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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,
Floyd E. Naud)	CONCLUSIONS OF LAW,
NAUD'S LANDING)	AND ORDER
1701 NW Thurman)	
Portland, Oregon)	
- - - - -)	
Multnomah County)	

A hearing in the above matter was held on the 17th day of January, 1984, in Portland, Oregon, before Hearings Examiner Douglas Crumme'. The Applicant appeared in person and was not represented by legal counsel. The Commission was not represented by legal counsel. The record of the hearing was held open to receive additional evidence from the Applicant. The record was reopened on March 19, 1984, as a result of additional evidence submitted by the Applicant.

On April 23, 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. Floyd E. Naud has applied for a Dispenser Class A (DA) license, doing business as NAUD'S LANDING, 1701 NW Thurman, Portland, Oregon. The proposed outlet will be located in a premises at which a Dispenser Class A license was formerly held through December, 1982.

2. The Commission's Regulatory Staff has proposed that Mr. Naud's application be denied, citing the following:

- a. ORS 472.160(1) (not demanded by public interest or convenience).
- b. OAR 845-05-040(2)(b) (sufficient licensed premises in the applicant's community).
- c. OAR 845-05-040(2)(c) (dining service or atmosphere not unique or substantially different).
- d. OAR 845-05-040(3)(f) (lesser services and facilities than existing dispenser outlets and pending dispenser applications).
- e. ORS 472.110(4) (quota).
- f. Battle Creek Golf Course, Inc. v. OLCC, 21 Or. App. 179, 534 P2d 204 (1975).

(Commission's Exhibit J.)

3. A cocktail license was first issued at the Naud's Landing location in 1939. Between 1951 and approximately 1979, the premises was licensed to a Mr. and Mrs. Lefebvre. Mr. and Mrs. Lefebvre died in about 1979. Their heirs sold the premises in 1979. In 1980, the premises sold again. In October, 1982, the premises was involved in a proceeding with the Internal Revenue Service for non-payment of taxes. Ultimately, the title to the premises was regained by the Lefebvre heirs, who paid off existing liens and back taxes. The Lefebvre heirs have made an agreement to sell to Mr. Naud. The agreement is conditioned on the issuance of a DA license to Mr. Naud.

4. The licensed premises has been closed since October, 1982.

5. After the closure of the premises in 1982 and the institution of proceedings by the Internal Revenue Service, neither the former licensee, the IRS, nor security interest holders renewed the dispenser license at the premises or obtained secured party authorization to operate and preserve the license at the business.

6. The licensed premises under prior owners consisted of a lounge and bar. The lounge had seating for 56 persons. The bar had seating for 26 persons.

7. If issued a DA license at the premises, Mr. Naud proposes to add a new separate dining room with seating for 50 persons and an additional separate banquet room and overflow dining room with seating for 40 to 50 persons. (Applicant's Exhibit No. 4.) Mr. Naud will also do extensive remodeling to the kitchen, lounge and exterior of the building. (Applicant's Exhibit No. 6.)

8. Mr. Naud proposes to operate the proposed outlet from 6:00 a.m. to 2:30 a.m., six days a week.

9. The proposed outlet would be open for breakfast, lunch and dinner.

The breakfast menu would consist of a set selection of standard breakfast items.

The lunch would be offered from 11:00 a.m. to 2:00 p.m. through a buffet line. A different selection of lunch buffet entrees would be available each day. At least two entrees, sandwiches and a salad bar would always be provided. Representative buffet entrees are lasagna, Swiss steak, stuffed bell

peppers, macaroni and cheese, goulash, roast pork, chicken strips, Salisbury steak, oysters, spaghetti and fried chicken. The buffet entrees would include potatoes, vegetable and a dinner roll. The buffet entrees would cost \$3.25.

The Applicant's dinner menu entrees would include the following:

T-bone steak	\$7.95
Rib eye steak	7.50
Top sirloin steak	6.95
Chopped sirloin steak	4.25
Chicken fried steak	4.35
Soup and salad bar	2.00

In addition to the above, the Applicant would provide hot sandwiches, cold sandwiches, soup and chili during the evening hours. (Commission's Exhibit G.)

10. The Applicant projects he would experience the following sales at Naud's Landing with a DA license:

PROJECTED SALES

<u>MONTH</u>	<u>FOOD</u>	<u>ALCOHOLIC BEVERAGES</u>	<u>OTHER</u>	<u>TOTAL</u>
<u>1984</u>				
March	\$ 5,850	\$ 4,500	\$ 850	\$ 11,200
April	5,850	4,500	850	11,200
May	5,850	4,500	850	11,200
June	7,800	6,000	950	14,750
July	7,800	6,000	950	14,750
August	9,750	7,500	950	18,200
September	9,750	7,500	950	18,200
October	11,700	9,000	950	21,650
November	11,700	9,000	950	21,650
December	11,700	9,000	950	21,650
<u>1985</u>				
January	13,650	10,500	950	25,100
February	<u>13,650</u>	<u>10,500</u>	<u>950</u>	<u>25,100</u>
12-Mo. Total	<u>\$115,050</u>	<u>\$88,500</u>	<u>\$11,100</u>	<u>\$218,150</u>
12-Mo. Average	<u>\$ 9,587</u>	<u>\$ 7,375</u>	<u>\$ 925</u>	<u>\$ 17,887</u>

(Applicants' Exhibit No. 7.)

11. In 1981, the last full calendar year under which the Naud's Landing premises was operating with a DA license, the business experienced average monthly food sales of \$2,554, average monthly liquor sales of \$5,404, and average monthly total sales of \$7,958. This yields a percentage of food sales to total sales of 32 percent.

12. Mr. Naud's food sales projections in Finding of Fact No. 10 above were based on the underlying projections that there would be 75 food patrons a day during the first three months of operation, 100 food patrons a day during the next two months, 125 food patrons a day during the next two months, 150 food patrons a day during the next two months, and 175 food patrons a day during the next two months, at an average ticket of \$3.25.

13. Mr. Naud's liquor sales projections in Finding of Fact No. 10 above are based in part on the historical ratio of food sales to liquor sales at the premises.

14. Floyd Naud's sales projections stated in Finding of Fact No. 10 above are based in large degree on the demand he believes there is in the immediate area around the proposed outlet for decent food.

15. The licensee at the proposed outlet from 1980 to 1982, Garrison Caleen, ran the premises in a very irregular and haphazard manner. Operating hours varied. There was little attention to quality.

16. The immediate neighborhood around Naud's Landing in Northwest Portland contains a concentration of retail, service

and industrial businesses. Some employ a relatively large number of people. Some run second shifts.

17. Approximately 171 persons from the immediate neighborhood signed a petition in support of the issuance of a DA license at Naud's Landing. (Applicant's Exhibit No. 2.)

18. The following businesses located in the immediate vicinity of the proposed outlet have written letters in support of the issuance of a DA license at Naud's Landing: Lutz Tire Company (37 employees), Gardner & Beedon Company (100 employees), Premier Gear & Machine Works (45 employees) and Quimby Welding Supplies, Inc. (Applicant's Exhibits No. 1 and 8.) Some of these businesses are interested in holding meetings in the Naud's Landing banquet room.

19. Many persons in the Applicant's neighborhood desire a convenient restaurant nearby with decent food where they can eat a fast but healthy lunch or dinner.

Some who signed to Mr. Naud's petition in support of a DA license do not like the quality of the food at the nearby dispenser outlets.

20. Mr. Naud intends to employ an experienced manager with many years in the food service business. Mr. Naud intends to offer high-quality food.

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

<u>AREA</u>	<u>FOOD SALES</u>	<u>TOTAL SALES</u>
City of Portland	\$34,540	\$55,231
Multnomah County	38,064	59,553

22. The following areas contain the numbers of dispenser licenses and populations indicated:

<u>AREA</u>	<u>POPULATION</u>	<u>POPULATION DIVIDED BY 2,000</u>	<u>LICENSES</u>	
			<u>DA/DB</u>	<u>DC</u>
City of Portland	365,000	182.50	313	17
Multnomah County	557,500	278.75	380	22

23. The following are the nearest dispenser outlets to the proposed outlet:

<u>OUTLET</u>	<u>DISTANCE FROM PROPOSED OUTLET</u>	<u>SEATING</u>				<u>AVERAGE MONTHLY TOTAL SALES</u>	<u>% OF FOOD TO TOTAL SALES</u>
		<u>REST</u>	<u>LOUNGE</u>	<u>BANQ</u>	<u>TOTAL</u>		
The Galley	6 Blks N	64	36	0	100	\$12,732	25.02
Tony's	5 Blks SW	50	36	0	86	18,161	29.34
Chuckles	9 Blks SW	60	75	0	135	17,738	29.59
Beaver Cafe	8 blks W	69	58	0	127	20,887	37.21
Slabtown	8 Blks SE	60	190	0	250	33,501	22.58
Nostalgia	12 Blks NW	66	170	66	236	19,065	22.09
Joe's Cellar	8 Blks SW	72	108	0	180	48,647	43.63
Lovejoy Tav	12 Blks SW	89	56	0	145	15,089	21.37
Yurs	12 Blks SE	40	100	0	140	28,759	38.30

(Commission's Exhibit B.)

24. At the date of the Applicant's hearing, there were 65 dispenser licenses available to the Commission for issuance to DA and DB applicants. On this same date, there were 34 DA applications and no DB applications pending before the Commission.

25. Mr. Naud has recently sold his trucking business and is now able to spend 100 percent of his time running Naud's Landing. This will allow him time to contact the many businesses near Naud's Landing and advise them of the availability of banquet facilities and food at Naud's Landing.

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 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).

The proposed outlet would be located in Portland. Portland contains 313 DA and DB licenses to serve its population of 365,000. This substantially exceeds the one per 2,000 standard in OAR 845-05-040(2)(c). This is prima facie evidence that the Applicant's community is being adequately served. The Commission notes further that a number of the nearest dispenser outlets to the proposed outlet are experiencing average total

sales that are substantially below the average for all dispenser outlets in Portland. This figure indicates less demand per outlet in the Applicant's immediate neighborhood than in the City as a whole. Preference for this application is not indicated under OAR 845-05-040(2)(c) due to the sufficient number of outlets in the Applicant's community.

2. An application for a DA license may be granted or denied on the basis of a comparison with existing DA licenses in the same city or county or a comparison with other pending dispenser's applications. OAR 845-05-040(1). Preference in licensing may be given to applicants providing greater services, facilities and economic benefit to the area or 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, entertainment or such characteristics. Gross sales figures may be used as a basis for determining the number of patrons served. OAR 845-05-040(2)(a).

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).

The Applicant has projected average monthly total gross sales over the first year of operation with a DA license of \$17,887. The ultimate basis for the Applicant's projection is the interest the Applicant believes there is in the immediate

neighborhood for the good quality food that the Applicant intends to serve. However, the level of business the Applicant is likely to do as a result is a very inexact matter. The interest in the neighborhood for good food does not by itself constitute a reliable basis for the projection.

The previous operator of the premises experienced average monthly total sales in 1981 of only \$7,958. This figure is not a wholly fair reference for what the Applicant is likely to experience since the previous operator ran a haphazard, irregular business with little attention paid to the quality of the food. The Applicant plans to offer a good quality menu with breakfast, lunch and dinner items of a type that appear would be appropriate for local workers interested in a meal before work, at lunch, or after work. Further, the Applicant is proposing to add a new 50-seat dining room and a new 40-to-50-seat banquet room that can also be used for overflow dining. Thus the Applicant should experience higher sales than the previous licensee. The Applicant's \$17,887 per month projection appears reasonable in light of these additional considerations.

The Applicant's projections though do not compare favorably with Portland DA outlet averages. Portland DA outlets have recently averaged \$55,231 per month in total sales. As a result, the Applicant has failed to demonstrate that his likely sales establish preference under OAR 845-05-040(2)(a). Thus unfavorable consideration is shown under OAR 845-05-040(3)(f).

The Applicant proposes a 40 to 50-seat banquet area that can be separated off from the remainder of the premises by a

folding wall. This banquet capacity might indicate preference for licensure under OAR 845-05-040(2)(a) under some circumstances. However, the Applicant's failure to demonstrate greater sales at the premises outweighs preference that might be shown by the proposed banquet room. The low projected sales means the Applicant has not demonstrated sufficient public interest in use of the banquet room or the premises as a whole to lead to greater services and economic benefit to the area or public.

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, 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 Applicant has not demonstrated that the dining service or atmosphere at Naud's Landing would be unique or substantially different in comparison to existing dispenser outlets within a 20-mile radius. The only evidence of uniqueness that the Applicant offered was that he would serve good food in comparison to the fare offered at some of the nearest dispenser outlets to Naud's Landing. Whether the Applicant's food would be better than his nearest competitors does not address the 20-mile radius provision in the rule. No showing has been made that dining service or atmosphere would be unique within a 20-mile radius. Preference for licensure is therefore not shown under OAR 845-05-040(2)(b).

4. The Commission must exercise caution in the grant of the limited number of dispenser's licenses available to insure that these licenses are distributed in a manner to best serve the state's population. ORS 472.110(4), Battle Creek Golf Course, Inc. v. OLCC, 21 Or. App. 179, 183-84, 534 P2d 204 (1975); ORS 472.160(1).

Although the Commission currently has available more dispenser licenses for issuance to DA and DB outlets than there are applications pending, the number of licenses available is quite limited.

ULTIMATE CONCLUSIONS OF LAW

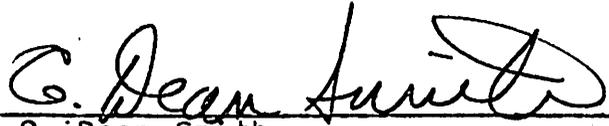
The application by Floyd Naud for a DA license at Naud's Landing is not demanded by the public interest and convenience because the Applicant's community is adequately served by existing outlets, because the Applicant will not offer greater services and economic benefit, because the Applicant has failed to establish any preference based on uniqueness or substantial difference of the dining service or atmosphere within a 20-mile radius, and because of the shortage of DA licenses available for issuance. ORS 472.160(1).

FINAL ORDER

It is hereby ordered that the application for a Dispenser Class A (DA) license by Floyd E. Naud at Naud's Landing, 1701 NW Thurman, 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 24th day of April, 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.