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, CONCLUSIONS OF LAW, AND ORDER
Alberto Sabatino PEPPINO'S 75 N. Main Street Ashland, Oregon 97520 - - - - - - - - - - - - - - Jackson County	)	OLCC-84-L-009

A hearing in the above matter was held on the 11th day of July, 1984, in Medford, Oregon, before Hearings Examiner Allen R. Scott. The record remained open until July 21, 1984, for receipt of further evidence from Applicant. The Applicant appeared in person and was not represented by legal counsel. The Commission was not represented by legal counsel.

On October 22, 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 seeks a Dispenser Class C (DC) license at PEPPINO'S, a restaurant located in downtown Ashland. Applicant has held a Restaurant License at this premises since July, 1983. The premises has two dining areas. The larger area will have a formal atmosphere and will be used primarily for service of complete dinners. Applicant intends the smaller, less formal area, to be used for family and pizza service.

ISSUES

I. The staff asserts that there are sufficient licensed premises in the locality set out in the application. (OAR 845-05-030(1)).

II. The staff asserts that Applicant's dining service and atmosphere are not unique (OAR 845-05-040(2)(b)). Lack of uniqueness is not, of course, a basis for denial of an application. Applicant claims a preference under this criterion.

III. The staff asserts that Applicant has not established inadequate service in the area. (OAR 845-05-040(2)(c)). This criterion is also not a basis for denying an application.

IV. The staff asserts that Applicant's premises will provide lesser services, facilities, and economic benefit. (OAR 845-05-040(3)(f)). The Staff cites the Applicant's sales figures as the sole basis for the use of this criterion.

V. The evidence establishes that Applicant is entitled to preference because of the location of the premises in a town having a population of less than 25,000 (ORS 472.114).

I. SUFFICIENT LICENSED PREMISES

The existence of sufficient licensed premises in the locality set out in an application shall weigh against granting the application. 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. Jackson County, with a population of 133,350, presently has 66 DA and DB licenses and 6 DC licenses.

2. The City of Ashland, which has a population of 16,360, presently has 11 DA and DB licenses and 2 DC licenses.

Conclusions of Law

The Staff cites only the number of premises in the city and county, but provides no information regarding the number of premises or the population within a 10-mile radius of the Applicant's premises as is required by the regulation. There is, thus, no factual basis for concluding that there are sufficient licensed premises in the locality.

The Commission concludes that this criterion is not a basis for denying the license.

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 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

3. Applicant will serve lunch and dinner. The hours of operation will be 11:00 a.m. to 10:00 p.m.

4. The food at Applicant's premises is Italian. An extensive selection of dinners is offered, including five veal dishes, five chicken dishes, five styles of spaghetti, four styles of fettuccine, tortellini, two ravioli dishes, lasagna, cannellone, and calzone. The dinners range in price from approximately $6.00 to approximately $10.75. In addition, four special dinners are offered, including New York steak, scampi

all' italiana, scallops alla ghiotta, and calamari. These dinners are priced from $9.50 to $12.95.

5. The menu also offers approximately 12 varieties of pizza and six varieties of calzone. The menu also contains several side orders, beverages, and a children's menu.

6. Applicant is a native of Italy. He spent several years in Italy working as a cook and otherwise learning the restaurant business. He has cooked in several restaurants in Southern Oregon since coming to the United States.

7. The Italian food served at Applicant's premises is high quality, authentic Italian cuisine. Applicant uses good ingredients and uses his experience and expertise to prepare dishes which are superior to that offered at the other Italian restaurants in the area. Veal, for example, is prepared in five different styles: sauteed with mushrooms, capers and lemon butter; sauteed with artichokes and mushrooms with a cream sauce; sauteed in butter and mushrooms and simmered in red sauce; sauteed in butter and flamed with marsala wine; and baked with parmigiana and mozzarella cheese and prosciutto. Chicken and pasta dishes are also prepared in several different ways.

8. There are three existing DA's in the Ashland area which serve Italian food. However, none serves Italian cuisine of the quality prepared by Applicant.

9. There is no Italian restaurant with a Dispenser Class A license within 20 miles that serves food of the same quality and authenticity that Applicant provides.

10. The atmosphere and style at Applicant's premises is intended to be that of an Italian trattoria, an informal, family-style gathering spot for the community.

Conclusions of Law

Applicant's claim to uniqueness is based upon the quality and authenticity of his Italian cuisine. His position is supported by the testimony of two witnesses, both credibly claiming some expertise in judging Italian cuisine and food preparation in general. One of the witnesses is of Italian descent and lived for a number of years in Italy. He has also eaten at a large number of Italian restaurants in the United States. The other witness is the owner of a chef placement service. He has had extensive professional experience in dining and in judging the quality of food. Although both witnesses were obviously friendly toward the Applicant, the Commission believes that their testimony was both sincere and knowledgeable.

Applicant's claim to quality and authenticity is also supported by two newspaper reviews of his restaurant. One review, appearing in the Mail Tribune of Medford, praises the food highly. The Reviewer states: "The service was a little disorganized, but the food was top-notch -- one of the best meals we've had in a while." The same reviewer also states: "I tried the chicken dish with broccoli, cauliflower and tomatoes, since I have not seen anything like that on a menu around the Rogue valley. It was a pleasing combination. I'd order it

again." The other review appeared in the Daily Tidings of Ashland. The reviewer states, in part:

> This is a quality operation that cuts no corners. Ingredients are fresh and imaginatively blended, and prepared with flair. By combining the best influences of Northern and Southern Italy as freely as a chef adds a pinch of this or that spice to the pot, the results are robust and satisfying. Portions are ample without being overwhelming."

The review goes on to praise most of the dishes and to comment on the "velvety smooth sauces" which "set every entree apart from the ordinary."

The testimony of the witnesses further establishes that no other restaurant in the Southern Oregon area offers Italian food of similar quality.

The Commission concludes that the Applicant is entitled to preference under this criterion.

III. INADEQUATE SERVICE IN THE AREA

> Preference in licensing may be given to an Applicant showing any one or more of the following. Applicant shall have the burden of proving that these provisions apply:
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> . . .
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> 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

11. The City of Ashland has a population of 15,360 and presently has eleven DA and DB licenses and two DC licenses in operation.

12. Jackson County has a population of 133,350 and has 66 DA and DB licenses and 6 DC licenses in operation.

Conclusions of Law

The City of Ashland has more than one dispenser outlet per 2,000 population. Jackson County has slightly more than one per 2,000 population.

Applicant presented evidence that Ashland is a major tourist center and that it needs more than the average number of dispenser outlets. However, Applicant provided no specific evidence that the present dispenser outlets in Ashland are inadequately serving the needs of local people and tourists. The Commission concludes that Applicant has not established preference under this criterion.

IV. LESSER SERVICES, FACILITIES, AND BENEFIT

> 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

13. Sales at Applicant's premises since it opened in July, 1983, have been as follows:

Month	Food	Beer & Wine	Total
1983			
July	$ 9,494	$ 0	$ 9,494
August	13,018	593	13,610
September	9,567	486	10,053
October	8,056	404	8,460
November	5,320	704	6,024
December	6,744	496	7,240
1984			
January	3,743	No Record	3,743
February	3,987	No Record	3,987
March	8,610	161	8,771
April	7,842	451	8,293
May	8,866	614	9,480
June	13,760	984	14,744
Average	$ 8,250	$543 (9 mos)	$ 8,793

14. Existing DA outlets in Ashland have had the following average monthly sales: food - $24,680; alcoholic liquor - $15,683; total - $40,363.

15. Existing DA outlets in Jackson County have the following average monthly sales: food - $29,635; alcoholic liquor - $14,721; total - $44,356.

Conclusions of Law

Applicant estimated that if the license is granted, average monthly sales at the premises will be as follows: food - $21,932; alcoholic liquor - $2,251; total - $24,183. Thus, even if these "projections" are accurate, Applicant's gross sales are likely to remain significantly below the average for DA premises in the area. This is evidence that Applicant's premises will serve fewer patrons than existing DA premises on

the average. In any event, the Commission concludes that the projections are not altogether credible, as they involve a tripling of present sales. Applicant provided no convincing theory or formula to establish the validity of the projection.

Applicant argues that the average in this instance is somewhat misleading. He points out that one of the existing premises, the Ashland Hills Restaurant, has average sales of approximately $115,000 per month. This figure distorts the average. Applicant argues that a median figure would be more meaningful. The median gross monthly sales of existing DA premises in Ashland is approximately $28,000. Applicant's argument, thus, is somewhat persuasive, in that Applicant's projected sales of approximately $24,000 would be close to the mid-point of the sales at existing DA premises in the area. Nevertheless, even under this computation, Applicant's sales are less than existing DA premises in the area.

The Commission concludes that Applicant's premises will probably serve fewer patrons than existing DA premises in the area. However, it should be noted that Applicant is applying for a DC license and, therefore, a comparison with existing DA premises is not particularly meaningful. The Commission concludes that, although this criterion provides some basis for denial, it is not of great weight in this particular matter.

V. PREFERENCE FOR LOCATION

> Preference in licensing may be given to dispenser's license applicants where an applicant's premises are located in a rural or unincorporated area or in an incorporated area with a population of less than

25,000, or applicant's premises has seating for 100 or fewer patrons. OAR 845-05-040(2)(d).

Findings of Fact

16. Applicant's premises is located in Ashland, a town having fewer than 25,000 population.

Applicant is entitled to preference under this criterion because of its location in a town having less than 25,000 population. The Commission concludes that this preference helps to offset the fact that Applicant's premises will probably serve fewer patrons than do existing DA premises in the area.

ULTIMATE CONCLUSIONS OF LAW

Although Applicant's premises will probably serve fewer patrons than do existing DA premises on the average, this factor is outweighed by Applicant's unqiue food service and by the fact that Applicant's premises is located in a small town. OAR 845-05-040(2)(b), (2)(d).

FINAL ORDER

It is hereby ordered that the application for a Dispenser Class C (DC) license by Alberto Sabatino in the trade name Peppino's, 75 North Main Street, Ashland, Oregon 97520, be GRANTED upon payment of appropriate license fees to the Commission, with issuance of the license subject to the following condition:

1. That Applicant's premises be ready for operation as a Dispenser Class C license within 90 days of the Commission's Final Order in this matter or that the commitment of the license be withdrawn.

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 October, 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.