

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,  
James H. and Peggy L. Sumner, Jr. ) CONCLUSIONS OF LAW,  
P 'n J's THE OTHER SIDE ) AND ORDER  
832-38 N. Killingsworth Street )  
Portland, Oregon 97217 )  
- - - - - )  
Multnomah County )

A hearing in the above matter was held on the 10th day of January, 1984, in Portland, Oregon, before Hearings Examiner Jill Thompson. The Applicants appeared in person and were not represented by legal counsel. The Commission was not represented by legal counsel.

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. Applicants have applied for a Dispenser Class A (DA) license at P 'n J's THE OTHER SIDE, 832-38 N. Killingsworth Street, Portland, Oregon. They currently hold a Retail Malt Beverage (RMB) license at the premises.

2. The Commission has refused the application on the following grounds:

- a. OAR 845-05-030 (sufficient outlets).
- b. OAR 845-05-040(2)(b) (failure to establish preference for uniqueness).

- c. OAR 845-05-040(2)(c) (failure to establish preference for inadequate service).
- d. OAR 845-05-040(3)(a) (failure to establish preference for greater services or uniqueness).
- e. OAR 845-05-040(3)(e)(B) (tavern-style operation by emphasis on alcoholic liquor).
- f. OAR 845-05-040(3)(f) (lesser services).
- g. ORS 472.110(4) (statutory quota).
- h. Battle Creek Golf Club v OLCC (Commission not required to issue all of its licenses).

3. There are ten DA-licensed premises within approximately one mile of Applicants. The closest of these ten is across the street. The next closest is 3/4 mile away.

4. Dispenser license distribution figures, as relevant, are:

	<u>POPULATION</u>	<u>STATUTORY QUOTA</u>	<u>DA/DB OPERATING OR COMMITTED</u>
City of Portland	365,000	182.50	308
Multnomah County	557,500	278.75	375

5. Applicants' hours are 11:00 a.m. to 2:30 a.m. Their lunch menu offers five sandwiches with soup or salad, a half chicken with french fries, and chicken wings with french fries; prices range from \$2.75 to \$4.00. Their dinner menu contains the following entrees:

Fried Chicken	\$7.80
Roast Pork	8.25
Roast Beef	6.50
10 ounce T-bone or New York Steak	8.75
Spareribs	7.75
Red Snapper	5.75

All dinners are served with vegetables, potatoes, bread and soup or salad.

6. Applicants testified that theirs is the only establishment in the area suitable for family dining. They state that blacks are not welcome at the DA outlet across the street from them; there is no other dispenser outlet in that neighborhood for 3/4 mile.

7. Applicants presented five letters in support of their application, three of which were from northeast Portland business people. They also presented a petition signed by 180 people. The signatures were gathered over about a 2-1/2 week period in January 1984; all but 10 of the signers live in north or northeast Portland. Applicants' market area is the black and ethnic minority community in North and Northeast Portland.

8. Applicants' actual and projected average sales are as follows:

	<u>TOTAL</u>	<u>FOOD</u>	<u>ALCOHOLIC LIQUOR</u>	<u>FOOD SALES %</u>
6/82 - 5/83	\$ 6,149	-0-	\$ 4,657	-
Projected	32,346	\$15,840	16,506	49%

9. Average sales figures for the city and county, and for those premises used in the Commission's comparison survey, are as follows:

	<u>TOTAL</u>	<u>FOOD</u>	<u>ALCOHOLIC LIQUOR</u>	<u>FOOD SALES %</u>
City of Portland	\$55,231	\$34,540	\$20,691	63%
Multnomah County	59,553	38,064	21,489	64%
Survey Outlets	23,840	11,456	12,384	48%

10. Applicants' premises seats 80 in the dining room and 45 in the lounge. They are adding a separate banquet room which will seat up to 25; the room will be completed by June, 1984.

11. Of the ten outlets used as comparison premises, eight have no banquet facility, and only two have greater seating capacity than applicants. Six are open for breakfast.

12. Applicants have a disc jockey in the dining room one night a week; the room contains a dance floor. The disc jockey appears on alternating Wednesday and Saturday nights, starting at 9:00 p.m. Wednesdays and 10:00 p.m. Saturdays. No dining tables are moved to enlarge the dance area.

13. Applicants originally requested a No. 4 minor posting ("No Minors Permitted Except During Meal Hours") until 8:00 p.m., at which time minors would be excluded. At the time they applied they were under the impression that the Commission required minors to be excluded from all licensed premises after 8:00 p.m. Upon receiving the Commission's refusal letter they discovered that such was not the case, and now intend to allow minors in the dining area without restriction when the kitchen is open.

14. The Commission's refusal letter stated that Applicants' menu "does not compare favorably with other menus." The letter did not explain in what respects the menu compared unfavorably, or what other menus were used as standards.

15. Applicants recently completed a building expansion which doubled the size of their original premises. The additional space is to be principally used as the dining room, seating 80. The dining room is separated from the lounge by ceiling-high partitions. Applicants invested about \$28,000 in creating and equipping the dining facility.

16. The premises in the Commission's comparison summary have average per-seat gross sales of \$249; Applicants' sales projections anticipate per-seat sales of \$259, and are reasonable.

#### DISCUSSION

Applicants argue that the black community should be treated as a self-contained market area, and the statutory quota applied separately to Portland's black population of 40,000, for purposes of determining whether there are sufficient existing outlets. In fact such a mechanism does exist in the Commission's rules; OAR 845-05-030(1) allows applicants to establish that their market community is determined by factors other than a geographic radius.

Applicants also argued that the black community cannot support the sales levels achieved in the city overall, and that for that reason comparatively low sales should not preclude issuance of dispenser licenses in the area. However, the Commission's rules also contemplate that situation; the licensing criterion in OAR 845-05-040(3)(f) measures applicants' premises in comparison with others in their area.

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).

The only evidence produced by the Commission relating to this criterion was a recitation in its refusal letter of the number of licenses issued in the city and county; that statement is insufficient to establish a negative weighing factor under this criterion.

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

(a) None of the criteria set forth in subsection 2(a) or (b) of this rule is [sic] met. OAR 845-05-040(3)(a).

. . . .

(a) Applicant's premises will provide greater 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.

(b) Applicant's premises will 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 such characteristics. OAR 845-05-040(2)(a),(b).

The Commission compared Applicants' premises with ten dispenser licensees in the area. Applicants offer greater seating capacity than eight of those outlets, and also have a banquet facility, which eight of the comparison premises lack. Applicants' projected sales exceed average actual sales of the comparison outlets. The premises' menu cannot be found to be unique. Nevertheless, Applicants' seating, banquet space and projected sales indicate Applicants will offer greater services than are generally available in the area, and the Commission concludes that unfavorable consideration under this criterion is not warranted because Applicants meet some of the criteria in 845-05-040(2)(a) and (b).

3. 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).

Applicants' market community consists principally of blacks and ethnic minorities living in north and northeast Portland. Although the city and county are oversubscribed, there was uncontroverted evidence that Portland's black population is 40,000, virtually all of whom live in north and northeast Portland. There are no DA licensees within a 3/4-mile radius of Applicants who cater to blacks. Further, the extent of Applicants' community support revealed by petitions and letters in support of the application indicate that the community is not being adequately served. The Commission concludes that Applicants have established a preference under this criterion. The Commission has in the past recognized the validity of marketing a service concept which particularly appeals to specific racial or ethnic groups. Final Order, Geneva's, 7/22/83; Final Order, El Dorado Club, 4/19/82. The fact that there exists a market demand for dispenser outlets which cater to and solicit the patronage of black and ethnic family groups does not suggest that racial discrimination exists on the part of Licensees who are not identically oriented.

4. Unfavorable consideration may be given to an 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 Commission stated that Applicants' premises would emphasize the sale of alcoholic liquor by the presence of a dance floor and disc jockey booth in the dining room. It also noted that Applicants' proposed minor posting would exclude minors

from the dining room after 8:00 p.m. Applicants' original minor posting proposal was based on a misconception of OLCC requirements, and has been revised to allow minors in the dining area until full meal service ends. Applicants plan to use a disc jockey one night per week only; this cannot be found to create a primary emphasis on the sale of alcoholic beverages. There was no evidence offered that the mere presence of a dance floor and disc jockey booth would result in an emphasis on the sale of alcoholic beverages. The Commission concludes that this criterion does not provide a basis for unfavorable consideration.

5. 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).

There is no evidence that Applicants' menu offers less variety than those of the comparison survey outlets. Applicants will offer greater services in terms of seating and banquet facilities than most in their area. Additionally, Applicants have invested \$28,000 in building and equipping their dining facility. The comparison outlets are all located within about a one-mile radius of Applicants. The only other comparative data in evidence are the average sales for the city and county, which are substantially higher than the averages

existing in Applicants' area, and are the only figures considered by the Commission in concluding that Applicants would provide lesser services. However, gross sales average is only one factor to be considered in the above analysis, and no reason was offered for ignoring the other service factors in the application, or the favorable sales comparison of Applicants' projections with other dispenser licensees in their area. An unfavorable comparison based on city or county sales averages alone is not automatically dispositive of the lesser services criterion. The Commission concludes that this criterion is not a basis for unfavorable consideration.

6. 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:

- (a) Applicant's premises will provide greater 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(2)(a).

Applicants will provide greater seating and banquet facilities than the majority of the premises on the Commission's comparison survey of DA outlets in the area. Applicants' sales projections exceed average sales of those outlets. There was no evidence that the projections were unreliable, or that dispenser sales in Applicants' area have been decreasing. The Commission concludes a preference exists under this criterion.

7. The total number of licensed premises dispensing distilled liquor pursuant to this chapter shall not in the aggregate at any time exceed one such licensed premises for each 2,000 population in the state, determined according to the last available estimated quarterly State Board of Higher Education figures. ORS 472.110(4).

The Commission has licenses available to grant, hence this statute is not a grounds for refusal.

8. Battle Creek Golf Course, Inc. v. OLCC, 21 Or. App. 179, 183-84, 534 P2d 204 (1975), does not contain license refusal criteria beyond those already in the Commission's rules.

#### ULTIMATE CONCLUSIONS OF LAW

The Commission concludes the license should be granted. There are no negative criteria shown which provide a basis for refusal, and Applicants have established a preference under OAR 845-05-040(2)(a) for greater services in their area, and 845-05-040(2)(c) for inadequate outlets in the area.

#### FINAL ORDER

It is hereby ordered that the application for a Dispenser Class A (DA) license by James H. and Peggy L. Sumner, Jr. at P'n J's The Other Side, 832-38 N. Killingsworth Street, Portland, Oregon, be GRANTED upon the completion of Applicants' banquet facility, such facility to be complete within ninety (90) days from the date of this order.

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.



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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.