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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,
Anthony Silvers)	CONCLUSIONS OF LAW,
CHOCOLATE MOOSE)	AND ORDER
211 SW Ankeny)	
Portland, Oregon 97204)	
- - - - -)	
Multnomah County)	

A hearing in the above matter was held on the 27th day of April, 1984, in Portland, Oregon, before Hearings Examiner Jill Thompson. The Applicant appeared in person and was not represented by legal counsel. The Commission was not represented by legal counsel.

On September 24, 1984, the Commission considered the record of the hearing, the Proposed Order of the Hearings Examiner, Exceptions to the Proposed Order of the Hearings Examiner, and applicable statutes and regulations. Pursuant to this review, the Commission enters the following:

BACKGROUND

The Applicant is requesting a Dispenser Class A (DA) license at the CHOCOLATE MOOSE, which is located in Portland's Old Town district. The premises has had an RMB license since 1964, and has been in its present location since 1969. Applicant owned the premises from 1964 to 1979, when he sold it to a contract buyer. The buyer defaulted on the contract in 1983 and Applicant again took possession of the premises. A change of ownership has been approved, and Applicant is the sole licensee.

ISSUES

The following are the issues raised by the application:

1. The refusal letter cited OAR 845-05-040(3)(f) (lesser services) as a basis for denial. The letter alleges Applicant's sales history and projections are lower than prevailing averages.
2. Applicant contends his food preparation techniques are unique, and that his premises is unique in that it provides a sense of continuity and local identity that other Old Town dispenser outlets lack.
3. Applicant contends existing outlets are insufficient to meet the demand expressed for his premises.

The refusal letter listed other grounds for denial which are not proper refusal criteria. They are: Battle Creek Golf Course, Inc. v. OLCC; failure to establish preferences in OAR 845-05-040(2); and OAR 845-05-040(1), which allows comparisons between existing premises and license applications. The letter also cited the statutory quota contained in ORS 472.110(4). Because the Commission has licenses available to grant, the quota is not a basis for refusal. P 'n J's The Other Side, Final Order, June, 1984.

The letter also cited OAR 845-05-030(1) (sufficient licenses premises) but stated only the number of existing licensees in the city and county. No other evidence was offered. This is insufficient data to support a conclusion of sufficient licensed premises. Home Plate, Inc. v. OLCC, 20 Or App 88, 530 P2d 862 (1975).

Applicant argued that his application should not be denied simply because he has a smaller-scale operation than other DA

licensees. The Commission has no statute or rule permitting a preference factor for smaller restaurants in a densely populated area.

I. LESSER SERVICES

Unfavorable consideration may be given to an applicant if the 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

1. Applicant's actual and projected sales, and relevant dispenser averages, are as follows:

	<u>Gross</u>	<u>Food</u>	<u>Food Sales %</u>
Applicant 1982-83	\$ 6,799	\$ 1,975	29%
Applicant projections	18,667	10,333	55%
City of Portland	55,231	34,540	63%
Multnomah County	59,553	38,064	64%

2. License Division staff conducted a comparison survey of dispenser outlets near Applicant. The survey listed sales histories for nine premises, and seating facilities for 11. Two of the nine outlets had disproportionately high sales compared to city and county averages. Below are Applicant's actual and projected sales and sales of the comparison survey outlets. There are two entries for the survey outlets: the first includes all nine; the second omits the sales of the two unusually high-revenue premises.

	<u>Gross</u>	<u>Food</u>	<u>Food Sales %</u>
Applicant 1982-83	\$ 6,799	\$ 1,975	29%
Applicant projections	18,667	10,333	55%
Nine comparison outlets	51,225	32,776	64%
Seven comparison outlets	29,981	17,101	57%

3. Applicant's premises seats 90 and has no banquet space. The comparison survey outlets seat from 55 to 320; eight lack banquet facilities. Three outlets seat fewer than Applicant; these three are all DC licensees.

4. Applicant serves lunch and dinner. His hours of operation are greater than two of the comparison premises, and are the same as six; one of the premises also serves breakfast. If his application is granted he will be open from 11:30 a.m. until 2:30 a.m. seven days a week.

Conclusions of Law

Applicant's premises would provide substantially lower sales volume than prevailing city, county or nearby dispenser outlets, by every measurement technique applied. His seating capacity is lower than nearby DA licensees, he has no banquet facilities and his hours of operation are not exceptional. The Commission concludes that this criterion provides a basis for unfavorable consideration.

II. UNIQUENESS

Preference for issuance of a dispenser license will be given to applicants who 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 characteristics. OAR 845-05-040(2)(b).

Findings of Fact

5. Applicant's menu offers the following:

Lobster, served out of the shell	\$11.25
New York steak	10.25
Shrimp in butter sauce	8.25
Pot roast	7.25
Poached chicken breast	7.25
Poach white fish	6.25

The above entrees are served with bread and appropriate side dishes.

Special salad with cheese, shrimp, egg	6.25
Steak sandwich with salad	5.25
Ragout of the day with salad	3.25
Pot roast sandwich	3.25
Ham and cheese sandwich with salad	3.25
Small shrimp salad	3.25
Cheese and fruit board	2.25
Daily lunch specials	3.25 - 4.25

All the above menu items are available at all hours Applicant is open.

6. Applicant claims his recipes and cooking methods or presentation of his lobster, white fish, pot roast and chicken entrees are unique in the Old Town area.

7. The Chocolate Moose has been in its present location since 1969, and precedes most dispenser licensees in the Old Town area. Applicant's patronage has changed over the years as the area has evolved and become rehabilitated. His clientele is no longer drawn from people who regarded the premises as a neighborhood tavern. Instead his patrons are persons who work in or close to the area, shoppers and sightseers. Applicant contends he has a unique appeal for this clientele in that his premises meets its expectations of good food and pleasant surroundings while at the same time offering a sense of stability and continuity with Portland's pre-renewal period.

Conclusions of Law

Applicant did not attempt to establish uniqueness within a 20-mile radius. His premises may well be unique in the Old Town area, but the regulation is not satisfied by less than a 20-mile area. The Commission concludes that this criterion does not provide a basis for preference.

III. INADEQUATE EXISTING OUTLETS

Preference in licensing may be given to applicant showing any one or more of the following. The applicant shall have the burden of proving that these provisions apply:

. . .

(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

8. Applicant presented a 264-signature petition in support of his application. The signatures were gathered in Applicant's premises over a one-month period during March and April, 1984.

9. The refusal letter in citing this criterion stated only that the Applicant had failed to establish inadequate service in his community. The Commission takes official notice of the fact that Portland and Multnomah County are oversubscribed according to the statutory quota distribution factor.

Conclusions of Law

Applicant's city and county are oversubscribed according to the quota contained in the above rule. Although Applicant has presented a petition in support of his application, the Commission concludes this petition is not sufficient evidence that the area is inadequately served. Applicant has failed to show a preference according to this criterion.

ULTIMATE CONCLUSIONS OF LAW

The license should not be granted. Applicant has not established a preference for licensing, and the lesser services criterion in OAR 845-05-040(3)(f) has been shown to provide a basis for unfavorable consideration.

FINAL ORDER

It is hereby ordered that the application for a Dispenser Class A (DA) license by Anthony Silvers at the Chocolate Moose, 211 SW Ankeny, Portland, Oregon, be DENIED.

It is further ordered that due notice of such action, stating the reasons therefor, be given as provided by law.

Dated this 28th day of September, 1984.



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.