

services, facilities, and economic benefit to the area or to the general public than do existing premises. OAR 845-05-040(3)(f).

II. The evidence makes relevant the preference for greater services, facilities and economic benefit to the area. OAR 845-05-040(2)(a).

III. The staff asserts that the application should be denied because Applicant's premises will not provide greater services, facilities, and economic benefit to the area and will not 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. OAR 845-05-040(3)(a).

IV. Applicant asserts preference because the area is inadequately served by existing premises. OAR 845-05-040(2)(c).

I. and II. LESSER SERVICES/GREATER 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).

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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, or other 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

1. Applicant's premises is located on SE Powell Boulevard, outside the city limits of Portland.

2. According to remodeling plans, Applicant's premises, if the license is granted, will seat 60 in the restaurant, 35 in the banquet room, 36 in the lounge, and 15 at the bar, for a total of 146.

3. Applicant's hours of operation will be from 11 a.m. to midnight or later six days a week and from 2:00 p.m. to 9:30 p.m. on Sunday. Lunch and dinner are served.

4. There are 11 existing dispenser outlets within two miles of Applicant's premises. Most have about the same seating capacity or are larger. Six serve two or three meals a day. Seven have separate banquet facilities while four do not.

5. Applicant's monthly sales during 1984 and 1985 have been as follows:

<u>Month</u>	<u>Food</u>	<u>Alcoholic Beverage</u>	<u>Total</u>
January 1984	\$10,735	\$15,391	\$26,126
February	10,815	16,630	27,445
March	13,815	19,258	33,073
April	13,044	15,801	28,845
May	13,364	15,909	29,273
June	13,593	13,779	27,372
July	12,235	12,448	24,683
August	12,065	15,054	27,119
September	10,712	14,319	25,031
October	11,802	15,201	27,003
November	14,087	16,227	30,314
December	14,594	16,347	30,941
Average	12,571	15,530	28,102
January 1985	15,978	16,746	32,724
February	15,052	15,375	30,427
March	17,295	18,381	35,676
April	17,900	17,176	35,076
May	18,447	17,202	35,649
Average	16,934	16,976	33,910

6. Applicant's operation of the premises since he repossessed it in late 1982 has involved a gradual evolution toward full restaurant service. In March of 1983, Applicant expanded the kitchen significantly and introduced a new menu. Food sales prior to this expansion had been approximately \$2,000 per month. Food sales went up substantially following the introduction of the new menu. Food sales for the entire year of 1983 averaged \$5,758.

7. The original menu offered beginning in March 1983 contained seven hamburgers, bacon, lettuce and tomato sandwich, vegetarian sandwich, taco salad, dinner salad, nachos, chips, onion rings, french fries, and clam chowder.

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8. In August 1983, Applicant introduced a new menu which expanded the sandwich offerings to include cheese, turkey and bacon, turkey, and ham and cheese. It added additional soup, chili, and oysters. Food sales increased significantly following the introduction of this menu.

9. In January of 1985, Applicant introduced a new menu. The menu maintains the large sandwich selection. It offers, in addition, two sizes of filet mignon, broiled halibut, deep fried shimp, deep fried oysters, fish and chips, shrimp salad, taco salad, shrimp cocktail, baked potato, and desserts.

10. Applicant offered an additional menu at the hearing. It was to go into effect shortly after the hearing, whether or not the license is granted. This new menu retains the dishes offered on the prior menu and adds several dinners, including shrimp, oysters, "surf and turf," and "admiral's platter." It also offers a salad bar and daily specials such as seafood fettucine, shrimp and halibut salad, and beef kabob.

11. Applicant estimates that with the addition of the dispenser privileges, the addition of the new menu, the increase in seating, and the changes in the structure of the premises, monthly sales of food and alcohol will be as follows: food - \$33,412; alcoholic beverages - \$23,569; total - \$56,981.

12. Dispenser Class A outlets in Multnomah County have had the following monthly average sales: Food - \$38,499; alcoholic beverages - \$20,825; total - \$59,324.

13. There are 11 existing Dispenser Class A outlets within two miles of Applicant's premises. Five of these have lower average sales than Applicant's present sales. Seven of these 11 premises have sales which are less than Applicant's projected sales.

14. Applicant has significant banquet business presently, including regular meetings of employees of nearby companies. He reasonably expects an increase in the banquet sales.

15. Applicant has spent no money on advertising. If the license is granted, he will advertise.

Conclusions of Law

The evidence does not establish any particular distinction between Applicant's premises and the existing premises in the area with respect to days and hours of operation, seating, or banquet facilities.

Applicant's projected gross sales of \$57,000 will place his sales only slightly below the county average of \$59,000. This projection is rather optimistic, but credible. It is noted that Applicant's sales, particularly food sales, have shown a steady and substantial growth during the last two years. It is not unrealistic to conclude that this substantial upward trend will continue if the license is granted, given the addition of several entrees to the menu, the establishment of a banquet room, and Applicant's intention of advertising the premises. The history of the premises under Applicant's control indicates an earnest intent on his part to develop the establishment into

a successful restaurant. All these factors make Applicant's projection, though it is indeed optimistic, not unrealistic. That is, it may reasonably be anticipated that if the license is granted the sales will reach the projected \$57,000 within a reasonable time.

The evidence also establishes that Applicant's projected sales will exceed sales at seven of the eleven nearest existing dispenser outlets. These eleven premises are within approximately a two-mile radius of Applicant's premises. Applicant views this two-mile area as his primary market area. The Commission has found a comparison of an applicant's sales with sales at nearby premises to be a valid measure of the service to be provided by the applicant and has found that an applicant will provide greater services where an applicant's projected sales exceed the sales at a majority of the nearby premises. Elephant and Castle, Inc., Elephant and Castle, OLCC-84-L-034, January 1985.

The evidence thus establishes that, if the license is granted, Applicant's sales will compare favorably with the County average and will exceed sales at the majority of the eleven nearest DA outlets. Thus, Applicant is entitled to preference under OAR 845-05-040(2)(a)(greater services). Elephant and Castle, supra. Unfavorable consideration is thus not shown under OAR 845-05-040(3)(f)(lesser services).

III. UNFAVORABLE CONSIDERATION:

NOT UNIQUE/GREATER SERVICES, FACILITIES NOT SHOWN

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).

16. Applicant's menu features standard "American" dishes such as steaks, seafood, and sandwiches.

17. There are five DA outlets within two miles of Applicant's premises which feature similar standard American fare. There are many others within ten miles featuring similar food.

18. Applicant's decor features hanging macrame fixtures, some stained glass, many hanging plants, and a beamed ceiling.

19. Applicant's premises has a game area. If the license is granted, it will be moved upstairs to an area over the bar. It will contain two pool tables, four electronic games and an English style dart game. Noise from the area will not intrude on the dining area.

20. The only musical entertainment featured at the premises is a stereo played at low volume.

21. Applicant's facilities, services, and economic benefit, as compared to those offered at other premises in the area, are as noted in the Findings of Fact under Section I.

Conclusions of Law

The criterion involved permits denial of an application if an applicant establishes neither uniqueness in food service nor greater services, facilities, and economic benefit.

Applicant has not established that the dining service is unique within 20 miles. The food served at the premises is of a general style similar to that at several other premises within two miles and many others within 20 miles. Although Applicant provided persuasive evidence that he goes to considerable lengths to provide good quality food, such as outstanding hamburgers and french fries made on the premises, the evidence does not establish that the quality is in fact unique within 20 miles. The evidence indicates that some of the decor items, such as the macrame and the stained glass, are unusual. Applicant has not established, however, that they are in fact unique within 20 miles. In any event, these items of decor do not seem to be of such impact on the dining atmosphere as to entitle Applicant to preference.

Applicant has established that the premises will provide greater services, facilities and economic benefit to the area than do the existing premises. The facts relating to this matter are stated in Sections I and II above and the Conclusions of Law under those sections. They indicate that Applicant's projected sales will compare favorably with the county average and will exceed those of the majority of premises in the area.

The Commission concludes that this criterion does not provide a basis for denying the application.

IV. INADEQUATE SERVICE IN THE AREA

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

22. There are 11 existing DA outlets within two miles of Applicant's premises. The nearest is two blocks away; the next nearest is approximately 1.1 miles away.

23. The nearest DA premises, The Grove, two blocks away, features live country music and a juke box. Its lounge area is somewhat dark, in contrast to Applicant's bright interior.

24. One of the premises within two miles features topless dancing.

25. Among the 11 premises within two miles, five feature American food, two feature Chinese food, two feature Mexican food, one features Italian food, and one features German food.

Conclusions of Law

Applicant claims preference under this criterion. However, the evidence does not support a conclusion that the existing service is inadequate. Applicant provided persuasive evidence, in the form of testimony and letters from several patrons, that many of the patrons definitely prefer Applicant's premises to some of the other premises in the area. The preference is based in some instances on the atmosphere and decor at the other premises and sometimes upon preference for Applicant's food. This evidence of preference for Applicant's premises is not sufficient, however, to establish that the service in the area is inadequate. The considerable variety of premises within two miles indicates that service is not inadequate. The Commission concludes that Applicant is not entitled to preference under this criterion.

ULTIMATE CONCLUSIONS OF LAW

The application should be granted because Applicant has established that the premises will provide greater services, facilities, and economic benefit to the area than do existing premises, and because no basis for unfavorable consideration has been established. OAR 845-05-040(2)(b).

FINAL ORDER

The Commission orders that the application for a Dispenser Class A license by Robert B. Hanzlik in the trade name Daily Planet, 11312 SE Powell Boulevard, Portland, Oregon, 97266 be GRANTED, with issuance of the license subject to the following conditions:

1. That the remodeling be completed as proposed and approved;
2. That a new minor posting sketch be completed;
3. That the appropriate fee be paid; and
4. That the premises be ready for operation as a DA outlet within 60 days of the Commission's Final Order.

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

Dated this 27th day of September, 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.