

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

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|---------------------------|---|---------------------|
| In the Matter of the |) | |
| Request for Removal of |) | |
| a License Restriction by: |) | FINAL |
| |) | FINDINGS OF FACT, |
| Marvin & Susan Van Wey |) | CONCLUSIONS OF LAW, |
| dba YOUR PARTY SHOPPE |) | AND ORDER |
| 2080-82 West Main |) | |
| Medford, Oregon |) | OLCC-84-L-040 |
| - - - - - |) | |
| Jackson County |) | |

A hearing in this matter was held on January 28, 1985, in Medford, Oregon, before Hearings Examiner Douglas Crumme'. The Licensees appeared and were represented by Gregory T. Hornecker, Attorney at Law, Medford, Oregon. The Commission was not represented by legal counsel.

On June 24, 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:

INTRODUCTION

Marvin and Susan Van Wey hold Package Store (PS) and Retail Malt Beverage (RMB) licenses from the Commission at a business known as YOUR PARTY SHOPPE, 2080-82 West Main, Medford, Oregon. Your Party Shoppe is a retail party supply business.

The premises sells beer, wine, pop, party foods, decorations, party hats, gifts, and party hardware.

In issuing Your Party Shoppe PS and RMB licenses in July 1984, the Commission imposed two restrictions on the RMB license. The first restriction limits on-premises consumption of beer and wine to beer and wine tasting events only. The second restriction forbids keg beer sales.

The Licensees have requested that the second restriction be lifted, allowing the Licensees to sell kegs.

ISSUES

I. The Commission's Regulatory Staff argues that the keg sales restriction is necessary because of the public interest or convenience under ORS 471.295(1), because of the purposes of the Liquor Control Act (ORS Chapter 471), and because of current public attitudes against alcohol abuse. OAR 845-05-055. These arguments are based on the Staff's conclusion that keg sales at Your Party Shoppe would increase the likelihood of underage drinking and drinking drivers. Commission's Exhibit A.

II. The Licensees argue that they should be allowed to sell kegs because the Commission allows an existing business with PS and RMB licenses to do so.

III. The Licensees argue that keg sales at Your Party Shoppe are demanded by the public interest and convenience

under ORS 471.295(1) because their customers would find it convenient to be able to buy kegs to go at Your Party Shoppe.

I. EFFECT OF RESTRICTION ON DRINKING BY MINORS
AND DRINKING DRIVERS

The Commission's administrative rule concerning license restrictions provides as follows:

The Commission shall, pursuant to ORS 471.030, 471.040, 471.215, 471.730, 472.030, and 472.060, and other applicable statutory provisions, restrict as it deems necessary the license privileges or conduct of operations of licensed premises and impose special conditions or requirements on a license either at the time of issuance of the license or at any time subsequent thereto. Such restrictions shall be established or modified in conformity with the purposes of the liquor control statutes and may result from economic factors, changes in the character or environment of the community or the public attitude which, in the Commission's opinion, indicate a need for the establishment or modification of restrictions. OAR 845-05-055.

The Commission's Regulatory Staff argues that the restriction against keg sales at Your Party Shoppe is necessary under ORS 471.295(1), which provides:

The commission may refuse to license any applicant if it has reasonable ground to believe any of the following to be true:

(1) . . . [T]hat the granting of a license in the locality set out in the application is not demanded by public interest or convenience. ORS 471.295(1).

The Commission's Regulatory Staff also argues that the restriction against keg sales at Your Party Shoppe is necessary under the purposes of the liquor control laws.¹ The purposes of the Liquor Control Act, ORS Chapter 471, are, in pertinent part, as follows:

(1) The Liquor Control Act shall be liberally construed so as:

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(b) To eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of such beverages and to promote temperance in the use and consumption of alcoholic beverages.

(c) To protect the safety, welfare, health, peace and morals of the people of the state.

(2) Consistent with subsection (1) of this section, it is the policy of this state to

¹ The Staff did not cite any particular purposes of the liquor control laws either by reference to statute numbers or by specific reference to the substance of the statutory purposes. Commission's Exhibit A. This might in some cases constitute insufficient notice under ORS 183.415(2)(c), which requires the Staff's refusal notice to include a "reference to the particular sections of the statutes and rules involved." However, the general tenor of the statutory purposes the staff wished to raise was apparent from the refusal notice. Commission's Exhibit A. Further, the Licensees did not object to the manner by which the Staff referred to the statutory purposes in its refusal notice. Rather, the Licensees proceeded and addressed the Staff's various arguments. Therefore, the Commission concludes that any defect in notice in this area was not prejudicial and was waived by the Licensees. Haviland Hotels, Inc. v. OLCC, 20 Or App 110, 530 P2d 1259 (1975).

encourage the development of all Oregon industry. ORS 471.030.

Findings of Fact

1. The evidence showed no studies, surveys or specific examples tending to prove that keg sales at a business such as Your Party Shoppe would increase underage drinking or drinking drivers.

2. Presently, with the exception of one premises in Ashland, only wholesale malt beverage and wine (WMBW) licensees and taverns holding just RMB licenses are allowed to sell kegs of beer for off-premises consumption.² ORS 471.265(2)(c), ORS 471.235(1). The general issuance of RMB licenses to existing PS outlets in order to allow keg sales at PS outlets would lead to a large increase in the number of premises selling kegs to go.

3. Minor's access to taverns, where keg sales are allowed under RMB license privileges (ORS 471.265(2)(c)), is restricted by minor postings. OAR 845-06-040(3). In contrast, minors have unrestricted access to PS outlets, where minor posting restrictions do not apply because PS license privileges do not allow consumption of alcohol on the licensed premises. ORS 471.260(1), OAR 845-06-040(2).

² Beer kegs customarily come in 15 1/2 and 7 3/4 gallon sizes.

4. PS outlets' employees between 18 and 20 years old are allowed to sell those alcoholic beverages authorized for sale under a PS license. ORS 471.480. However, WMBW and RMB outlets' minor employees are not allowed to sell or serve alcoholic beverages. OAR 845-06-035(4)(f).

5. Your Party Shoppe's average customer is 35 to 40 years old.

6. A number of regular keg purchasers have their own tap and cooling equipment in order to buy keg beer for their normal home consumption. These purchasers are generally over 35 years old.

7. About 10 percent of Your Party Shoppe's current sales are from alcoholic beverages. About 90 percent of Your Party Shoppe's customers who purchase alcoholic beverages also purchase food.

8. Keg sales at Your Party Shoppe would likely constitute about five to ten percent of total sales, as evidenced by the Licensees' projection.

9. Your Party Shoppe has two employees on duty from noon until 6:00 p.m. and one employee on duty at other hours.

10. Your Party Shoppe's staffing levels are likely to be sufficient to allow employees the time to follow keg sales tag receipt procedures (ORS 471.478(1), OAR 845-06-085) while tend-

ing to the other business in the store. The store is currently averaging about \$17,000 a month in sales.

11. Licensee Marvin Van Wey has managed his family's full-sized grocery business in Jacksonville, Oregon, for about 12 years. The Van Weys have held a PS license at their Jacksonville Grocery throughout Marvin Van Wey's management of the business. The Commission has not found any violations at the Jacksonville grocery during the years Mr. Van Wey has managed it.

12. There have been no OLCC violations at Your Party Shoppe since it began operating under PS and restricted RMB license privileges in July 1984.

13. The record showed there is only one business in Oregon that has held both PS and RMB privileges that has sold kegs to go. This business, the Ashland Wine Cellar, sells primarily wine but has also sold kegs of beer since 1980. There have been no violations or special problems that have been detected from the Ashland Wine Cellar's sale of kegs of beer.

Conclusions of Law

The record sets out at least four reasonable grounds for the restrictions against keg beer sales at Your Party Shoppe.

First, minors are more likely to buy keg beer in Your Party Shoppe than taverns because, in contrast to taverns, businesses with PS licenses do not have minor postings forbidding minors to enter. See Findings of Fact 3. Since the

absence of minor postings gives minors easier access, there is likely to be a higher incidence of minors attempting to purchase kegs at Your Party Shoppe than at taverns. The more minors there are that attempt to purchase kegs, the more likely it is that some will be successful.

Second, PS-licensed businesses such as Your Party Shoppe may employ 18-20 year olds to sell alcohol while RMB licensees may not. See Finding of Fact 5. These young employees are likely to be less mature, have poorer judgment and be more susceptible to peer pressure than the employees over 21 years old who work in taverns. Thus, these young employees are more likely to sell kegs to minors.

Third, the large quantity of alcohol contained in a keg of beer makes kegs particularly dangerous in the hands of minors. Thus, it is reasonable to set restrictions on the availability of kegs in order to diminish the chance that minors obtain keg beer.

Fourth, the issuance of RMB licenses to PS Licensees such as Your Party Shoppe in order to allow keg sales would be likely to increase drinking drivers by increasing the availability of kegs. Kegs facilitate serving a large amount of beer to a large number of people. Many persons who attend get-togethers where kegs are served are likely to drive. The more available kegs are, the more likely people are to be driving

home from get-togethers where they have had ready access to a large amount of beer.

The lack of a record of problems and abuses from keg sales at Ashland Wine Cellar does not necessarily mean none have occurred. Further, the Ashland Wine Cellar is only one outlet. The lack of problems and abuses at this one outlet does very little to disprove the reasonable conclusion that there is a greater risk of problems from keg sales at Your Party Shoppe due to minor's easier access to PS outlets, the presence of 18-year old clerks selling alcohol in PS outlets, and the greater availability of keg beer if RMB licenses are issued to PS outlets to allow keg sales.

The Licensees' good record with the Commission and Your Party Shoppe's adult, non-alcohol orientation are also not sufficient to overcome the conclusion that keg sales at a business such as Your Party Shoppe presents an increased risk of underage drinking and drinking drivers. The "minor posting," "minor employee" and "greater availability" arguments still lead to the conclusion there would be an increased risk of these problems.

An increase in underage drinking and drinking drivers would be counter to the public interest (ORS 471.295(1)) for many obvious reasons. An increase in these problems would also be counter to various purposes of the Liquor Control Act, ORS

Chapter 471, including the goals to protect the safety, welfare and health of Oregonians (ORS 471.030(1)(c)) and to promote temperance. ORS 471.030(1)(c). There is, therefore, a proper basis to conclude that the restriction against keg sales at Your Party Shoppe is necessary pursuant to applicable statutory provisions, the purposes of the liquor control laws and public attitudes against alcohol abuse. OAR 845-05-055.

II. INCONSISTENT PRIOR
COMMISSION PRACTICE

(1) Jurisdiction for judicial review of contested cases is conferred upon the Court of Appeals

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(8)(a) The Court may affirm, reverse or remand the order

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(b) The Court shall remand the order to the agency if it finds the agency's exercise of discretion to be:

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(B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency
ORS 183.482(1), (8).

14. The Commission has issued PS and RMB licenses to other businesses in Oregon besides Your Party Shoppe. The Commission has, in every case but the Ashland Wine Cellar, placed

restrictions on the RMB licenses of these businesses to limit on-premises consumption of alcohol to beer and wine tastings only and to forbid keg sales for off-premises consumption.

15. The Commission issued PS and RMB licenses to Ashland Wine Cellar in 1980. When it applied for the licenses, Ashland Wine Cellar proposed to sell kegs of beer to go. In issuing the two licenses, the Commission imposed a restriction which stated: "The sale and service of alcoholic beverages for on-premises consumption is limited to wine tasting events." The Commission had intended this restriction to forbid the sale of kegs to go. However, the Licensee misunderstood the Commission's intentions and sold kegs of beer to go for four years before the Commission learned of it.

16. When the Commission learned that Ashland Wine Cellar had been selling kegs, the Commission initially sought to halt these sales. However, the Commission later determined to allow the keg sales to continue, concluding that halting keg sales would impose an "unwarranted financial hardship," and that the Ashland Wine Cellar was a special and distinguishable case because of the following factors:

1. The Retail Malt Beverage license allows the sale of kegs to go.
2. When the Licensees made application for the Package Store and Retail Malt Beverage licenses they proposed to sell kegs of beer to go.

3. The language of the restriction placed on the Retail Malt Beverage license did not specifically prohibit sale of kegs to go.
4. The Licensees have invested money in equipment for the provision of keg sales to go.
5. A substantial portion of the Licensees' business is the sale of kegs to go.
6. There are no known problems associated with the sale of kegs of beer to go at this location.

Commission's Exhibit J

17. In applying for PS and RMB licenses at Your Party Shoppe, the Licensees proposed to sell kegs to go. (Commission's Exhibit I.) The Commission initially issued only a PS license to the Licensees because of the Commission's opposition to the keg sales. (Commission's Exhibit H.) The Commission later issued an RMB license at Your Party Shoppe to allow wine tastings only, and with the express restriction that keg sales to go were forbidden. (Commission's Exhibit F.)

18. Your Party Shoppe has a cooler that is nine-feet wide and 30-feet long with ample room to store kegs.

19. The Ashland Wine Cellar sells very little food. Your Party Shoppe has a much bigger selection of food than the Ashland Wine Cellar.

20. Southern Oregon State College is located in Ashland.

21. There are no colleges or schools located in the immediate vicinity of Your Party Shoppe.

Conclusions of Law

The Commission has allowed one combined PS/RMB outlet, the Ashland Wine Cellar, to sell kegs to go. A comparison of the Ashland Wine Cellar and Your Party Shoppe situations reveals a reasonable explanation for the Regulatory Staff's proposal to treat the two outlets differently with respect to keg sales.

In the Ashland Wine Cellar case, the Staff set an initial condition on the RMB license that did not forbid keg sales, despite the Staff's intention to so restrict the license. (See Finding of Fact 15.) With the condition worded as it was, the Ashland Wine Cellar had a reasonable basis to conclude that keg sales would be allowed, given that it had proposed selling kegs in making its application. Ashland Wine Cellar therefore invested in appropriate fixtures and equipment and developed keg sales into a substantial portion of its business before the Commission learned four years later that the premises was selling kegs.

In contrast, the record does not show that the Commission ever caused the Van Weys to conclude the Commission had granted Your Party Shoppe the authority to sell kegs to go. Therefore, there is no argument that the Commission in any way misled the Licensees at Your Party Shoppe into making an investment in equipment and fixtures to sell kegs.

Because Ashland Wine Cellar's keg sales appear to have become a substantial part of their business, the hardship from forbidding keg sales there now would be relatively severe. This adds weight to the argument that Ashland Wine Cellar should be treated as a special case, given that the hardship arose from the Commission's improperly drafted initial restriction.

Ashland Wine Cellar's situation is also distinguishable in that it has sold kegs for four years without any problems. Thus, although Your Party Shoppe appears no more likely than Ashland Wine Cellar to have problems from keg sales, the issue is necessarily more speculative in the case of Your Party Shoppe because of the lack of a keg sales history.

These different factors establish a reasonable basis for treating Your Party Shoppe differently from Ashland Wine Cellar on the question of allowing keg sales. This case, then, would not be subject to remand under ORS 183.482(8)(b)(B) were the Commission to continue the keg sales restriction. Moki, Inc. v. OLCC, 68 Or App 800, 683 P2d 159 (1984).

III. PUBLIC CONVENIENCE

The commission may refuse to license any applicant if it has reasonable ground to believe any of the following to be true:

(1) . . . [T]hat the granting of a license in the locality set out in the application

is not demanded by public interest or convenience. ORS 471.295(1).

Finding of Fact

22. About 20 of Your Party Shoppe's customers have expressed an interest in buying kegs at Your Party Shoppe.

23. Your Party Shoppe is located along a busy, commercially-developed street leading from Medford to Jacksonville.

24. Your Party Shoppe is located 1.5 miles from the nearest RMB outlet and 1.75 miles from the nearest WMBW outlet.

25. Some of Your Party Shoppe's customers would find it less appealing to buy kegs in a tavern environment than at a WMBW outlet or Your Party Shoppe.

26. At least some of the WMBW licensees in Medford are located in an industrial district.

27. At least one of the WMBW licensees in Medford is not open in the evenings or on weekends, whereas Your Party Shoppe is open both in the evenings and on Saturdays.

28. Except for beer cups, WMBW licensees generally do not sell items related to kegs of beer. In contrast, Your Party Shoppe sells a number of related items, including food.

29. Your Party Shoppe is located next door to one of the Commission's retail liquor agencies.

Conclusions of Law

The sale of kegs at Your Party Shoppe would be convenient to the public for several reasons. Some persons would prefer

not to buy their kegs in a tavern environment. Your Party Shoppe has a convenient location on a busy commercial street as opposed to the location of some of the WMBW licensees in an industrial district. The nearest keg outlet to Your Party Shoppe is 1.5 miles away. Your Party Shoppe offers more of a one-stop concept than taverns and WMBW licenses for people wanting to buy items related to keg beer. Your Party Shoppe offers longer hours than at least one of the WMBW licensees.

The convenience to the public of keg sales at Your Party Shoppe weighs in favor of the Licensees' request under ORS 471.295(1).

ULTIMATE CONCLUSIONS OF LAW

The Licensees' request to sell kegs at Your Party Shoppe should be denied. The record adequately explains the basis for treating Your Party Shoppe differently from Ashland Wine Cellar, which holds the same licenses as Your Party Shoppe and which the Commission allows to sell kegs to go. There are proper reasons for restricting keg sales at Your Party Shoppe under the statutes governing the Commission and the purposes of the Liquor Control Act. The reasons for the restriction outweigh the fact that keg sales at Your Party Shoppe would be of some convenience to the public. The reasons for the restriction concern avoiding death and injury, while the convenience issue primarily concerns saving keg purchasers some time.

Avoiding death and injury is a more compelling factor in this case.

FINAL ORDER

The Commission orders that the request for removal of the restriction against keg sales on the RMB license that Marvin and Susan Van Wey hold at Your Party Shoppe, 2080-82 West Main, Medford, 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 28th day of June, 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.