



- b) OAR 845-05-030(1) (sufficient licensed premises).
- c) OAR 845-05-040(1) and OAR 845-05-040(3)(f) (proposed outlet will offer lesser services, facilities and economic benefit to the community).
- d) ORS 472.110(4) (quota).
- e) Battle Creek Golf Course, Inc. v. OLCC, 21 Or. App. 179, 534 P2d 204 (1975).

(Commission's Exhibit D.)

3. The Edelweiss Restaurant is located across from the Klamath County Courthouse in downtown Klamath Falls.

4. The Edelweiss Restaurant has seating in a front dining room for 22 persons and seating in a rear dining room for 56 persons.

5. The front and rear dining rooms of the Edelweiss Restaurant may be separated from one another by closing a door so that banquets may be held for as many as 56 persons in the rear room.

6. The Edelweiss Restaurant has no pool tables, game machines or entertainment.

7. The decor of the Edelweiss Restaurant includes Bavarian and Swiss features that are unique in comparison to existing dispenser outlets within 20 miles. (Applicants' Exhibit #1.)

8. The Edelweiss Restaurant is open from 9:00 a.m. until 9:00 p.m., Monday through Saturday. If issued a DA license, the premises would also offer a Sunday Brunch from 10:00 a.m. until 2:30 p.m.

9. The Edelweiss Restaurant does not have a lounge or bar. Cocktails would be served from a service bar to be constructed.

10. The Applicants have an option on some space next door to the Edelweiss Restaurant. The Applicants may exercise their option on this space in the future to construct a lounge if issued a DA license at the premises. This space is 1200 to 1500 square feet in size.

11. The Applicants' lunch menu is available each day until 5:00 p.m. The Applicants' present lunch menu includes the following:

HICKORY SMOKED SPECIALTIES

Bar-B-Q Beef Sandwich	\$3.25
Bar-B-Q Beef Dog	2.95
Bar-B-Q Pork Spare Ribs	3.75
Bar-B-Q Quarter Chicken	3.25
Join the Half a Rack for Lunch Bunch	5.95
Half Bar-B-Q Chicken	4.50
Rib & Chicken Combo	4.50

SOUPS

Homemade Soup of the Day	\$1.65 - Bowl .95 - Cup
Friday - Homemade Clam Chowder	2.10 - Bowl 1.00 - Cup

SALADS

Soup & Salad with Buttered Roll	\$2.50 2.75 - Friday
Chef Salad	3.75
Half Chef Salad	2.50
Whole Shrimp Salad	5.95
Half Shrimp Salad	2.50
All Small Salads	1.25
Hickory Smoked Breast of Chicken with Tossed Salad and Fresh Fruit	\$3.25

SANDWICHES

Pastrami	\$3.25
Submarine	3.95
Combination	3.50
French Dip	3.25
Bacon, Lettuce & Tomato	2.95
Vegetarian	2.85
Roast Beef	3.05
Ham & Cheese	2.95
Turkey	2.95
Turkey Gobbler	3.25
Edelweiss Frank	2.75

GERMAN SAUSAGES

Bratwurst	\$2.98
Knackwurst	2.98

(Applicants' Exhibit #3.)

12. The Applicants' dinner menu is offered after 5:00 p.m. each day. Items on the dinner menu include the following:

HICKORY SMOKED SPECIALTIES

Spare Rib Dinner	\$5.95
Chicken Dinner	5.75
Combination Dinner	6.50
Child's Plate	3.25

EDELWEISS SAUSAGE DINNERS

Bratwurst	\$4.50
Knackwurst	4.50

OTHER ENTREES

Prime Rib	\$6.95
Abalone Steak	8.95

(Applicants' Exhibit #4.)

13. The Applicants have purchased and are awaiting the delivery of a charbroiler. When the charbroiler arrives, the

Applicants will add the following entrees to the dinner menu: filet mignon, T-bone steak, rib eye steak and lamb steak.

14. The Applicants have a wine list with 12 selections. (Applicants' Exhibit #4.)

15. The Applicants' hickory smoke their own meats. The hickory-smoked items, the bratwurst and the knockwurst are unique among dispenser outlets within 20 miles of the Edelweiss Restaurant.

16. The Edelweiss Restaurant's recent sales have been as follows:

<u>ACTUAL SALES</u>			
<u>MONTH</u>	<u>FOOD SALES</u>	<u>BEER/WINE</u>	<u>TOTAL SALES</u>
<u>1982</u>			
November	\$ 10,184.51	\$ 506.13	\$10,690.64
December	13,469.66	413.98	13,883.64
<u>1983</u>			
January	11,994.84	457.78	12,452.62
February	11,600.74	894.42	12,045.46
March	13,822.47	894.42	14,716.89
April	13,421.00	826.54	14,247.54
May	12,020.97	522.31	12,543.28
June	15,351.66	708.67	16,060.33
July	15,134.62	990.53	16,125.15
August	14,692.82	1,278.23	15,971.05
September	12,587.33	1,078.56	13,665.89
October	<u>14,844.09</u>	<u>1,376.02</u>	<u>16,220.11</u>
Total	<u>\$159,124.71</u>	<u>\$9,497.89</u>	<u>\$168,622.60</u>
Average	<u>\$ 13,260.39</u>	<u>\$ 791.49</u>	<u>\$ 14,051.88</u>

17. The Applicants have reliably projected that they would achieve average monthly total sales of about \$21,000 with the addition of the four charbroiled dinner entrees described in Findings of Fact #13 and the receipt of a DA license.

18. Approximately 522 persons have signed a petition in support of the issuance of a DA license to the Edelweiss Restaurant. (Applicants' Exhibit #2.) More than half of the petition signers reside outside the city limits of Klamath Falls in towns and unincorporated areas for which Klamath Falls is the main commercial center.

19. Dispenser outlets in the following areas experienced the average monthly gross sales indicated during a one-year period through September, 1983:

<u>Area</u>	<u>Average Food Sales</u>	<u>Average Total Sales</u>
City of Klamath Falls	\$25,871	\$38,020
Klamath County	18,599	26,797

20. Sales at Klamath County dispenser outlets have declined since the one-year period through September, 1983, as evidenced by the testimony of Applicant Jack Piazzini. This decline is a reflection that the Klamath Falls economy has recently been weak, as evidenced by the opinion of Mr. Piazzini.

21. The following areas contain the populations and numbers of dispenser outlets indicated:

<u>AREA</u>	<u>POPULATION</u>	<u>POPULATION DIVIDED BY 2,000</u>	<u>LICENSES COMMITTED OR IN OPERATION</u>	
			<u>DA/DB</u>	<u>DC</u>
City of Klamath Falls	16,850	8.425	17	0
Klamath County	58,350	29.175	35	1

22. The nearest DA and Dispenser Class C (DC) outlets to the Edelweiss Restaurant are as follows:

NEAREST DA & DC OUTLETS TO EDELWEISS RESTAURANT

<u>OUTLET</u>	<u>DISTANCE AND DIRECTION FROM EDELWEISS</u>	<u>SEATING</u>	<u>BANQUET FACILITIES</u>	<u>AVERAGE MONTHLY TOTAL SALES</u>
Lighthouse Dining (DA)	0.1 mile S.	125	No	\$26,538
Molatoes Rest. (DA)	0.2 mile S.	271	Yes	\$56,936
Blue Ox Rest. (DA)	0.1 mile N.	103	No	\$19,906
Surf-n-Turf (DA)	0.1 mile N.	97	No	\$16,204
Pelican Cafe & Lounge (DA)	0.2 mile N.	276	No	\$34,986
Winema Motor Hotel (DA)	0.4 mile N.	1,140	Yes	\$19,718
The Sakura Rest. (DA)	3 miles N.	1,265	Yes	\$71,270
High Chaparral Rest. & Lounge (DA)	4.6 miles N.	285	Yes	\$62,141
Roger's (DA)	1.7 miles E.	166	No	\$49,553
Jefferson Inn (DA)	2 miles E.	208	No	\$60,291
J.R.'s Family Dining (DC)	2.2 miles E.	88	Yes	\$28,623
Lucca Cafe (DA)	2.2 miles E.	166	No	\$15,990
Kingwah Rest. (DA)	2.1 miles NE	293	Yes	\$73,394
Cimarron Rest. & Lounge (DA)	2.1 miles E.	244	Yes	\$56,490
Kopper Kitchen (DA)	2.5 miles E.	172	Yes	\$69,307
El Gringo's (DA)	3.1 miles E.	163	Yes	\$47,585

<u>OUTLET</u>	<u>DISTANCE AND DIRECTION FROM EDELWEISS</u>	<u>SEATING</u>	<u>BANQUET FACILITIES</u>	<u>AVERAGE MONTHLY TOTAL SALES</u>
Stockman's Social Club (DA)	3.6 miles E.	108	No	\$26,990
Ho Wah Rest. (DA)	3.7 miles E.	180	No	\$9,133
Spud Cellar (DA)	10.3 miles SE	76	No	\$6,143
Satellite Rest. (DA)	5.5 miles S.	140	Yes	\$23,564
Murphy's Club (DA)	19.3 miles SE	34	No	\$3,858

23. At the date of the Applicants' hearing there was also a DA license application pending for the Chez Nous near Klamath Falls. The Chez Nous has a French menu. The Chez Nous projects average monthly sales of \$34,000.

24. The population of the city of Klamath Falls was 18,300 in 1978 and 16,850 in January, 1984.

25. Since the summer of 1983, Penny's, Payless, and Sears stores located in downtown Klamath Falls closed. The Sears was moved to south Klamath Falls and changed to a catalog order facility. The Penny's and Payless stores were not moved to any other location in the area.

26. A program designed to bolster business in downtown Klamath Falls has recently gotten underway. The program is backed by Federal grants. As part of the program, a manager was hired to promote business in downtown Klamath Falls.

27. The strength of the wood products business in Klamath Falls has recently improved. The Weyerhaeuser mill and the Columbia plywood plant in Klamath Falls are operating at or near capacity. Weyerhaeuser reopened a mill in Bly, east of Klamath Falls, in the fall of 1983.

28. Machano Electric Company opened in Klamath Falls in 1983 and now has 100 employees. Machano opened a subsidiary, Data Carriages, Inc., at approximately the end of 1983. Data Carriages employs 200 persons.

29. The Commission takes official notice that as of March 27, 1984 there were 67 dispenser licenses available for issuance throughout the state to DA and DB applicants. As of this same date, there were 36 DA and DB applications pending before the Commission.

#### DISCUSSION

1. The Applicants testified they desire to apply for a DA rather than a DC license because they believe a DC license would require them to move or screen off from the public certain areas where they would dispense or store alcoholic beverages. The Applicants estimate these changes would cost about \$10,000 and be less efficient than operations under a DA license.

2. An increase in sales to about \$21,000 per month as projected is likely for two reasons. First, the charbroiler will add from \$2,000 to \$5,000 (or an average of \$3,500) per month in sales, as evidenced by the opinion of Jack Piazzini. Further, the availability of cocktails is likely to lead to an

increase in sales of about 20 percent, as evidenced by the opinion of Mr. Piazzini and the numerous requests the Applicants have had for cocktails.  $(\$14,051 \text{ (existing sales)} + \$3,500 \text{ (charbroil increase)}) \times 1.2 = (\$17,551) \times 1.2 = \$21,061.$

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The following criteria will weigh against issuing a license:

(1) There are sufficient licensed premises in the locality set out in the application, or the granting of a license in the locality set out in the application is not demanded by public interest or convenience. Factors such as declining or static population, business or industrial development in the applicant's community or by decreasing sales or patronage at other similarly licensed outlets in that community may be considered. For purposes of this section, the applicant's community will be a 10-mile radius for dispenser licenses and a two-mile radius for other licenses, unless the applicant establishes that a substantial portion of the patronage of the premises is or would be from a larger or smaller area. OAR 845-05-030(1).

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:

. . .

(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).

The Applicants' community is adequately served by existing dispenser outlets as indicated by the fact that both Klamath

Falls and Klamath County contain more than the standard under OAR 845-05-040(2)(c) of one dispenser outlet per 2,000 population. Indeed, Klamath Falls contains twice the one per 2,000 population standard. Thus, no preference for license issuance is shown under OAR 845-05-040(2)(c).

Furthermore, the locality within a 10-mile radius of the Edelweiss contains sufficient dispenser outlets, as indicated by the closure of two department stores, the population declines in Klamath Falls since 1978, and the recent declines in sales at Klamath Falls dispenser outlets. The sufficiency of existing outlets weighs against license issuance under OAR 845-05-030(1).

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

. . .

(f) Applicant's premises will provide lesser service, 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).

The Applicants' premises would provide lesser services, facilities and economic benefit than existing licensed premises in the Klamath Falls area as indicated by the Edelweiss' comparatively low likely sales with a DA license and the Edelweiss' comparatively limited seating. The likely sales at the

Edelweiss with a DA license are about \$21,000 per month versus average sales at Klamath Falls DA outlets of \$38,020 per month. The Edelweiss has fewer seats than 19 of the 21 dispenser outlets within 20 miles. The low sales and limited seating therefore show unfavorable consideration under OAR 845-05-040(3)(f).

Preference for license issuance might be shown in some cases under OAR 845-05-040(2)(a) as a result of the banquet facility the Edelweiss would offer. Slightly fewer than half of the DA and DC outlets within 20 miles of the Edelweiss have banquet rooms. In this case, however, the Applicant's failure to establish the likelihood of greater sales outweighs the preference that might be shown by the banquet facility. Even with the banquet room, the Applicants' sales show the Edelweiss would not provide as much service and economic benefit as existing outlets in the community.

3. 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).

The Edelweiss' hickory-smoked items and bratwurst and knackwurst constitute a unique dining service among dispenser outlets within 20 miles of the Edelweiss and show some preference for licensure under OAR 845-05-040(2)(b).

Further, the Bavarian and Swiss decor features of the Edelweiss constitute a substantially different dining atmosphere among dispenser outlets within 20 miles and show some preference for license issuance under OAR 845-05-040(2)(b).

4. The total number of licensed premises dispensing distilled liquor shall not exceed one for each 2,000 population in the state. ORS 472.110(4).

This statute limits the total number of DA licenses available for issuance throughout the state. As the number of available dispenser licenses is not exhausted, the statute does not provide a basis for denying the license. The bases for denying licenses are stated in ORS 472.160 and OAR 845-05-005 through 845-05-070.

5. 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:

. . . .

(e) Applicant's premises are located in a rural unincorporated area or in an incorporated area with population of less than 25,000 and Applicant's premises has seating capacity for 100 or fewer persons. OAR 845-05-040(2)(e).

Klamath Falls' population is 16,850. The Edelweiss has seating for 78 persons. Preference for license issuance is thus shown under OAR 845-05-040(2)(e).

#### ULTIMATE CONCLUSIONS OF LAW

The Application for a DA license at the Edelweiss Restaurant is not demanded by the public interest and convenience because of the sufficient licensed premises in the locality and

because of the limited services and economic benefit the Applicants would provide with a DA license. ORS 472.160(1).

The number of dispenser licenses in Klamath Falls is two times the one per 2,000 population standard presumed to provide adequate service under OAR 845-05-040(2)(c). Therefore, the number of outlets in the community is a strong negative factor against the application.

The Edelweiss' unique bratwurst, knackwurst and hickory-smoked items and substantially different Swiss and Bavarian decor features are not so unusual as to merit strong weight as preference factors.

FINAL ORDER

It is hereby ordered that the application by Jack and Linda Piazzini for a DA license at the Edelweiss Restaurant, 327 Main Street, Klamath Falls, 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 27th day of July, 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.