

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the)	FINAL
Application for a)	FINDINGS OF FACT,
Package Store (PS))	CONCLUSIONS OF LAW,
License by:)	AND ORDER
)	
Plaid Pantries, Inc.)	
dba PLAID PANTRY MARKET NO. 144)	OLCC-85-L-042
824 SE 60th)	
Portland, Oregon 97215)	
- - - - -)	
Multnomah County)	

A hearing was held in the above matter on December 10 and 11, 1985, in Portland, Oregon, before Hearings Examiner Douglas Crumme'. The Commission was represented at the hearing by Michael V. Reed, Assistant Attorney General, Portland. The Applicant was represented by James K. Neill, Jr., Attorney at Law, Portland.

The Hearings Examiner issued a Proposed Order on April 2, 1986. The Applicant filed Exceptions to the Proposed Order on May 1, 1986. The Hearings Examiner subsequently determined to issue an Amended Proposed Order.

On August 25, 1986, the Commission considered the record of the hearing, the applicable law, the Amended Proposed Order of the Hearings Examiner, Exceptions to the Amended Proposed Order of the Hearings Examiner, and Response to Exceptions. Based on this review, the Commission enters the following:

RULINGS

Keith Skelton and Betty Roberts requested limited party status in the hearing. Mr. Skelton and Ms. Roberts are husband

and wife. They live five blocks from the proposed outlet. They requested party status for the purpose of representing the interests of persons in the neighborhood who oppose the application. The Commission's staff did not object to the request for party status. The Applicant's objections were overruled in part. Mr. Skelton's and Ms. Roberts' request for limited party status was granted.¹

WITNESSES

FOR THE COMMISSION: Charles Ellis, Investigator, OLCC License Division.

FOR THE PETITIONERS: Jay Renaud, Counselor, New Day Center; Bernard Hartnell, Administrator, Portland Adventist Convalescent Center; Reverend Cliff Hoffman, Associate Pastor, Mt. Tabor Seventh-day Adventist Church; R. Charles Nagele, Vice President, Portland Adventist Medical Center; Brenda Hickethier, Director, Portland Adventist Medical Center Eating Disorders Clinic; Reverend Harold Miller; Loraine Harwood; Yosh Inahara, owner, Seaton's Pharmacy; Keith Skelton, Attorney at Law; John Piacentini, President, Plaid Pantries, Inc.; Dr. David Moore, Director, Chemical Dependency Unit, Portland Medical Center.

FOR THE APPLICANT: Joseph Roy Bardsley, President, Bardsley & Haslacher, Inc.; Dr. Curtis Holzgang, Associate Director of Medicine, St. Vincent Hospital; Jan Turin, Legal Assistant; Roger Staver, Director of Real Estate, Plaid Pantries, Inc.

ISSUES

I. The Commission's Regulatory Staff Committee argues that the application should be denied because of the objections of a hospital and convalescent home within 500 feet of the proposed outlet. OAR 845-05-025(2)(c).

II. The Regulatory Staff Committee argues that the application should be denied because of the objections of a church located within 500 feet of the proposed outlet. OAR 845-05-025(2)(b).

III. The Regulatory Staff Committee argues that the application should be denied because public opinion weighs against the application. OAR 845-05-035.

I. HOSPITAL AND CONVALESCENT HOME OBJECTIONS

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:

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

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

(d) . . . 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.

FINDINGS OF FACT

Portland Adventist Medical Center Objections

1. Plaid Pantries, Inc., has applied for a PS license at a proposed outlet to be known as Plaid Pantry Market No. 144

(hereinafter referred to as Plaid Pantry No. 144), 824 SE 60th Avenue, Portland, Oregon. The site is at the intersection of 60th Avenue and Belmont Street. The site is presently a paved lot.

2. The Portland Adventist Medical Center (PAMC) has submitted written opposition to the Plaid Pantry No. 144 application. The PAMC is an acute care hospital. The main facility of the PAMC is located several miles from the proposed site of Plaid Pantry No. 144. The PAMC operates a chemical dependency clinic known as the New Day Center, located about 200 feet from the planned site of Plaid Pantry No. 144. The PAMC also operates an eating disorders clinic, located immediately adjacent to the planned site. The New Day Center and the eating disorders clinic are departments of the PAMC.

3. PAMC's written opposition to the Plaid Pantry No. 144 application was signed by its vice president, R. Charles Nagele. The letter objects to the proximity of the proposed outlet to the New Day Center, the eating disorders clinic, the Portland Adventist Convalescent Center, and the Mt. Tabor Seventh-day Adventist Church. Commission's Exhibit N.

4. The PAMC owns a 38-unit apartment house across the intersection from the eating disorders clinic. The apartments are for employees of the PAMC. The PAMC does not employ security personnel for the apartments. The PAMC fears that a PS license would attract persons to the neighborhood who would threaten the safety of the PAMC's employees.

New Day Center

5. The Director of the New Day Center opposes issuance of a PS license at Plaid Pantry No. 144 because of the belief that the license would increase traffic, litter, crime, and alcohol and drug use in the area, including Mt. Tabor Park, and would complicate management of New Day Center patients by stimulating their craving for alcohol. Commission's Exhibit Q.

6. The New Day Center offers an intense residential treatment program for alcoholics and chemically dependent persons. Patients reside at the Center for an average of about 28 days and come to the Center for weekly follow-up counseling for one year. The Center also has a small outpatient program.

7. The New Day Center has the capacity for 30 resident patients. The average census is 20 patients. On December 10, 1985, one-third of the resident patients were under 21 years of age. All the patients on December 10, 1985, were alcoholics.

8. The New Day Center encourages its patients to stay inside the building, but it is not a locked facility.

9. The New Day Center keeps patients' money in a locked safe. The Center gives patients limited amounts of money as needed. Patients are asked why they want money. They are given their money if they demand it.

10. New Day Center patients use the facilities in the neighborhood, including Mt. Tabor Park, located about one block from the Center, and Seaton's Pharmacy, located across the street from the site of the proposed outlet, to meet their normal living needs.

11. New Day Center patients have left the Center impulsively, walked off a short ways, and then returned either on their own or after New Day employees went to get them, as evidenced by the testimony of Jay Renaud, a counselor at the New Day Center.

12. New Day Center patients who leave the facility in an unauthorized fashion are not typically removed from the program, although they might be, depending on the case.

13. In the spring of 1984, two New Day Center patients walked from the Center to a PS outlet at 60th and Burnside. They obtained several quart bottles of malt liquor and consumed them in the parking lot of the store. The Center placed the two patients on probation. Both were retained as residents.

14. The proposed outlet is likely to be visible from some windows of the The New Day Center during at least the winter months when trees have lost their leaves. Applicant's Exhibits 2-1, 2-7, 2-10 and 2-11.

Eating Disorders Clinic

15. The director of the eating disorders clinic opposes issuance of a PS license at Plaid Pantry No. 144 in part because of the fear that the safety of clinic patients will be threatened by intoxicated persons attracted by the availability of beer and wine at the store. The clinic also opposes license issuance because the food and alcohol available at the store would conflict with some patients' therapies.

16. The eating disorders clinic has eight to ten resident patients at a time. It is primarily an outpatient facility.

Thirty to forty patients receive treatment at the clinic each day.

17. The patients at the eating disorders clinic generally have treatment programs that last from six months to two years.

18. Approximately five to ten percent of the patients at the eating disorders clinic have both alcohol and eating disorders.

19. The eating disorders clinic's treatment programs emphasize abstaining from alcohol and other chemical agents.

Portland Adventist Convalescent Center (PACC) Objections

20. The PACC is located directly across Belmont Street within about 100 feet of the proposed site of Plaid Pantry No. 144.

21. The PACC is a long-term, intermediate-care nursing facility. It has an occupancy of about 165 patients. It employs 200 persons.

22. The Administrator of the PACC has written to the Commission, opposing the application for a PS license at Plaid Pantry No. 144. Commission's Exhibit P. The PACC opposes the application because of fears that a PS license would do the following: hurt PACC patients' need for a peaceful atmosphere; impair the security of employees going to and from work, particularly female employees; increase traffic; increase the use of alcohol and drugs in the area, particularly in Mt. Tabor Park; increase litter; conflict with the New Day Center; and, harm the therapy of alcoholic patients at the PACC.

23. Alcohol may be prescribed as medication at the PACC. The use of alcohol is not otherwise allowed at the facility.

24. The alcoholic patients at the PACC most commonly have some other condition besides alcoholism that is their primary medical problem. The alcoholic patients' physicians sometimes prescribe treatment for their alcoholism as well as their primary problem. In these cases, the PACC would provide treatment for both the alcoholism and the primary problem.

25. The alcoholic patients at PACC are among the more mobile patients at the facility.

Good Cause

26. The PAMC and PACC are owned by the Seventh-day Adventist Church.

27. The Seventh-day Adventist Church strongly opposes the use of alcohol and tobacco. The Church believes in a healthful diet as opposed to "junk" food.

28. The intersection of 60th and Belmont is controlled by a traffic light. An average of 15,902 vehicles a day pass through the intersection. There are several bus stops at the intersection.

29. Mt. Tabor Park is a large park located about one block east of the PACC. Mt. Tabor Park has a history of teenage drinking and drug use.

30. There are presently approximately 127 Plaid Pantry Markets in Oregon. Plaid Pantries, Inc., has held PS licenses since 1960.

31. The Commission has found Plaid Pantries, Inc., to have violated the Commission's rules or has warned Plaid Pantries for the suspected violation of the Commission's rules on about 149 occasions since 1963.

32. Plaid Pantries, Inc., trains its employees to avoid illegal sales of alcohol. Plaid Pantries' policy is to fire employees that sell alcohol to minors. Applicant's Exhibit 10.

33. An alcoholic who enters a recovery program and stops consuming alcohol may have an impulsive urge to begin drinking again, particularly in the early phases of withdrawal. This impulsive urge may be triggered by environmental factors such as the availability or visibility of alcohol nearby.²

34. In 1975 and 1976, New Day counselor Jay Renaud worked at an alcohol outpatient clinic that was about 1.5 blocks from a convenience grocery store. There were four incidents that Mr. Renaud was aware of where clinic patients purchased alcohol at the store after leaving the clinic.

35. Dr. Curtis Holzgang, Associate Director of Medicine at St. Vincent's Hospital, was associated for a number of years with an aversion therapy program for alcoholics at the Raleigh Hills Center in Portland. A 7-Eleven convenience store was located two blocks from the Raleigh Hills Center. There were no incidents that Dr. Holzgang was aware of where Raleigh Hills patients walked to the 7-Eleven and purchased alcohol.

36. The nearest PS outlet to the intersection of 60th and Belmont is about one-half mile away. There are approximately ten PS outlets within one mile.

CONCLUSIONS OF LAW

Under OAR 845-05-025(2)(c), the Commission will not issue a license where a person having control of a hospital, nursing facility or convalescent home within 500 feet of the proposed outlet submits written opposition, unless the applicant shows good cause to outweigh the opposition.

In the present matter, the PAMC, a hospital, and the PACC, a convalescent home, have submitted written opposition to the granting of the license sought by the Applicant.

The objections from the PACC meet the requirement under the rule that the facility must be within 500 feet of the proposed outlet. The PACC is directly across Belmont Street from the proposed outlet and is not more than about 100 feet away.

The Applicant argues that the objections of the PAMC do not meet the 500-foot requirement because the main facility of the PAMC is located several miles away and the only PAMC facilities within 500 feet are the New Day Center and the eating disorders clinic.

This argument is not persuasive. Both the New Day Center and the eating disorders clinic are departments of the hospital. Both the New Day Center and the eating disorders clinic have resident patients. The New Day Center patients reside at the Center for an average of about 28 days. As hospital departments engaged in medical treatment of resident patients, the location of the New Day Center and the eating disorders clinic within 500 feet of the proposed outlet brings the PAMC's objections within the scope of OAR 845-05-025(2)(c).

The Applicant argues that this conclusion would require the Commission to include every weight loss clinic and "Schick" center within the scope of the rule. This argument is an exaggeration. Each case must be judged on its own facts. OAR 845-05-025(2)(c) may reasonably be interpreted to apply where hospital departments within 500 feet of the proposed outlet administer medical treatment to resident patients, as in the present case.

The written objections from the PAMC and the PACC meet the requirement under OAR 845-05-025(2)(c) that the opposition come in writing from persons in control of the facilities. The letter from the PAMC was submitted by its vice president. The letter from the PACC was submitted by its administrator.

The Applicant argues that good cause is shown to overcome the objections of the PAMC and the PACC for several reasons.

The Applicant first argues that good cause is shown because the objections by the two facilities are based on a religious objection to the consumption of alcohol, cigarettes, and junk food. This argument is not well taken. The PAMC and PACC are owned by the Seventh-day Adventist Church. The Seventh-day Adventist Church's opposition to alcohol should cause the Commission to look carefully at the PAMC's and PACC's objections to Plaid Pantry No. 144 to make sure that they are not simply a subterfuge for moral or religious objections to alcohol. However, the fact that the Church opposes alcohol is not a reason to disregard the other specific objections cited

by the PAMC and the PACC. The facilities' various objections must each be evaluated on their own merits.

The Applicant argues that good cause is shown because the feared conflicts cited by the PAMC and PACC are either not likely to occur, or would not be so serious as to justify license denial. This argument is not persuasive. Even if none of the other conflicts cited by the PAMC and PACC were likely to occur, the objection that the sale of beer and wine at Plaid Pantry No. 144 would significantly interfere with the treatment of resident patients at the New Day Center, the eating disorders clinic and the PACC is a persuasive reason for license denial.

The sale of beer and wine at Plaid Pantry No. 144 would significantly increase the chances that the recovering alcoholics at these facilities would purchase alcohol and drink, because recovering alcoholics have an impulsive urge to drink that may be triggered by environmental factors such as the availability or visibility of alcohol nearby. This craving for alcohol can be particularly intense during the early phases of withdrawal and recovery. The sale of alcohol at the proposed outlet would make alcohol much more available to the resident alcoholic patients at the New Day Center, the eating disorders clinic and the PACC. The proposed outlet is within 200 feet of each of these facilities. The nearest PS outlet to these facilities presently is about one-half mile away.

The Applicant argues that the proposed outlet would not be visible from inside the New Day Center. This is not supported

by the record. See Finding of Fact 14. In any case, the New Day Center is not a locked facility. Patients leave the Center and use facilities in the neighborhood. Therefore, New Day Center patients are likely to quickly learn from their own or other's observations that an outlet selling beer and wine is 200 feet away. The proposed outlet would be even closer and more visible to the eating disorders clinic and the PACC.

The Applicant argues that good cause is nevertheless shown because alcoholism is not a disease that can be cured, making the key to success a desire to quit drinking, rather than hoping to lock one's self away from exposure to alcohol. This argument implies that the patients being treated for alcoholism at the New Day Center and the PACC should be viewed the same while they are undergoing their resident treatment as when they have completed their resident treatment.

This argument is not persuasive. The New Day Center patients enroll at the Center in early enough stages of recovery to require participating in a 28-day resident treatment program. The recovering alcoholic's craving for alcohol is particularly strong during the early phases of withdrawal. Consequently, alcoholic patients are much less likely to have acceptable control over their craving to drink when they are resident patients at these facilities than after they have finished their resident treatment.

The resident alcoholic patients at the New Day Center, the eating disorders clinic and the PACC are not few in number.

The New Day Center alone has an average census of 20 patients. At the time of the hearing, all these patients were alcoholics. Thus, at an average stay of 28 days, the New Day Center may have as many as 240 different resident alcoholic patients each year. The eating disorders clinic and the PACC have additional resident alcoholic patients. The PACC's alcoholic patients are among the more mobile patients at the facility. The eating disorders clinic is immediately next door to the proposed outlet. Consequently, there is a concentration of people being treated for alcoholism in very close proximity to the location where the Applicant seeks to sell beer and wine.

The finding that the proposed outlet would interfere with the treatment of alcoholic patients at the facilities nearby is necessarily an inference because the proposed outlet is a new facility. There is no history of a PS outlet being in such close proximity to these facilities. The evidence does show, however, that New Day Center patients use the neighborhood, that New Day Center patients walk away from the facility impulsively, that the PACC's alcoholic patients are among the more mobile patients at that facility, that two New Day patients recently walked to one of the existing PS outlets nearby and purchased and consumed a quantity of alcohol, and that one of the New Day Center counselors previously worked at an outpatient clinic where patients went from the clinic to a nearby

convenience store to buy alcohol. Thus, the inference that the proposed outlet would disrupt the facilities' treatment of their resident alcoholic patients is a reasonable one.

The PAMC and PACC treat patients for whom the consumption of alcohol has become a harmful addictive disease. Their objections to the sale of alcohol at Plaid Pantry No. 144 reflect a reasonable attempt to maintain the integrity of their treatment programs and to protect the health of their patients. Consequently, the objections by the PAMC and the PACC establish a basis for denial of this application under OAR 845-05-025(2)(c).

II. CHURCH OBJECTIONS

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:

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

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(b) A church;

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(d) . . . 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.

FINDINGS OF FACT

37. The Mt. Tabor Seventh-day Adventist Church is located approximately 200 feet south of the proposed outlet, across the street from the New Day Center.

38. The Church has 600 members. Its primary services are on Saturday morning, when 300 to 400 people normally attend. It also has services on Wednesday evening, when approximately 40 persons attend. There are meetings at the Church at other times as well.

39. The Associate Pastor of the Church has written the Commission on behalf of the Church, objecting to the application. Commission's Exhibit O.

40. The Church opposes license issuance because of the proximity of the proposed outlet to the New Day Center, because of the possibility that the proposed outlet would attract undesirables to the area who may commit crimes, because of the possibility of increased noise, because of a concern about litter, because of a concern that Seaton's Pharmacy would be financially hurt, and because of concerns that teenage drinking in Mt. Tabor Park might be worsened, interfering with Church use of the Park.

CONCLUSIONS OF LAW

OAR 845-05-025(2)(b) provides that the Commission will deny a license application where there is written opposition from a person in control of a church that is located within 500 feet of the proposed outlet, unless the applicant shows good cause to overcome the written opposition.

In the present matter, persons in control of the Mt. Tabor Seventh-day Adventist Church, located 200 feet from the proposed outlet, have filed written opposition.

The Applicant argues that good cause is shown to overcome the Church's opposition because the Church strongly opposes the consumption of alcohol, cigarettes and junk food for religious reasons. The Applicant argues that the Church's various objections to the issuance of a PS license are all due to the Church's religious views. This argument is not well taken. The Church's opposition to alcohol should cause the Commission to look carefully at the Church's objections to make sure that they are not simply a subterfuge for the Church's religious views. However, the fact that the Church opposes alcohol is not a reason to disregard the Church's other specific objections. The Church's various objections must be judged on their own merits.

The Applicant next argues that good cause is shown because of the unlikelihood that the sale of beer and wine at the proposed outlet would interfere with activities at the Church. This argument is well taken. The Church's concerns do not persuasively establish that license issuance would interfere with any of the activities peculiar to churches that OAR 845-05-025(2)(b) is designed to address. The evidence does not show that license issuance would significantly interfere with the Church's services or other religious activities. The Church's objections may be evaluated under OAR 845-05-035 as part of general public opinion. However, good cause has been shown to

overcome the Church's objections as refusal grounds under OAR 845-005-025(2)(b) on account of interference with religious activities.

III. PUBLIC OPINION

The Commission may refuse to issue or renew a license if it determines that public opinion weighs against the issuance of a license. Interested persons may express their support for or opposition to the issuance of a particular license by petition or letter timely received at the Commission offices, or by personal appearance and testimony at a Commission hearing, if any. Such public opinion will be evaluated in light of the reasons expressed and the extent to which the persons expressing it are likely to be affected by the issuance of the license. Greater weight will be given to opinions of persons residing, working or owning a business within a one-mile radius of the proposed premises. The number of persons expressing support or opposition will not, in and of itself, be controlling. Arguments concerning matters which are primarily within the control of the city or county government, and which were raised, or reasonably should have been raised, before the governing body of the city or county when it was considering its recommendation, may be given lesser weight by the Commission if the governing body's recommendation is inconsistent with the argument. OAR 845-05-035.

FINDINGS OF FACT

41. Bardsley & Haslacher, Inc., did a public opinion survey of the area within a one-mile radius of 60th and Belmont concerning the application for a PS license at Plaid Pantry No. 144.

The survey was conducted by phone. If someone was not available, a substitute home was phoned. The survey was conducted on December 4 and 5, 1985.

The survey showed the following results:

<u>Favor</u>	<u>No Opinion</u>	<u>Oppose</u>
21%	46%	31%

42. The Commission conducted a public opinion survey concerning the application for a PS license at Plaid Pantry No. 144. The area surveyed was irregularly shaped and included those residents living within about three blocks from the intersection of 60th and Belmont.

The survey was conducted by mail. The Commission mailed 148 questionnaires. Of these, 83 were returned. Questionnaires were mailed out on August 16, 1985, and were due back by August 21, 1985.

The survey showed the following results:

<u>Favor</u>	<u>No Opinion</u>	<u>Oppose</u>	<u>Failed to Return Survey</u>
12%	0%	44%	44%

43. The area included in the Bardsley & Haslacher survey went about four or five times further out from 60th and Belmont than the area included in the Commission survey.

44. Other than the letters from representatives of the Seventh-day Adventist Church and health care facilities in the area (see Findings of Fact 2, 5, 22 and 39), the Commission has received 32 letters signed by a total of 42 persons in opposition to the issuance of a PS license at Plaid Pantry No. 144. A number of the persons who wrote objection letters have mailing addresses indicating they live within several blocks of the proposed outlet.

The Commission has not received any letters from the public in support of a PS license at Plaid Pantry No. 144.

45. Those favoring the application in the Bardsley & Haslacher survey and the Commission survey cited the following reasons:

<u>Reasons for Support</u>	<u>Bardsley & Haslacher Survey</u>	<u>Commission Survey</u>
Convenience	30%	44%
Other stores sell	28	0
General reasons/- foresee no problems	23	28
Free enterprise	11	0
Site needs a business	8	0
Would benefit the Applicant if it had a license	1	0
No reason stated	4	44

46. Those opposing the application in the two surveys and the letters cited the following reasons:

<u>Reasons for Opposition</u>	<u>Bardsley & Haslacher Survey</u>	<u>Commission Survey</u>	<u>Letters</u>
Oppose drinking	22%	0%	2%
Too many stores in area	21	39	5
Will worsen underage drinking	20	0	0
Too close to residential area	15	0	0
Will attract crime, vandalism and undesirables	12	32	24

<u>Reasons for Opposition</u>	<u>Bardsley & Haslacher Survey</u>	<u>Commission Survey</u>	<u>Letters</u>
Proximity to Mt. Tabor Park	11	22	24
Bad influence on children	11	0	2
Worsen traffic	9	39	2
Proximity to New Day Center or PACC	9	39	74
Litter/noise	0	29	14
Proximity to church and schools	0	3	5

47. The Applicant collected a petition signed by 212 persons in support of license issuance. The petition was collected at a Plaid Pantry Store at 48th and Belmont.

48. The Mt. Tabor Neighborhood Association Board of Directors initially opposed issuance of a PS license at Plaid Pantry No. 144. The Board later changed its position after Plaid Pantry agreed to devote part of its lot to a community flower garden, to contribute to the garden expenses, and to construct a bulletin board and bench outside the store.

49. The Western Psychological & Counseling Services Center is located about one-half block from the proposed site of Plaid Pantry No. 144. The Center's patients include people who are trying to overcome alcohol abuse. The director of the Center has written the Commission opposing issuance of a PS license at Plaid Pantry No. 144.³ Commission's Exhibit KK.

50. Yosh Inahara, owner of Seaton's Pharmacy, collected a petition against the application. The petition was signed by 953 persons. About 707 of the signatures were from persons

residing in the Mt. Tabor area. Mr. Inahara told many of the petition signers of the problems he feared from the proposed outlet.

51. Mr. Inahara opposes license issuance because he believes a PS license would worsen traffic, would worsen litter, would compete with Seaton's Pharmacy, and would cause a problem for alcoholics who fill prescriptions at Seaton's Pharmacy.

52. Seaton's Pharmacy fills prescriptions for some patients of the New Day Center and the PACC. Seaton's Pharmacy also fills Antabuse prescriptions under a program where alcoholics purchase and consume the drug at the Pharmacy.

53. Rev. Harold Miller testified at the Commission's hearing in opposition to the application. He lives about 150 feet from the proposed outlet. He is a member of the Mt. Tabor Seventh-day Adventist Church. His objections include the contribution that the store might make to alcohol problems in the area, the proximity of the store to Mt. Tabor Park, the possibility that the late-night operation of the store might draw undesirables to the neighborhood who may commit crimes or other problems, and the effect of the store on traffic.

54. Loraine Harwood testified at the Commission's hearing in opposition to license issuance. She lives about three blocks from the proposed outlet. She is employed at the PACC. Her objections include the effect of the store on traffic, the possibility that the store would draw undesirable persons to the area, and the possibility that PACC patients would go to

the store and violate their diets. Her two children wait for their school bus at 60th and Belmont. She is a member of the Mt. Tabor Seventh-day Adventist Church. She is opposed to the consumption of alcohol.

55. Keith Skelton, Attorney at Law, testified at the hearing in opposition to the application. Mr. Skelton lives five blocks from the proposed site of Plaid Pantry No. 144. Mr. Skelton's objections include the proximity of the store to Mt. Tabor Park, the proximity to the New Day Center, the location in the midst of a residential area, the sufficiency of existing outlets, the danger that the store would worsen traffic, the danger that the store would draw outsiders to the neighborhood late at night, the presence of two schools within five blocks, and the proximity to the Antabuse program conducted at Seaton's Pharmacy. Mr. Skelton is particularly concerned about the effect of the store on alcoholics receiving treatment in the community because his son is a recovering alcoholic who consumed Antabuse at Seaton's Pharmacy.

56. The area within one mile of the proposed outlet is a densely developed portion of east Portland. The area is primarily residential. There are commercial uses along some portions of the major arterial streets.

57. The Mt. Tabor Elementary School is about 0.25 miles from the proposed site of Plaid Pantry No. 144. The Elementary School Annex is about one block from the proposed site. The Glencoe School is about 0.4 miles from the proposed site. There is no evidence that the schools oppose the application.

58. The Portland City Council considered the Plaid Pantry No. 144 application at its meeting of May 16, 1985. At the meeting, the Council was advised of concerns about the proximity of the license to Mt. Tabor Park, the affect on traffic, proximity to the New Day Center, and the affect on the Antabuse program at Seaton's Pharmacy. The Council voted to recommend that the Commission grant the application.

CONCLUSIONS OF LAW

OAR 845-05-035 provides that the Commission may deny an application if public opinion weighs against the application. To establish a basis for denial, the criterion requires a showing that public opinion against the application is entitled to more weight than the opinion of those who favor the application or who have no opinion. Southland Corporation, 7-Eleven Food Store, OLCC-84-L-014, May 1985. This determination is not based simply on a comparison of the number of those opposed to the number not opposed. The weight of opinion is also assessed in light of the reasons expressed and the likelihood that those expressing a view will be affected by the license. The criterion provides that greater weight will be given to the opinions of persons residing, working or owning a business within a one-mile radius of the proposed premises.

One-Mile Radius

The provision of OAR 845-05-035 giving greater weight to the opinion of persons living or working within one mile is not particularly helpful in evaluating public opinion in this

case. The Bardsley & Haslacher survey, the Commission's survey, and most of the other evidence of public opinion in the record show the opinion of persons living or working within one mile of the proposed outlet. There is little opinion in the record from persons who live or work farther than one mile from the proposed outlet. Consequently, the one-mile provision gives "greater" weight to almost all of the evidence of public opinion in the record.

As a result, the analysis of what opinion is entitled to the most weight in this case turns on the persuasiveness of the reasons expressed, the extent to which persons expressing opinions are likely to be affected by license issuance, and the numbers opposed versus not opposed of those likely to be affected.

Persuasiveness of Reasons Pro and Con

The reasons in support of the license are identified in Finding of Fact 45.

A number of the reasons expressed in support of the application have little or nothing to do with the likely effects of a PS license at 60th and Belmont. These reasons include a belief in free enterprise, that other stores sell alcohol, that the site needs a business, and that the Applicant would benefit by license issuance. The Commission has held that no weight should be given to public opinion that has nothing to do with the affects of the sale of beer and wine at a particular location. Ioannis and Stavros Karakasis, Dimitri's Grocery, May

1985. Consequently, these reasons are not entitled to any weight.

The view of some supporters that the proposed outlet is not likely to cause any problems is unpersuasive in light of the conclusion that the proposed outlet is likely to tempt patients at the nearby alcoholic treatment facilities to purchase alcohol and drink to excess in the neighborhood around 60th and Belmont. See Conclusions of Law I at pages 10 through 15; Conclusions of Law II at pages 16 through 19.

The lone remaining reason for support listed in Finding of Fact 45, then, is that the proposed outlet would be convenient. Convenience in purchasing beer and wine is related to the effects of a PS license. The convenience argument is entitled to some weight in determining the relative persuasiveness of the reasons expressed for and against the application.

The objectors' reasons are identified in Finding of Fact 46. All of these reasons are arguably related to the effects of a PS license. A number of the objectors' reasons, however, should be given little or no weight for other reasons.

Some of the objections are entitled to lesser weight under OAR 845-05-035 because they are concerns within the primary control of the City of Portland and were rejected by the City Council. OAR 845-05-035 provides that the Commission may give lesser weight to arguments which are primarily within the control of the city or county government, and which were raised or reasonably should have been raised before the governing body of the city or county, if the governing body's recommendation is

inconsistent with those arguments. The City of Portland has primary control over matters such as crime, the safety of Mt. Tabor Park, conflict with the schools, traffic, litter and noise. These arguments were raised or should have been raised before the City of Portland when it considered its recommendation on the application. The City voted to recommend that the application be granted. Thus, the City's recommendation indicates these objections should be given lesser weight.

Other objections are entitled to lesser weight because they have not been shown to be well-founded. Specifically, the record does not adequately show that there are too many stores in the area, that this license would attract undesirables, or that this license would worsen underage drinking in the area. If anything, the record shows that there are relatively few stores in the immediate neighborhood and that the Applicant has adopted policies and procedures to discourage illegal sales.

The objection that competition from the proposed outlet would financially hurt Seaton's Pharmacy should not be given any weight. The Commission does not have any authority to regulate competition between licensees and non-licensees. ORS Chapters 471 and 472.

The objections based on a moral or religious opposition to the consumption of alcohol should not be given any weight. It is beyond the Commission's jurisdiction to deny an application based solely on moral or religious objections by the public to the consumption of alcohol. Plaid Pantries, Inc., Plaid Pantry Market No. 134, OLCC-85-L-045, April 1986.

The objectors in the immediate area have cited one reason, however, that is not within the primary jurisdiction of the City and which the record shows is a valid concern. This objection is the proximity of the proposed outlet to the facilities that treat alcoholics. The New Day Center, the eating disorders clinic, and the PACC have alcoholic patients. Alcoholics visit Seaton's Pharmacy to receive Antabuse treatments. Western Psychological and Counseling Service works with alcoholic clients about one-half block from the proposed outlet. The sale of beer and wine at the proposed outlet makes it likely that some of these alcoholics would purchase and consume alcohol to excess in the neighborhood. See Conclusions of Law I at pages 10 through 15; Conclusions Law II at pages 16 through 19.

The relative persuasiveness of the supporters' reasons and the objectors' reasons thus turns on comparing the supporters' belief that the proposed outlet would be convenient with the objectors' concerns about the proximity of the proposed outlet to the various facilities in the immediate neighborhood that treat alcoholics.

The Commission has recognized that where beer and wine is otherwise available in a community, valid health and safety concerns carry greater weight than support for the application based on convenience. Robert Lindell, Corbett Cow, June 1984. The Corbett Cow was a small grocery store located across the

street from the City of Corbett's elementary, middle and secondary schools. Students patronized the store. Objectors feared increased teenage drinking.

The situation in the present case is analogous to that in Corbett Cow. Beer and wine are presently sold elsewhere in the Mt. Tabor neighborhood. There are ten PS outlets located from one-half mile to one mile of 60th and Belmont. The concerns about the proximity to the facilities in the neighborhood that treat alcoholics are entitled to as much weight as the concerns about the proximity to minors in Corbett Cow. Both cases involve the well-founded fear that persons with insufficient control of their drinking will become intoxicated and harm themselves or others in the neighborhood. These patients might wander into the street and cause traffic accidents, or trespass onto someone's property to find a place to hide and drink, or engage in some other type of dangerous, illegal or offensive behavior as a result of intoxication. The jobs of those who work at the facilities with resident alcoholic patients would certainly be more difficult because of the increased temptation and danger to their patients.

On balance, the objectors' concerns about the proximity to the alcoholic treatment facilities are more compelling than the supporters' interest in the convenience of another store in the neighborhood.

Extent To Which Persons Would Be Affected By License Issuance

The extent to which persons expressing opinions on this application are likely to be affected by license issuance is

related to the persuasiveness of the reasons expressed for and against the application.

As noted above, the one benefit to the public from license issuance that was persuasively shown was the convenience of another outlet at which to buy beer and wine. This benefit would only be very important, however, for those persons living within several blocks of the proposed outlet. Persons living farther away than several blocks are already likely to be nearer to another PS outlet than they would be to Plaid Pantry No. 144, because there are already ten PS outlets that lie between one-half mile and one mile from the proposed outlet.

The one harm from license issuance that was persuasively shown concerns the proximity to the alcoholic treatment centers nearby. This harm is most likely to affect those within easy walking distance of resident alcoholic patients who might buy alcohol at the proposed outlet and drink in the neighborhood. It appears unlikely that resident alcoholic patients would take the time to walk more than several blocks to consume beer or wine that they might have purchased at the proposed outlet. These patients would have been deprived of alcohol while residents at the treatment facilities and would therefore have a strong compulsion to drink right away. They would likely want to consume their purchase before their treatment facility sent someone to get them.

Consequently, persons living or working within several blocks of the proposed outlet are most likely to be affected by

license issuance. Their opinions are entitled to greater weight under OAR 845-05-035.

Numbers Opposed and Not Opposed

While most of the persons who live within one mile of the proposed outlet do not oppose the application, most of those who live within several blocks are opposed.

The Bardsley & Haslacher survey reliably indicates that most of those within one mile of the proposed outlet do not oppose the application. See Finding of Fact 41. The Applicant's 212-signature petition, collected at the Plaid Pantry Market on 48th and Belmont, the favorable recommendation by the Mt. Tabor Neighborhood Association, and the favorable recommendation by the City of Portland⁴ corroborate that there is public opinion in support of the application.

The Commission's survey shows, however, that most of those living within a few blocks of the proposed outlet oppose the application. Of the 148 survey questionnaires distributed by the Commission within a three-block radius of the proposed outlet, 44 percent were returned indicating opposition to the application, even though a large number of persons did not return their questionnaires. The results among those who returned their questionnaires were so one-sided against the application that the Commission may reasonably infer that if every person surveyed had returned their questionnaire, over half would have opposed the application.⁵

The finding that most persons living within a few blocks of the proposed outlet oppose the application is supported by

several indicators of public opinion besides the Commission survey. First, the 953-signature petition against the application collected by Mr. Inahara at Seaton's Pharmacy, across the street from the proposed outlet, is entitled to some weight despite the fact that Seaton's Pharmacy would be a business competitor of the proposed outlet. The Commission may assume that, as a business competitor, Mr. Inahara might have colored his explanation of the issues to the potential petition signers. Nevertheless, the large number of signatures and the fact that the petition was collected immediately across the street from the site of the proposed outlet is an indicator of significant opinion against the application among persons in the immediate community. Second, 32 letters of opposition were received, many from nearby residents, while there were no letters of support. Third, several people who live nearby testified against the application. No one who lives in the community testified in the Applicant's favor.

In addition to those living within several blocks of the proposed outlet, there also appears to be opposition to this application among those who work nearby. This opposition is indicated by the testimony and letters from various employees of the health care facilities and the Church.

Summary

The greater weight due the opinion of persons living or working within one mile of the proposed outlet is not particularly helpful in determining the weight of public opinion in

this case because almost all opinion is from persons who live or work within one mile.

Of the opinion received from persons who live or work within one mile, the most weight should be given to that from persons within several blocks of 60th and Belmont, because they would be most affected by license issuance. Most of the persons who live within several blocks oppose the application. Many who work within several blocks also oppose the application.

The two arguments for and against the application that are entitled to any significant weight are convenience and the proximity to the alcoholic treatment facilities. The convenience argument is less compelling than the objection due to the proximity to the treatment facilities.

In light of the above, the Commission may deny this application under OAR 845-05-035 because public opinion weighs against license issuance.

ULTIMATE CONCLUSIONS OF LAW

The application by Plaid Pantries, Inc., for a Package Store license at Plaid Pantry No. 144 should be denied because of the objections of the Portland Adventist Medical Center and the Portland Adventist Convalescent Center, and because public opinion weighs against the application.⁶ The objections of the Mt. Tabor Seventh-day Adventist Church are not sufficient for license denial under OAR 845-05-025(2)(b).

FINAL ORDER

The Commission orders that the application by Plaid Pantries, Inc., for a Package Store license at Plaid Pantry Market No. 144, 824 SE 60th, Portland, Oregon, be DENIED.

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

Dated this 16th day of September, 1986.

William A. Thomas

William A Thomas
Administrator
OREGON LIQUOR CONTROL COMMISSION

Mailed this 16th day of September, 1986.

Jane M. Roschusatta

Processing Assistant
Hearings Division

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.

FOOTNOTES

¹ Mr. Skelton and Ms. Roberts were made limited parties to the hearing to represent neighbors' concerns about the affect of license issuance on the following:

- a. Crime in the area in general and in Mt. Tabor Park;
- b. The proximity of the proposed outlet to nursing homes and alcoholic rehabilitation centers;
- c. Residential property values in the area;
- d. Traffic congestion.
- e. The attraction of persons who do not normally come into the neighborhood;
- f. Neighborhood peace and quiet.

Mr. Skelton's and Ms. Roberts' request to represent the interests of the neighborhood in the outcome of the hearing was denied concerning the following:

- a. Whether the proposed outlet would financially harm Seaton's Pharmacy, located across the street from the proposed outlet.
- b. Whether the highest and best use of the property on which the proposed outlet would be located is for a convenience store.

² There was conflicting evidence on whether increased accessibility to and visibility of alcohol would increase the likelihood that a recovering alcoholic might submit to the urge to begin drinking.

Dr. Curtis Holzgang, Associate Director of Medicine at St. Vincent Hospital, testified that the commitment of the alcoholic to quit is the key, and that access to alcohol is not a significant factor. Dr. Holzgang noted that alcohol is eventually readily available to a recovering alcoholic. Dr. Holzgang was associated for a number of years with an aversion therapy program for alcoholics at the Raleigh Hills Center in Portland. A 7-Eleven convenience store was located two blocks from the Raleigh Hills Center. Dr. Holzgang was not aware of any Raleigh Hills' patients who bought alcohol at the 7-Eleven store.

In contrast to Dr. Holzgang's testimony, Dr. David Moore, Director of the Chemical Dependency Unit of the Portland Medical Center, testified that an alcoholic has a compulsion to drink in the early phases of withdrawal and recovery. He testified that the availability of alcohol can stimulate this compulsion. He testified that recovering alcoholics need to be kept away from alcohol until they are reasonably in control of their drinking.

Jay Renaud, Counselor at the New Day Center, testified that a recovering alcoholic's urge to drink is impulsive and is influenced by environmental factors.

The Commission found the testimony of Dr. Moore and Mr. Renaud to be the most persuasive. It is logical that increased accessibility to and visibility of alcohol would increase the chances that an alcoholic in the early phases of withdrawal and recovery would give in to the urge to drink again.

³ The Regulatory Staff Committee's notice giving reasons for its refusal recommendation did not cite the Western letter as a basis for denial of the application under OAR 845-05-025(2)(c). The Western letter was presumably offered only as evidence of public opinion under OAR 845-05-035.

⁴ The recommendation of the local government is itself an indication of public opinion under OAR 845-05-035. Ioannis and Stavros Karakasis, Dimitri's Grocery, May 1985.

⁵ The Commission mailed 148 questionnaires. There were 83 questionnaires returned, and 65 not returned. Of the 83 questionnaires returned, 65 opposed the application.

If at least ten of the 65 persons who did not return their questionnaires are also opposed, then at least 75 of the 148 persons surveyed would be opposed. The 75 opposed would constitute a majority (over 50 percent) of those surveyed.

The fact that 65 of the 83 persons who returned their questionnaires opposed the application makes it likely that at least 10 of the 65 persons who did not return their questionnaires would be opposed.

⁶ The PAMC and PACC objections and public opinion would each be persuasive bases to deny the application in this case even if no other bases for license denial were shown.