

BEFORE THE LIQUOR CONTROL COMMISSION  
OF THE STATE OF OREGON

In the Matter of the Application ) To Change Location of a ) Dispenser Class A (DA) ) Licensed Premises by: )  North's Restaurants, Inc. ) FRED'S GOOD TIMES ) 2424 N. Pacific Highway ) Medford, Oregon ) - - - - - ) Jackson County )	FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
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A hearing in the above matter was held on the 7th day of February, 1984, in Portland, Oregon, before Hearings Examiner Douglas Crumme'. The Applicant appeared in person and was represented by Sydney Chandler, Attorney at Law, Coos Bay, Oregon. The Commission was not represented by legal counsel. The record of the hearing was held open to receive further documentary evidence from the Regulatory Staff and from the Applicant.

On June 25, 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:

FINDINGS OF FACT

1. North's Restaurants, Inc. holds a Dispenser Class A (DA) license at North's Chuckwagon, 1016 N. Riverside, Medford, Oregon.

North's owns ten percent of the stock of the Good Times Recreation Company.

The Good Times Recreation Company owns a business named FRED'S GOOD TIMES, 2424 N. Pacific Highway, Medford, Oregon. The Good Times Recreation Company holds a Retail Malt Beverage (RMB) license from the Commission at Fred's Good Times.

North's has applied to the Commission to move its existing DA license from 1016 N. Riverside to the location of Fred's Good Times at 2424 N. Pacific Highway, Medford, Oregon. North's has further applied for Commission approval to change the name of the DA-licensed business from North's Chuckwagon to Fred's Good Times and for Commission approval of Fred Owen (who owns 90 percent of the stock of the Good Times Recreation Company) as a licensee of the DA-licensed business.

2. The Commission's Regulatory Staff Committee has recommended that the application to change location be refused, citing the following:

- a. OAR 845-05-065(3) and (4) (the proposed new location does not adequately serve the same area as the existing licensed premises).
- b. OAR 845-05-040(3)(d) (applicant will serve only one meal per day).
- c. OAR 845-05-040(3)(e)(B) (licensed premises will be operated primarily as a tavern rather than as a restaurant, as indicated by factors emphasizing the sale of alcoholic beverages to a greater degree than food service).

(Commission's Exhibit I.)

3. North's Chuckwagon is 0.8 miles from Fred's Good Times.
4. Fred's Good Times has in the past been operated primarily as a tavern, with 18 pool tables and a bar on one side of the

premises separated by a half-wall from a large dance facility on the other side.

5. The Applicant would make significant changes to the floorplan and operation of Fred's if allowed to move the DA license from North's to Fred's.

The Applicant has recently remodeled an area of the building into a proposed banquet room that will have seating for 120 persons. The banquet room will be separated from the remainder of the premises by walls and doors. The banquet room will have a separate entrance. The banquet room has not been carpeted or furnished yet.

The Applicant would construct a new dining room in Fred's that would be located in the middle of the premises between the dance area and the pool area. The dining room would be separated from the remainder of the premises by full permanent walls and doors. The dining room would contain seating for 90 persons. The Applicant would construct a new set of restrooms that dining room patrons could visit without traveling through the pool table or lounge areas.

The Applicant would divide off part of the pool table area by walls or partial walls for use as a second smaller lounge.

The Applicant would offer an extensive new food menu in the dining room, the pool table area, and the proposed second smaller lounge from 11:00 a.m. until 2:00 a.m. each day. (The menu would not be offered in the large dance lounge).

6. After the proposed changes and remodeling described in the Finding of Fact above, the seating in the different areas at Fred's Good Times would be as follows:

PROPOSED SEATING AFTER REMODELING

<u>AREA</u>	<u>NUMBER OF SEATS</u>
Dining Room	90
Banquet Room	120
Large lounge with dance floor	226 (including 18 at bar)
Pool and game room	60
<u>Proposed new lounge</u>	<u>40 (including 17 at bar)</u>
TOTAL	536

7. If issued a DA license, the Applicant plans to offer live music and dancing in its 226-seat lounge from 9:00 p.m. until 2:30 a.m. on Friday and Saturday evenings. The Applicant may study expanding the live music and dancing to Wednesday and Thursday evenings in the future. The 226-seat lounge and dance floor will be closed except those evenings when music and dancing are offered.

8. After the proposed remodeling for a DA license, the Applicant would have 15 pool tables and four or five game machines in its 60-seat pool table area. The seating in the pool table area is at tables that are about three feet by four feet in size and are large enough for dining.

9. Twenty-three of the seats in the 40-seat lounge next to the pool room will be at booths that are large enough for dining.

10. The Applicant's menu would include the following:

CHICKEN

Chicken sandwich	\$ 4.65
Chicken pot pie	4.95

Chicken breast strips in plum sauce	5.95
Teriyaki chicken	6.95

### STEAKS

London broil	\$ 7.95
Top sirloin	8.95
Steak kabob	7.25
New York strip	10.95
Steak and shrimp	8.45

### SEAFOOD

Scallops	\$ 7.95
Shrimp	8.95
Halibut	8.95
Fried clams	5.95
Crab meat and shrimp fromage	8.45

### SNACKS AND APPETIZERS

Deep-fried artichoke hearts	\$ 2.95
Onion rings	2.25
Thin onion rings	2.25
Zucchini slices	2.25
Fried cheese stick	3.25
Fried clams	4.25
Onion soup	2.45
Broccoli-cheese soup	2.45
Soup and sandwich	4.45
Soup and salad	3.95

### SALADS

Taco salad	\$ 5.25
Super tostada	5.95
Chef salad	4.95
Dinner salad	2.25
Crab Louis	6.75
Shrimp and snow pea salad	5.95

### POTATO SKINS AND NACHOS

Mexi skins	\$ 4.70
Combo skins	4.70
Supreme nachos	4.95
Combo nachos	4.95

### SANDWICHES

Club sandwich	\$ 4.25
Fish sandwich	4.65
Steak sandwich	5.95
French dip sandwich	4.95

RIBS AND BURGERS

10 barbecued ribs	\$12.95
7 barbecued ribs	9.95
4 barbecued ribs	6.95
Hamburger	Price Not Listed
Cheeseburger	Price Not Listed
Bacon cheeseburger	Price Not Listed
Barbecue burger	Price Not Listed
Mushroom burger	Price Not Listed

CHILDREN'S PLATES

Burger plate	\$ 2.35
Hot dog platter	2.35

DESSERTS

Mud pie	\$ 1.95
Carrot cake	1.95
Cheesecake	1.95
Vanilla ice cream	.50
Chocolate or strawberry sundae	1.25

(Commission's Exhibit G.)

11. The Applicant's proposed menu would include a wine list with selections available by the bottle. (Commission's Exhibit G.)

12. At the time the Applicant submitted materials to the Commission in connection with its present applications, the Applicant had retained an artist to draw at least two possible menu covers. Both covers featured caricatures of Fred Owen, President of the Good Times Recreation Company. The Regulatory Staff saw just one of the covers. That cover had references to alcohol and pool. The cover that the Applicant intends to use, however, has no apparent references to alcohol or entertainment. On the cover intended to be used, there is a three-quarter-page caricature of Fred Owen. The cover says "Fred's" below Mr. Owen. A halo

floats above Mr. Owen's head. A small cherub hangs onto the halo. (Commission's Exhibit G.)

13. The recent sales at Fred's Good Times have been as follows:

<u>ACTUAL SALES - FRED'S GOOD TIMES</u>		
	<u>BEER AND WINE</u>	<u>FOOD</u>
<u>1983</u>		
January	\$11,498.00	0
February	12,953.00	0
March	14,336.00	0
April	12,041.00	0
May	7,827.00	0
June	8,172.00	0
July	8,473.00	0
August	6,334.00	0
September	6,634.85	0
October	8,359.26	0
November	11,466.29	0
December	11,193.41	0
<u>1984</u>		
January	9,414.63	0

14. The Applicant is reasonably likely to have higher food sales than liquor sales at Fred's Good Times. See Discussion below on Pages 8 through 11.

15. Dispenser outlets in the following areas have recently experienced the average monthly sales indicated:

<u>AREA</u>	<u>FOOD SALES</u>	<u>TOTAL SALES</u>
City of Medford	\$34,390	\$51,246
Jackson County	27,867	40,602

16. The Commission's Regulatory Staff Committee "recognizes the arguments that you [the Applicant] make that this premises is an entertainment center with food service and that this could be described as unique", citing OAR 845-05-040(2)(b).

The Staff concluded however that this uniqueness did not overcome the refusal grounds cited by the Staff. (Commission's Exhibit I).

17. The combination of 15 pool tables and a large dancing facility that Fred's Good Times would offer in conjunction with the food service planned would be unique among dispenser outlets in Klamath, Jackson and Josephine Counties, as evidenced by the testimony of Fred Owen.

18. Some existing Medford dispenser outlets have pool tables. One Medford dispenser outlet has approximately five pool tables.

19. Most of Fred's Good Times' patrons are in their 20s. The Applicant desires to raise the average age of the patrons at Fred's to about 30.

20. Fred's is recognized as a safe place that is comfortable for unescorted women, as evidenced by the testimony of Fred Owen.

#### DISCUSSION

The Regulatory Staff's citation of OAR 845-05-040(3)(e)(B) as a refusal ground raises the issue of whether alcohol sales would exceed food sales at Fred's with a DA license and the proposed changes.

Excluding banquets, the Applicant projects the following sales with a DA license:

#### PROJECTED AVERAGE MONTHLY SALES\*

<u>SOURCE</u>	<u>SALES</u>	<u>BASIS</u>
Lunch Food	\$11,800.00	(185 lunch patrons per weekday x \$3.00 average ticket) + (92 lunch patrons per Fri. and Sat. x \$3.00 average ticket.)

<u>SOURCE</u>	<u>SALES</u>	<u>BASIS</u>
Dinner Food	\$38,600.00	(180 dinner patrons per day Sun. through Thur. + 220 dinner patrons Fri. and Sat.) x \$6.75 average ticket.
Pool Room Food Besides Lunch	\$ 1,000.00	(9 patrons per day x \$4.00 average ticket.)
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Total Food	\$51,400.00	
Alcohol in Dining Room, 40-seat lounge & Pool Table area	\$12,850.00	(Belief that alcohol sales will be 20 % of total sales in these areas.)
Alcohol in Dance Lounge on Fri. and Sat.	\$ 7,803.00	(\$900 per Fri. and Sat. in alcohol sales in dance lounge.)
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Total Liquor	\$20,653.00	
Total Food and Liquor	\$72,053.00	
Percent of Food to Total	71%	

\* The evidence on projections varied in a couple of instances between the formula the Applicant used as a basis for sales from a certain source and the amount that the Applicant computed for that source. The sales projections listed above are a composite of the Applicants' computations and the Hearings Examiner's own computations in certain instances from the Applicant's formulas themselves.

The Applicant's projections are not particularly reliable because they rest on unsupported assumptions that may not hold true in the case of Fred's.

One unsupported assumption is the number of lunch turns Fred's dining room will do. The Applicant projects Fred's will do two lunch turns on weekdays based on evidence that this is an average for Medford restaurants. There has been no showing, however, why Fred's would be likely to achieve this average figure.

Another unsupported assumption is that Fred's would realize 80 percent food sales in areas where the full menu is served because this is an industry average. There was no showing that 80 percent food sales is in fact an industry average for such areas or why Fred's would be likely to achieve this percentage.

Despite the limited reliability of the Applicant's projections, it nevertheless appears reasonably likely that Fred's would have food sales that are higher than liquor sales.

Food sales are likely to be higher than liquor sales because the portions of the business where the full menu would be served would be open many more hours a week than the portions where food would not be served. The full menu would be served in the dining room, pool room and 40-seat lounge for 105 hours each week. (15 hours per day x 7 days). In contrast, the dance lounge, which is the only area where the menu will not be served, would be open initially only about eleven hours a week. (5-1/2 hours a day x 2 days).

The availability of food at a restaurant does not guarantee that customers will come to the premises to eat. The Applicant's proposed menu, however, is extensive and varied and seems likely to draw serious interest from food patrons if the food is prepared well and the service is good. The long hours when the full menu is available creates the opportunity for substantial food sales.

The 120-seat banquet room has the potential to add significantly to food sales. Although there is no track record of banquets at the old Fred's, we can conclude the Applicant is likely

to seriously seek banquet business in order to earn a return on the investment in the banquet room and the food service operation.

The Applicant's most recent alcohol sales with 18 pool tables and the large dance lounge operation have been below \$11,500 per month. See Finding of Fact No. 13. The availability of distilled spirits would provide a new service and would be likely to increase alcohol sales some. But given the existing alcohol sales base, it seems likely that the proposed food operation can at least match the alcohol sales volume.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission may allow a change of location of licensed premises to any licensee that qualifies under the criteria set forth in OAR 845-05-015 through OAR 845-05-045 when the proposed new location serves the community of the existing licensed premises. OAR 845-05-065(3).

For the purposes of this rule, "community" means the area primarily served by the existing licensed premises. The applicant has the burden of establishing the geographic area served by the existing licensed premises and showing that the new location will serve adequately the same area. The new location may serve a community larger than the existing community. OAR 845-05-065(4).

This case presents the question of what OAR 845-05-065(4) means by requiring that ". . . the new location will serve adequately the same area [as the existing licensed premises]."

In its refusal recommendation, the Regulatory Staff took the position that Fred's would not "serve adequately" the same area as North's because "[t]he present location reports sales on the renewal application submitted in August, 1983 of \$85,492 of which \$83,680 is food. You propose \$60,140 in gross sales of which

\$34,366 would be food at the new location." Commission's Exhibit I. The Staff appears to reason that Fred's will not "serve adequately" the same area served by North's because Fred's total sales will be lower than North's. The Staff does not explain in the record why it interprets the term "serve adequately" in this way.

The Commission does not agree with the Staff's interpretation that the term "serve adequately" implies such a sales comparison. There are three reasons for the Commission's view.

The first reason is that neither OAR 845-05-065(3) nor OAR 845-05-065(4) makes specific mention of this sort of sales comparison. Rather, the rules refer solely to whether the geographic areas served by the old and new locations are adequately the same. If the rule was intended to require some sort of sales comparison between the old and new locations, it would have said so.

The second reason the Commission disagrees with the Staff's interpretation of the term "serve adequately" is because OAR 845-05-065(3) already triggers specific requirements under OAR 845-05-040 regarding sales for licensees seeking changes of location. Under OAR 845-05-040, the Commission may examine the new location's sales in comparison to the existing outlets in the city or county (OAR 845-05-040(2)(a) and may examine whether the new location will emphasize the sale of alcohol over food. OAR 845-05-040(3)(e)(B). The specific reference to these sales criteria in OAR 845-05-065(3) makes it unlikely that the term "serve

adequately" was designed to imply the additional sales comparison between the old and new locations urged by the Staff.

The third reason why the Commission does not agree with the Staff's interpretation of the term "serve adequately" is that it would involve the Commission in issues better left to the judgment of the licensees. A licensee presumably seeks to change the location of a dispenser license to make a greater profit at the new location. The licensee will make a greater profit if there is more demand and more volume for liquor by the drink at the new location. That clearly is the case in the instant matter. The Licensee wants to move its DA license from North's, where demand for liquor is low, to Fred's, where demand for liquor is likely to be higher. By seeking a more profitable location for the license, the licensee works to serve the local demand for distilled liquor more adequately rather than less. As long as the new location is otherwise qualified under the Commission's license criteria and serves the same geographic area, the Commission should take advantage of the Licensee's ability to seek and fill demand.

Rather than invite a sales comparison, the term "serve adequately" simply invites inquiry into whether the new location serves substantially the same geographic community as the old location. The present application meets this test. Fred's is only 0.8 miles from North's. The two locations serve the same community.

Having concluded the application meets the requirement under OAR 845-05-065(4) that the new location serve the same community as the old, the remaining inquiry is whether or not the Applicant

is qualified under the license criteria cited as refusal grounds by the Staff. These are discussed below.

2. Unfavorable consideration may be given to a DA applicant if the applicant will provide meal service at no more than one meal per day. OAR 845-05-040(3)(d).

The Applicant will provide meal service from its entire menu from 11:00 a.m. until 2:30 a.m., seven days a week. These hours cover the lunch and dinner periods. Unfavorable consideration is therefore not shown under OAR 845-05-040(3)(d).

3. Unfavorable consideration may be given to a DA applicant if the applicant's premises will be operated primarily as a tavern rather than as a restaurant, as indicated by factors emphasizing the sale of alcoholic liquor to a greater degree than food service. OAR 845-05-040(3)(e)(B).

The main issue under OAR 845-05-040(3)(e)(B) is whether Fred's would serve more alcoholic beverages than food with a DA license. It is reasonably likely that the Applicant will emphasize food sales over alcoholic beverage sales with the Applicant's proposed changes. See Finding of Fact No. 14 and the Discussion beginning on page 8.

The Commission has some protection against Fred's emphasizing alcohol sales, since failure by the Applicant to operate Fred's substantially as proposed could subject Fred's DA license to nonrenewal. OAR 845-05-025(3). The Commission recommends a condition to license issuance that failure to emphasize food sales will be deemed a failure to operate substantially as proposed.

Because it appears likely from the record that Fred's will sell more food than alcohol and because of the Commission's protection under OAR 845-05-025(3) should food sales not be emphasized, unfavorable consideration is not shown under OAR 845-05-040(3)(e)(B).

4. 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, quantity 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 Regulatory Staff Committee did not contest the Applicant's argument that the combination of food service and entertainment at Fred's would be unique and show some preference under OAR 845-05-040(2)(b). See Finding of Fact No. 16 and Commission's Exhibit I, page 2.

#### ULTIMATE CONCLUSIONS OF LAW

The Applicant's application to change the location of North's Chuckwagon should be granted because the new location will adequately serve the community served by the present location of North's, because the new location will be open for more than one meal a day, because the particular combination of entertainment and food service available at the new location will constitute a unique dining service or atmosphere, and because the new location is likely to emphasize food sales over liquor sales as represented by the Applicant. OAR 845-05-065(3).

#### FINAL ORDER

It is hereby ordered that the Commission GRANT the application by North's Restaurants, Inc. to change the location of its

DA license from North's Chuckwagon, 1016 N. Riverside, Medford, Oregon to Fred's Good Times, 2424 N. Pacific Highway, Medford, Oregon, subject to the following conditions, and upon the payment of appropriate license fees to the Commission:

- a. Applicant must offer the substantial equivalent of the menu and floorplan layout described in the record of Applicant's February 7, 1984 hearing prior to the exercise of DA license privileges at Fred's Good Times.
- b. The Applicant must be prepared to operate at Fred's Good Times as proposed within six months of the date of the Commission's Final Order in this matter or the grant of the Applicant's applications will be withdrawn.
- c. Applicant's entire proposed menu must be available from 11:00 a.m. until 2:00 a.m. or closing, whichever is earlier, in the dining room, pool area and 40-seat lounge.
- d. Failure by Applicant to achieve greater food sales than alcoholic beverage sales in the first 12 months of operation will be deemed a failure to operate substantially as proposed.

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

Dated this 26th day of June, 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.