

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the)	
Application for a)	
Dispenser Class A (DA))	
License by:)	FINAL
)	FINDINGS OF FACT,
The Corner Pocket, Inc.)	CONCLUSIONS OF LAW,
dba THE CORNER POCKET)	AND ORDER
1331 Waverly Drive SE)	
Albany, Oregon)	OLCC-84-L-032
-----)	
Linn County)	

A hearing in this matter was held on October 29, 1984, in Albany, Oregon, before Hearings Examiner Douglas Crumme'. The Applicant appeared and was represented by D. Michael Mills, Attorney at Law, Salem, Oregon. The Commission was not represented by legal counsel.

On May 28, 1985, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Hearings Examiner, Exceptions to the Proposed Order of the Hearings Examiner, and Response to Exceptions. Based on this review, the Commission makes the following:

BACKGROUND

Corner Pocket, Inc. has applied for a Dispenser Class A (DA) license at The Corner Pocket, 1331 Waverly Drive SE, Albany, Oregon. The Applicant opened The Corner Pocket with a retail malt beverage (RMB) license in March, 1984. The Corner Pocket is a franchise. Of 44 Corner Pockets in other states, 29 have cocktail license privileges. The Applicant's president is Ron Abel, an experienced restaurateur who holds DA licenses at the Union Oyster Bar restaurants in Salem and Eugene.

ISSUES

- I. The Regulatory Staff argues the application should be denied because the Applicant offers primarily fast or short order foods. OAR 845-05-040(3)(b).
- II. The Regulatory Staff argues the application should be denied because The Corner Pocket will be operated primarily as a tavern, rather than as a restaurant, as indicated by factors emphasizing the sale of alcoholic liquor. OAR 845-05-040(3)(e)(B).
- III. The Regulatory Staff argues the application should be denied because the premises will provide lesser services, facilities and economic benefit to the area or to the general public. OAR 845-05-040(3)(f).
- IV. The Regulatory Staff argues that the application should be denied because The Corner Pocket will neither offer greater services nor be unique among dispenser outlets within a 20-mile radius. OAR 845-05-040(3)(a).
- V. The Applicant contests the staff's position and argues that preference for license issuance is shown because the Applicant's community is not adequately served by existing dispenser outlets (OAR 845-05-040(2)(c)) and because the Corner Pocket is unique. OAR 845-05-040(2)(b).

I. FAST FOOD EMPHASIS

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

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(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

1. THE CORNER POCKET's menu offers the following items:

APPETIZERS

Chicken Strips	\$2.29
Sea Chunks	2.29
Clam Strips	2.50
Chicken, Fish & Clams	4.90
Nacho Platter	2.25
Nacho Chips	1.25
Mushroom Basket	-
Zucchini Strips	-
Cauliflower	-
Potato Skins	-

STUFFED POTATOS

Bacon and Cheese	\$2.75
Southern Special	3.95

ENTREES

Ribeye Steak	\$9.95
Top Sirloin Steak	6.95
Prawns	6.95
Steak and Prawns	10.95
Oysters	5.95
Scallops	-
Clams	-
Seafood Combination	-
Chicken Strips	-

HAMBURGERS

Regular Hamburger	\$2.45
Cheeseburger	2.60
Double Burger	3.75
Mushroom Burger	2.95
Chili Cheeseburger	3.50
Bacon Cheeseburger	2.95
Bunless Burger	2.35
Taco Burger	3.25

SANDWICHES

French Dip	\$2.95
Turkey	2.95
Club	3.75
Pastrami	3.25

Ham and Cheese	2.95
Ham and Mushrooms	2.95
Roast Beef and Cheese	2.95

SALADS

Chef Salad	\$3.50
Small Chef Salad	2.50
Taco Salad	3.50
Small Taco Salad	2.50

PIZZA

Canadian Bacon and Pineapple	-
Pepperoni	-
Canadian Bacon	-
Salami Linguica and Olives	-
Combination	-

SIDE ORDERS

Soup	-
Chili	-
French Fries	-
Onion Rings	-
Garlic Bread	-
Beef Franks	-
Beef Sausage	-
Beef Jerky	-
Pepperoni Sticks	-
Nuts	-
Potato Chips	-

(Applicant's Exhibits 9 and 11.)

2. The Applicant would remodel an existing game room into a dining room if issued a DA license.

3. The Corner Pocket would have seating in the following areas after the proposed remodeling:

<u>AREA</u>	<u>SEATING</u>	<u>PERCENT OF FLOOR SPACE*</u>	<u>PRIMARY USES</u>
Dining Room	46	9.3	Dining
Lounge	84	24	Drinking and Dining

Pool Room	10	50	Pool Playing At 14 Tables
Dance Room	53 (approx.)	16.7	Dance Room and Banquet Area

* Percent of floor space of those areas of the premises available to patrons for dining and drinking, playing pool or dancing. Excludes rest rooms and areas of the premises not open to the public.

4. The lounge has a 37-foot long bar.
5. The lounge is separated from the pool room by a floor-to-ceiling wall that consists primarily of tempered glass windows, allowing lounge patrons a good view of the pool area.
6. The Applicant's lounge is available for the service of full meals. The tables in the lounge are large enough to accommodate patrons eating full meals.
7. The seating in the dance area is at cocktail-sized tables.
8. The Applicant offers live music in its dance room on Thursday, Friday and Saturday evenings.
9. The Corner Pocket's entrees have accounted for about 40 to 45 percent of total food sales since The Corner Pocket began offering the entrees in October 1984, as evidenced by the estimate of Corner Pocket, Inc. manager John Rhoades.

Conclusions of Law

The Commission has interpreted OAR 845-05-040(3)(b) as follows:

[T]he 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 [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 accomodates, or supply a substantial majority of the outlet's revenues. OLCC Final Order, Rose Mary's Food and Beverage, Inc., OLCC-84-L-029, Dugan's, December 1984.

The Corner Pocket would provide primarily fast or short order foods under the interpretation in Dugan's, as indicated by several factors.

First, although the focus of analysis under Dugan's is not simply on menu listings, the fact that fast and short order foods so greatly outnumber entrees at The Corner Pocket is a strong indicator that fast or short order foods will dominate both the lunch and dinner meal periods that the premises is open and will supply a substantial majority of revenues. The fast or short order foods on The Corner Pocket menu such as sandwiches, hamburgers, appetizers and side orders, number about 35 items plus pizza, as opposed to just nine entrees.

In Dugan's, the Commission concluded the evidence did not show the Applicant would primarily provide fast or short order foods in part because a number of the fast or short order foods were on the breakfast menu. Thus a simple counting of fast foods did not show whether fast foods dominated lunch and dinner or whether fast food sales dominated all sales. The Corner Pocket, in contrast, is not open for breakfast. Its

full selection of fast and short order foods are available during the lunch and dinner periods and are in competition with entree sales. Thus, the count of fast foods versus entrees is a much more telling indicator in the case of The Corner Pocket than in Dugan's that fast foods and short order foods are primarily provided.

A second factor indicating that The Corner Pocket would provide primarily fast or short order foods under the interpretation set forth in Dugan's is that the dining room will take up only about 9.3 percent of the public floor space at the premises. The remainder of the floor space will be in the lounge, the pool room and the dance area. These areas are probably more conducive to fast and short order foods than full meals because of the nature of the facilities and activities that will take place in these areas. This floor space breakdown is likely to contribute to fast and short order foods dominating both meal periods at the Corner Pocket and supplying a majority of the Corner Pocket's revenues.

A third factor indicating that the Corner Pocket would primarily provide fast or short order foods is the fact that entree sales have accounted for as little as 40 percent of food sales since entree sales began in October 1984. At this level, fast and short order food sales exceed entree sales by a factor of as much as 50 percent. Thus, fast and short order foods have supplied a substantial majority of the Corner Pocket's food revenues.

In light of the above, some unfavorable consideration is indicated for this application under OAR 845-05-040(3)(b).

II. EMPHASIS ON SALE OF ALCOHOL

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

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(e) The applicant's premises will be operated primarily as a tavern rather than as a restaurant, as indicated by factors emphasizing:

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(B) The sale of alcoholic liquor to a greater degree than food service. Subsection (e) does not apply to Dispenser Class "B" licenses. OAR 845-05-040(3)(e)(B).

Findings of Fact

10. The Applicant's sales at The Corner Pocket have been as follows:

<u>Actual Sales</u>				
<u>Month</u>	<u>Food</u>	<u>Total Food & Alcoholic Beverages</u>	<u>% Food Sales To Total Food & Alcohol Sales</u>	<u>Pool/Misc.</u>
Mar (21-31)	\$2,402	\$ 8,281	29	\$4,284
April	3,996	14,097	28	7,526
May	3,914	14,640	27	7,317
Jun	3,354	12,664	26	4,734
Jul	2,886	10,886	27	3,915
Aug	3,169	15,862	20	4,594
Sep	4,570	15,632	29	4,641
Oct	5,468	20,004	27	6,108
Nov	7,660	22,468	34	7,172
Dec	<u>8,092</u>	<u>22,982</u>	<u>35</u>	<u>7,983</u>

11. The Applicant's percentage of food sales to total food and alcoholic beverage sales is not likely to be higher

than 37 percent with a DA license, as evidenced by the Applicant's projection. The Applicant projects 37 percent food sales despite the addition of cocktails because of the proposed change of the game room into a 46 seat dining room, because the Applicant plans to increase efforts to promote The Corner Pocket for banquets and groups, and because of the belief that cocktails would draw in more patrons to dine.

12. The Commission notes Findings of Fact 2 through 8 in connection with the issue of whether the Corner Pocket would emphasize the sale of alcohol.

13. The Applicant has hosted several functions for large groups in its pool area. Food was served at these functions. The Applicant has not yet held banquets or meetings in its dance area. However, the dance area would work well for such use, and the Applicant intends to promote that area for groups and meetings.

14. The Corner Pocket is a new facility that was custom-constructed for its present use. The premises features oak fixtures and decor. The colors and furnishings were carefully coordinated to create an attractive, modern atmosphere as opposed to what one might traditionally associate with a pool hall. (Applicant's Exhibits 1 through 8, Commission's Exhibit D.)

15. The Applicant has installed a high quality ventilation system to help make the air inside The Corner Pocket clean and fresh, as opposed to the stale and smokey atmosphere that might be associated with a pool hall.

Conclusions of Law

The Corner Pocket as remodeled with a DA license would have an emphasis on the sale of alcoholic beverages. The emphasis on the sale of alcoholic beverages is indicated in part by the likely percentage of food sales to total sales at the premises. The Applicant has projected that alcoholic beverage sales will probably be nearly twice as high as food sales.

The Corner Pocket's emphasis on the sale of alcoholic beverages is also shown by the large percentage of floor space at the premises that is devoted to activities with a drinking rather than a dining emphasis. See Finding of Fact 3. The dining room will comprise only 9.3 percent of the floor space. The remaining 90.7 percent of the floor space, including the lounge, the pool area and the dance area, are likely to emphasize drinking over dining because of the nature of the facilities and activities in these areas, despite the effort the Applicant has made to create a modern, attractive facility unlike a typical pool hall.

As a result of these factors, some unfavorable consideration is indicated for this application under OAR 845-050-40(3)(e)(B).

III. LESSER SERVICES

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

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(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

16. Nine of the nearest eleven dispenser outlets to The Corner Pocket have more dining room seating than The Corner Pocket will have in its proposed 46-seat dining room.

17. Six of the nearest eleven dispenser outlets to The Corner Pocket have banquet rooms.

18. None of the existing dispenser outlets in Albany or Linn County have more than about two pool tables.

19. The capital investment for the land and building at The Corner Pocket, excluding parking, was approximately \$350,000. The Applicant's investment in improvements to the building has been \$250,000.

20. During a recent 12-month period, dispenser outlets in Albany and Linn County experienced the following average monthly sales:

<u>Area</u>	<u>Food Sales</u>	<u>Total Sales</u>	<u>Percent of Food To Total Sales</u>
City of Albany	37,443	52,586	71
Linn County	25,144	36,910	68

21. In addition to the sales set forth in Findings of Fact 10, The Corner Pocket averaged about \$6,300 in food

sales in January and February 1985, as evidenced by the Applicant's estimate.

22. The issuance of a DA license at the Corner Pocket plus the other changes the Applicant has made or would make would be likely to cause an increase in its recent monthly sales, for several reasons. First, the Applicant proposes to convert its electronic game room into a new 46-seat dining room. Second, the Applicant has changed a portion of the pool room into the separate dance area. The dance area is suitable for banquets and groups. The Applicant intends to promote this area for banquets and groups. Third, a large number of persons have indicated an interest in cocktails at The Corner Pocket. These persons include seven witnesses at the Applicant's hearing, 16 persons who signed letters in support, and 802 persons who signed the Applicant's petition. Finally, The Corner Pocket is located in the largest shopping center in Albany. The shopping center is located on a heavily traveled arterial in a busy and growing section of the city. The shopping center is a commercial magnet for a large area beyond the city limits of Albany. The Corner Pocket would be the only dispenser outlet in the immediate vicinity of this shopping center.

23. The likely size of the increase in the Applicant's sales with a DA license has not been reliably established. The Applicant has not established that its sales would necessarily equal or exceed the average sales at DA outlets in Albany or Linn County. See Discussion below.

Discussion

The Applicant projects that with a DA license its average sales would increase to about \$14,000 a month in food and \$23,000 a month in alcoholic beverages, for a total of \$37,000 a month. These projections would represent an increase in total sales of about 61 percent and an increase in food sales of about 58 percent from the Corner Pocket's most recent specific sales available from December, 1983.

A main point that the Applicant cites in support of the \$37,000 per month sales projection is that a Corner Pocket in Cedar Rapids, Iowa that opened in the spring of 1984 with a cocktail license averaged about \$49,000 per month in its first five months of operation. The Cedar Rapids Corner Pocket has a less extensive and less expensive menu than the Applicant.

The experience at the Cedar Rapids outlet does not establish that the Applicant's projection is reliable, however. There are many other factors besides the availability of cocktails that could account for the relatively high sales at the Cedar Rapids outlet. Although the experience at the Cedar Rapids outlet shows the Applicant may have the potential to do a much higher sales volume, it does not show that such a volume is necessarily likely.

The Applicant also argues that the projections are supported by evidence of The Corner Pocket's sales during two occasions when special dispenser licenses (ORS 472.195) were exercised at the premises. However, the evidence in this area

was also not specific enough to support the particular projections. The evidence concerning this was limited to testimony that The Corner Pocket experienced "dramatic" sales increases during the two periods when the special dispenser licenses were exercised. The first occasion when a special dispenser license was exercised was a party held in conjunction with a river raft event. The second occasion was The Corner Pocket's six-month anniversary. The evidence that increases in sales during these events were "dramatic" is too imprecise to allow the specific projection of a 61 percent increase in total sales. Further, these appear to have been special events designed to draw in an unusual number of patrons to the premises. The record does not show that the Applicants would experience similar patronage levels on a regular basis with a DA license.

The specific sales projections with a DA license are undercut to a degree by the fact that food sales at The Corner Pocket dropped in January and February 1985, after hitting a high in December 1984. This downturn after ten months of operation makes it appear less likely that the projected future large increases will be achieved.

Conclusions of Law

The Applicant will offer lesser services than existing outlets in Albany and Linn County in several categories. The Corner Pocket would offer less dining room seating than nine of the nearest eleven dispenser outlets to it. The fact that The Corner Pocket would have a dance area that could be used for

banquets does not particularly indicate the premises would offer greater services, since most of the nearest dispenser outlets also have banquet facilities. The Corner Pocket's \$600,000 investment in land, building and furnishings has not been shown through any comparative evidence to constitute a greater investment than other pending applicants or existing licensees.

On the other hand, The Corner Pocket would offer many more pool tables than nearby outlets. Further, although the Applicant has not reliably established that sales would rise to the Albany and Linn County dispenser averages, the Applicant's sales are likely to rise significantly with a DA license because of the new dining room and other factors listed in Finding of Fact 22. The Corner Pocket certainly has a potential to reach the local dispenser sales average.

The Commission concludes that any unfavorable consideration shown for this application under OAR 845-05-040(3)(f) due to lesser services is slight.

IV. 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:

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(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

24. The record does not contain any evidence to indicate that the Applicant's menu is unique or substantially different in comparison with other dispenser outlets within 20 miles.

25. The opportunity at the Corner Pocket to eat in the lounge and watch the activity through the windows in the 14-table pool room is unique in comparison to existing dispenser outlets within 20 miles.

Conclusions of Law

A Corner Pocket patron can eat in the lounge and observe the activity in the 14-table pool room through the windows separating the lounge from the pool room. No other dispenser outlet within 20 miles has nearly as many pool tables or affords a view of such a large number of pool tables while dining. Thus, the Corner Pocket affords a unique type of dining atmosphere.

The Corner Pocket's uniqueness is comparable in some respects to the uniqueness that might be found at restaurants associated with bowling alleys where the Commission has issued dispenser licenses.

This application is similar to a recent case in which the Commission concluded there was a preference for uniqueness under OAR 845-05-040(2)(b) due to an Applicant's combination of dining

service and entertainment, including a pool room with 15 tables. OLCC Final Order, North's Restaurants, Inc., Fred's Good Times, June, 1984.¹

There are also parallels to a recent case in which the Commission found preference under OAR 845-05-040(2)(b) because an Applicant offered unique entertainment in the room in which dining service was offered. OLCC Final Order, The Last Laugh, Inc., The Last Laugh, May, 1984.

Consequently, preference for license issuance is shown under OAR 845-05-040(2)(b).

V. LACK OF GREATER SERVICES OR UNIQUENESS

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

26. The Commission notes Conclusions of Law III and IV in connection with whether unfavorable consideration is indicated under OAR 845-05-040(3)(a).

¹ Although the Corner Pocket is similar to Fred's Good Times with respect to uniqueness due to the number of pool tables, there were differences between the two cases. Fred's Good Times had a greater selection of entrees than the Corner Pocket and the issue of "fast foods" was not cited in Fred's as a basis for unfavorable consideration. Further, Fred's had a larger dining room than the Corner Pocket and the record in Fred's reliably established that food sales would be at least 50 percent of total food and alcoholic beverage sales. Thus, the Commission did not find unfavorable consideration in Fred's due to an emphasis on the sale of liquor. Fred's Good Times, supra.

Conclusions of Law

Preference was not shown in this application under OAR 845-05-040(2)(a) for greater services but was shown under OAR 845-05-040(2)(b) for uniqueness. Consequently, unfavorable consideration is not shown under OAR 845-05-040(3)(a).

VI. 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:

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(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).

Findings of Fact

27. The Corner Pocket is located in the City of Albany and in Linn County. These areas contain the following populations and numbers of dispenser outlets:

<u>Area</u>	<u>Population</u>	<u>Population Divided By 2,000</u>	<u>DA/DB Licenses</u>
City of Albany	27,736	13.87	16
Linn County	89,350	44.06	33
State of Oregon	2,635,000	1,317.00	1,393

28. The Corner Pocket is located in the Albany Plaza Shopping Center, which is the largest shopping center in Albany.

The shopping center is a commercial magnet for a large area beyond the city limits of Albany. There is also a large Fred Meyer shopping center across the street from the Albany Plaza.

29. The Corner Pocket would be the only dispenser outlet located in the Albany Plaza Shopping Center area. The existing DA outlets in Albany are all located within about 1.5 miles of The Corner Pocket. Applicant's Exhibit 10.

Conclusions of Law

OAR 845-05-040(2)(c) provides preference for license issuance if the Applicant's community as defined under OAR 845-05-030(1) is not adequately served by existing dispenser outlets. OAR 845-05-030(1) defines the Applicant's community as the area within a 10-mile radius unless the Applicant establishes that a substantial portion of its patronage is from a larger or smaller area. The Corner Pocket has established that a substantial portion of its patronage would come from throughout Linn County because the Corner Pocket would be the only dispenser outlet located at the Albany Plaza Shopping Center, which is the largest shopping center in Linn County. The shopping center draws customers from throughout the County because of its size. The fact that the Corner Pocket offers unique entertainment and dining service in a 20-mile radius also establishes the likelihood the premises will draw a substantial portion of its patronage from throughout Linn County.

OAR 845-05-040(2)(c) does not offer specific guidance on what standards to employ to determine that a community is not adequately served. However, a reasonable factor to look at to

make this determination is whether the community contains less than the number of dispenser licenses per population authorized for issuance to the State of Oregon as a whole. The number of DA and DB licenses authorized for issuance in Oregon exceeds 1.1 per 2,000 population. ORS 472.110(4) and (5), ORS 472.113(1) and (2). The Applicant's community, Linn County, has only about 67 percent of this figure. This large disparity indicates that Linn County is not adequately served.

This large disparity overcomes the prima facie evidence of adequate service that would otherwise be indicated under OAR 845-05-040(2)(c) due to the fact that the City of Albany has more than one dispenser outlet per 2,000 population. The County figures carry greater weight in this case since the Applicant has established that its patrons come from throughout the County.

In light of the above, preference for license issuance is shown under OAR 845-05-040(2)(c).

ULTIMATE CONCLUSIONS OF LAW

This application should be granted due to the preferences shown because the Corner Pocket would be unique and its community is not adequately served. These factors overcome the negative considerations. The Corner Pocket will have a new dining room and an extensive food menu which will compensate for any emphasis on alcohol that might otherwise be a basis for refusal. The unfavorable consideration shown due to lesser services is not particularly strong because the Corner Pocket's

level of services will not be that far below existing local outlets and the Corner Pocket has a potential to experience large future sales increases.

The Commission notes that there is strong local support for the issuance of this license. Further, the Commission has a responsibility to encourage the development of Oregon industry in licensing actions where consistent with other laws and rules. ORS 471.030(2). These factors help tip the balance in favor of license issuance in this case.

FINAL ORDER

The Commission orders that the application by Corner Pocket, Inc. for a Dispenser Class A license at The Corner Pocket, 1331 Waverly Drive SE, Albany, Oregon, be GRANTED upon payment of appropriate license fees to the Commission.

It is further ordered that notice of this action, including the reasons for it, be given as provided by law.

Dated this 31st day of May, 1985.



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.