BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the Application for a Dispenser Class A (DA) License by: Phillip & Nancy Tucker dba THE CROSSROADS STEAK, SEAFOOD & SPIRITS 2336 Poplar Drive Medford, Oregon 97504 - - - - - - - - - - - - - - Jackson County	)	PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OLCC-85-L-008

A hearing was held in the above matter on April 11, 1985, in Medford, Oregon, before Hearings Examiner Douglas Crumme'. The Commission was represented at the hearing by Michael V. Reed, Assistant Attorney General, Portland, Oregon. The Applicants were represented by Steven L. Swartsley, Attorney at Law, Medford, Oregon.

WITNESSES

FOR THE COMMISSION: Jerry Kosovich, Program Coordinator, OLCC License Division; Phillip Tucker; Arnold Egli, District Investigator, OLCC License Division; Rock LaFlesche, Sergeant, Medford Police Department; and Phyllis Franck, Manager, Manhattan Rose.

FOR THE APPLICANTS: Robert Walker, Chief of Police, City of Talent; Phillip Tucker; and Nancy Tucker.

The Hearings Examiner enters the following based on the record of the hearing:

BACKGROUND

Phillip and Nancy Tucker have applied for a Dispenser Class A (DA) license at The Crossroads Steak, Seafood & Spirits,

2336 Poplar Drive, Medford, Oregon. The Crossroads is a new restaurant that the Tuckers opened on February 4, 1985. The Crossroads has operated under a Retail Malt Beverage (RMB) license (ORS 471.265) issued to Mrs. Tucker. The RMB license contains the restriction that Mr. Tucker may not be employed or participate in the management at The Crossroads. The Applicants desire that Mr. Tucker be allowed to work as an on-premises owner under a DA license.

ISSUES

I. The Commission's Regulatory Staff argues that the application should be denied because Mr. Tucker is in the habit of using alcoholic beverages to excess (ORS 472.160(4)(a)) and because court records indicate Mr. Tucker has a record of abuse of alcoholic liquor. OAR 845-05-025(6).

II. The Applicants argue that preference for license issuance is shown under OAR 845-05-040(2)(b) on the grounds that The Crossroads would offer dining service or atmosphere of a type or quality that would be unique within a 20-mile radius.

In its letter giving notice of its refusal grounds, the Commission's Regulatory Staff had argued that the application should be denied under ORS 472.160(4)(d)[1] and OAR 845-05-025(7)[2] because Mr. Tucker had been convicted of a felony. The alleged felony was Driving While Suspended in Medford in 1978. However, at the Applicants' hearing, the Regulatory Staff conceded that the evidence shows that this conviction was not a felony. Thus, this criterion is no longer a contested issue in this matter.

The Regulatory Staff also argued in its refusal letter that this application should be denied under OAR 845-05-040(3)(a)[3], on the grounds that The Crossroads would neither be unique nor provide greater services in comparison to existing outlets in Medford and Jackson County. However, at the Applicants' hearing, the Regulatory Staff conceded that The Crossroads would provide greater services as defined under OAR 845-05-040(2)(a)[4], although the Staff continues to maintain that the premises is not unique. The Staff conceded therefore that OAR 845-05-040(3)(a) would not apply as a refusal ground. Thus, this criterion is no longer a contested issue in this matter.

I. ABUSE OF ALCOHOL

> The commission may refuse to license any applicant if it has reasonable grounds to believe:
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> . . . . .
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> (4) That the applicant:
>
> (a) Is in the habit of using alcoholic beverages, habit-forming drugs or controlled substances to excess. ORS 472.160(4)(a).
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> * * * * *
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> 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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> . . . . .
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> (6) Court or medical records indicate that the applicant has a record of abuse of alcoholic liquor or controlled substances. OAR 845-05-025(6).

Findings of Fact

1. Phillip Tucker has been convicted of the following:

Arrest Date	Offense	Disposition
9-5-75	Driving Under the Influence of Liquor (DUIL)	$355 fine & 90-day suspension of Oregon driver's license
9-8-77	Driving Under the Influence of Intoxicants (DUII)	$500 fine, one-year suspension of Oregon driver's license
10-4-78	DUII[5] and Driving While Suspended	$505 fine, 30 days jail with work release privileges, refrain from use of alcohol until April 1981, attend Alcoholics Anonymous for six months, submission to polygraph examination every six months, and take Antabuse
9-8-83	DUII	$755 fine, one-year suspension of Oregon driver's license, 20 days jail with work release privileges

2. Mr. Tucker was taken into custody by the Medford City Police on December 14, 1984, at about 3 a.m. Mr. Tucker had consumed alcoholic beverages prior to being stopped by the police. Mr. Tucker was initially charged with Driving While Suspended, DUII and Misuse of a Driver's License. The DUII charge has been dismissed. The record does not indicate that there has been a disposition of the Driving While Suspended and Misuse of a Driver's License charges.

3. While in the custody of the Medford Police on December 14, 1984, Mr. Tucker had an odor of alcoholic beverages on

his breath. He was very uncooperative. He was visibly angry and upset. In the police station, he answered "bullshit" to all the questions that the police asked him.

4. The Medford City Police released Mr. Tucker to the custody of his brother-in-law, Talent Police Chief Robert Walker, at about 3 or 4 a.m. on December 14, 1984. Mr. Tucker was not under the influence of alcohol to a point where Mr. Walker would have arrested him for driving under the influence.

5. License Division Investigator Arnold Egli interviewed Mr. Tucker within a few days prior to December 7, 1984. During the interview, Mr. Tucker said he had not had a drink of alcohol in two weeks and was going to give up alcohol altogether.

6. Between April 1981, when the condition on his DUII/ DWS convictions requiring alcohol abstention expired, and March 1985, when Mr. Tucker stopped drinking altogether, Mr. Tucker consumed alcohol only irregularly. He would have a beer or two on a hot day when sitting by his swimming pool at home. Every two or three weeks, he and his wife would go for a cocktail or two after work. Much less often, Mr. Tucker would go for a drink with his co-workers after work. Mr. Tucker was the general manager of a large Medford auto dealer. During the get-togethers with co-workers, he sometimes consumed six or seven drinks to the point where he was intoxicated. Mr. Tucker drank to this degree no more frequently than once every several months and perhaps as infrequently as two or three times between April 1981 and March 1985.

7. Mr. Tucker enrolled in a Serenity Lane, Inc. alcoholism treatment program in March 1985. The treatment program involves six weeks of two-hour group therapy sessions held every evening. Following that, Mr. Tucker will participate in once-a-week individual counseling sessions with a Serenity Lane counselor. The once-a-week sessions will continue for up to one year. At the time of the hearing, Mr. Tucker had nearly completed the every-evening group therapy sessions.

8. In addition to the sessions at Serenity Lane, Mr. Tucker has been attending meetings once a week with a chapter of Alcoholics Anonymous.

9. Mr. Tucker has realized through his participation in the Serenity Lane program that he is an alcoholic, despite the fact that he consumes alcohol to excess only infrequently. He realizes he lacks the control to stop at one drink in social situations and tends to drink to the point where he becomes intoxicated and drives.

10. Mr. Tucker intends to consume no more alcohol because of the problems that alcohol has caused him and his family.

Conclusions of Law

Mr. Tucker's four DUII convictions indicate both the abuse of alcoholic beverages and a habit of using alcoholic beverages to excess.

The question raised by the findings is whether good cause is shown for license issuance in the face of this record.

The Commission has found good cause to overcome a record of abuse of alcoholic liquor or controlled substances under OAR 845-05-025(6) where there is an indication that the Applicant has overcome the problem through successfully completing a treatment program. OLCC Final Order, Robert D. Hoblit, Family Zoo Tavern, July 1984; OLCC Final Order, Norma Mae Gallagher, The Crab Pot, February 1984. The length of time since the most recent conviction related to alcohol or controlled substance abuse is also a factor in finding good cause. In the Family Zoo Tavern, supra, the Commission noted the remoteness in time of the offenses involved where the most recent offense occurred approximately two years prior to the Applicant's hearing and the next most recent offense occurred five years prior to that. In the Crab Pot, supra, the Commission noted the remoteness of time since the offenses involved where the most recent offense occurred approximately three years before the Applicant's hearing.

On the other hand, the Commission has held that good cause to overcome a record of abuse of alcohol or controlled substances is not shown if insufficient time has elapsed since the most recent instances of abuse or if there has been insufficient evidence of reform since the instances of abuse. Scott Bowman, OLCC-85-SP-003, March 1985. In Bowman, the Commission concluded that insufficient time had elapsed and there had been insufficient evidence of reform to overcome the Applicant's habit of using controlled substances to excess where the most

recent instances of excessive use had occurred only 14 months prior to the Applicant's hearing and the Applicant had continued to use some of the illegal drugs during the intervening period.

In the present case, Mr. Tucker's record of alcohol abuse is relatively recent. His last conviction for DUII concerned an incident in September 1983. Further, Mr. Tucker continued to drink alcohol through early March 1985, despite stating to a Commission License Investigator in early December 1984 that he was going to give up alcohol altogether. Mr. Tucker only began his alcoholism treatment program in March 1985. As of the date of the Applicants' hearing on April 11, 1985, Mr. Tucker had completed only approximately five weeks of this program. The program is scheduled to continue for as much as another year.

The evidence is insufficient, therefore, to show good cause to overcome Mr. Tucker's record of alcohol abuse and his habit of using alcohol to excess. Insufficient time has passed and there is insufficient other evidence that Mr. Tucker has successfully reformed himself to allow the conclusion that good cause for license issuance is shown under ORS 472.160(4)(a) and OAR 845-05-025(6).

Mr. and Mrs. Tucker have filed this application as joint applicants. The record does not indicate that they have filed an application in the alternative for Mrs. Tucker as a sole licensee.

Mr. Tucker testified that as a DA licensee, he desires to be able to work on the premises as an owner, overseeing the business. The Applicants did not indicate a desire to pursue

their DA application under the restriction presently on Mrs. Tucker's RMB license that forbids Mr. Tucker from working on the premises. The Applicants' counsel argued that any restriction that the Commission imposes on Mr. Tucker as a licensee should be triggered by future problems with alcohol abuse, rather than imposing present restrictions on Mr. Tucker's activities as a licensee.

Because the Tuckers are pursuing this as a joint application, Mr. Tucker's problems with alcohol establish a basis for denial of the entire application, despite the fact that the record does not show that Mrs. Tucker has any problem with alcohol abuse.

Further, Mr. Tucker's record of alcohol abuse and habit of using alcohol to excess are serious enough and recent enough that good cause for license issuance would not be established simply by a restriction triggered by future alcohol abuse problems. Good cause has not been shown at this time to approve the Applicants' request for issuance of a DA license to Mr. Tucker to work as an owner on the licensed premises, overseeing the business.

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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> . . . . .
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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)(a),(b).

Findings of Fact

11. The Applicants have modeled The Crossroads after the Stuart Anderson's Cattle Company Restaurants. There are no Stuart Anderson's Restaurants in the Medford area.

12. The Crossroads employs plexiglass booth dividers and sets its booths at such angles that the booths have an unusual degree of privacy in comparison to existing dispenser outlets within 20 miles of The Crossroads.

13. The Crossroads' evening menu items are listed under price groupings from $4.95 to $16.95. The price groupings give customers a selection of items in each price range. This menu format is unique among existing dispenser outlets within 20 miles of The Crossroads.

14. The Crossroads' entree selections are priced below comparable selections at most of the existing DA-licensed dinner houses within 20 miles of The Crossroads that have a similar theme to the Crossroads.

15. The Crossroads features higher caliber musical entertainment and facilities than other DA outlets in the Medford area. The Crossroads' musical entertainment is offered in the lounge.

Conclusions of Law

The Crossroads offers a substantially different type of dining atmosphere in comparison to existing DA outlets within

20 miles with respect to the unusual degree of privacy afforded by its booth design. Consequently, some preference for license issuance is indicated under OAR 845-05-040(2)(b).

Preference is not indicated under this rule, however, because of The Crossroads' menu format or musical entertainment. Although the particular menu format is unique, this factor is not significant enough to constitute a substantially different type of dining service at the premises. The Crossroads' entertainment does not indicate preference under OAR 845-05-040(2)(b) because the entertainment is in the lounge and does not relate to the type or style of dining service at the premises.

ULTIMATE CONCLUSIONS OF LAW

This application should be denied despite the preference for license issuance shown by The Crossroads' substantially different type of dining atmosphere and by the Crossroads' greater services. Although the premises itself appears well qualified for a DA license, one of the joint applicants in this matter, Phillip Tucker, lacks the personal qualifications required of a licensee due to his record of abuse of alcohol and his habit of using alcohol to excess.

The Applicants have not filed an application in the alternative for Mrs. Tucker to be considered as the sole applicant. Further, the Applicants have not indicated a desire to consider restrictions on Mr. Tucker's licensure, other than restrictions triggered by future instances of alcohol abuse. However, Mr. Tucker's alcohol problems are serious enough and recent enough

that good cause has not been shown for license issuance on such a basis. Therefore, the application should be denied.

PROPOSED ORDER

The Hearings Examiner proposes that the application by Phillip and Nancy Tucker for a Dispenser Class A license at The Crossroads Steak, Seafood & Spirits, 2336 Poplar Drive, Medford, Oregon, be DENIED.

Dated this 24th day of May, 1985.

OREGON LIQUOR CONTROL COMMISSION

Douglas Crumme'
Hearings Examiner
Hearings Division

NOTICE: You are entitled to file exceptions to this Proposed Order. Exceptions may be filed with the Hearings Division within fifteen (15) days from the service of this Order. The Commission will review this matter before taking final action.

FOOTNOTES

1. ORS 472.160(4)(d) provides as follows:

> The commission may refuse to license any applicant if it has reasonable grounds to believe:
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> . . . . .
>
> (4) That the applicant:
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> . . . . .
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> (d) Has been convicted of violating any of the alcoholic liquor laws of this state, general or local, including the provisions of this chapter, or has been convicted at any time of a felony.

2. OAR 845-05-025(7) provides as follows:

> 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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> . . . . .
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> (7) The applicant has been convicted of a felony or of a Class A misdemeanor involving moral turpitude.

3. OAR 845-05-040(3)(a) provides as follows:

> Unfavorable consideration may be given to an applicant if any of the following are shown:
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> (a) None of the criteria set forth in subsection (2)(a) or (b) of this rule is met.

4. OAR 845-05-040(2)(a) provides as follows:

> Preference in licensing may be given to applicants showing any one or more of the following. The applicant shall have the burden of proving that these provisions apply:

(a) Applicant's premises will provide greater services, facilities and economic benefit to the area or to the general public, as indicated by actual or reasonably projected number of patrons served, seating capacity, banquet facilities, hours of operation, number of employees, extent of investment in facilities, amenities, or other such characteristics. Gross sales figures may be used as a basis for determining the number of patrons served.

5. The Regulatory Staff's letter giving notice of its refusal grounds did not assert that Mr. Tucker had been convicted for a DUII that occurred on October 4, 1978. The refusal letter listed only a Driving While Suspended conviction for that date. However, Commission's Exhibit C includes sentence orders for both a Driving While Suspended conviction for October 4, 1978, and for a conviction on a companion charge for DUII. Thus, Exhibit C indicates that Mr. Tucker was convicted for both DUII and Driving While Suspended committed on October 4, 1978.

Mr. Tucker's testimony that he did not understand he had been convicted of DUII for this date is not sufficient to rebut Commission's Exhibit C that this DUII conviction in fact occurred. Therefore, Finding of Fact 1 indicates this conviction.