERVICES

Unfavorable consideration may be given to an applicant if the applicant's premises will provide lesser services, facilities and economic benefit to the area or to the general 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, or other such characteristics. Gross sales figures may be used as a basis for determining the number of patrons served. OAR 845-05-040(3)(f).

Findings of Fact

15. Sales at Applicants' premises have been as follows during 1983 and 1984. The Seasonal Dispenser License was in effect from May 1 to November 30 during these years.

<u>Month</u>	<u>Food</u>	<u>Alcoholic Liquor</u>	<u>Total</u>
Feb 1983	\$ 98	\$ 614	\$ 712
Mar	0	500	500
Apr	2,745	1,782	4,527
May	3,053	1,652	4,705
Jun	6,790	2,448	9,238
Jul	6,476	2,760	9,236
Aug	4,705	2,977	7,682
Sep	5,855	3,601	9,456
Oct	6,451	6,015	12,466
Nov	4,228	4,331	8,559
Dec	0	846	846
Jan 1984	378	1,056	1,434
Feb	536	1,318	1,854
Mar	218	1,874	2,092
Apr	1,048	984	2,032
May	4,366	2,129	6,495
Jun	4,638	2,606	7,244
Jul	4,829	3,282	8,111
<u>Aug</u>	<u>4,961</u>	<u>3,044</u>	<u>8,005</u>
Average	\$3,230	\$2,306	\$ 5,536

During the winter months (December through March), the restaurant has been closed except for banquet use.

16. Sales at existing dispenser outlets in Grant County have been as follows: Food \$14,218.00; alcoholic liquor \$6,401.00; total \$20,619.

17. Applicants' premises has no separate banquet facility. However, only one of the four nearest dispenser outlets has a separate banquet facility. Applicant does provide service to banquets when possible. For example, Applicants served three banquets last winter. Applicants hope to serve more banquets.

18. Applicants' premises is open for lunch and dinner six days a week. Three of the four nearest dispenser outlets are open seven days a week. Two of them are open for breakfast as well as for lunch and dinner.

Conclusions of Law

Applicants' gross sales are considerably below the average for Grant County. Applicants provided a projection of sales if the DA license is granted which would place their gross sales at \$8,191.00 per month. Applicant provided no convincing explanation as to how these figures were arrived at. Given the fact that Applicants already have dispenser privileges for seven months out of the year, the Commission concludes that this estimate is not credible. In any event, even if it were attained, Applicants' sales would still be far below the average at existing Grant County premises. It may be concluded, therefore, that Applicants' premises will serve fewer patrons than the existing premises in the area on the average.

The hours and days of operation of Applicants' premises are also less than three of the four nearest premises. This is also an indication of lesser services.

Applicants' premises has no separate banquet facility. However, only one of the nearest four premises has such a separate banquet facility. Applicant cannot be said to have lesser services, therefore, with respect to banquet facilities.

The evidence establishes that Applicants' premises will probably serve fewer patrons than do existing premises in the area, and that the days and hours of operation are somewhat

less than three of the four nearest premises. The Commission therefore concludes that this criterion provides a basis for denying the application.

IV. UNFAVORABLE CONSIDERATION: UNIQUENESS AND SERVICES

Unfavorable consideration may be given to an applicant if any of the following are shown:

- (a) None of the criteria set forth in subsection (2)(a) or (b) of this rule is met. OAR 845-05-040(3)(a).

Findings of Fact

19. Applicants have established that the dining service and atmosphere at the premises will be unique in the area.

Conclusions of Law

This criterion calls for unfavorable consideration of an application if the applicant fails to establish either that applicant will provide greater services or that the dining service or atmosphere will be unique. As Applicants have established that dining service will be unique, this criterion does not provide a basis for denying the application.

V. PREFERENCE FOR LOCATION AND SIZE

(1) It is the finding of the Legislative Assembly that ORS 471.030(2) does not require the commission consistently to grant licenses to applicants which have the potential to do a larger gross business than other applicants.

(2) It is the intention of the Legislative Assembly, that in issuing Class "A" and "C" licenses authorized under ORS 472.110 and 472.113, the commission shall recognize the importance of issuing licenses to otherwise qualified applicants located in rural and unincorporated areas and in incorporated areas with populations of less than 25,000.

(3) It is the intent of the Legislative Assembly that the commission shall recognize the importance in licensing applicants described in subsection (2) of this section to also recognize those having seating capacities for 100 or fewer patrons. ORS 472.114.

Findings of Fact

20. Applicants' premises is located in a rural and unincorporated area.

21. Applicants' premises seats 29 in the bar area and 40 in the dining area for a total of 69.

Conclusions of Law

Applicants' premises meets both of the bases for preference stated in the statute quoted above. Therefore, Applicants are entitled to preference under this statute.

ULTIMATE CONCLUSIONS OF LAW

Although Applicants' premises will probably serve fewer patrons than do existing premises in the county, the application should nevertheless be granted because Applicants have established a need for additional services in the area, because Applicants will provide food service and atmosphere which are unique within twenty miles, and because Applicants are entitled to preference based upon location and size of the premises. OAR 845-05-040(2)(b), (2)(c); ORS 472.114.

FINAL ORDER

It is hereby ordered that the application for a Dispenser Class A license by Robert L. and Susan L. Dempster, in the trade name Austin House, N/S Highway 26 at Austin Junction, P.O. Box 8, Bates, Oregon 97817, be GRANTED upon payment of

appropriate license fees to the Commission, with issuance of the license subject to the following conditions:

1. The premises be ready for operation as a Dispenser Class A premises within 60 days of the Commission's Final Order in this matter, or that the commitment of the license be withdrawn.
2. That Applicants pay the appropriate license fee prior to issuance of the license.

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

Dated this 19th day of December, 1984.

William A. Thomas for C. Dean Smith

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.