

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the)
Application for a)
Seasonal Dispenser (Seas. D))
License by:)
Paul D. Hartwell) FINAL
RAINBOW TAVERN) FINDINGS OF FACT,
Fifth and Deschutes) CONCLUSIONS OF LAW,
Maupin, Oregon 97037) AND ORDER
- - - - -)
Wasco County)

A hearing in the above matter was held on the 7th day of December, 1983, in The Dalles, Oregon, before Hearings Examiner Jill Thompson. The Applicant appeared in person and was represented by Thomas Peachy, Attorney at Law, The Dalles, Oregon. The Commission was not represented by legal counsel.

On November 26, 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. Paul Hartwell has applied for a Seasonal Dispenser (Seas. D) license for the months of April through October at the RAINBOW TAVERN, Fifth and Deschutes, Maupin, Oregon. Applicant now has a Retail Malt Beverage (RMB) license at the premises.

2. The Commission has refused the application, citing the following grounds:

- a. Insufficient seasonal fluctuation;
- b. Negative local endorsement;
- c. Opposition from a church within 500 feet of applicant;
- d. Lack of a preference for uniqueness.

3. The Deschutes River runs through Maupin and is used in the area for sports fishing and rafting. The area also attracts gamebird and deer hunters. Applicant furnished affidavits from a restaurant and five other Maupin retail businesses. These businesses offer sales and rental of sports equipment, tourist lodging and variety goods. Each affidavit states that the signer's business experiences high fluctuation between April and October due to sports and recreation tourism.

4. Applicant's gross sales between April 1982 and November 1983 are as follows:

	<u>GROSS</u>	<u>FOOD</u>	<u>BEER/ WINE</u>	<u>FOOD SALES PERCENTAGE</u>
<u>1982</u>				
April	\$11,869	\$6,340	\$5,193	53%
May	11,966	6,514	5,181	54%
June	9,741	5,541	3,935	57%
July	11,089	5,843	4,990	53%
August	11,156	6,264	4,585	56%
September	10,096	5,447	4,359	54%
October	9,619	5,076	4,349	53%
November	8,180	3,980	4,039	49%
December	7,834	4,159	3,524	53%
<u>1982 Averages</u>	\$10,172	\$5,463	\$4,462	54%
Apr-Oct Averages	\$10,791	\$5,861	\$4,656	54%
<u>1983</u>				
January	\$9,084	\$4,913	\$3,799	54%
February	8,555	4,140	3,946	48%

March	9,437	4,443	4,223	47%
April	10,354	6,037	4,113	58%
May	11,116	6,237	4,478	56%
June	10,699	6,110	3,952	51%
July	11,665	6,342	4,589	54%
August	12,298	7,127	4,506	58%
September	11,944	6,487	4,604	54%
October	12,473	6,791	4,995	54%
November	9,510	4,638	3,977	49%
1983 Averages	\$10,649	\$5,751	\$4,289	54%
Apr-Oct Averages	\$11,507	\$6,447	\$4,462	56%
Jan-Mar, Nov Averages	\$9,146	\$4,534	\$3,986	50%

5. The existing Maupin dispenser sales averages are: gross, \$8,508; food, \$3,228; food ratio, 38 percent.

6. The City of Maupin has recommended against grant of the license. The application was considered by the City Council at a public hearing on May 11, 1983. Applicant attended and participated in the hearing.

7. The mayor of Maupin holds the only existing dispenser license in the town. Prior to final deliberation and voting he declared a conflict of interest and did not join in the council's action, although he did not disqualify himself during the public participation phase of the hearing. The council voted unanimously to deny the application, stating they felt there are already sufficient licensed premises in town.

8. The population of Maupin is 525, of which 264 are registered voters. Subsequent to City Council consideration of the application Applicant circulated a petition supporting the

application. The petition contains 230 signatures, of which at least 129 are Maupin residents. (Some signers listed only a street address, without identifying their city of residence.)

9. The City Council held a public hearing, followed by a regular public meeting, on August 8, 1984, to reconsider its recommendation against the application. The Council again voted to recommend denial of the application. The vote was 3-2 with two abstentions. Applicant participated in the Council meetings and presented petitions supporting his application. One of the abstentions was that of the mayor.

10. The Maupin Evangelical Church is less than 500 feet from Applicant's premises. The church filed a written objection to the application, stating that issuance of the license would contribute to drunk driving generally, that it is concerned about potential reduction in sheriff's patrols in the area, and that the license would not serve a useful public interest.

11. Applicant is located in a 60 year-old building. It was originally built as a blacksmith shop, and was converted to a restaurant/tavern sometime in the Thirties. The existing dispenser outlet in Maupin is housed in an equally old building.

12. Applicant is open daily from 7:00 a.m. to 2:30 a.m. April-October, and from 10:00 a.m. weekdays and 7:00 a.m. weekends, November-March. His closing hours between November and March are flexible, and depend on local demand.

13. Applicant offers the following menu:

BREAKFAST

2 Eggs	\$2.25
2 Eggs w/bacon, sausage or ham	2.50-2.75
Three types of omelet	2.25-3.95
Steak and eggs	4.95
Fried egg and bacon sandwich	1.95
French toast w/ham, bacon, or sausage	2.75
Various side orders	

LUNCH

Five types of hamburger	\$1.95-3.25
Nine types of hot sandwich	1.50-3.25
Self-serve deli sandwich bar (7 meats, 3 cheeses, various breads)	2.25+
Chili	2.25
Various side orders	

DINNER

Tenderloin	\$8.95
8 oz. top sirloin	6.95
12 oz. top sirloin	7.95
Steak and lobster	14.95
Steak and shrimp	7.50
Ham steak	5.50
Halibut or salmon steak	5.95
Fried chicken	4.95

All the above are served with
soup or salad, potato and bread

Seafood combination w/salad and potato	6.50
Chicken basket	3.25
Chicken strips	2.95
Clam strips	2.95
Fish and chips	3.25
Shrimp basket	3.95
Salad bar	1.00-2.00

14. The existing dispenser outlet offers a greater variety of breakfast items but fewer lunch and dinner items. The only seafood offered on its menu is a tuna sandwich.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. A seasonal dispenser's license may be issued based upon evidence furnished by the applicant indicating a seasonal demand resulting from tourism or from activities such as fishing, hunting or skiing which are determined by weather conditions or state regulation. The term of a seasonal dispenser's license shall be fixed by the Commission, be valid for not more than seven months and may be divided into no more than two periods. The term may vary from season to season if demand or conditions warrant. OAR 845-04-040.

Although Applicant's average sales and food percentage are higher than Maupin's existing DA licensee this fact is irrelevant to whether a seasonal trend exists at Applicant's outlet.

Applicant's sales history indicates seasonality during 1982 and 1983 during the same period in which other local businesses experience sports- and tourist-related seasonal increases. In 1982, April-October sales increased an average of six percent, and in 1983, April-October sales increased an average of eight percent, over the yearly averages for those years. Compared with the sales for the months outside the season requested by Applicant, the increase is more striking. The 1983 non-seasonal (January-March, November) averages indicate an average 26 percent increase in gross sales and a 42 percent increase in food sales during April-October 1983. The non-seasonal averages are more reliable as a basis for comparison than the yearly averages, which are statistically biased because of the high increase attributable to seasonality. The

Commission concludes that tourism- and sports-related seasonal demand exists during April-November.

2. 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:

- (1) An adverse recommendation by the governing body of the appropriate city or county, after due consideration. The recommendation may be disregarded by the Commission if the body has failed to give to the Applicant and to interested members of the public both reasonable notice of the proceedings at which the application was considered and reasonable opportunity to be heard. OAR 845-05-025(1).

On May 11, 1983, the Maupin City Council voted unanimously to deny the application following a public hearing during which Applicant was present and participated in the public discussion. The basis for denial was that there are sufficient existing outlets.

Applicant points out that the mayor of Maupin holds the only dispenser license in town, against which Applicant would be competing if his application is granted. Although this situation creates a potential conflict for the mayor, he announced the existence of a conflict prior to the vote and abstained from the vote itself.

The statute governing resolution of conflicts of interest of public officials, ORS 244.120, requires only that the official announce the conflict "prior to taking any official action thereon." ORS 244.120(1)(a). The official is required only to

declare the conflict; the statute does not prohibit the official from voting on the matter after the conflict has been announced. In this case the mayor both announced the conflict and abstained from voting. There is no convincing evidence that the other council members' awareness of the mayor's license acted as a latent influence on their votes.

Although the council member who moved to recommend against granting the license mentioned two negative factors (opposition of the church and others, and lack of uniqueness), the motion was not expressly based on those two factors alone. No council member repudiated the basis for the council's original vote, sufficiency of existing outlets. Under these circumstances, and in view of the fact that the council's action on August 8, 1984, was a "reconsideration" of its action on May 11, 1983, the Commission infers that "sufficiency of existing premises" was a continuing basis for the council's action.

For reasons expressed elsewhere in this Order, the Commission concludes that the Applicant has shown good cause to overcome the city council's concerns about lack of uniqueness and the opposition of the church and others. However, the Commission concludes that the Applicant has not shown good cause to overcome the city council's primary concern that there are already sufficient dispenser outlets in Maupin. The city council is in the best position to determine the needs of its electorate, and has declared that one dispenser outlet is sufficient for the City of Maupin. The signatures of 129 residents

on a petition supporting this application do not necessarily show that the existing outlet is insufficient. The normal population of Maupin is 525. Also, there is no evidence that the seasonal influx of people raises the average population of Maupin to anywhere near the statutory quota for dispenser licenses. (Although the quota does not apply to Seasonal Dispenser licenses, the quota nevertheless represents a legislative declaration of the number of dispenser licenses necessary for serving the general public.) The Commission believes that the city council's finding of "sufficient outlets" is reasonable, and that the Applicant has failed to show good cause to overcome this basis for the city council's negative endorsement. Accordingly, OAR 845-05-025(1) provides a basis for denial of the application.

Another issue is raised about the significance of the declarations made by one of the council members who abstained from voting. In the May 11, 1983 meeting that council member had stated that the OLCC, rather than the city, should make the licensing decision. Applicant argues that the Commission should take the opinion expressed by the abstaining member as an indication of support for the application. In explaining his abstention the councilman stated that he had friends and customers on both sides of the issue.

There is no way available to the Commission to transform an abstention into a vote as a matter of law. As a matter of fact, if the abstention were considered as a yea vote, the vote

would end in a tie, which would result in an affirmance of the previous decision to recommend denial. In this regard it should also be noted that at the 1983 meeting in which the councilman stated that the OLCC should decide the issue, he voted to recommend denial.

3. 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: . . .

(2) Written opposition to the granting of the license, stating reasons for the opposition, by a person having control of:

(a) A pre-elementary, elementary or secondary school;

(b) A church;

(c) A hospital, nursing facility or convalescent home; or

(d) A park, including amusement park, playground or recreational facility, if such facility is located within 500 feet of the proposed outlet in an urban or suburban area or within 1500 feet in a rural area. Good cause which outweighs such written opposition may include, but is not limited to, other licensed premises being located within the same distance of the opposing facility or the opposing facility beginning operation at a time when the subject premises were licensed. OAR 845-05-025(2).

Maupin Evangelical Church is located within 500 feet of Applicant's premises, and written objection on behalf of the church was filed by its pastor. However, the grounds stated in the objection (opposition to drunk driving; possible future County Sheriff budget reductions) do not pertain specially to

the church. The objection did not state that Applicant's premises would or do interfere with church functions or property. Further, Applicant already holds an RMB license at the premises, the existence and operation of which was not objected to by the church. The Commission concludes that these reasons provide good cause which outweighs this criterion.

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).

Applicant would be the only dispenser outlet in Maupin offering seafood. Other than seafood, Applicant's menu does not vary in type of food served from that of the existing licensee, although Applicant offers a greater variety of lunch and dinner items. The Commission concludes some preference exists under this criterion.

FINAL ORDER

It is hereby ordered that the application for a Seasonal Dispenser license by Paul D. Hartwell at the RAINBOW TAVERN, Fifth and Deschutes, Maupin, Oregon, be DENIED on the grounds Applicant failed to overcome that negative local endorsement (OAR 845-05-025(1)).

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

Dated this 29th day of November, 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.