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November

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,
Paul R. and Catharina M. Zech)	CONCLUSIONS OF LAW,
dba HALFWAY HOUSE RESTAURANT)	AND ORDER
P.O. Box 15)	
Crescent Lake, Oregon 97425)	OLCC-85-L-024
- - - - -)	
Klamath County)	

A hearing in this matter was held on July 24, 1985, in Klamath Falls, Oregon, before Hearings Examiner Allen R. Scott. The Applicants appeared and were represented by Michael L. Brant, Attorney at Law, Klamath Falls. The Commission was not represented by legal counsel.

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

BACKGROUND

Applicants' premises is located on Highway 58, five miles west of its junction with Highway 97. It is approximately 85 miles from Klamath Falls, 62 miles from Bend, and 13 miles from Chemult. Applicants have operated the premises since July 1, 1984, with a Retail Malt Beverage license and Seasonal Dispenser license. They seek a Dispenser Class A license.

ISSUES

I. The staff asserts that the application should be denied because Applicants will provide lesser services,

facilities and economic benefit to the area than do existing premises. OAR 845-05-040(3)(f).

II. The staff asserts that the license should be denied because Applicants will provide neither greater services nor unique dining service or atmosphere. OAR 845-05-040(3)(b).

III. The evidence makes relevant the preference for a premises located in a rural unincorporated area and having fewer than 100 seats. OAR 845-05-040(2)(e).

I. LESSER SERVICES, FACILITIES AND ECONOMIC BENEFIT

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 serve breakfast, lunch and dinner.
2. Sales at the premises have been as follows:

<u>Month</u>	<u>Food</u>	<u>Alcoholic Beverages</u>	<u>Total</u>
Jul 1984	\$4,898	\$1,026	\$5,924
Aug	5,450	997	6,447
Sep	5,271	952	6,223
Oct	4,432	646	5,078
Nov	4,185	414	4,599
Dec	3,966	519	4,485

Jan 1985	4,552	391	4,943
Feb	4,435	365	4,800
Mar	5,648	372	6,020
Apr	4,834	412	5,246
May	6,859	607	7,466
Jun	7,401	1,083	8,484
Average	\$5,161	\$ 649	\$5,810

Applicants' Seasonal Dispenser license was in effect from June through December.

3. Applicants estimate that if the DA license is granted, average monthly sales will be as follows: food - \$7,666; alcoholic beverages - \$710; total - \$8,376.

4. According to evidence presented by the staff at the hearing, average monthly sales at existing dispenser outlets in Klamath County have been as follows: food - \$19,092; alcoholic beverages - \$2,171; total - \$21,263. The Commission takes official notice that the most recent figures available from the Commission's License Division indicate that average monthly sales at existing dispenser outlets in Klamath County have been as follows: food - \$18,536; alcoholic beverages - \$8,019; total - \$26,555.

5. The premises is open seven days a week all year. The hours of operation are as follows: 8:30 a.m. to 8:30 p.m., Monday through Friday; 8:30 a.m. to 10:00 p.m., Saturday; 9:30 a.m. to 8:30 p.m., Sunday.

6. The following four outlets holding dispenser privileges are within approximately 14 miles of Applicants' premises: The Old 58 (DA), 8.8 miles to the west; the Chemult Chalet (Seas. D), 13 miles to the southeast in Chemult; Mohawk

(DA), 12 miles to the northwest on Highway 97 in Crescent; Gilchrist Restaurant & Lounge (DA), 13 miles to the northeast in Gilchrist. An application for a DA for the Chemult Chalet is pending.

7. All of the above premises serve breakfast, lunch and dinner. Three have more seating than Applicants' premises and one has slightly less. Two have banquet facilities. Average monthly total sales at the four premises are as follows: The Old 58 - \$8,356; Chemult Chalet - \$19,766; Mohawk - \$5,218; Gilchrist Restaurant & Lounge - \$11,207.

8. Highway 58 is a main highway between western and eastern Oregon. Applicants' premises is patronized by automobile travelers along Highway 58. It also gets much of its business from people who either live full time in the area or who spend frequent weekends in the area in cabins or summer homes. Applicants estimate that within approximately four miles of their premises, there are 63 full-time residents and approximately 100 people who spend frequent weekends in the area.

9. Applicants' premises also receives business from bus passengers. Three regularly scheduled buses stop each day at the premises, one in the morning, one in the mid-afternoon and one in the late afternoon. The buses stop long enough for passengers to eat or drink if they wish. Tour buses also frequently stop at the premises, particularly during the winter months.

10. Applicants offered four letters supporting the application. Three are from people who spend time in the area pur-

suings recreational opportunities. One is from a resident of the area.

Conclusions of Law

The evidence establishes that Applicants' premises will provide lesser services, facilities, and economic benefit to the area than do existing premises.

The criterion permits a comparison of an applicant's premises with existing premises in the city or county or with pending applications anywhere in the state. Applicants' sales, according to the reasonable projection provided by Applicants, will be considerably less than the average at existing premises in Klamath County. They will also be less than two of the four nearest outlets, approximately the same as one, and somewhat more than the fourth. Three of the four nearest premises have DA licenses while the other has a Seasonal Dispenser and a pending DA application. It may be concluded, therefore, that Applicants' sales and the number of patrons served will be less than sales and patronage at both the nearest premises and those in the county as a whole.

Other aspects of Applicants' services appear to be similar to the services provided at the nearest existing premises. All four of the nearest premises serve breakfast, lunch and dinner, as do Applicants. Applicants' hours or days of operation will not exceed those at the nearest premises. Two of the four nearest premises have a banquet room, whereas Applicants do not. This factor seems to be of little significance in this case, however, in that there are no organized groups in the

area which would frequently use the premises, except for volunteer firemen, who already do so.

Applicants will, according to the evidence, provide services to people traveling on both scheduled buses and tour buses. There is also evidence that many of the people who live in the area would like to see a license at the premises. However, these factors are not sufficient to outweigh the evidence of lesser services provided by the actual and projected sales.

The Commission concludes that this criterion provides a basis for denying the application.

II. LACK OF GREATER SERVICES AND LACK OF 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).

* * * * *

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).

* * * * *

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

11. Applicants' menu provides a substantial selection of typical "American" foods. The breakfast offering includes omelets, hotcakes, various egg and meat combinations, and side dishes. The lunch menu offers approximately 13 sandwiches and six burgers. The dinner menu offers 12 full dinners, including steak, roast beef, veal, liver and onions, chicken, and seafood dinners. The menu also offers soup, salad and desserts.

12. The four nearest outlets with dispenser privileges offer a similar type of cuisine.

Conclusions of Law

This criterion provides for denial of a license if the premises does not provide greater services, facilities or economic benefit to the area and does not provide unique food service. Applicants make no claim to unique food service

within 20 miles. The facts noted under Section I above establish that Applicants will not provide greater services, facilities and economic benefit to the area than existing premises. This criteria therefore provides a basis for denying the application.

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 will provide a total of 87 seats, with 56 being in the dining room, six at a counter, and 25 in the lounge.

14. Applicants' premises is located in an unincorporated area.

Conclusions of Law

Applicants qualify for preference under this criterion. The Commission believes, however, that this preference is not sufficient to overcome the two bases for negative consideration discussed earlier in this Final Order.

The preference for location/small size may, as the Commission has concluded in Ronald and Susan Martin, Ron Martin's

Bistro, OLCC-L-85-002, May 1985, be weighed against, and perhaps given precedence over, the negative consideration relating to lesser services. However, in that case, the applicant was entitled to preference for uniqueness. The Commission's decision to grant the license was based upon the preference for uniqueness combined with the preference for location/small size. In the case at hand, Applicant has established no basis for preference for uniqueness. Furthermore, Applicant has not shown that the preference for location/small size should be given great weight in this case. The evidence establishes that travelers along Highway 58 and Highway 97 can be served by existing dispenser outlets within 10 to 15 miles of Applicant's premises. Furthermore, the small population of the area and Applicants' low present sales (with a Seasonal Dispenser license) do not indicate any great need for an additional license in the area. No other factors indicate that the preference for location/small size should be given particular weight in this case.

The Commission concludes that the preference for location/small size is not enough to overcome the negative consideration indicated by Applicants' lesser services, facilities and economic benefit and Applicants' lack of uniqueness/lack of greater services, facilities and economic benefit to the area.

ULTIMATE CONCLUSIONS OF LAW

The application should be denied, despite the preference for location and size, because Applicants' premises will provide lesser services to the area than do existing premises and

because Applicants' premises will provide neither dining service that is unique within 20 miles nor greater services, facilities, and economic benefit to the area than do existing premises. OAR 845-05-040(3)(f); OAR 845-05-040(3)(a).

FINAL ORDER

The Commission orders that the application for a Dispenser Class A license by Paul R. and Catharina M. Zech in the trade name Halfway House Restaurant, P.O. Box 15, Crescent Lake, 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 8th day of November, 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.