

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the)
Application for Renewal)
of a Dispenser Class A (DA))
License by:)
) FINAL
) FINDINGS OF FACT,
Leonard V. Ryan) CONCLUSIONS OF LAW,
PEPPER TREE RESTAURANT) AND ORDER
3190 Portland Road, NE)
Salem, Oregon 97303)
- - - - -)
Marion County)

A hearing in the above matter was held on the 9th day of September, 1983, in Salem, Oregon, before Hearings Examiner Jill Thompson. The hearing record remained open until October 19, 1983. The Applicant appeared in person and was represented by D. Michael Mills, Attorney at Law, Salem, Oregon. The Commission was represented by legal counsel.

On June 25, 1984 the Commission considered the record of the hearing, 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. Applicant has applied for renewal of his Dispenser Class A (DA) license at the PEPPER TREE RESTAURANT, 3190 Portland Road, NE, Salem, Oregon. He has held a DA license at this premises since 1971.

2. The Commission has refused the renewal application for failure to meet OAR 045-05-025(4) (food sales ratio). The refusal letter also states that "[s]taff was not convinced that

this [applicant's efforts] could be looked on as a serious and substantial effort . . . "

3. Applicant's actual sales during 1982 and 1983 were as follows:

<u>1982</u>	<u>GROSS</u>	<u>FOOD</u>	<u>LIQUOR</u>	<u>FOOD SALES %</u>
January	\$9,515	\$1,742	\$7,773	18.3%
February	12,496	1,723	10,773	13.8%
March	11,888	1,638	10,250	13.8%
April	12,276	1,842	10,433	15.0%
May	16,793	1,495	15,298	8.9%
June	14,409	849	13,560	5.9%
July	23,972	969	23,003	4.0%
August	35,431	1,758	33,673	5.0%
September	30,981	1,298	29,684	4.2%
October	32,041	659	31,382	2.1%
November	30,103	392	29,711	1.3%
December	38,592	510	38,083	1.3%
AVERAGES	\$22,375	\$1,240	\$21,135	5.5%
<u>1983</u>				
January	\$32,913	\$566	\$32,347	1.7%
February	37,590	487	37,103	1.3%
March	48,913	3,295	45,618	6.7%
April	50,254	6,985	43,269	13.9%
May	44,584	7,592	36,992	17.0%
June	53,313	9,091	44,222	17.1%
July	54,820	8,303	46,517	15.2%
August	51,671	9,951	41,720	19.3%
September	53,615	8,489	45,126	15.8%
October	46,498	7,107	53,605	13.3%
November	33,325	6,235	39,560	15.8%
December	34,160	5,686	39,846	14.3%
AVERAGES	\$46,724	\$6,149	\$40,575	13.2%

4. In previous years Applicant had achieved the following food sales percentages:

1976	50.0%
1977	25.0%
1978	19.5%
1979	17.7%
1980	14.4%
1981	16.4%

5. In late 1981, Applicant decreased his hours of operation and eliminated lunch service. He took these steps as a cost-cutting measure aimed at offsetting decreasing sales. Applicant's revenues had been declining since the spring of 1981.

6. In August 1982, Applicant hired a new chef and revised his menu. He also added a night manager to train and supervise food service employees.

7. In January 1983, Inspector Manning visited the premises and discussed food service requirements with Applicant's general manager. Manning stressed the need for Applicant to improve his food sales, and discussed ways to improve sales and emphasize food service. Applicant's manager proposed taking some steps to heighten food sales, including revising the menu, lowering prices and redecoration. Manning also suggested advertising Applicant's food service.

8. By mid-March 1983, Applicant had repainted the premises' interior and exterior, added new tablecloths and fresh flowers to the tables, remodeled the lounge, expanded the menu, lowered food prices and reopened for lunch on weekdays. He had also begun construction of a banquet room seating 50, which was completed in August 1983.

9. Applicant's dinner menu contains the following entrees:

Fried Chicken	\$4.95
Broiled Chicken	4.95
Sauteed Chicken Livers with Hollandaise	3.95
Lasagne	3.95
Spaghetti with Meat Sauce	3.95
Baked Red Snapper	4.95
Filet of Sole	4.95

8 ounce Sirloin Steak	6.95
Veal Cutlets	4.95
Chicken-Fried Steak	4.95

All the above items are served with appropriate side dishes.

10. Applicant's lunch menu contains a variety of hot plates, eight kinds of sandwich, soup and salads; entree and sandwich prices range from \$2.50 to \$5.95.

11. Applicant also owns and is DA-licensed at Ryan's Motor Inn in Salem and the Pier Point Inn in Florence. In February 1983, he assigned his sales and marketing manager for those outlets to expand the market area of the Pepper Tree. The manager has contacted various local organizations, clubs, and convention facilities, to which he has distributed menu facsimiles and information about the Pepper Tree's food service, including banquet accommodations. He has also distributed menus to commercial and government offices within about a one and one-half mile radius of the premises.

12. For at least the past two or three years, Applicant has been advertising in the local press and radio.

13. Applicant's 1983 food sales percentage at Ryan Motor Inn was 49.4, and at Pier Point Inn was 74.0.

14. Applicant has live rock music in the lounge six nights a week, from 9:00 p.m. until closing. After the band starts playing the prices on most drinks increase by 50¢; Applicant does this in lieu of a cover charge, to offset entertainment costs.

15. In November 1982, OLCC published an "Open Letter to ORBA Members" in an ORBA publication. The letter stated that if a renewal application is received which indicates food sales of less than 25 percent the Enforcement Division will attempt to work with licensees to assist them in improving food sales prior to the next renewal period. The letter also states that this procedure may not be followed if food sales have fallen below 10 percent.

DISCUSSION

Applicant contends that the Commission cannot charge or argue that Applicant's efforts have not been serious or substantial, because the rule containing the "serious and substantial" standard was not cited in the Commission's refusal letter. While it is true that the rule was not mentioned by number, the Commission announced its intention of applying a standard contained in the rule by stating the standard and explaining why they thought it had not been met. Applicant has not shown he has been prejudiced by the Commission's failure to specify the rule number in its charge letter. In fact, an element of Applicant's defense was that the standard had been met.

Applicant also argues that the Commission did not follow its own published procedure of allowing a licensee to build up its food sales percentage over a one-year renewal period. However, in the same statement used by the Commission to announce this approach, it also announced that it might not be applied

to licensees whose food sales were below 10 percent. As Applicant's reported food sales were 5.5 percent, he could not reasonably have relied on an extra renewal period.

Another contention by Applicant is that the Pepper Tree's sales should be aggregated with those of Applicant's other DA-licensed premises and a single food sales percentage derived, apparently for use in evaluating all of Applicant's premises. This approach would result in overall food sales of over 40 percent. There is no basis in the Commission's statutes or rules for doing this.

Applicant also argued that his liquor sales percentage is artificially high due to the entertainment surcharge on drinks after 9:00 p.m., and his relatively low food prices. While these factors may well contribute to Applicant's problem, the lapse is not ameliorated by simply identifying its reasons.

The Commission argues that Applicant's efforts were made with the sole intent of satisfying the Commission's food service requirements and are thus "merely a stop-gap." Even assuming that this Licensee's sole intent is to maintain its license, the Commission cannot comprehend why that circumstance is blameworthy. The Commission's food service rules contain no requirement that applicants or licensees be motivated by any particular imperative.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The following criteria will be given sufficient consideration so that a license will not be issued unless good cause which outweighs the criteria involved is shown by the applicant:

- . . .
- (4) The Applicant seeks a Dispenser Class "A" license under ORS 472.110(2) and has less than or is unable reasonably to project at least 25 percent ratio of food sales to gross sales of food and alcoholic liquor. OAR 845-05-025(4).

Applicant's food sales have improved markedly over the past several months. The food percentage average for 1982 was 5.5 percent, and for 1983 was 13.2 percent. This represents a 240 percent increase in the Applicant's food sales, and there is no evidence the trend will not continue. The Commission concludes that Applicant can reasonably project at least 25 percent food sales, which provides good cause outweighing the criterion in OAR 845-05-025(4).

2. Failure by a Class "A" Dispenser licensee to maintain at least a 25 percent ratio of food sales to gross sales of food and alcoholic liquor may be grounds for refusal to renew a license unless the licensee has fully complied with the requirements of this rule and adequately demonstrates that a serious and substantial effort has been made to emphasize food service. OAR 845-08-015(5).

Applicant has hired new staff to improve the quality of his food service, and to promote public awareness of its availability. He has revised his menu, redecorated, added a banquet facility and reopened for lunch. Applicant's food sales have increased greatly. Applicant has demonstrated that his efforts are serious and substantial, and there is no evidence to the contrary.

ULTIMATE CONCLUSIONS OF LAW

The Commission concludes Applicant's renewal application should be approved. Applicant can reasonably project food

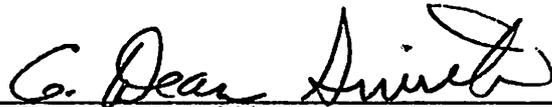
sales of at least 25 percent, and has made serious and substantial efforts to emphasize food service.

FINAL ORDER

It is hereby ordered that the application for renewal of a Dispenser Class A license by Leonard V. Ryan at Pepper Tree Restaurant, 3190 Portland Road, NE, Salem, Oregon, be GRANTED.

It is further ordered that due notice of such action, stating the reasons therefor, be given as provided by law upon the payment of appropriate license fees to the Commission.

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.