BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the Application for a Dispenser Class A (DA) License by: Al & Opal Salazar dba PINE STREET THEATRE 221 SE Ninth Portland, Oregon 97214 - - - - - - - - - - - - - - Multnomah County	)	FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OLCC-85-L-001

A hearing in this matter was held on February 1, 1985, in Portland, Oregon, before Hearings Examiner Jill Thompson. The Applicants appeared and were represented by Dale Rader, Attorney at Law, Tualatin, Oregon. The Commission was not represented by legal counsel.

On April 29, 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

Applicant Al Salazar has held an RMB license at the premises since August 1983. It is located in the inner east side of Portland in a former church building which Mr. Salazar owns.

ISSUES

The following issues are raised by the application.

1. Whether the premises would be heavily patronized by minors. OAR 845-05-040(3)(c).

2. Whether the premises would be operated primarily as a tavern. OAR 845-05-040(3)(e)(B).

3. Whether Applicants would provide lesser services. OAR 845-05-040(3)(f).

4. Whether Applicants would be unique. OAR 845-05-040(2)(b).

5. Whether Applicants have established preferences for either uniqueness or greater services. OAR 845-05-040(3)(a).

I. USE BY MINORS

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

(c) The applicant's premises will be heavily patronized by minors unaccompanied by adults. OAR 845-05-040(3)(c).

Findings of Fact

1. Applicants' premises is adjoined by an auditorium which seats 400; there is no intervening wall between the premises and the auditorium. At the time the application was processed the staff had been left with the impression that Applicants wished the auditorium to be included in the licensed premises. Applicants use the auditorium for various functions, including live rock music on weekends. Minors and adults attend these concerts, for which Applicants normally obtain a Special Dispenser license. On the day of the hearing, Applicants stated it had not been their intention to extend the license to the auditorium. The staff's reason for citing the above rule was that Applicants' use of the auditorium attracted large numbers of minors who would not be accompanied by adults.

Conclusions of Law

Applicants have specifically omitted the auditorium from the premises they wish licensed. There is no evidence that their operation of the building to be covered by the license would be heavily patronized by minors. The Commission concludes that OAR 845-05-040(3)(c) does not provide a basis for refusal.

II. TAVERN-STYLE OPERATION

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

2. The staff cited this criterion in large part because the 400-seat auditorium would occupy about half of the total seating of the premises staff thought the application covered. The auditorium is not intended to be a regular dining facility, and staff concluded it would be used principally as a lounge.

3. Applicants provided a sales projection with their application. The projection indicated Applicants expected food

sales to comprise 42 percent of total sales. At the hearing Applicant Al Salazar stated that he had not prepared the projection, and that his expectation was that approximately 90 percent of total sales will be from food. He based this projection on his experience with Salazar's, a DC premises in Zig Zag which he owns, whose menu Applicants intend to offer at Pine Street Theatre.

4. Applicants' premises would seat 250, with 75 seats in a dining area and 175 in a lounge. Dining service will be offered in the lounge. Applicants' hours will be 11:00 a.m. - 10:30 p.m. Monday - Saturday.

Conclusions of Law

There is insufficient evidence to support a conclusion that the premises would be operated primarily as a tavern. The auditorium would not be included in the licensed area, as was originally thought, which substantially decreases the area which would be limited to consumption of alcohol. Applicants intend to offer full meal service in the lounge, so it cannot be presumed that that area would be used solely for consumption of alcoholic beverages. Also, Applicants do not plan to remain open much past normal dining hours, which diminishes the time that patrons will enter the premises simply to drink. They project that 90 percent of their total sales will be food. Applicants' limitation of the premises to be licensed, their early closing hours and high projected food sales percentage do not support a conclusion that the premises would be operated

primarily as a tavern. The Commission concludes that OAR 845-05-040(3)(e)(B) does not provide a basis for unfavorable consideration.

III. LESSER SERVICES

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

5. Applicants project average gross sales of about $21,667, 90 percent of which would be food. The projection is based on a 75-seat daily turnover, with an average expenditure of $10 food and $1.10 alcohol per seat. Applicants state they are unable to precisely predict turnover accurately. They offered full meal service, using a more limited menu than they propose with this application, for about 1-1/2 weeks in December 1984. Their daily sales average was $220/day, 90 percent of which was food.

6. Relevant average dispenser sales figures are as follows:

	Gross	Food	Food Sales %
City of Portland	$55,218	$35,120	64
Multnomah County	59,324	38,499	65

The staff did not conduct a comparison survey of other dispenser licensees in Applicants' area.

7. Applicants presented nine letters in support of the application based on favorable experiences the writers have had with presenting, performing in or attending events held in Applicants' auditorium. Applicants also presented a 336-signature petition supporting the application.

DISCUSSION

Applicants presented evidence that the auditorium adjacent to their premises is used frequently for civic and private functions, such as fund-raisers, company banquets, etc., for which Applicants often furnish food service. Availability of this sort of facility would be a factor in applying the lesser services criterion if it were part of the premises to be licensed. OAR 845-05-040(3)(f) applies to characteristics of "Applicant's premises." In this case, the auditorium would not be included in the licensed premises, and the rule does not allow it to be considered.

Conclusions of Law

The only evidence as to relative service levels between Applicants and other dispensers is comparative city and county average sales. Applicants' projections are strikingly lower

than those averages. Applicants argue that it is impossible to accurately predict the marketplace, and also that a new business should not be judged against the accomplishments of established dispenser outlets. Applicants also argued that dispenser outlets' sales generally had fallen during 1984.

However, OAR 845-05-040(3)(f) patently imposes requirements that projections be reasonable and that applicants meet service thresholds in one or more of the characteristics mentioned in the rule. Applicants have not offered relevant evidence which would overcome the low patronage level suggested by their projections. There is evidence in the record that dispenser gross sales in a large region in Multnomah County declined $200 a month between 1983 and 1984; this district maintained average sales of over $56,000 in both 1983 and 1984. The $200 represents a decline of only 2/5 of a percent, which is too insignificant to support Applicants' theory or justify an inference that Applicants' projections are substantially close to existing dispenser averages.

The Commission concludes that Applicants would offer lesser services than existing dispenser outlets, and that OAR 845-05-040(3)(f) provides a basis for unfavorable consideration.

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:

. . .

(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

8. Applicants would offer the following menu:

LUNCH

braised turkey wings with tomato sauce	$ 7.95
roast turkey with dressing	8.50
sausage with rice and vegetables	3.45
steamed clams with red sauce	11.50
spaghetti	4.25

DINNER

braised lamb shank	7.95
broiled chicken breast with mushroom sauce	8.95
Polynesian game hen	10.75
Oriental duck	14.75
pork chops	8.25
ham steak	7.50
shrimp omelet	5.95
halibut steak	10.95
seafood combination	10.95
fried oysters with creole sauce	10.95
prawns with creole sauce	10.95
swiss steak with sour cream sauce	7.95
beef ka-bob	8.95
braised filet strips with ginger sauce	10.75
10 oz. New York steak	11.75
14 oz. New York steak	13.75
10 oz. New York steak with oysters	13.75
10 oz pepper steak	11.95
8 oz. filet mignon	12.00
6 oz. filet mignon and stuffed prawns	14.95
6 oz. filet mignon and oysters	13.95
12 oz. filet with artichoke hearts & bearnaise sauce	15.95

All dinners include appropriate side dishes. The menu also offers three appetizers, soup, salad and desserts.

9. Applicants' proposed dinner menu is the same as that offered at Salazar's in Zig Zag, owned by co-applicant Al Salazar.

10. Applicants consider their proposal to be unique because of entertainment events staged in the auditorium, for which they intend to continue obtaining Special Dispenser licenses. They also contend their dining service is unique in their area because of its superior quality.

11. The auditorium is not visible from the dining room.

Conclusions of Law

There is no evidence supporting Applicants' claim that their cuisine would be of such superior quality that it would be unique in their neighborhood. Further, OAR 845-05-040(2)(b) requires uniqueness within a 20-mile radius, which presumably covers more than what Applicants consider to be their neighborhood.

Nor does the entertainment offered in Applicants' auditorium fit within the terms of the rule, which requires that "[a]pplicant's premises will provide . . . atmosphere which is unique . . . ." The auditorium is not part of the premises. Even if it were, the entertainment offered there is not visible from the dining area, thus it could not contribute to the enjoyment of dining patrons.

The Commission concludes that Applicants have not established a preference under OAR 845-05-040(2)(b).

V. GREATER SERVICES/UNIQUENESS

> Unfavorable consideration may be given to an applicant if any of the following are shown:
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> (a) None of the criteria set forth in subsection (2)(a) or (b) of this rule is met. OAR 845-05-040(3)(a).
>
> (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.
>
> (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)(a),(b).

Conclusions of Law

Based on Findings of Fact 5 through 7, Applicants would provide lesser services; therefore, they have failed to establish that they would provide greater services, (OAR 845-05-040(2)(a)). Based on Findings of Fact 8 through 11 Applicants' premises would not be unique or substantially different in a 20-mile radius (OAR 845-05-040(2)(b)). The Commission concludes that OAR 845-05-040(3)(a) provides a basis for unfavorable consideration.

ULTIMATE CONCLUSIONS OF LAW

The application should be denied. Applicants have not established preferences in any area, and Applicants' lesser services (OAR 845-05-040(3)(f)) and failure to establish a preference for either greater services or uniqueness (OAR 845-05-040(3)(a)) provide a basis for unfavorable consideration.

FINAL ORDER

It is hereby ordered that the application for a Dispenser Class A (DA) license by Al and Opal Salazar at Pine Street Theatre, 221 SE Ninth, Portland, Oregon, be DENIED.

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

Dated this 7th 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.