

BEFORE THE LIQUOR CONTROL COMMISSION  
OF THE STATE OF OREGON

In the Matter of the	)	
Application for a	)	
Dispenser Class C	)	
License by:	)	PROPOSED <del>Final</del>
	)	FINDINGS OF FACT,
Chinn's Restaurant, Inc.	)	CONCLUSIONS OF LAW,
dba CHINN'S RESTAURANT	)	AND ORDER
4835 Commercial Street S.E.	)	
Salem, Oregon 97302	)	OLCC-84-L-035
- - - - -	)	
Marion County	)	

A hearing in this matter was held on December 12, 1984, in Salem, Oregon, before Hearings Examiner Allen R. Scott. The Applicant appeared and was represented by Michael Mills, Attorney at Law, Salem, Oregon. The Commission was not represented by legal counsel.

On March 21, 1985, the Commission considered the record of the hearing, the applicable law, and the Proposed Order of the Hearings Examiner. Based on this review, the Commission makes the following:

BACKGROUND

Applicant seeks a Dispenser Class C license at CHINN'S RESTAURANT, which is located on Commercial Street S.E. in Salem, Oregon. Applicant withdrew its pending application for a Dispenser Class A license at the hearing. Corporate principal George Chinn has operated the following Chinese restaurants in Salem since 1950: China Cafe, 1950-1953; China City, 1953-1972; Salem Golf Club Restaurant, 1972-1983.

Chinn's Restaurant opened for business on July 15, 1984, with a Restaurant license.

## ISSUES

I. The Staff asserts that there are sufficient licensed premises in the locality. OAR 845-05-030(1).

II. The Staff asserts that Applicant will not provide dining service or atmosphere unique in the area. OAR 845-05-040(2)(b).

III. The Staff asserts that existing dispenser outlets are providing greater service to the public. OAR 845-05-040(3)(f).

### I. SUFFICIENT LICENSED PREMISES

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).

### Findings of Fact

1. Applicant's premises is located in Salem. The population of Salem has been as follows:

1981	-	92,300
1982	-	91,400
1983	-	90,720
1984	-	92,680

2. Marion County, in which Applicant's premises is located, has had the following population:

1981 - 209,730  
1982 - 207,350  
1983 - 205,900  
1984 - 210,000

3. The City of Salem presently has 41 DA and DB licenses committed and in operation. Salem has 9 DC licenses committed and in operation.

4. Marion County presently has 71 DA and DB licenses.

5. Average monthly sales at existing Dispenser Class A outlets in Salem have been as follows:

<u>Year</u>	<u>Food</u>	<u>Alcoholic Liquor</u>	<u>Total</u>
1982	\$30,986	\$17,446	\$48,432
1983	27,373	17,545	44,918
1984	29,531	15,873	45,404

6. Average monthly sales at existing DA outlets in Marion County have been as follows:

<u>Year</u>	<u>Food</u>	<u>Alcoholic Liquor</u>	<u>Total</u>
1982	\$26,415	\$14,437	\$40,852
1983	26,014	15,385	41,399
1984	26,192	13,433	39,625

7. Since January 1, 1982, eight Dispenser Class A outlets in Salem have closed. Two of these were reopened under new ownership and are presently open. Four of the premises which closed featured some sort of specialty food. However, none featured Chinese cuisine.

8. The area of Salem in which Applicant's premises is located is one of the fastest growing areas in Salem for retail operations. Among the businesses that have recently been built

in the area are a GI Joe's, a Payless Drug Store, an Albertson's Food Store, and the Salem Garden Supply.

Conclusions of Law

The Staff's position at the time of the recommendation of refusal was that declining or static population in the area and decreasing sales at DA outlets establish that there are sufficient licensed premises in the area. It is noted that the criterion involved makes a ten mile radius the relevant area. Here, the Staff has not established population or sales within a specific ten mile radius. However, in this case it may be reasonable to infer that the sales for the City and County are reflective of the area within ten miles. The ten mile radius covers all of the City of Salem, which is the population center of the County. Furthermore, most of the ten mile radius is within Marion County. A portion of the ten mile radius extends into Polk County, but it may well be that that portion of Polk County involved is not large enough or heavily populated enough to invalidate the inference drawn from Salem and Marion County figures. The Commission therefore concludes that the population and sales figures for Marion County and Salem are, in this instance, sufficient to establish the trends within ten miles.

However, the evidence developed at the hearing indicates that both Salem and Marion County experienced a significant population increase during 1984. The 1984 figures were not available to the Staff at the time of its recommendation. The

Commission concludes that it has not been established that the population of Salem and Marion County is either static or declining.

With respect to sales at existing DA premises, it is noted that the criterion makes decreasing sales relevant to the question of the sufficiency of present premises; static sales are not relevant under the criterion. The evidence indicates that sales at existing DA premises in Salem actually increased slightly from 1983 to 1984. Sales at Marion County establishments declined slightly during that period. Given the fact that Applicant's premises is actually located in the City of Salem, the city figures are more significant, and, as they show an actual increase, the evidence therefore fails to support a conclusion that sales have decreased.

The Staff also notes that approximately eight DA premises have closed in Salem during the past two to three years, with only two reopened and remaining in business at this time. This fact might be evidence of decreasing patronage. However, there is no evidence from which one can conclude whether these closures were due to the economic failure of the enterprises or to some other factors. There is also some evidence that none of the closed premises resembled Applicant's proposed operation. There is also no evidence in the record as to whether the actual number of Dispenser Class A outlets in Salem has increased during the past two or three years, notwithstanding the closure of some premises. If the actual number has increased,

that might suggest that the closures were due more to individual problems than to the number of premises in the area. The closures thus are not persuasive evidence that the area has sufficient licensed premises.

It is also noted that the criterion involved makes relevant the increasing sales or patronage at "similarly" licensed premises. All of the information noted above relates to DA premises. As Applicant is applying for a DC license, it is questionable whether the evidence is relevant to this consideration.

The Commission concludes that it has not been established that there are sufficient licensed premises in the locality; therefore this criterion is not a basis for denying the application.

## II. UNIQUENESS

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:

. . .

(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)(b).

### Findings of Fact

9. Applicant features Chinese food. The dinner menu contains several appetizers, several kinds of soup, several noodle dishes, ten combination plates, three family dinners, approximately 30 entrees of various kinds, several varieties of chow mein or chop suey, and various accompanying dishes. The menu also has approximately 11 American entrees, including steaks, chicken, and seafood. The lunch menu has a smaller variety of Chinese food and a number of American dishes and sandwiches.

10. The dinner prices range up to approximately \$9.50.

11. Applicant also offers food to go.

12. There are presently six DA outlets in Salem featuring Chinese food.

### Conclusions of Law

Applicant offers a varied and extensive Chinese menu. However, Applicant did not offer evidence that its menu is significantly different from the menu of other Chinese restaurants in Salem holding DA licenses. Applicant also did not offer any evidence suggesting that the atmosphere or decor of the premises is unique.

The Commission concludes that this criterion is not a basis for preference.

### III. LESSER SERVICES, FACILITIES AND ECONOMIC BENEFIT

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

. . . .  
(f) 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).

Findings of Fact

13. Applicant's premises will be open seven days a week for lunch and dinner from 11:00 a.m. to 10:00 p.m. or 11:00 p.m.

14. At the time of application, Applicant reasonably estimated that average monthly sales at the premises would be as follows with a dispenser license: Food, \$26,875; alcoholic liquor, \$6,083; total, \$32,958.

15. Actual monthly sales at the premises during the first four full months of operation were as follows:

<u>Month</u>	<u>Food</u>	<u>Beer &amp; Wine</u>	<u>Total</u>
August	\$38,916	\$1,384	\$40,300
September	35,077	992	36,069
October	30,879	776	31,655
November	28,664	881	29,545
Average	\$33,384	\$1,008	\$34,392

16. Applicant's projection noted above would result in a food percentage of approximately 82 percent. Actual food percentage during the first four full months of operation was 97 percent.

17. Of the nine nearest dispenser outlets, four have higher average gross sales than Applicant's projected sales and five have lesser sales than Applicant's projections.

18. Applicant's premises will seat 82 in the main dining room and 42 in a banquet room. Six of the nearest nine DA premises have larger seating and three have lesser seating.

19. Of the seven existing Chinese restaurants with dispenser outlets, three have greater sales than Applicant's projections and four have lesser sales. Two of the existing Chinese restaurants seat fewer people and four seat more. Three of the six have banquet rooms.

#### Conclusions of Law

Applicant's projections of sales with a DC license are in fact less than actual sales during the first four full months of operation with a beer and wine license. Clearly, then, Applicant's projections are reasonable or even perhaps somewhat pessimistic. The projections leave Applicant's premises somewhat below the average for Salem and Marion County. However, as this is a DC application, a comparison with existing DA outlets is not necessarily meaningful.

It is noted that Applicant estimates that 82 percent of gross sales with a DC license will come from food sales. This also seems reasonable, and it is supported by the experience at the premises during the first four months of operation, during which beer and wine sales were only 3 percent of sales.

Applicant's overall services, facilities, and economic benefit to the community appear reasonably comparable to those provided by existing DA outlets. That is, the premises is somewhat smaller than the average, yet it does have a banquet facility, is open for lunch and dinner, and has sales within the same general range as those at existing premises.

Evidence from Applicant and from the Staff indicated that Applicant's premises may reasonably be viewed as a "family restaurant," in that it will not have live entertainment, it emphasizes food over alcoholic liquor sales, and it generally would be attractive to people of all ages. It is also noted that Applicant's premises provides an extensive and varied menu of Chinese food along with American food.

The Commission concludes that evidence does not establish that Applicant's premises will provide lesser services, facilities, and economic benefit to the area and that this criterion is therefore not a basis for denying the application.

#### ULTIMATE CONCLUSIONS OF LAW

The application for a Dispenser Class C license should be granted because Applicant will not provide lesser services, facilities, or economic benefit to the area, because it has not been established that the area is served by sufficient licensed premises, because Applicant's premises offers a wide variety of food, because Applicant's sales compare favorably even with existing DA outlets, and because Applicant will emphasize food service over the sale of alcoholic liquor.

FINAL ORDER

It is hereby ordered that the application for a Dispenser Class C license by Chinn's Restaurant, Inc., in the trade name Chinn's Restaurant for 4835 Commercial Street S.E., Salem, Oregon 97302, be GRANTED upon payment of appropriate license fees to the Commission.

It is further ordered that notice of this action, including the reasons for it, be given as provided by law.

Dated this 26th day of March, 1985.

*William A. Thomas for C. Dean Smith*

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.