

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the)
Application for a)
Dispenser Class A (DA))
License by:)
)
Raymond and Toni Gassner)
THE CASTLE STEAKHOUSE)
14601 SE Division)
Portland, Oregon)
- - - - -)
Multnomah County)

FINAL
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

A hearing in the above matter was held on the 2nd day of April, 1984, in Portland, Oregon, before Hearings Examiner Douglas Crumme'. The Applicants appeared in person and were represented by James K. Neill, Jr., Attorney at Law, Portland, Oregon. The Commission was not represented by legal counsel.

RULING ON REQUEST FOR PARTY STATUS

Darwin Hamblin submitted a request for party status in the hearing. The bases stated by Mr. Hamblin in support of his request included that there are sufficient licensed premises in the community, that Mr. Hamblin owns equipment located at The Castle, and that issuance of a DA license to Mr. and Mrs. Gassner at The Castle would impair the value of the DA license Mr. Hamblin presently holds at that location. Mr. Hamblin formerly leased the Castle location and operated a business there named the Nevada City Supper Club under a DA license. Mr. Hamblin has lost his lease, however his DA license is still in effect. Mr. Hamblin believes issuance of a DA license to the Applicants would impair the value of his interests at the premises.

The Hearings Examiner denied Mr. Hamblin's request for party status at the hearing. The Examiner concludes that Mr. Hamblin's stated interests in the hearing are either not within the scope of the Commission's jurisdiction (OAR 845-03-020(7)-(b)) or were adequately represented at the hearing by existing parties. (OAR 845-03-020(7)(d)).

It is beyond the Commission's jurisdiction to determine ownership of the equipment that might presently be located at the premises. The Commission can require that adequate equipment be provided to operate the business as proposed. But the Commission has no jurisdiction to require that the equipment used is that in which Mr. Hamblin asserts an interest.

It is also beyond the Commission's jurisdiction to assist Mr. Hamblin in maintaining the value of his interests in the premises by requiring in effect a new license applicant at the premises to buy Mr. Hamblin's interest rather than apply for a new license. A liquor license is a purely personal privilege. ORS 471.301(1)(a). Mr. Hamblin does not have exclusive rights to a license at the Castle location.

Mr. Hamblin's interest concerning the sufficiency of outlets in the community was adequately represented by the Commission's staff. The staff cited sufficient licensed outlets as one of the grounds for its refusal recommendation on Mr. and Mrs. Gassner's application.

On June 25, 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:

FINDINGS OF FACT

1. Raymond and Toni Gassner have applied for a Dispenser Class A (DA) license, doing business as THE CASTLE STEAKHOUSE, 14601 SE Division, Portland, Oregon. This is an application for a new license at a restaurant building where the existing DA licensees have lost their lease.

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

- a. ORS 472.160(1) (not demanded by public interest or convenience).
- b. OAR 845-05-030(1) and ORS 472.160(1) (sufficient licensed premises).
- c. OAR 845-05-040(2)(c) (failure to show public not being adequately served by existing dispenser outlets in community).
- d. OAR 845-05-040(2)(b) (not unique or substantially different).
- e. OAR 845-05-040(3)(d) (will provide meal service at only one meal per day).
- f. OAR 845-05-040(3)(f) (lesser services).
- g. Battle Creek Golf Course, Inc. v. OLCC, 21 Or App 179, 534 P2d 204 (1975); and ORS 472.110(4) (quota).

(Commission's Exhibit I.)

3. The proposed outlet will be located in a free-standing building that is designed to house a full-service restaurant.

4. The Castle will have a separate dining room (118 seats), lounge (59 seats), and banquet room (75 seats).

5. The Applicants propose to open the Castle at 4:00 p.m. The full dinner menu would be served from then until 11:00 p.m. The lounge would remain open until 1:00 a.m. or 2:00 a.m. The Applicants would operate six days a week.

6. If the Commission requires, the Applicants would agree as a condition to issuance of a DA license to operate The Castle for both lunch and dinner. The Applicants would prefer to operate for dinner only because that is to be the focus of the business.

7. The entrees on the Applicants' proposed menu include the following:

Filet Mignon	\$ 9.95
Ribeye Steak	8.75
New York Steak	9.50
Sirloin Steak	8.75
Lobster and Choice Filet	14.95
Lobster	11.95
Steak and Shrimp	8.75
New York Cut	7.95
Seafood Combination	7.50
Oysters	7.50
Shrimp	7.50
Steak Sandwich	4.95
Spaghetti	3.95
Fish and Chips	4.25
Giant Ground Beef Burger	3.25

8. The Applicants have reliably projected the following gross sales at The Castle with a 4:00 p.m. opening (see Discussion No. 1 below):

<u>MONTH</u>	<u>TOTAL</u>	<u>BAR</u>	<u>FOOD</u>
November	\$ 34,000	\$ 11,000	\$ 23,000
December	42,000	14,000	28,000
January	42,000	14,000	28,000
February	46,000	15,000	31,000
March	49,000	16,000	33,000
April	49,000	16,000	33,000
May	53,000	17,000	36,000
June	55,000	18,000	37,000
July	58,000	18,000	40,000
August	57,000	19,000	38,000
September	60,000	19,000	41,000
October	<u>60,000</u>	<u>19,000</u>	<u>41,000</u>
TOTAL	\$605,000	\$196,000	\$409,000

9. DA outlets located in Multnomah County have recently experienced average monthly food sales of \$38,064 and average monthly total food and alcoholic beverage sales of \$59,553.

10. There are 17 dispenser outlets located within three miles of the proposed site for The Castle. Commission's Exhibit E. These outlets all received dispenser licenses prior to February, 1981, when a dispenser license was first issued at the Castle location.

11. The following areas contain the populations and numbers of dispenser outlets indicated:

<u>AREA</u>	<u>POPULATION</u>	<u>POPULATION DIVIDED BY 2,000</u>	<u>DA/DB COMMITTED AND IN OPERATION</u>	<u>DC COMMITTED AND IN OPERATION</u>
Multnomah County	564,500	282.25	375	22
State of Oregon	2,635,000	1,317.50	1,403	111

12. The Applicants did not introduce any evidence that The Castle would offer dining service or atmosphere that is

unique or substantially different compared to existing DA outlets within 20 miles.

13. The record does not show that the population of Multnomah County had suffered a recent decline prior to the Applicants' hearing. See Discussion No. 2 below.

14. At the date of the Applicants' hearing there were 67 licenses available for issuance to DA and Dispenser Class B applicants. As of this same date there were 34 DA applications and one DB application pending before the Commission.

15. Darwin Hamblin and a partner operated a DA-licensed business at the site proposed for The Castle from 1981 to 1983. Mr. Hamblin and his partner were evicted from the premises and are no longer in business there. As of April 2, 1984 Mr. Hamblin asserted an ownership interest in equipment located at the premises.

16. The landlord of the premises proposed for The Castle has agreed to provide a fully-equipped restaurant for lease to the Applicants. The landlord has agreed to obtain alternative equipment should the existing equipment for the premises not be available. (Applicants' Exhibit No. 9.)

DISCUSSION

1. The Applicants' projected sales set forth in Finding of Fact No. 8 were shown to be reliable based on the testimony of Raymond Gassner and William Holdner. Mr. Gassner's testimony shows he has operated a dinner-house restaurant in Vancouver, Washington for 13 years. This business is also named The

Castle. Mr. Gassner holds a cocktail license at this business. The Vancouver restaurant has dining seating for 58 and lounge seating for 32. The premises has a similar menu to that proposed for the Portland Castle. The Vancouver facility averages monthly total sales of about \$35,000. About 65 to 70 percent of sales at the Vancouver restaurant are in food. Only about five percent of the sales at the Vancouver Castle occur during lunch. The Vancouver restaurant has been profitable. Mr. Gassner works at the Vancouver restaurant himself, primarily as a cook and a manager. Mr. Gassner would work full-time at the Portland facility if issued a DA license there. The location of the Vancouver Castle is more remote and on a quieter street than the location of the proposed Portland Castle on Division. The Vancouver Castle is often filled to capacity and patrons must wait in line to get a table.

It is quite likely that Mr. Gassner could increase business at the Portland Castle to about \$60,000 a month after one year of operation since he is realizing \$35,000 a month at the much smaller, more poorly located Vancouver facility.

The reliability of the projections was also supported by testimony of Mr. William Holdner, who has been Mr. Gassner's accountant for many years. Mr. Holdner testified that Mr. Gassner is a conservative, hard-working, successful individual who knows how to run a successful restaurant. Mr. Holdner's clients include many restaurateurs. Mr. Holdner believes Mr. Gassner's projections are conservative.

Objector Darwin Hamblin offered evidence to cast doubt on the Applicants' projections. Mr. Hamblin testified how he and his partner had operated a steak and seafood restaurant at the site of the proposed Castle. Mr. Hamblin's restaurant was known as the Nevada City Supper Club. Mr. Hamblin operated the restaurant from 1981 to 1983. Mr. Hamblin's best month's sales at the Nevada City Supper Club was \$47,000. Mr. Hamblin lost approximately \$200,000 at the Nevada City Supper Club.

The Commission does not believe Mr. Hamblin's experience at the location is a reliable indicator of the sales that Mr. Gassner is likely to realize. There are three reasons for this. First, while Mr. Gassner has been successful at The Castle in Vancouver, Mr. Hamblin was eventually unsuccessful at four of his previous restaurant operations. Thus the fact that Mr. Hamblin was unsuccessful at the Castle location does not necessarily imply Mr. Gassner would be unsuccessful. Second, while Mr. Gassner would work at The Castle full-time as an on-site manager, Mr. Hamblin and his partner did not work at the Nevada City Supper Club. Rather, they employed a manager. Mr. Gassner's full-time presence at the business is likely to have a beneficial effect on the profitability and success of the business. Finally, Mr. Hamblin believes his partner at the Nevada City Supper Club defrauded Mr. Hamblin in the business. There is no particular reason to believe that such partnership problems would come up for the Gassners and handicap their operation.

2. In its refusal recommendation, the Regulatory Staff Committee concluded that a population decline in Multnomah County indicated sufficient outlets in the area within 10 miles of The Castle. The Commission finds, however, that the Staff failed to prove a population decline. Commission's Exhibit I indicates that the population of Multnomah County was 561,400 in November, 1982. Hearings Specialist Gerald Lelack's testimony showed this figure fell to 557,500 in July, 1983. However, the License Division's "Fact Sheet" (Commission's Exhibit H) dated January 17, 1984 indicates a population for Multnomah County of 564,500. The precise date when the 564,500 figure was measured is not indicated. However, the use of the figure in the January 17, 1984 document suggests the figure was probably at least as recent as July, 1983. Thus the evidence is unclear and failed to show a population decline at the time of the hearing.

3. The Commission's Regulatory Staff requested that if the Commission grants this license, the Commission require as a condition of license issuance that the business have available sufficient equipment to operate as proposed.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following criteria will weigh against issuing a license:

1. There are sufficient licensed premises in the locality set out in the application, or the granting of a license in the locality set out in the application is not demanded by public interest or convenience. Factors such as declining or static population, business or industrial development in the applicant's community, or by decreasing

sales or patronage at other similarly licensed outlets in that community may be considered. 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).

The Regulatory Staff failed to show that there are sufficient licensed premises within ten miles of the proposed site of The Castle. This is because the record failed to show that there has been a recent population decline in Multnomah County as the Staff had alleged in its refusal letter. See Discussion No. 2. Further, the only other evidence suggesting sufficient premises under the guidelines set out in OAR 845-05-030(1) was that there are 17 dispenser outlets within three miles of the proposed site of The Castle. There was no reasoning or evidence put forth by the staff about why these 17 outlets would indicate there are sufficient outlets in a ten-mile radius. A simple recitation of the number of dispenser outlets within a certain distance of an applicant is not sufficient to constitute a showing of sufficient outlets. Home Plate v. OLCC, 20 OR App 188, 190-191, 530 P2d 862 (1975); Battle Creek Golf Course, Inc. v. OLCC, 21 Or App 179, 185-185, 534 P2D 204 (1975). Consequently, the Commission concludes OAR 845-05-030(1) has not been shown to weigh against the application.

2. 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:

. . . .
(c) 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).

The proposed outlet is located in Multnomah County. Multnomah County contains substantially more than one dispenser outlet per 2,000 population. This constitutes prima facie evidence that the Applicants' community is adequately served. The Applicants have therefore failed to demonstrate any preference for license issuance under OAR 845-05-040(2)(c).

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

. . . .
(b) Applicant's premises will provide dining service or atmosphere which is unique or substantially different in quality, or type from that offered by other licensees within a 20-mile radius as indicated by menu, decor and amenities, entertainment or other such characteristics. 845-05-040(2)-(b).

The Applicant did not present any evidence that The Castle would offer unique or substantially different dining service or atmosphere within a 20-mile radius. The Applicants have therefore failed to show a preference under OAR 845-05-040(2)(b).

4. (1) An application for a dispenser license may be granted or denied on the basis of a comparison with other existing dispenser licenses in the same city or county or with

other pending applications for such licenses anywhere in the state, as provided in sections (2) and (3) of this rule.

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

(a) Applicants premises will provide greater 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(2)(a).

The Regulatory Staff took the position that unfavorable consideration was shown in this case under OAR 845-05-040(3)(f) due to lesser services. The Commission concludes, however, that the Applicants have shown preference for license issuance under OAR 845-05-040(2)(a) (which applies the same standard as OAR 845-05-040(3)(f)) because of the Applicants' comparatively high likely sales and banquet facility. Monthly sales at The Castle have been reliably projected to rise to \$60,000 after one year's operation. This compares favorably to existing dispenser outlets in Multnomah County. Thus the projections show greater services and economic benefit. In addition, the premises will have a 75-seat banquet facility. Banquet facilities are a preference item under OAR 845-05-040(2)(a).

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

. . . .
(d) The applicant will provide meal service at no more than one meal per day. This provision does not apply to Dispenser Class "B" licenses. OAR 845-05-040(3)(d).

The Applicants would prefer to operate for dinner only, opening after 4:00 p.m. This would indicate unfavorable consideration under OAR 845-05-040(3)(d). However, the Applicants would agree to operate during lunch also if the Commission requires this as a condition to license issuance. This would overcome the unfavorable consideration otherwise indicated under OAR 845-05-040(3)(d).

6. The total number of licensed premises dispensing distilled liquor shall not exceed one for each 2,000 population in the state. ORS 472.110(4).

This statute limits the total number of DA licenses available for issuance throughout the state. As the number of available dispenser licenses is not exhausted, the statute does not provide a basis for denying the license. The bases for denying licenses are stated in ORS 472.160 and OAR 845-05-005 through 845-05-070.

In Battle Creek Golf Course, Inc. v. OLCC, 21 Or App 179, 534 P2d 204 (1975), the Court of Appeals recognized the Commission's authority to consider dispenser applications "in terms of the "public interest or convenience" in the future as well as the present. ORS 472.160(1)." Battle Creek, supra at 184. The record contains no particular evidence or rationale, however, on how the public interest or convenience in the future

would be furthered by withholding from Mr. and Mrs. Gassner one of the DA licenses presently available.

ULTIMATE CONCLUSIONS OF LAW

The application for a DA license at The Castle is demanded by the public interest and convenience because the Applicants' likely sales and banquet facility indicate they would provide greater services, facilities and economic benefit with a DA license. This factor overcomes any unfavorable consideration there would be by virtue of the Applicants' desire to operate only for dinner. Even with operating only for dinner, the Applicants are still likely to achieve greater sales than the average DA outlet in Multnomah County. Further, the Applicants would be willing to operate during the lunch hour for a second meal period if required by the Commission.

Although the record fails to establish preferences for license issuance because of uniqueness or inadequate service by existing outlets, the failure to show preference is not the same thing as a showing of unfavorable consideration. Unfavorable consideration was not shown in this case under any of the criteria under OAR 845-05-040(3).

FINAL ORDER

It is hereby ordered that the application for a DA license by Raymond and Toni Gassner, The Castle Steakhouse, 14601 SE Division, Portland, Oregon, be GRANTED upon the payment of appropriate license fees to the Commission.

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

Dated this 26th day of June, 1984.


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.