

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,
Ronald & Susan Martin)	CONCLUSIONS OF LAW,
dba RON MARTIN'S BISTRO)	AND ORDER
263 N Hemlock)	
Cannon Beach, Oregon 97110)	OLCC-85-L-002
- - - - -)	
Clatsop County)	

A hearing in this matter was held on February 22, 1985, in Cannon Beach, Oregon, before Hearings Examiner Allen R. Scott. The Applicants appeared and were represented by Dan Van Thiel, Attorney at Law, Astoria, Oregon. The Commission was not represented by legal counsel.

On May 28, 1985, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Hearings Examiner, Exceptions to the Proposed Order of the Hearings Examiner, and Response to Exceptions. Based on this review, the Commission makes the following:

BACKGROUND

Applicants seek a Dispenser Class A license for their restaurant, which is located in downtown Cannon Beach. They presently hold a Seasonal Dispenser license and a Restaurant license at this premises. Applicants have operated this premises for approximately three and one-half years. Applicants have operated other licensed premises in Oregon, including both dispenser

outlets and beer and wine outlets, for approximately 14 years and have received no citations or warnings from the OLCC.

ISSUES

I. The Staff asserts that the license should be denied because Applicants will provide lesser services, facilities, and economic benefit to the area or the general public than do existing premises. OAR 845-05-040(3)(f).

II. Applicants claim a preference for uniqueness of dining service. OAR 845-05-040(2)(b).

III. Applicants claim a preference for size of the premises and the size of the city in which it is located. OAR 845-05-040(2)(d).

I. LESSER SERVICES

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

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(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

1. Applicants' premises seats 28 in the dining room and 16 in the lounge.

2. The premises is open five days a week from 3 p.m. or 4 p.m. to 1 a.m. If the license is granted, Applicants intend to add lunch service.

3. Applicants have no specific banquet facility, although they have on occasion hosted small banquets or gatherings in the premises.

4. Monthly sales at the premises during the 12 months preceding the hearing were as follows:

<u>Month</u>	<u>Food</u>	<u>Alcoholic Beverages</u>	<u>Total</u>
Feb 1984	\$4,039	\$2,100	\$ 6,139
Mar	6,200	5,500	11,700
Apr	5,800	4,900	10,700
May	6,400	5,200	11,600
Jun	6,000	6,000	12,000
Jul	7,500	6,500	14,000
Aug	7,000	7,000	14,000
Sep	6,800	6,500	13,300
Oct	4,749	3,213	7,562
Nov	4,270	3,001	7,271
Dec	5,573	3,612	9,185
Jan 1985	4,510	3,208	7,718
Average	5,737	4,728	10,465

5. Applicants' Seasonal Dispenser license was in effect from March through September during the period above.

6. Applicants reasonably estimate that the addition of the full year dispenser license would increase sales in the five months in which the seasonal license is not in effect by

approximately 25 percent. They also predict that opening for lunch will increase their gross by approximately one-third. Their total projected sales if the license is granted would then be approximately \$15,000.

7. Average monthly sales at existing DA outlets in Clatsop County and Cannon Beach have been as follows:

	<u>Food</u>	<u>Alcoholic Beverage</u>	<u>Total</u>
Clatsop County	\$25,108	\$14,034	\$39,142
Cannon Beach	31,138	13,199	44,337

8. A comparison of Applicants' services with those provided by six existing DA outlets in the general Cannon Beach area reveals the following: All six have substantially higher gross sales than Applicants' projected sales; all six have substantially greater seating than Applicants' premises; most of the six are open six or seven days a week in contrast to Applicants' five day per week operation; only one has a separate banquet facility.

Conclusions of Law

Applicants' projected gross sales are substantially below the average for Cannon Beach and Clatsop County and are below sales at the six outlets used for comparison purposes. That fact indicates that Applicants' premises will serve fewer patrons than do the existing premises and will have a lesser economic impact on the community than do those existing premises.

Applicants argue that a simple comparison of gross sales is unfair to them and perhaps misleading because their premises is smaller than the others in the area. They argue that a comparison of sales on a "per seat" basis would be more appropriate and that such a comparison would place them in a more favorable light. They also note that the use of gross sales as the only basis for comparison would make it difficult or impossible for a small premises such as theirs to ever get a DA license.

The Commission notes that, under the criterion, gross sales appear to be significant for two reasons: As an indication of the number of patrons served and as an indication of the economic impact of the operation on the community, in terms, for example, of purchases of commodities for use in the premises. A "per seat" sales comparison is thus not very meaningful under this criterion, as the number of patrons served and the general economic impact of the premises has little to do with per seat sales. The Commission concludes that a comparison of gross sales is appropriate under the criterion and, in this case, it indicates that Applicants' premises will have a significantly smaller economic impact on the community than do the existing premises.

The evidence also establishes that Applicants' premises will provide lesser services than existing premises in terms of days of operation and seating capacity. However, the evidence

does not establish that the absence of a banquet room will result in the premises providing lesser services than existing premises, as only one of the six other premises in the area has a banquet room.

The Commission concludes that this criterion is 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:

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(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. Applicants' dinner menu features Italian foods. Among the items offered are nine pasta entrees, nine dinners including garlic shrimp, sauteed scallops, baked scallops Devonshire, broiled swordfish, baked halibut, poached halibut, filet of sole Siciliano, sauteed chicken breasts Piccata, and steak and ravioli. The prices of the full dinners range from \$11.95 to \$15.95. Salads are also offered.

10. If the license is granted, Applicants will offer lunch. The proposed lunch menu contains the following items:

Three hot sandwiches and two cold sandwiches; six spaghetti and ravioli dishes; a Mediterranean salad and an Italian vegetable salad; soup and side dishes.

11. Applicants emphasize freshness and high quality in the food they serve. They prepare most of the food, other than pasta, on the premises.

12. There are no other DA outlets featuring a full Italian food menu within 20 miles of Applicants' premises.

Conclusions of Law

The evidence establishes that Applicants' food service is unique as defined by the criterion." The Staff does not dispute this conclusion.

The Commission concludes that Applicants have established a basis for preference under this criterion.

III. PREFERENCE FOR SIZE AND LOCATION

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:

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(e) Applicant's premises are located in a rural unincorporated area or in an incorporated area with population of less than 25,000 and applicant's premises has seating capacity for 100 or fewer patrons.
OAR 845-05-040(2)(e).

Findings of Fact

13. Applicants' premises seats a total of 44.

14. Applicants' premises is located in Cannon Beach, which has a population of 1,215.

15. Cannon Beach presently has five DA outlets and one DB outlet.

16. Cannon Beach is a major tourist area. Tourist business has been growing rapidly in recent years. Winter-time tourist business, which was very slow in the past, has increased significantly, particularly on weekends.

Conclusions of Law

Applicants are entitled to preference under this criterion.

The Staff indicated at the hearing that it had considered this preference but had declined to attach much weight to it. The Staff's reasoning was that since Cannon Beach is "over subscribed," as evidenced by the number of premises in relation to the population, the preference is of little weight.

The Commission notes that the criterion involved (and the statute upon which it is based, ORS 472.114) do not indicate that the number of existing premises in a small town is a basis for weighing the significance of this criterion. Furthermore, the sheer number of premises in relation to the population is not necessarily an indication of the adequacy of existing service because it does not take into account circumstances which may result in more than ordinary need in a particular area. In this case, the evidence establishes that Cannon Beach is a major tourist area and that it therefore may have a need for a

much greater than normal number of dispenser outlets. Thus, the mere number of premises in Cannon Beach in relation to the population does not establish that the area has a sufficient number of such premises.

Applicants provided evidence that the Cannon Beach community views with favor the application involved in this hearing. The Mayor of Cannon Beach testified that the City Council had considered this application along with another application for a Dispenser Class A license in the trade name Surf View II. The Council recommended favorably on both applications but indicated to the OLCC that if only one were granted, the Council would favor the application involved in this hearing. The Mayor also indicated that in the view of the Council and many Cannon Beach residents, "big isn't necessarily better."

Applicant also provided testimony and letters from residents of Cannon Beach expressing their favorable view of the premises and their support for the application. Applicants also provided a petition containing approximately 350 signatures of those supporting the application.

The Commission notes that in this case this criterion appears to conflict, to a degree, with OAR 845-05-040(3)(f), (lesser services, facilities, and economic benefit), discussed in section I above. It is almost inevitably difficult for a small premises to meet that latter criterion, particularly as it relates to the economic benefit of an application. On the

other hand, OAR 845-05-040(2)(e), noted above on Page 7, gives preference to smaller premises, at least if such premises are located in a small town or rural area. The Commission believes that in situations where the criterion favoring small places in small towns is applicable, it may reasonably be weighed against, and perhaps given precedence over, the criterion relating to lesser services, at least as that criterion relates to economic factors which are to a significant degree a function of size. In this case, the Commission concludes, therefore, that Applicants are entitled to some preference under this criterion and that that preference should offset the negative consideration provided by OAR 845-05-040(3)(f).

ULTIMATE CONCLUSIONS OF LAW

The license should be granted, although Applicants' premises will provide lesser services and economic benefit to the area, because Applicants' premises will provide unique dining service and because Applicants are entitled to a preference based upon the small size of a premises and its location in a town of less than 25,000 population. OAR 845-05-040(2)(b)(2)(e).

FINAL ORDER

The Commission orders that the application for a Dispenser Class A license by Ronald and Susan Martin in the trade name Ron Martin's Bistro, 263 N Hemlock, Cannon Beach, Oregon be GRANTED upon payment of appropriate license fees to the Commission with issuance of the license subject to the following conditions:

1. That Applicants' premises be ready for operation as a Dispenser Class A outlet within 90 days of the Commission's decision in this matter:

2. That Applicants provide lunch service as proposed and as noted in Finding of Fact 10 above.

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

Dated this 31st day of May, 1985.



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.