

BEFORE THE LIQUOR CONTROL COMMISSION  
OF THE STATE OF OREGON

In the Matter of the	)	
Request for Change of Operation	)	
And Remodeling of a	)	
Dispenser Class A (DA)	)	FINAL
License by:	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Zack's Restaurant Establishment, Inc.	)	AND ORDER
ZACK'S RESTAURANT	)	
3000 SE Powell	)	OLCC 84-L-026
Portland, Oregon	)	
-----	)	
Multnomah County	)	

A hearing in the above matter was held on the 7th day of September, 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.

The Hearings Examiner, having considered the record of the hearing, the applicable law and regulations and being fully advised, issued a Proposed Order dated November 23, 1984.

No Exceptions were filed to the Proposed Order within the fifteen (15) day period specified in OAR 845-03-050.

Now, therefore, the Commission hereby adopts the Proposed Order of the Hearings Examiner as the Final Order of the Commission, and enters the following:

BACKGROUND

Zack's Restaurant Establishment, Inc. holds a Dispenser Class A (DA) license at ZACK'S RESTAURANT, 3000 SE Powell, Portland, Oregon. The Commission initially approved closure of

the premises in July, 1983 to allow the Licensee to do extensive remodeling to the premises. The Licensee subsequently changed its plans for the premises two times, eventually deciding on the present remodeling request. The Commission extended the approved closure date for the premises in June, 1984, to allow time for resolution of the Licensee's present remodeling request.

### ISSUES

- I. The Regulatory Staff argues that the Licensee's remodeling request should be denied because the remodeled premises would place an emphasis on the sale of alcohol over food.
- II. The Licensee argued that its remodeling request should be approved because the proposed remodeling will result in substantial improvements to Zack's, and the Commission's practice has been to approve remodeling that improves the licensed operation. The Licensee argued there is no valid explanation in the case of Zack's for deviation from this past practice. ORS 183.484(4)(b)(B).
- III. The Licensee argued that preference for the proposed remodeling is shown because the proposed remodeling will lead to the provision of greater services, facilities, and economic benefit. OAR 845-05-040(2)(a).
- IV. The Licensee argued that preference for the proposed remodeling is shown because the remodeling would lead to unique or substantially different dining service or atmosphere. OAR 845-05-040(2)(b).

The notice that the Commission's Regulatory Staff sent the Licensee that set forth the grounds for the Staff's refusal

recommendation did not refer by number to any particular statutes or rules. (Commission's Exhibit H.) ORS 183.415(2)(c) requires such notice to include "a reference to the particular sections of the statutes and rules involved . . ." However, the Licensee was prepared and proceeded at the hearing on the issue of whether the remodeling would merit unfavorable consideration under OAR 845-05-040(3)(e)(B) due to an emphasis on the sale of liquor over food. Thus, the lack of a citation to this rule number in the refusal notice did not appear to result in any unfairness of a sort that would subject the case to remand under ORS 183.482(7).<sup>1</sup> In any case, the Licensee made no such argument. Thus, this defect in the notice was waived.

The Licensee moved at the hearing for dismissal of the Regulatory Staff's refusal recommendation on the ground that neither any statute nor any of the Commission's administrative rules set forth the standards on which remodeling requests are to be judged. The Hearings Examiner denied the motion. OAR 845-05-005, Red Robin Enterprises, Inc. v. Oregon Liquor Control Commission, 55 Or App 720, 725, 639 P2d, 710 (1982).

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<sup>1</sup> ORS 183.482(7) provides as follows:

(7) Review of a contested case shall be confined to the record . . . The court shall remand the order for further agency action if it finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure.

I. EMPHASIS ON SALE OF ALCOHOL

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

. . .

(e) The applicant's premises will be operated primarily as a tavern, rather than as a restaurant, as indicated by factors emphasizing:

. . .

(B) The sale of alcoholic liquor to a greater degree than food service. OAR 845-05-040(3)(e)(B).

Findings of Fact

1. With the proposed remodeling, Zack's is likely to realize a percentage of food sales to total sales of from 35 to 50 percent, as evidenced by a comparison between Zack's after the proposed remodeling and two other Portland DA outlets (Harrington's and JT Barringer's) with which the owners of Zack's are affiliated. Harrington's and JT Barringer's are located in downtown Portland. Harrington's and Barringer's have similar decor themes to that proposed for Zack's. Their menus are similar, but contain fewer selections than now proposed for Zack's. Harrington's food sales are presently about 34 percent of total sales. Barringer's food sales are about 45 percent of total sales.

2. Zack's full menu would be served at all seats in the premises. Nevertheless, certain portions of the premises will

have a dining emphasis and other portions will have a lounge emphasis. There will be 104 seats in the areas that will have a dining emphasis. There will be up to 90 seats in the areas with a lounge emphasis. There will also be some space at the bar without seating at which patrons may stand. There will be 68 seats in a corner that should have a dining emphasis in the daytime and early evening, but which will be used primarily for lounge purposes at night. The Licensee plans to seat groups for meetings and banquets in this 68-seat area during the daytime. (Applicant's Exhibit 10.)

3. Under the proposed remodeling, the dining and lounge areas of Zack's will be on different elevations and will be separated by brass railings. There will also be some etched glass panels and plants that separate the dining areas from the lounge. The view between these areas will otherwise be open.

4. The areas of Zack's that would emphasize dining would take up about 41 percent of the interior floor space of the premises, excluding the kitchen and rest rooms. The 68-seat lounge and banquet area would take up about 18 percent of the floor space. The bar, lounge and dance floor would take up the remaining 41 percent of the floor space. (Applicant's Exhibit 10.)

5. In connection with the proposed remodeling, the Licensee will construct an outdoor deck to be included in the licensed premises.

6. The Licensee proposes to have recorded music for dancing at night. The dance floor will take up about one-sixth of the lounge area.

7. With the proposed remodeling, Zack's would not have a game room, pool tables or stand-up game machines. The premises may have some table-top electronic games.

8. After the proposed remodeling, Zack's menu would include at the least the substantial equivalent of 10 appetizers, soups, seven hamburgers, seven light entrees, 14 sandwiches, five large salads, seven desserts, and the following additional entrees:

Beef

Filet mignon	\$7.95
Top sirloin steak	6.95
Steak and mushrooms	8.25
12-oz top sirloin	8.95
London broil	6.50

Seafood

Baked scallops	\$7.50
Broiled mahi-mahi	6.50
Cod Vera Cruz	6.50
Deep water shrimp	7.50
Steamed butter clams	6.50
Teriyaki shark	6.75

Chicken

Chicken and mushrooms	\$6.95
Chicken teriyaki	5.95
Chicken picatta	6.50
Chicken Dijon	6.50
Mexican chicken	5.95

(Applicant's Exhibit 9.)

Conclusions of Law:

Zack's will emphasize the sale of alcoholic beverages over food service. The main indicator of this emphasis is the fact that 50 to 65 percent of Zack's total sales are likely to be in alcoholic beverages as opposed to food. Thus, most of the sales at the premises are likely to be in alcohol.

Although the sale of alcohol will be emphasized over food, this emphasis will not be a particularly strong one. A significant food service effort will be made, as indicated by the fact that 41 percent of the floor space will be in areas emphasizing dining, with an additional 18 percent of the floor space emphasizing dining during the day, and as indicated by Zack's extensive proposed menu. Further, all the seats in the house will be available for dining. Thus, although some unfavorable consideration would be indicated under OAR 845-05-040(3)(e)(B), this criterion is not of great weight in the case of Zack's.

II. INCONSISTENT PRIOR COMMISSION PRACTICE

(1) Jurisdiction for judicial review of contested cases is conferred upon the Court of Appeals . . .

. . .

(8)(a) The Court may affirm, reverse or remand the order . . .

. . .

(b) The Court shall remand the order to the agency if it finds the agency's exercise of discretion to be:

. . .

(B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; . . .  
ORS 183.482.

### Findings of Fact

9. The Commission's Regulatory Staff generally approves remodeling requests if the Staff believes the remodeling will be an improvement over the existing operation, as evidenced by the testimony of the License Division's Hearings Specialist.

10. The proposed remodeling will cost about \$300,000 to complete.

11. The proposed remodeling will increase the size of the building from about 4,400 square feet at present to 7,500 square feet.

12. The proposed remodeling will increase total seating to 274 from the actual figure of 150 before closure of the premises in July, 1983.<sup>2</sup>

13. The proposed remodeling will not increase the percentage of seats in the lounge. Before closure of the premises in July, 1983, about two-thirds of Zack's actual seating was in the lounge portions of the premises.

<sup>2</sup> The License Division Investigation Report (Commission's Exhibit B) indicates that the "previously approved" seating at Zack's provided for 165 seats in the restaurant and 120 seats in the lounge. The actual seating at the premises before closure in July, 1983, however, was for 50 in the dining area and 100 in the lounge. The record did not show how long the seating for 150 persons was in effect, or whether this seating was approved by the Commission.

14. The proposed remodeling does not markedly change the exposure of dining-area patrons to the lounge. The lounge and dining portions of the premises were not in separate rooms prior to closure in July, 1983.

15. The proposed remodeling will improve the facilities at Zack's for large groups. Prior to closure in July, 1983, there was no banquet area at Zack's for large groups.

16. The proposed remodeling will result in the elimination of a game room.

17. The new menu planned in conjunction with the proposed remodeling will be substantially larger than the former menu. There will be a large increase in the number of entrees.

18. The proposed remodeling will significantly enhance the interior and exterior decor.

19. With the proposed remodeling, Zack's will operate for lunch and dinner. Formerly, Zack's operated in the evening only.

20. The Licensee held a Retail Malt Beverage (RMB) license at Zack's from 1975 to 1978. The Licensee obtained the change of location of a DA license to Zack's in 1978. Since 1975, the highest percentage of food sales to total sales at Zack's was about 30 percent, when the RMB license was in effect. The food sales percentage at Zack's for the period preceding closure in July, 1983 was about 6.2 percent. In contrast, after the proposed remodeling and associated changes,

the food percentage at Zack's is likely to increase to between 35 to 50 percent (see Finding of Fact No. 1).

21. With the proposed remodeling, Zack's sales are likely to increase substantially from the recent average sales before closure in July, 1983. The reasons for the increase are the expansion of hours to include lunch, the expansion in seating and building size, the large expansion of the menu and the number of dinner entrees, the addition of a space that can be used by large groups, and the large investment to make the premises a more comfortable, attractive facility.

22. The Licensee's proposal to remodel Zack's is part of a general effort by Mr. Rice and Mr. Goforth to upgrade and improve the eight liquor-licensed outlets that they own.

#### Conclusions of Law

The evidence indicates that the Commission Regulatory Staff's general practice is to permit remodeling requests where the remodeling results in an "improvement" to the operation. Such a practice makes sense. It allows the upgrading of existing outlets.

In the instant case, the Licensee has demonstrated that the proposed remodeling would lead to substantial improvements from the former operation under several of the Commission's license criteria.

OAR 845-05-040(3)(e)(b) disfavors an emphasis on the sale of alcohol versus food. In the instant matter, the Licensee's

proposed remodeling and associated menu change would increase food sales from the recent figure of 6.2 percent to about 35 to 50 percent.

OAR 845-05-040(2)(a) favors premises that will provide greater services, facilities and economic benefit. In the instant matter, the Licensee proposes to invest \$300,000 in the existing facility. Seating will be greatly expanded from the former actual seating and will be the equivalent of the former approved seating. The hours of operation will be expanded. The menu will be expanded. Gross sales are likely to show a large increase. All these factors indicate a significant move in the direction of greater services as a result of the proposed remodeling.

OAR 845-05-040(3)(a)(A) indicates disfavor for a premises that emphasizes entertainment. The Licensee's proposed remodeling at Zack's will eliminate an existing game room and replace live music with recorded music. The emphasis on games and entertainment at the premises should be decreased, consistent with OAR 845-05-040(3)(a)(A).

The record did not explain why the remodeling request to improve Zack's should be denied when the Staff's general practice is to approve remodeling leading to improvements. The present record would likely subject the application to remand as an unexplained, inconsistent practice under ORS 183.482(8)(b)(B) were the Commission to deny the request.

III. GREATER SERVICES

An application for a DA license may be granted or denied on the basis of a comparison with existing DA licenses in the same city or county or a comparison with other pending dispenser's applications. OAR 845-05-040(1). Preference in licensing may be given to applicants providing greater services, facilities and economic benefit to the area or 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, entertainment or such characteristics. Gross sales figures may be used as a basis for determining the number of patrons served. OAR 845-05-040(2)(a).

Findings of Fact

23. The Commission takes official notice that DA outlets in Portland and Multnomah County have had the following recent average sales:

	<u>Food</u>	<u>Alcoholic Beverages</u>	<u>Total Food And Alcoholic Beverages</u>
Portland	\$34,540	\$20,691	\$55,231
Multnomah County	38,064	21,489	59,553

24. The increased sales at Zack's after the proposed remodeling are likely to reach the \$60,000 level and to exceed the average monthly sales in Portland and Multnomah County noted in Finding of Fact No. 23 above, as indicated by several factors. First, Zack's was averaging \$32,000 per month before

closure in July, 1983, with much less seating and floorspace, a much smaller menu, a less attractive facility and no lunch sales. Second, Harrington's, a DA outlet operated by Zack's principals that has a similar menu and decor but less seating than the remodeled Zack's, averages \$120,000 per month in total sales. Third, the Original Taco House, a DA outlet located four blocks from Zack's, averages \$88,000 per month total sales with just 150 seats, indicating a healthy demand for dispenser services in the community. Fourth, the Monte Carlo, a DA outlet near Zack's on SE Powell, does a busy banquet business, indicating that Zack's 68-seat area that can accommodate groups should provide a good boost to sales.

#### Discussion

The Staff argued that the sales at three DA outlets operated by Zack's principals discredit the Licensee's projection that the remodeled Zack's would average total sales of \$100,000 per month. The Commission agrees that the \$100,000 projection was not convincingly established. However, the evidence submitted by the Staff to discredit the projection did not establish that the Licensees are unable to achieve the \$60,000 level in monthly sales. Two of the outlets cited by the Staff are older, smaller facilities that are not very comparable to the remodeled Zack's. The third outlet cited has a more comparable menu and decor, but the information in the record makes it difficult to use that outlet as a predictor for Zack's. For example, the seating at this third outlet was not provided, and the

sales were not specifically indicated, other than falling somewhere between \$32,000 and \$50,000 per month.

#### Conclusions of Law

With the proposed remodeling, Zack's is likely to average monthly total sales of at least \$60,000. See Findings of Fact No. 24. This figure exceeds the average monthly total sales of DA outlets in Portland and Multnomah County. See Finding of Fact No. 23 above. These comparatively high likely sales show that Zack's will provide greater services and economic benefit and thus establish a preference for the Licensee's remodeling request under OAR 845-05-040(2)(a).

#### IV. UNIQUENESS

Preference for issuance of a dispenser license will be given to applicants who provide dining service or atmosphere which is unique or substantially different in quality, quantity or type from that offered by other licensees within a 20-mile radius as indicated by menu, decor and amenities, entertainment or other characteristics. OAR 845-05-040(2)(b).

#### Findings of Fact

25. There are no new moderately-priced dispenser outlets on the east side of the Willamette River in Portland with the same decor and menu theme as proposed for Zack's. There are some dispenser outlets on the west side of the Willamette in Portland that have similar menus and decor themes to that proposed for Zack's. Some of these outlets will have higher

menu prices than Zack's. The record did not show, however, that Zack's would provide dining service or atmosphere that would be unique or substantially different within a 20-mile radius of its location.

#### Conclusions of Law

For a preference to exist under OAR 845-05-040(2)(b), a premises must offer substantially different dining service or atmosphere in comparison to other dispenser outlets within 20 miles. The record did not show uniqueness or substantial difference within a 20-mile area. Therefore, no preference is indicated under this regulation.

#### DISCUSSION

The Regulatory Staff requested at the hearing that if the Commission approves this remodeling request, the following four conditions be imposed:

- a. Receipt of executed \$100,000 loan from U.S. National Bank.
- b. Remodeling to be completed according to plans on file with the Commission.
- c. Verification of approximately \$200,000 financed from other Goforth and Rice restaurant operations.
- d. Premises to be in operation by January 1, 1985.

Condition "d", that the premises be in operation on January 1, 1985, does not appear realistic given the present timing. The Licensee stated at the hearing that the remodeling would take from six to nine months to complete following

approval by the Commission. Without examining the matter in detail, nine months does not appear excessive for the Licensee to complete remodeling costing \$300,000. The Commission believes the nine-month period is appropriate. The Licensee no doubt has its own interest in doing the remodeling as quickly as possible so that it can open and begin earning a return on its investment.

#### ULTIMATE CONCLUSIONS OF LAW

A review of the refusal criteria cited in this matter indicate that the Commission should allow the proposed remodeling. Although the remodeled premises is likely to place some emphasis on the sale of alcohol, this emphasis will not be strong and does not indicate strong unfavorable consideration. Preference for the remodeling is shown because it would lead to the provision of greater services, facilities and economic benefit.

In addition, the Commission should allow this remodeling request under the Commission's practice of approving remodeling that leads to improvements. The record does not adequately explain how the particular improvements involved in this case are distinguished from remodeling improvements that the Commission normally approves.<sup>3</sup>

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<sup>3</sup> The Commission recognizes that the Commission may choose to create some exceptions to what the record indicates is the general practice of approving remodeling improvements. The Commission's recommendation that the remodeling be approved in this case is based on the conclusion that neither precedent nor reasoning for such an exception were apparent from the record.

FINAL ORDER

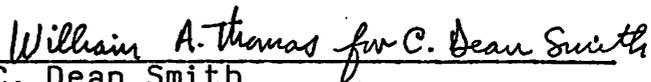
It is hereby ordered that the request by Zack's Restaurant Establishment, Inc. to remodel Zack's Restaurant, 3000 SE Powell, Portland, Oregon, be GRANTED, subject to the following conditions:

- a. Licensee must receive an executed loan of \$100,000 from U.S. National Bank.
- b. Licensee must submit verification to the Commission of any additional financing for the remodeling beyond the U.S. Bank loan.
- c. The remodeling must be completed as proposed and be ready for operation within 270 days of the issuance of the Final Order in this matter, or approval of the remodeling will be withdrawn.

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

Dated this 19th day of December, 1984.

  
Douglas Crumme  
Hearings Examiner  
Hearings Division

  
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.