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BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the)	
Application for a)	
Dispenser Class C (DC))	
License by:)	FINAL
)	FINDINGS OF FACT,
Rose Mary's Food & Beverage, Inc.)	CONCLUSIONS OF LAW,
DUGAN'S)	AND ORDER
1441 NE Broadway)	
Portland, Oregon 97232)	OLCC-84-L-029
- - - - -)	
Multnomah County)	

A hearing in the above matter was held on the 11th day of September, 1984, in Portland, Oregon, before Hearings Examiner Jill Thompson. The Applicant appeared in person and was 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, and applicable statutes and regulations. Pursuant to this review, the Commission enters the following:

BACKGROUND

Applicant currently holds an RMB license, which has existed at the premises since August 1981. Applicant is wholly owned by Steven Dugan. The premises was formerly known as Hamburger Mary's, with Dugan as a co-licensee. Dugan acquired sole ownership in August 1982, and changed the premises name and menu in April 1983. DUGAN'S is about two blocks from the LLOYD Center.

ISSUES

The following issues are raised by the application:

1. The staff contends there are sufficient licensed premises in the area. OAR 845-05-030(1).
2. The staff contends Applicant would offer primarily short-order food. OAR 845-05-040(3)(b).
3. The staff contends Applicant would offer lesser services. OAR 845-05-040(3)(f).
4. Applicant contends it will offer greater services than available elsewhere in its community. OAR 845-05-040(2)(a).
5. Applicant contends it is entitled to a preference for uniqueness. OAR 845-05-040(2)(b).
6. The staff contends Applicant is unable to establish preferences for uniqueness or greater services. OAR 845-05-040(3)(a).

I. SUFFICIENT LICENSED PREMISES

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).

Findings of Fact

1. Staff alleges that population declined in both the City of Portland and Multnomah County from 1983 to 1984. It

states in its refusal letter that the city population declined from 367,000 in 1983 to 365,000 in 1984. However, the Commission takes official notice that License Division's monthly license distribution report dated September 30, 1984 indicates that Portland's 1984 population is 370,963. The refusal letter also states that the county population declined from 564,000 in 1983 to 557,500 in 1984. Although the license distribution report's 1984 population figure is 557,500, the license investigation report prepared in this case, dated May 16, 1984, shows a current county population of 576,500. The investigation report also indicates that the population figures stated in the refusal letter are for 1982 and 1983, rather than 1983 and 1984.

2. Following are city and county DA outlet average sales for 1982 and 1983:

	<u>Gross</u>	<u>Food</u>	<u>Food Sales %</u>
City of Portland - 1982	\$55,231	\$34,540	63%
- 1983	55,218	35,120	64%
Multnomah County - 1982	59,553	38,064	64%
- 1983	59,324	38,499	65%

3. To support its contention of sufficient licensed premises, the staff analyzed recent sales of nine DA licensees in Applicant's area, and of the Applicant. Five DA outlets in Applicant's area experienced declining gross sales in 1983 (compared to 1982) of from two percent to 68 percent, and four experienced increased gross sales of from 13 percent to 98 percent in the same period.

4. Following are Applicant's average sales since 1982:¹

	<u>Gross</u>	<u>Food</u>	<u>Food Sales %</u>
1982	\$33,782	\$31,398	93%
1983	30,951	28,482	92%
1984 (through August)	35,981	33,000	92%

Conclusions of Law

Because of the conflicting data regarding city and county population figures, there is insufficient evidence in the record on which to base a conclusion that city or county population has increased, decreased, or remained static. Further, OAR 845-05-030(1) defines the area in which declining population or development is to be examined as the area in a 10-mile radius of the premises, and there is no evidence pertaining to those elements which is relevant to the area within a 10-mile radius.

Finally, any comparison made on the basis of sales or patronage must be based on "similarly licensed outlets." The only evidence of comparisons made for the purposes of 845-05-030(1) is those between Applicant and DA licensees. Applicant is applying for a DC license, the privileges of which are substantially narrower than those of a DA license. No comparison was offered between Applicant and existing DC outlets

¹ As an indication of demand Applicant submitted a 216-signature petition in support of the application. Also, the Commission received two letters of support from Portland businesses which indicate the writers are willing to go out of their way to use Dugan's to entertain business associates as well as for their personal enjoyment.

within a 10-mile radius. Applicant's average sales (gross and food) increased 16 percent in 1984 over its 1983 sales. Applicant's 1983 sales decrease of eight percent from its 1982 sales occurred during the year that Applicant changed its trade name and menu. Because of Applicant's 1984 increased sales, the Commission concludes that the 1983 decrease does not reflect a continuing sales decline, but was most likely the result of Applicant's menu and name change. In summary, Applicant's sales have increased in the last year, and there is no evidence of decline in population, development or sales of DC licensees in Applicant's community. The Commission concludes that OAR 845-05-030(1) does not weigh against licensure.

II. SHORT-ORDER FOOD

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

. . .

(b) 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. This provision does not apply to Dispenser Class "B" licenses. OAR 845-05-040(3)(b).

Findings of Fact

5. Applicant serves three meals daily. Its breakfast menu offers 20 varieties of omelet priced from \$3.55 to \$5.80; three varieties of eggs Benedict, half and full portions, priced from \$3.00 (half) to \$5.55 (whole); sausage or ham and eggs for \$4.10; Spanish eggs for \$4.75; and two varieties of French toast for \$3.25 or \$4.00. All egg entrees are served

with potatoes and toast or muffins. Applicant also serves a Sunday brunch.

Applicant's lunch menu has 21 sandwiches and hamburgers at \$3.10 to \$5.95, three salads at \$1.95 to \$5.25, and soup or chili.

Applicant's dinner menu offers the following:

Top sirloin bits	\$8.95
Large shrimp saute	8.95
Fish and seafood saute	7.95
Boneless chicken breast	6.95
Meat-, seafood- or vegetable-stuffed baked potato	6.95
Daily catch	Varies
Daily special	Varies

All dinner entrees include appropriate side dishes.

Applicant also offers eight appetizers at \$2.50 to \$6.00, during all open hours. If the application is granted Applicant will install a char-broiler, which will allow him to double the number of dinner entrees it now offers to include steaks, chicken, fish and other broiler-cooked entrees.

6. Approximately one percent of Applicant's food sales are attributable to take-out orders.

7. Applicant does not desire a DA license, and does not intend to apply for one in the future. Mr. Dugan wishes to retain the premises' emphasis on food and to discourage patrons from coming in simply to drink. The 1982 DA application was filed when the premises was known as Hamburger Mary's and Mr. Dugan's former partner wanted to add a lounge.

8. The staff refusal letter stated that the fast-food criterion was being applied in part because its dinner entrees

"are available only after 5:30 p.m.," and because its menu "is primarily made up of breakfast items, sandwiches and burgers."

9. Regardless of whether the application is granted Applicant will add banquet facilities seating 85 to its existing premises. The space is adjacent to the premises, from which it is separated only by a party wall.

Conclusions of Law

The staff's objection to Applicant's menu, insofar as OAR 845-05-040(3)(b) is concerned, is apparently based partly on the fact that the menu offers a greater number of breakfast and lunch items than dinner entrees. This is attributable to the fact that Licensee is open for breakfast, and does not of itself establish a presumption that Licensee specializes in short-order food.

Applicant persuasively argued that the term "primarily fast foods, short order foods . . ." in OAR 845-05-040(3)(b) should not be interpreted to mean simply a preponderance of menu listings, but, rather, should be applied in light of the context in which the meals are served. Applicant pointed out that Elmer's Pancake and Steak House is DA-licensed and serves a preponderance of breakfast items. The Commission concludes that in order for a premises' cuisine to be described as primarily fast or short order, such foods would have to dominate all meal periods the outlet accommodates, or supply a substantial majority of the outlet's revenues. There is no evidence of the proportion of full lunch or dinner entree sales to

breakfast sales. There is no evidence or argument that Applicant's dinner menu contains fast foods.

Applicant's take-out food sales are quite low (one percent of gross sales), and it is adding banquet space for 85. Further, because it will expand its cooking facilities to a degree that will allow it to substantially increase its dinner menu, the proportion of dinner entrees to breakfast and lunch items will rise significantly. The Commission concludes that OAR 845-05-040(3)(b) is not a basis for unfavorable consideration.

III. LESSER SERVICES

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

. . .

(f) 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

10. The refusal letter cited Applicant's total sales, compared to city and county averages; seating, compared to the DA outlets in the comparison survey; and stated that Applicant lacks banquet facilities.

11. The staff stated it would compare Applicant's sales with food sales only of city and county dispenser licensees because the application is for a DC rather than a DA license. The pertinent 1984 figures are as follows:

	<u>Food Sales</u>	<u>Food Sales %</u>
City of Portland	\$35,120	64%
Multnomah County	38,499	65%
Applicant	33,000	92%

12. The staff prepared a comparison survey of 10 DA outlets in Applicant's area. Applicant will have greater seating capacity than three; greater hours of operation than seven; and greater banquet accommodations than five (of the five, four have no banquet facility). Applicant's 1984 food sales average is higher than three of the 10 DA licensees in the survey.

Conclusions of Law

Applicant's current food sales are 94 percent of the city-wide average of all dispenser licensees, and are higher than three of the 10 DA licensees included in the comparison survey. Its seating and banquet accommodations are greater than many outlets in the survey. There is no evidence from which to conclude that Applicant's food sales will decrease if the application is granted. The Commission concludes OAR 845-05-040(3)(f) does not provide a basis for unfavorable consideration.

IV. GREATER SERVICES

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) Applicant's 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).

Findings of Fact

13. Applicant contends that the premises will offer greater services based on the same figures offered by the staff in support of its contention that Applicant will offer lesser services. These figures are presented in Findings of Fact 10 and 11.

14. Applicant offers seasonal outdoor seating for 20 on the sidewalks abutting its premises, which is located on a corner.

15. Applicant projects a food sales increase of \$10,000 monthly, based on its new banquet space and the increased patronage a DC license would bring. Applicant also predicts a \$10,000 increase in alcoholic liquor sales. These projections would result in average gross sales of about \$56,000, and a food sales percentage of 77 percent. The citywide gross sales average for all dispenser licensees is \$55,218 with a food sales percentage of 64 percent.

Conclusions of Law

Applicant's current food sales average is only six percent lower than that experienced by all dispenser outlets in the

area. In order to exceed that average, Applicant's food sales would only have to increase seven percent. Applicant projects a 30 percent increase in food sales, and the Commission concludes this projection is reasonable because of Applicant's new banquet facility and its proposed expanded menu. Applicant will also provide greater services than DA licensees in its neighborhood in terms of hours of operation, banquet facilities, seating and seasonal outdoor dining. The Commission concludes that Applicant has established a preference for licensing under OAR 845-05-040(2)(a).

V. UNIQUENESS

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.
OAR 845-05-040(2)(b).

Findings of Fact

16. Applicant's premises is located in an historic building, is furnished with antiques, has decor featuring hangings and curios which are antique or of historical significance, has substantial hanging and stationary plantings, and offers seasonal outdoor seating. It also has a mezzanine-level art deco-style dining area.

17. The refusal letter argues that Applicant had failed to establish a preference for uniqueness because some of its features are available at existing dispenser licensees within a 20-mile radius.

18. Applicant concedes that other licensees may have one or two of its design and service features, but contends that no single dispenser within a 20-mile radius offers them all, based on Dugan's investigation. Additionally, the Commission received letters from two northwest Portland businesses stating their opinion that Dugan's is unique, and that they prefer to use Dugan's for business meetings, rather than premises closer to them, because of its atmosphere and service.

19. The internal features of the premises have not changed since 1982. In August 1982, the Commission issued a Final Order denying a DA license to the premises. In that Order, the Commission found that the premises' interior decor was substantially different within a 20-mile radius, and that a preference was warranted. Following that Order, Applicant added its outdoor seating.

Conclusions of Law

Applicant has retained all the features previously found by the Commission to establish a preference under OAR 845-05-040(2)(b), and has added seasonal outdoor seating. Applicant's evidence that the premises' combination of interior and exterior features creates a unique atmosphere among licensees within a 20-mile radius is credible. The staff did not controvert Applicant's evidence or offer rebuttal testimony that

Applicants would not be unique among Dispenser licensees in a 20-mile radius. The Commission concludes that Applicant has established a preference under OAR 845-05-040(2)(b).

VI. FAILURE TO ESTABLISH PREFERENCES

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

20. The refusal letter stated that Applicant had failed to establish preferences contained in OAR 845-05-040(2)(a) (greater services) and (b) (uniqueness).

21. The Commission concludes that Applicant has established preferences for greater services and uniqueness.

Conclusions of Law

Because Applicant established preferences for both greater services and uniqueness, OAR 845-05-040(3)(a) does not provide a basis for unfavorable consideration.

ULTIMATE CONCLUSIONS OF LAW

The license should be granted. No negative preferences or considerations have been shown, and Applicant has established preferences for greater services and uniqueness.

FINAL ORDER

It is hereby ordered that the application for a Dispenser Class C (DC) license by Rose Mary's Food & Beverage, Inc. at Dugan's, 1441 NE Broadway, Portland, Oregon, be GRANTED upon

payment of appropriate license fees to the Commission with the following condition:

That the premises be remodeled as proposed and that such remodeling be completed within 90 days of the date of the Final Order in this matter, or the license commitment will be withdrawn.

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.