

BEFORE THE LIQUOR CONTROL COMMISSION  
OF THE STATE OF OREGON

In the Matter of the	)	
Request for a Change	)	
of Operation of a	)	
Dispenser Class A (DA)	)	
Licensed Outlet by:	)	FINAL
	)	FINDINGS OF FACT,
Daniel P. Gallagher	)	CONCLUSIONS OF LAW,
and Mau and Cloutier, Inc.	)	AND ORDER
dba CRAB POT	)	
185 Highway 101	)	OLCC-85-L-003
P.O. Box 341	)	
Warrenton, Oregon 97146	)	
- - - - -	)	
Clatsop County	)	

A hearing in this matter was held on February 12, 1985, in Astoria, Oregon, before Hearings Examiner Douglas Crumme'. The Licensees appeared and were represented by Dan Van Thiel, Attorney at Law, Astoria, 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

Mau and Cloutier, Inc. and Daniel Gallagher hold a Dispenser Class A (DA) license at the Crab Pot, 185 Highway 101, Warrenton, Oregon. The Licensees have requested that the Commission approve the Crab Pot's 3 p.m. opening hour and the use

of a portion of the premises for nude dancing entertainment. The Licensees have opened at 3 p.m. since August 1982 and have offered nude dancing since August 1984. They requested approval for these changes after the Commission informed them that approval should have been obtained.

ISSUES

I. The Commission's Regulatory Staff proposes that the Licensees' request for approval to open at 3 p.m. be refused because the premises is only open for one meal a day with such an opening hour (OAR 845-05-040(3)(d)) and because the 3 p.m. opening hour contributes to an emphasis on the sale of alcohol over food. OAR 845-05-040(3)(e)(B).

II. The Commission's Regulatory Staff proposes that the Licensees' request for approval to use a portion of the premises for nude dancing be refused under OAR 845-05-040(3)(e)(B) on the grounds that this use contributes to the Crab Pot's emphasis on the sale of alcohol over food.

I. REQUEST FOR APPROVAL OF 3 P.M. OPENING

OAR 845-05-040(3)(d) and OAR 845-05-040(3)(e)(B) provide as follows:

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

. . . . .

(d) The applicant will provide meal service at no more than one meal per day. This provision does not apply to Dispenser Class "B" licenses. OAR 845-05-040(3)(d).

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

. . . . .

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

. . . . .

(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

1. Mau and Cloutier, Inc. first became licensed at the Crab Pot in December 1980 under the management of Mr. Mau. Daniel Gallagher was added as a licensee at the Crab Pot in February 1982. Upon becoming a licensee, Mr. Gallagher and his mother, Norma Gallagher, took over management of the business.

2. Mau and Cloutier, Inc. proposed to open at 11 a.m. when originally issued a DA license at the Crab Pot in December 1980. However, shortly before the Gallaghers took over management of the business in February 1982, Mr. Mau was opening the Crab Pot at 4 p.m. or 5 p.m.

3. When the Gallaghers took over management of the Crab Pot in February 1982, they initially opened the business each day at 11 a.m.

4. In August 1982, the Gallaghers determined that lunch operations at the Crab Pot were running at a loss. They consequently changed to a 3 p.m. opening, which they have maintained since that time.

5. The hours that the Commission last "approved" for the Crab Pot are from 11:00 a.m. until 2:30 a.m. Commission's Exhibit J. The hearing record does not show when these hours were approved or what the approval process involved.

6. Commission Enforcement Inspectors paid periodic visits to the Crab Pot in 1982, 1983 and 1984.

7. The Commission renewed the DA license at the Crab Pot on April 1, 1983 and April 1, 1984.

8. The Commission did not communicate with the Licensees concerning their 3 p.m. opening hour until some time after August 1984.

9. Food sales accounted for 47.8 percent of the total food and alcohol sales at the Crab Pot over the one-year period ending March 31, 1984.

10. The Crab Pot's recent sales have been as follows:

<u>Month</u>	<u>Food</u>	<u>Alcohol</u>	<u>Total</u>	<u>Percentage of Food To Total</u>
Jan. 1984	3,017	5,356	8,373	36%
Feb.	2,787	6,078	8,865	31%
Mar.	2,470	5,815	8,285	30%
Apr.	2,353	5,191	7,544	31%
May	3,221	5,761	8,982	36%
Jun.	3,565	4,912	8,477	42%
Jul.	3,310	4,513	7,823	42%
Aug.	2,942	5,023	7,965	37%
Sep.	1,640	7,142	8,782	13%
Oct.	1,387	10,374	11,761	11%
Nov.	1,569	9,193	10,762	14%
Dec.	1,670	8,213	9,883	17%
Jan. 1985	2,588	6,589	9,177	28%

11. The fishing near the mouth of the Columbia River was very poor in 1984. This hurt the Crab Pot's banquet business and food sales.

12. In an effort to boost food sales, the Licensees began in January 1985 to offer a reasonably priced buffet in addition to their regular menu. The buffet includes a salad bar and one or two entrees.

Conclusions of Law

The Commission's authority for requiring approval of a Licensee's change in hours is set forth in OAR 845-08-015(6)<sup>1</sup>. This regulation provides as follows:

OPERATING AS PROPOSED. Commercial establishments must provide at least the food service last approved by the Commission, including number of meal periods, hours of meal service, and type of cuisine. Failure to provide this level of service is a violation and may result in a notice of violation or be grounds for refusing to renew a license.

The record shows that the last hours the Commission approved at the Crab Pot were from 11:00 a.m. until 2:30 a.m. Therefore, the Licensees' change to a 3 p.m. opening hour in August 1982 constituted a change, and unless approved, may

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<sup>1</sup> Prior to September 1984, OAR 845-08-015(6) was numbered OAR 845-08-015(7) and provided as follows:

The food service requirements of this rule are minimum requirements for all commercial establishments licensed under ORS Chapter 472. Failure to provide at least the food service proposed by an applicant at the time of licensing or license renewal, including number of meals, hours of meal service, and contents of menu, may be grounds for refusing to renew a license under OAR 845-05-015(3).

result in a violation or be grounds for refusing to renew the Crab Pot's license.

The Regulatory Staff first urges that the request for approval of the 3 p.m. opening hour be denied under OAR 845-05-040(3)(d), on the grounds that the 3 p.m. opening leaves the premises open for only one meal a day.<sup>2</sup> This argument is well taken. The change to the 3 p.m. opening hour eliminated the unprofitable lunch operation, leaving the Crab Pot open for only the dinner meal period. OAR 845-05-040(3)(d) therefore weighs against approval of the 3 p.m. opening.

The Regulatory Staff secondly urges that the request for approval of the 3 p.m. opening hour be denied under OAR 845-05-040(3)(e)(B) on the grounds that the 3 p.m. opening causes an emphasis at the premises on the sale of alcohol over the sale of food. This argument has not been persuasively established. The Crab Pot's food sales were 47.8 percent of total food and alcohol sales between April 1, 1983, and March 31, 1984, when the premises operated with the 3 p.m. opening hour. Thus, the large drop in the food sales percentage at the Crab Pot beginning in September 1984 must have been due to other factors than the 3 p.m. opening. Nothing else in the record establishes that the 3 p.m. opening hour causes a greater emphasis on the sale of alcohol than there would be with an

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<sup>2</sup> The Commission may apply its "Criteria for the Issuance and Maintenance of Licenses" to a request for modification of a licensed premises. Red Robin Enterprises, Inc. v. OLCC, 55 Or App 720, 639 P2d 710 (1982).

11 a.m. opening. Therefore, OAR 845-05-040(3(e)(B) has not been shown to weigh against the request for the 3 p.m. opening.

The Licensees presented evidence in support of the argument that the 3 p.m. opening should be approved because the Crab Pot's lunch operations were unprofitable. This argument is not persuasive. Although the Licensees discontinued lunch in August 1982 because their existing lunch operation had become unprofitable, the record fails to show that there was no reasonable lunch presentation possible that would have been profitable. In the absence of such evidence, the argument to approve the change to 3 p.m. based on unprofitability is not persuasive.

The Licensees also presented evidence in support of the argument that the Commission should approve the 3 p.m. opening hour because of the length of time that has passed since the Crab Pot has opened at 3 p.m. and because the license has been renewed since the 3 p.m. opening went into effect. The premises was opening at 4 p.m. or 5 p.m. sometime prior to the Gallagher's taking over management of the business in February 1982. Then, after a six-month period of opening at 11 a.m., the Crab Pot has been opening at 3 p.m. since August 1982. The license was renewed in both 1983 and 1984.

The argument for approval based on the length of time the Crab Pot has been opening at 3 p.m. and the intervening license renewals is unpersuasive. Although the Commission had the opportunity to observe that the opening hour changed to 3 p.m.

in August 1982, there is no evidence that the change came to the Commission's attention or that the Commission ever specifically considered the change for approval at the time of the 1983 and 1984 renewals. Therefore, there is no basis to conclude that the Commission's renewal of the Crab Pot license in April 1983 and April 1984 constituted an approval of the 3 p.m. opening for purposes of OAR 845-08-015(6).

By the same token, the lack of evidence that the Commission was specifically aware of, or considered and approved, the 3 p.m. opening hour precludes any argument that the Commission is now estopped from disapproving the 3 p.m. opening. OLCC Final Order, Robert Hoblit, Family Zoo Tavern, July 1984.

In sum then, the Licensees' 3 p.m. opening may be disapproved under OAR 845-05-040(3)(d) because the premises would offer only one meal per day. The arguments for approval are not persuasive.

II. REQUEST TO USE PORTION OF PREMISES FOR ENTERTAINMENT

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

. . . . .

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

. . . . .

(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

13. Attachment A (attached at the end of this Final Order) shows the approximate present floorplan of the Crab Pot. Attachment A shows two proposed partitions that the Licensees plan to install. The Commission has approved these proposed partitions.

14. The Crab Pot has offered nude female dancing entertainment on the portable stage in the dance floor area since August 1984. The dancing starts at 5 p.m. and occurs six nights a week.

15. Prior to the nude dancing, the Crab Pot held a minor posting (OAR 845-06-040(3)) that allowed minors in the dining areas of the Crab Pot. With the nude dancing, the entire premises has been posted off-limits to minors because the existing partitions enable persons in the hall to the dining room to see into the dance floor area. The Commission's Enforcement Division would approve a posting allowing minors back into the Crab Pot's dining areas if the Licensees install the additional proposed partitions depicted in Attachment A.

16. The dance floor, bandstand and folding walls near the dance floor in the Crab Pot have been in place in the same condition for about ten years. The only new fixture in these portions of the premises during the last ten years has been the addition of the portable stage in August 1984. See Attachment A.

17. During Mau and Cloutier's management of the Crab Pot prior to February 1982, live music was occasionally offered on the bandstand in the dance floor area.

18. When the Gallaghers took over management of the Crab Pot in February 1982, they initially offered live music on the bandstand four nights a week. They eventually reduced the frequency to two nights a week. They discontinued the live music altogether in May 1984 because it was no longer producing a profit.

19. The Crab Pot did not offer any entertainment between the end of the live music in May 1984 and the start of the nude dancing in August 1984.

20. During Mau and Cloutier, Inc.'s management of the Crab Pot prior to February 1982, the tables in the areas adjacent to the dance floor were covered with tablecloths and were set up in a manner appropriate for dining.

21. Since the time the Gallaghers took over management of the Crab Pot in February 1982, they have made the dance floor area available for banquets when not used for entertainment. Otherwise, the Gallaghers have not generally used the dance floor and immediately adjacent areas for regular dining. However, they have served food to patrons who want to eat while watching the entertainment.

22. Before the nude dancing, the tables in the dance floor area were spread out. With the advent of the nude dancing in August 1984, these tables have been arranged around the portable stage.

23. The Crab Pot has been profitable since the nude dancing began.

24. The Commission notes Findings of Fact 9, 10, 11 and 12 in connection with the request for approval of the nude dancing.

Conclusions of Law

The Commission's rule for requiring approval of a change in use of an area is OAR 845-06-100(4), which provides as follows:

Retail Malt Beverage, Restaurant and Dispenser licensees must make written request to the License Division and obtain approval from the Commission prior to making any of the following changes:

. . . . .

(4) Any change in the principal use of any room or area.

The Licensees have changed the principal use of the dance floor area at the Crab Pot. Before the nude dancing, the Licensees used the dance floor and adjacent area for live music and dancing two nights a week and the area was available for banquets the remainder of the time. The Licensees now use these areas for nude dancing six nights a week starting at 5 p.m. The business does not open until 3 p.m. Thus, the Licensees have changed the principal use of the dance floor area from availability for banquets to nude dancing entertainment.

The Regulatory Staff argues this change in principal use should be denied under OAR 845-05-040(3)(e)(B) on the grounds

the change contributes to an emphasis at the Crab Pot on the sale of alcohol over food.<sup>3</sup>

The Crab Pot's sales history substantiates that the nude dancing entertainment has contributed significantly to the emphasis on the sale of alcohol at the business. During the year preceding April 1, 1984, the food sales percentage at the Crab Pot was 47.8 percent. Through the start of the nude dancing in August, the monthly food sales percentages at the Crab Pot in 1984 ranged from 30 percent to 42 percent. With the first full month of nude dancing in September 1984, the food sales percentage dropped to 13 percent. The sharp decline in food sales percentage continued through December 1984, when the figure was 17 percent. (See Finding of Fact 10.) The percentage rose to 28 percent in January 1985. This rise was apparently due to the Licensees' new food buffet.

There are several reasons apparent why the heavy schedule of nude dancing entertainment in the dance floor area would hurt food sales. First, with the dancing starting at 5 p.m. and running six days per week, there is little time left for the dance floor area to be used for banquets. Second, the dancing has led to a change in minor postings forbidding minors until the Licensees install the additional folding doors depicted in Attachment A. Thus, families going out to dinner

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<sup>3</sup>See Footnote 2.

cannot eat in the Crab Pot presently because of the entertainment. Third, the sales experience since the start of the dancing in August 1984 shows that the dancing draws a mix of patrons less interested in dining than the premises drew before the dancing.

Article I, section 39, of the Oregon Constitution limits the type of commercial establishments qualified to hold DA licenses to those that cook and serve food. Therefore, alcohol consumption generated by entertainment activities should not be the dominant activity at a dispenser outlet. The Commission should disapprove the Licensees' nude dancing presentations in the dance floor area under OAR 845-05-040(3)(e)(B) because of the significant contribution this change in use makes to the Crab Pot's emphasis on the sale of alcohol over food.

#### ULTIMATE CONCLUSIONS OF LAW

1. The Licensees' request to open at 3 p.m. should be disapproved because the change to the 3 p.m. opening hour from the previously approved 11 a.m. opening causes the premises to provide meal service for only one meal per day. OAR 845-05-040(3)(d).

2. The Licensees' change to nude dancing entertainment in the dance floor area six days a week beginning at 5 p.m. should be disapproved because this use of the area significantly contributes to the emphasis at the Crab Pot on the sale of alcohol over food. OAR 845-05-040(3)(e)(B).

FINAL ORDER

1. The Licensee's request for approval to open for business at 3 p.m. at the Crab Pot, 185 Highway 101, Warrenton, Oregon, is DENIED.

2. The Licensees' request for approval to use the dance floor and adjacent area of the Crab Pot for the nude dancing entertainment presently offered is DENIED.

Dated this 11th day of June, 1985.



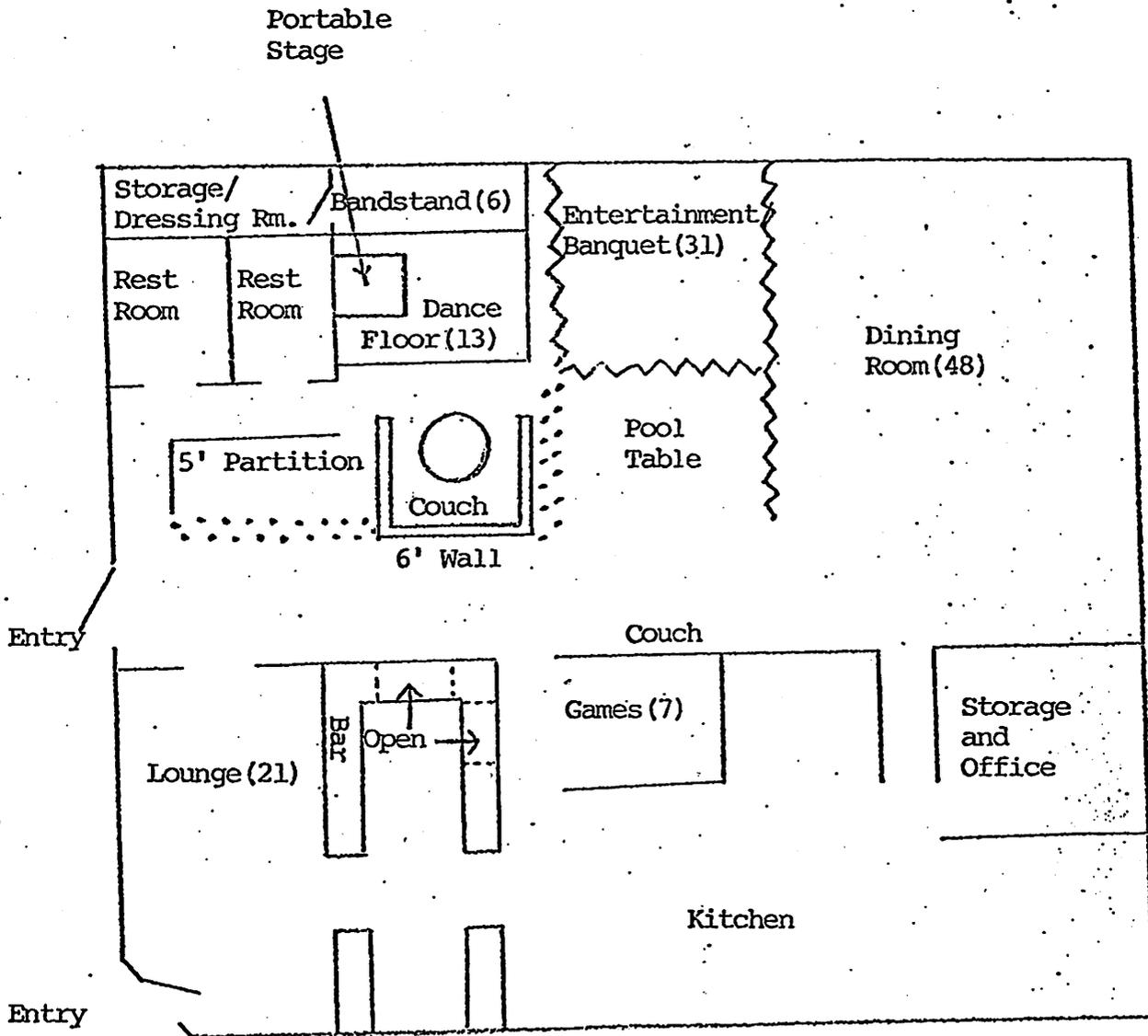
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C. Dean Smith  
Administrator  
OREGON LIQUOR CONTROL COMMISSION

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.

CRAB POT

(Seating figures in parentheses.)



~~~~~ = Existing folding wall

..... = Proposed folding wall