

alcoholic beverages, in that the Commission would lack the ability to enforce liquor laws).

3. Applicant is located in Metro on Broadway, which is a collection of food concessions having common seating facilities, located in downtown Portland.

4. Applicant's menu includes Belgian waffles with eleven different toppings, five kinds of pancakes, French toast, six kinds of omelets, four quiches, six pates, two salads, soup and 30 entree and dessert crepes. Applicant's hours are 7:00 a.m. to 10:00 p.m. Monday through Thursday, 7:00 a.m. through midnight Friday, and 9:00 a.m. through midnight Saturday.

5. Also located in Metro on Broadway are the Downtown Deli, which has a Retail Malt Beverage license, and five other food concessions offering fast food or desserts.

6. This application was first refused by the Commission in June 1983 on the same grounds cited in Finding of Fact 2. Following that refusal, Applicant and Downtown Deli came to an oral agreement that if a violation were to occur in Metro on Broadway, Applicant and Downtown Deli would be jointly liable, so there would be no need for the OLCC to prove which of the two licensees was responsible. Those terms were satisfactory to the Commission, and on October 4, 1983, it issued a license approval letter contingent upon receiving a written agreement between Applicant and the Downtown Deli reflecting joint liability.

7. Applicant prepared a written agreement and presented it to Downtown Deli, whose owner (who had made the oral agreement with Applicant's owner) refused to sign it. Applicant then applied for a reconsideration of the condition, which was refused on the grounds cited in Finding of Fact 2.

8. Whereas Downtown Deli sells beer and wine (both house and labeled), Applicant wishes only to sell a house wine and sangria. All its glassware will be identified with its name or logo.

9. Applicant will agree as a condition to licensing that, in the event a violation occurs in Metro on Broadway for which it is not possible to identify the responsible licensee (as between Applicant and Downtown Deli), Applicant will be solely liable to defend against any charges brought by the OLCC, and will not raise the defense that the other licensee must have committed the alleged violation.

10. Applicant's average sales between April 1983 and March 1984 were \$16,000. Fifteen percent of Applicant's sales are from breakfast, 47 percent from lunch and 38 percent from dinner. Applicant's total preparation and service counter area is 450 square feet. All tenants have an undivided interest in the common seating area, and no physical partitioning of this area is permitted any of the tenants.

11. Downtown Deli's RMB license carries a condition that "[t]he licensee shall be responsible for all conduct upon the licensed premises."

DISCUSSION

During the hearing, the Commission testified that it viewed the refusal criteria in this case (sufficient outlets and difficulty of enforcement) to be interdependent; that is, that the existence of the Downtown Deli precluded the issuance of any other license in Metro on Broadway because multiple licensees would pose too great a difficulty for Enforcement Division to successfully investigate violations.

This is an improper use of the sufficient outlet refusal criterion, whose only frame of reference is marketplace supply and demand. Likewise, the statute utilized here by the Commission as a refusal criterion on the grounds of difficulty of enforcement is not dependent for its viability on operation of other statutes or rules.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The commission may refuse to license any applicant if it has reasonable ground to believe any of the following to be true:

- (1) That there are sufficient licensed premises in the locality set out in the application, or that the granting of a license in the locality set out in the application is not demanded by public interest or convenience. ORS 471.295(1).

There is no evidence that supports the staff's invocation of this statute. The most recent refusal letter states on this point only that:

. . . Downtown Deli is currently licensed in the same communal dining area proposed to be licensed by the French Rose. This business currently has the privilege of

serving alcoholic beverages in that seating area, including the outdoor dining area for which you have made application."

The staff has made no attempt to meet its burden of proof on the issue. An earlier refusal letter stated that "[s]taff has received no indication that the public needs are not already being adequately met by the existing businesses [sic] licensed at this location." This statement appears to be an attempt by staff to transfer its burden of proof; however, the Applicant is not required to establish that existing licensees are insufficient to meet public demand except in rebuttal of evidence presented by staff supporting the Commission's position. In this case, the staff presented no evidence as to the sufficiency of existing outlets to meet public demand.

2. The Liquor Control Act shall be liberally construed so as:

(a) To prevent the recurrence of abuses associated with saloons or resorts for the consumption of alcoholic beverages.

(b) To eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of such beverages and to promote temperance in the use and consumption of alcoholic beverages.

(c) To protect the safety, welfare, health, peace and morals of the people of this state. ORS 471.030(1).

The staff contends that an unconditional licensing of Applicant would violate the above statute because of the potential difficulty in identifying which licensee is to be held responsible for violation charges. The Commission was satisfied

that this difficulty was obviated by the joint liability agreement previously proposed by Applicant. Applicant now proposes a license condition which would substantially guarantee the same certainty: If a violation is alleged to have occurred at Metro on Broadway, and it cannot be determined which licensee should be held responsible, Applicant will be responsible for defending against the charge and will not argue that Downtown Deli committed the violation. The practical effect of this condition would be that the Commission would not be unable to determine a responsible party for alleged violations.

ULTIMATE CONCLUSIONS OF LAW

The license should be issued. There is no evidence that existing outlets are sufficient to meet public demand, and Applicant has proposed a license condition that would preclude the possibility that the Commission could not enforce the liquor laws at Metro on Broadway.

FINAL ORDER

It is hereby ordered that the application for a Restaurant (R) license by Ecstasy Foods, Inc. at French Rose, 911 SW Broadway, Portland, Oregon, be GRANTED, upon the payment of appropriate license fees to the Commission, and with the following condition:

1. Licensee will solely defend, and be responsible for the disposition of, alleged violations of the alcoholic liquor laws and rules occurring at Metro on Broadway when it cannot be determined which licensee is responsible. In making its defense, licensee will not argue that the fault lies with Downtown Deli.

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

Dated this 24th day of August, 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.