

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

| | | |
|----------------------------|---|---------------------|
| In the Matter of the |) | |
| Application for a |) | |
| Dispenser Class A |) | |
| License by: |) | FINAL |
| |) | FINDINGS OF FACT, |
| Oregon Care, Inc. |) | CONCLUSIONS OF LAW, |
| HERSHEY'S PLACE |) | AND ORDER |
| 815 SW 51st |) | |
| Lincoln City, Oregon 97367 |) | OLCC 84-L-010 |
| - - - - - |) | |
| Lincoln County |) | |

A hearing in the above matter was held on the 3rd day of July, 1984, in Portland, Oregon, before Hearings Examiner Douglas Crumme'. The Applicant appeared in person and was not represented by legal counsel. The Commission was not represented by legal counsel.

On September 24, 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

Oregon Care, Inc. has applied for a Dispenser Class A (DA) license at HERSHEY'S PLACE, 815 SW 51st, Lincoln City, Oregon. Hershey's Place is located at the south end of Lincoln City near the mouth of Siletz Bay. Hershey's Place is a new business that was first opened on a limited basis on September 1, 1983. Full operations with a Seasonal Dispenser's license began on November 1, 1983.

ISSUES

- I. The Regulatory Staff argues the application should be denied because Hershey's will provide lesser services. OAR 845-05-040(3)(f).
- II. The Applicant argues that preference for license issuance is shown because Hershey's will provide greater services.
- III. The Regulatory Staff argues the application should be denied due to sufficient licensed premises. OAR 845-05-030(1).
- IV. The Applicant argues that preference is shown due to inadequate service in the community. OAR 845-05-040(2)(c).
- V. The Applicant argues that preference is shown because Hershey's will provide substantially different dining atmosphere. OAR 845-05-040(2)(b).
- VI. The Applicant argues that preference is shown because Hershey's has seating for under 100 persons and is located in a city with a population of under 25,000 persons.

The Regulatory Staff cited as a refusal ground ORS 472.110(4). This statute alone, however, is not a ground on which to refuse a license where licenses remain available for issuance. DA licenses are presently available for issuance. Therefore, the limited number of licenses available for issuance is not appropriately cited as a refusal ground in this case. This does not mean that quota-related licensing criteria cannot be used when considering an application.

The Regulatory Staff also cited Battle Creek Golf Course, Inc. v. OLCC, 21 Or App 179, 534 P2d 204 (1975) as a separate

refusal ground. However, the Commission has held that the Battle Creek decision does not create any independent basis for license refusal beyond the refusal grounds set forth in the statutes and administrative rules. P 'n' J's, supra at 11. Thus, Battle Creek, supra, is not appropriately a refusal ground.

I. 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

- Hershey's sales have been as follows:

| <u>Month</u> | <u>Actual Sales</u> | | |
|------------------|---------------------|---------------|---------------|
| | <u>Food</u> | <u>Liquor</u> | <u>Total</u> |
| November 1983 | \$17,191 | 4,112 | 21,303 |
| December | 16,525 | 3,831 | 20,356 |
| January 1984* | 17,800 | 1,896 | 19,696 |
| February | 20,932 | 4,095 | 25,027 |
| March | 24,344 | 4,158 | 28,502 |
| April | 20,072 | 3,465 | 23,537 |
| May | 23,426 | 3,820 | 27,246 |
| June | 19,388 | 3,561 | 22,949 |
| <u>July 7-26</u> | <u>23,480</u> | <u>3,710</u> | <u>27,190</u> |
| Average | \$20,351 | \$3,628 | \$23,979 |

* Seasonal Dispenser's license not in effect during January, 1984 only.

2. With a DA license, the Applicants are likely to realize average monthly sales during the first year of operation as follows: Food - \$25,000; Liquor - \$5,000; Total - \$30,000. The factors supporting these projections include planned new advertising, strong local support of the business, as shown by ten witnesses and 14 letter writers, and the greater number of patrons likely to result from the predictability of services that a full-year license brings.

3. Dispenser outlets in the following areas recently experienced the average monthly sales indicated:

| <u>Area</u> | <u>Food</u> | <u>Total</u> |
|----------------|-------------|--------------|
| Lincoln City | 33,352 | 46,737 |
| Lincoln County | 32,854 | 46,630 |

4. Salishan Lodge recently averaged \$235,489 a month in total food and alcoholic beverage sales. Excluding Salishan Lodge, the remaining DA outlets in Lincoln County averaged \$41,660 per month in total food and liquor sales.¹

5. Hershey's has seating for 41 in a downstairs dining room, 41 in an upstairs dining room, and seven at a bar upstairs. Total seating is for 89.

6. There are 17 DA outlets within 10 miles of Hershey's Place. 16 of these outlets have more seating than Hershey's.

7. With the exception of busy weekend hours, Hershey's can close off either its upstairs or downstairs dining room for a banquet group.

¹ The Commission takes official notice that 39 DA licenses are issued in Lincoln County.

8. Hershey's has hosted various banquet groups, including six groups during an eleven-day period in May, 1984. Many of these groups prefer to have cocktails available. (Applicant's Exhibit Nos. 2 and 4.)

9. The size of most banquets held by Lincoln City groups is under 40 persons. Hershey's gives banquet patrons a choice of entrees rather than requiring a single entree.

10. Ten of the 17 DA outlets within 10 miles of Hershey's do not have banquet or conference facilities.

Discussion

Applicant's projection of monthly average total sales of \$46,029 was not accepted because of Mr. Hershey's admissions that the projection was speculative and that he had little personal experience on which to base this projection.

Conclusions of Law

Hershey's will offer lesser services than other dispenser outlets in Lincoln City and Lincoln County because of Hershey's relatively low sales and limited seating.

The Applicant is likely to realize lower sales than the average for DA outlets in Lincoln City and Lincoln County. (See Findings of Fact No. 2 and 3.)

The Applicant has less seating than 16 of the 17 nearest DA outlets to Hershey's. It can be inferred from this that Hershey's seating would also be less than most of the DA outlets in Lincoln City and Lincoln County.

Hershey's banquet facilities might tend to show that Hershey's offers greater rather than lesser services. In this case, however, the Applicant's failure to establish the likelihood of greater sales at Hershey's shows that Hershey's will provide less service and economic benefit than the existing outlets in the community despite the banquet facilities. On balance, then, unfavorable consideration is shown under OAR 845-05-040(3)(f).

II. GREATER SERVICES

(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) 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, entertainment, or 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

Findings of Fact Nos. 1 through 10 above are incorporated into the consideration of whether Hershey's will provide "greater services."

Conclusions of Law

Hershey's will not offer greater services, facilities and economic benefit than existing dispenser outlets in Lincoln

City and Lincoln County because of Hershey's comparatively low likely sales and limited seating. The low sales and limited seating show lesser services despite Hershey's banquet facilities. See Conclusions of Law concerning "lesser services" at page five above. Consequently, preference for license issuance is not shown under OAR 845-05-040(2)(a).

III. SUFFICIENT OUTLETS

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

11. There was no evidence showing declining or static population, declining business or industrial development, or decreasing sales or patronage at other similarly licensed outlets in the Applicant's community.

Conclusions of Law

The record did not establish that there are sufficient licensed outlets in the community under OAR 845-05-030(1). No

evidence was produced on any of the factors listed under this criterion as establishing sufficient outlets.

IV. ADEQUATE SERVICE

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:

. . .

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

12. 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>Licenses</u> | |
|----------------|-------------------|--|-----------------|-----------|
| | | | <u>DA/DB</u> | <u>DC</u> |
| Lincoln County | 36,750 | 18.38 | 44 | 5 |
| Lincoln City | 5,820 | 2.91 | 12 | 1 |

13. A large number of tourists visit Lincoln City. Visits by tourists are markedly higher in the summer. However, the trend is for tourism in Lincoln City to be less seasonal.

Conclusions of Law

The Regulatory Staff has made a prima facie case that the Applicant's community is adequately served under OAR 845-05-040(2)(c) because far in excess of one DA/DB license per

2,000 population have been issued in Lincoln City and Lincoln County.

The fact that there is substantial tourist demand for dispenser services indicates that the community is not as over-licensed as the permanent population figures would indicate. However, the evidence concerning tourism is not specific enough to establish that existing dispenser services are inadequate, given the one-per-2,000 standard.

In light of the above, no preference has been shown for licensure under OAR 845-05-040(2)(c).

V. 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).

Findings of Fact

14. Hershey's Place has a good view of Siletz Bay, the mouth of Siletz Bay and the ocean beyond the bay. The tidal and wave action around the mouth of the bay is dramatic. Seals lie on the beaches near the bay mouth in view of Hershey's. There is a beach with parking facilities in front of Hershey's along the bay, allowing Hershey's patrons a view of the beach crowd. Hershey's has a telescope set up for patrons to enjoy the view in more detail.

15. Two existing dispenser outlets (the Bay House and the Marketplace Restaurant) are located on Siletz Bay. These outlets are back from the mouth of the bay. They do not have the same views of the mouth of the bay, the seals, and the people on the beach as Hershey's.

16. Hershey's is open for breakfast, lunch and dinner. Its dinner menu features a selection of beef, seafood and other entrees. The quality of Hershey's dinner entrees is comparable to the best in the area, as evidenced by the testimony of Dalton Hershey. Further, Hershey's dinner entrees are priced somewhat lower than several nearby dispenser outlets, including the Bay House and Salishan. However, Hershey's menu has not been shown to constitute a unique or substantially different dining service or atmosphere within 20 miles.

17. Hershey's building has a small game arcade, a package-store-licensed grocery area with picnic supplies and a gift shop. These areas are all separated from the restaurant by walls and doors. The game arcade is located about 50 feet down a hallway from the restaurant. Hershey's combination of services is substantially different from those to be found at existing dispenser outlets in the area.

Conclusions of Law

Hershey's view is not so unusual as to make its dining atmosphere unique or substantially different from existing dispenser outlets within 20 miles. Other dispenser outlets have views of Siletz Bay. Each particular dispenser outlet will have its own distinct setting and its own unique view, whether

of the ocean, the mountains or whatever the surrounding environments happen to be. Hershey's view has not been shown to be so extraordinary in comparison to other dispenser outlets in a 20-mile radius that preference for license issuance is shown under OAR 845-05-040(2)(b).

No other features of the premises provide preference under OAR 845-05-040(2)(b). The menu, although of high quality, is not unique or substantially different. The associated gift shop, grocery store and game arcade are not closely enough connected to dining service or atmosphere to show preference under this rule.

VI. SEATING UNDER 100/POPULATION UNDER 25,000

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:

. . .

Applicant's premises are located in a rural unincorporated area or in an incorporated area with a population of less than 25,000. OAR 845-05-040(2)(e).

Findings of Fact

18. The Applicant planned Hershey's to have seating for under 100 persons in part because of the preference for such outlets under OAR 845-05-040(2)(e).

Conclusions of Law

Preference for license issuance is shown in this case due to Hershey's seating for under 100 persons and location in

Lincoln City, population 5,820. (See Findings of Fact Nos. 4 and 11.)

ULTIMATE CONCLUSIONS OF LAW

The application for a DA license by Oregon Care, Inc. for a DA license at Hershey's Place should be granted because of Hershey's seating for under 100 persons and location in a city with a population under 25,000 persons.

The factors showing unfavorable consideration are not sufficiently strong to outweigh the preference factors. Unfavorable consideration has been shown due to lesser services: Hershey's sales are likely to be about 75 percent of the local average. However, one reason for Hershey's somewhat low sales is probably its small number of seats. Since Hershey's small number of seats is specifically made a preference factor under another of the Commission's license criteria, the somewhat low sales are not a serious unfavorable consideration in this case.

The hearing did not show unfavorable consideration due to sufficient licensed premises.

In light of these considerations, the application should be granted.

FINAL ORDER

It is hereby ordered that the application by Oregon Care, Inc. for a Dispenser Class A (DA) license at Hershey's Place, 815 SW 51st, Lincoln City, Oregon, be GRANTED upon 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 28th day of September, 1984.



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.