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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,
Elephant & Castle, Inc.,)	CONCLUSIONS OF LAW,
ELEPHANT & CASTLE)	AND ORDER
201 SW Washington Street)	
Portland, Oregon)	OLCC-84-L-034
-----)	
)	

A hearing in the above matter was held on the 9th day of November, 1984, in Portland, Oregon, before Hearings Examiner Douglas Crumme'. The Applicant appeared in person and was represented by James K. Neill, Jr., Attorney at Law, Portland, Oregon. The Commission was not represented by legal counsel.

On January 21, 1985, the Commission considered the record of the hearing, the Proposed Order of the Hearings Examiner, Exceptions to the Proposed Order of the Hearings Examiner, and applicable statutes and regulations. Pursuant to this review, the Commission enters the following:

BACKGROUND

Elephant & Castle, Inc., has applied for a Dispenser Class A (DA) license at the Elephant & Castle, 201 SW Washington Street, Portland, Oregon. The Applicant has held a Restaurant license from the Commission since 1968. The Elephant & Castle is located on the ground floor of the three-story Waldo Building, located at the west end of the Morrison Bridge. The Applicant and the tenant on the second and third floors of the

building are renovating and remodeling the entire Waldo Building, including the portion occupied by the Elephant & Castle.

ISSUES

I. The Commission's Regulatory Staff argues the application should be denied under OAR 845-05-040(3)(f), on the grounds the Elephant & Castle will offer lesser services.

II. The Regulatory Staff argues the application should be denied under OAR 845-05-040(3)(a), on the grounds the Elephant & Castle will neither offer greater services nor be unique.

III. The Applicant argues that preference for a DA license is shown both under OAR 845-05-040(2)(a) (greater services) and under OAR 845-05-040(2)(b) (unique or substantially different).

I. GREATER/LESSER SERVICES

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.
OAR 845-05-040(2)(a).

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

1. The Applicant will spend about \$200,000 to remodel and renovate the Elephant & Castle. In addition, the Applicant's upstairs tenants will spend about \$800,000 to remodel and renovate the second and third floors, the exterior of the building and the common areas on the first floor.

2. The top two floors of the Waldo Building have been vacant. When renovation is completed, they will provide approximately 9,000 square feet of office space. Renovation of the premises is scheduled for completion in December, 1984.

3. When remodeling of the Elephant & Castle is completed, total seating capacity will be reduced from 175 formerly to between 140 and 150.

4. Upon reopening, the Applicant will enlarge the Elephant & Castle's menu. The former menu consisted of five inexpensive entrees plus seven sandwiches. The new menu will include soups, salads, side orders, a childrens menu, about 15 sandwiches, and the following entrees:

English fish & chips	\$3.50 & \$4.75
Shrimp & chips	4.75 & 6.75
Scallops & chips	4.50 & 6.50
English seafood platter	4.95
English fish dinner	4.50
Shephard pie dinner	4.75
Steak & kidney pie dinner	4.75
Scottish bangers (sausages)	3.25
Teriyaki steak	5.25
Ground sirloin	4.95
Fried chicken	4.95
Grilled beef liver	4.75
Spaghetti	3.95

5. The Elephant & Castle will have the ability to seat small groups in areas that can be separated from the remainder of the premises by movable dividers.

6. Approximately 507,500 square feet of development and historic renovation projects are planned in the next two years within three blocks of the Elephant & Castle. The largest of these projects is the Rouse Development, which will be a \$130,000,000, three-square-block office and retail venture in downtown Portland. The Rouse Development will house between 70 and 100 small specialty shops in addition to two major department stores. The Rouse Development and other projects will provide space for approximately 2,540 employees and will in addition draw numerous people to the area who will patronize or provide services to the new shops and businesses. Applicant's Exhibit 13.

7. The Applicant's sales before closing in August 1984 for remodeling were as follows:

ACTUAL SALES

<u>Month</u>	<u>Food</u>	<u>Beer & Wine</u>	<u>Total</u>	<u>Percent of Food to Total Sales</u>
Jan 1983	\$17,106	\$11,011	\$28,117	61
Feb	16,554	11,366	27,920	59
Mar	19,830	14,008	33,838	59
Apr	17,946	11,439	29,385	61
May	14,755	13,932	28,687	51
Jun	17,446	16,459	33,905	51
Jul	15,797	10,845	26,642	59
Aug	15,898	10,082	25,980	61
Sep	14,929	10,331	25,260	59
Oct	17,075	10,314	27,289	62
Nov	14,247	8,767	23,014	62
Dec	14,370	9,122	23,492	61
Average	\$16,329	\$11,473	\$27,802	59
Jan 1984	\$14,124	\$ 8,359	\$22,483	63
Feb	11,877	8,541	20,418	58
Mar	17,482	12,050	29,532	59
Apr	13,162	8,747	21,909	60
May	12,818	9,484	22,302	57
Jun	14,655	13,152	27,807	53
Jul	11,355	8,116	19,471	58
Average	\$13,639	\$ 9,778	\$23,417	58

8. The Elephant & Castle's recent sales have been lower than in previous years. The sales at the premises hit a recent peak in 1978 and 1979, when they were about \$400,000 per year, or approximately \$33,333 per month.

9. With a DA license, the Applicant projects average monthly food sales of \$37,300 and average monthly alcoholic beverage sales of \$16,700 for a total of \$54,000. The projection was prepared by the Applicant's Certified Public Accountant. The bases for the projection are that the premises will have 127 seats, will turn over 1 1/4 times at lunch, will turn over one time at dinner, will have average lunch and dinner

food tickets of \$4.35 per patron and will have an average alcoholic beverage ticket of \$1.95 per patron. A computation based on these assumptions yields the projected figures.¹

The Applicant's projection is reasonable. The premises will have 140 or 150 seats rather than the 127 seats assumed in the projection. The assumed average meal prices are in line with the proposed menu. See Finding of Fact No. 4. The assumed number of turns is reasonable since the Applicant already does 1 1/4 turns at lunch and one turn at dinner, as evidenced by the testimony of the Applicant's president. The Applicant's plans to increase advertising and the upcoming development in the area should help maintain or even boost the present patronage levels. See Finding of Fact No. 6.

10. Dispenser outlets in the following areas recently experienced the average monthly sales indicated:

<u>Area</u>	<u>Food Sales</u>	<u>Total Sales</u>
City of Portland	\$35,120	\$55,218
Multnomah County	38,499	59,324

11. At \$54,000 per month, the Elephant & Castle's average monthly sales would exceed seven of the ten nearest DA outlets to it.

12. The Commission has recently granted DA licenses to three outlets in downtown Portland that provide more seating than the Elephant & Castle will upon remodeling. The precise

¹127 seats x (1.25 lunch turns + 1.0 dinner turns) x \$4.35 average food ticket x 30 days = \$37,290.38 food sales per month. 127 seats x (1.25 lunch turns + 1.0 dinner turns) x \$1.95 average alcoholic beverage ticket x 30 days = \$16,716.38 alcoholic beverage sales per month.

number of seats these premises will have is not shown in the record. The record does not show if these are the last three DA licenses the Commission has issued in the Portland area.

13. The three DA outlets referred to in the Finding of Fact above all invested significantly more in furnishing, constructing or remodeling their facilities than the Applicant will spend to remodel the Elephant & Castle.

Conclusions of Law

The Elephant & Castle would offer about the same level of sales as existing dispenser outlets in the City of Portland, where the premises is located. The sales at the Elephant and Castle would also exceed the sales of seven of the ten nearest DA outlets to it.

The fact that the Commission has recently granted three DA licenses in downtown Portland to premises with greater seating and probably involving a greater investment than the Elephant and Castle is not particularly helpful in analyzing the Applicant's qualifications under the "greater services" and "lesser services" criteria. An applicant's qualifications under these criteria are to be judged based on "a comparison with other existing dispenser licenses in the same city or county or with other pending applications for such licenses anywhere in the state." OAR 845-05-040(1).

There may be a rationale under the criteria for looking at the ten nearest existing outlets to the Applicant, to see how

the Applicant compares in its particular neighborhood or community. In terms of the comparison to existing outlets, however, the justification for looking at just three large, recently-granted outlets is not clear. If the record showed that all of the recent dispenser licenses granted in Portland went to dispenser outlets larger than the Elephant and Castle, and all recent Portland applications of a similar size to the Elephant and Castle had been denied, then that might show that denial of the Elephant and Castle application was consistent with recent Commission interpretation of the licensing criteria. The record does not permit such a conclusion in the present case, however, because it does not show that the three outlets cited by the staff are the most recent granted in Portland or that the Commission's recent practice has been to consistently deny Portland applicants similar in size to the Elephant and Castle.

The rationale for citing the three large, recently-granted outlets under the "greater services" and "lesser services" criteria also is not clear in terms of the comparison allowed under these criteria between the Elephant and Castle and other pending applications anywhere in the state. The fact that licenses were recently granted to these three outlets says nothing about the qualifications of the remaining pending applications. The record does not show that the Elephant and Castle compares unfavorably with other presently pending applicants.

In light of the Elephant and Castle's likely favorable sales comparison to the Portland DA average and the majority of the ten nearest DA outlets, preference for licensure is shown under OAR 845-05-040(2)(a) (greater services). Unfavorable consideration is not shown under OAR 845-05-040(3)(f) (lesser services).

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).

Finding of Fact

14. The Elephant & Castle is modeled after a pub of the same name located outside London, England. The Elephant & Castle in Portland has several features designed to create the atmosphere of an authentic English pub. These include a number of British flags and various other decor features recalling England. The premises has five dart boards and two pool tables. Dart league teams play at the premises. Both darts and pool are typical of an English pub. The Elephant & Castle has a number of items on its menu that are typical fare in English pubs. These include fish and chips, other Icelandic

cod dishes, steak and kidney pie, Shephard pie, and Scottish bangers. Bangers are a type of sausage served in Scotland.

15 There are no DA outlets within 20 miles of the Elephant & Castle which feature English pub dining service and atmosphere. One DA outlet within this radius does have an English atmosphere. This premises is Sweet Tibbie Dunbar. However, Sweet Tibbie Dunbar is more a formal dinner house than a pub. Sweet Tibbie Dunbar's menu consists of traditional American steak and seafood selections and is higher priced than the Elephant & Castle's menu.

16. The Staff's refusal letter argued that the London Grill and the East Bank Saloon, two DA outlets in Portland, are similar in dining service and atmosphere to the Elephant & Castle. However, the record shows the London Grill is simply a high-priced and relatively formal dining establishment and does not have a particularly English theme, either in decor or menu. The East Bank Saloon has a more informal atmosphere like a pub. However, the East Bank Saloon's decor and menu do not have an English theme.

17. The Waldo Building where the Elephant & Castle is housed has been placed on the National Register of Historic Places. The Waldo Building was constructed in 1886 It represents a fine example of Victorian Italianate architecture in vogue at that time. The Applicant and her tenants will restore the exterior of the building to its original condition as part of the renovation of the premises. See Finding of Fact No. 1.

Conclusions of Law

The Elephant & Castle offers dining service and atmosphere that are unique in quality and type in comparison to existing DA outlets within 20 miles. The dining service and atmosphere at the Elephant and Castle are unique because of the premises' traditional English pub qualities, including menu items, entertainment, and decor. As a consequence, preference for license issuance is indicated under OAR 845-05-040(2)(b).

III. LACK OF GREATER SERVICES OR UNIQUENESS

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

(a) None of the criteria set forth in subsection (2)(a) or (b) of this rule is met. OAR 845-05-040(3)(a).

Findings of Fact

18. The Commission notes Conclusions of Law Nos. I and II in connection with whether unfavorable consideration is indicated for the application under OAR 845-05-040(3)(a).

Conclusions of Law

Unfavorable consideration for license issuance is not indicated under OAR 845-05-040(3)(a) because the Applicant has established preference under both OAR 845-05-040(2)(a) (greater services) and under OAR 845-05-040(2)(b) (uniqueness).

ULTIMATE CONCLUSIONS OF LAW

The application for a DA license at the Elephant & Castle should be granted because preference for license issuance is

shown because the Elephant and Castle will offer greater services and will offer dining service and atmosphere that are unique in quality and type.

FINAL ORDER

It is hereby ordered that the application for DA license by the Elephant & Castle, Inc. at the Elephant & Castle, 201 SW Washington, Portland, Oregon be GRANTED upon payment of appropriate license fees to the Commission, subject to the condition that the Applicant continue to offer the English pub menu and decor that makes the premises unique.

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

Dated this 25th day of January, 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.