

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the)	
Application for a)	
Dispenser Class A)	
License by:)	FINAL
)	FINDINGS OF FACT,
The Last Laugh, Inc.)	CONCLUSIONS OF LAW,
THE LAST LAUGH (DA))	AND ORDER
426 NW Sixth Avenue)	
Portland, Oregon 97209)	
- - - - -)	
Multnomah County)	

A hearing in the above matter was held on the 30th day of January, 1984, in Portland, Oregon, before Hearings Examiner Allen R. Scott. The Applicants appeared in person and were represented by Henry M. Silberblatt, Attorney at Law, Portland. The Commission was not represented by legal counsel.

On May 21, 1984 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:

FINDINGS OF FACT

1. Applicants are applying for a Dispenser Class A (DA) license. They have been granted a Restaurant license.
2. The Commission's staff has recommended that the application be refused based upon OAR 845-05-030(1) (sufficient licensed premises in the locality), 845-05-040(1) and (2)(b)

(not unique), 845-05-040(2)(c) (no showing of inadequate service in the area), 845-05-040(3)(d) (one meal per day), 845-05-040(3)(e)(B) (operated primarily as a tavern), 845-05-040(3)(f) (lesser services and facilities), ORS 472.110(4) (quota).

3. Applicants are remodeling a building in Northwest Portland to house the premises.

4. The premises will consist of one large room seating approximately 250 people. It will contain no public bar or lounge, but only a service bar. Most of the tables in the premises will seat three to four people. A few will seat two people. Tables will be set with tablecloths and eating utensils.

5. The premises will feature live comedy shows five nights a week. The entertainment will be provided by nationally-known entertainers, including comedians who appear in Las Vegas or who have appeared on various national television programs.

6. On Wednesday, Thursday and Sunday one show will be presented. On Friday and Saturday, two shows will be offered.

7. The first show will be at 8:00 p.m.; the second show on Fridays and Saturdays will be at approximately 10:30 p.m. The premises will open one hour before the first show to allow for dining service. Dining service will also be provided during the shows.

8. The premises will close within one-half hour after the final show of the evening.

9. Eventually, Applicants plan to be open six nights a week, with the additional night devoted to comedy shows by amateurs.

10. All shows but the amateur night will require a cover charge. The charge will generally be about \$4.00 to \$6.00, except for a higher charge when a particularly well-known comic appears.

11. Applicants will have no other form of entertainment, such as pool tables or video games, on the premises.

12. Applicants intend to model the operation of the premises after a successful club they own in San Jose, California, which features comedy entertainment of the same style that they propose for their Portland operation.

13. There is presently no premises featuring "name" comedy entertainment on a regular basis in Portland or in Oregon. The nearest clubs of this nature are in Seattle and San Francisco.

14. Applicants' proposed menu features the following dinners: Sauteed scallops, halibut steak, sauteed scampi, chicken Syracuse, New York sirloin steak, filet mignon, New York steak and lobster, New York steak and scampi, and New York steak and scallops. The dinners range in price from \$8.25 to \$14.95. Applicants will also offer a hamburger, a steak sandwich, fish and chips, an omelette, and teriyaki steak wraps. Applicants also intends to offer appetizers and snacks.

15. Applicants offered the following estimates of sales if the DA license is granted:

<u>MONTH</u>	<u>FOOD</u>	<u>ALCOHOLIC BEVERAGES</u>	<u>TOTAL FOOD & ALCOHOLIC BEVERAGES</u>	<u>COVER CHARGE</u>	<u>GRAND TOTAL</u>
Jan	\$ 8,000	\$15,000	\$23,000	\$15,000	\$38,000
Feb	9,600	18,000	27,600	18,000	45,600
Mar	11,550	21,600	33,100	21,600	54,700
Apr	13,800	25,900	39,700	25,900	65,600
May	16,500	31,000	47,500	31,000	78,500
Jun	11,500	21,600	33,100	21,600	54,700
Jul	11,500	21,600	33,100	21,600	54,700
Aug	11,500	21,600	33,100	21,600	54,700
Sep	13,800	25,900	39,700	25,900	65,600
Oct	16,500	31,000	47,500	31,000	78,500
Nov	16,500	31,000	47,500	31,000	78,500
<u>Dec</u>	<u>16,500</u>	<u>31,000</u>	<u>47,500</u>	<u>31,000</u>	<u>78,500</u>
Average	\$13,100	\$24,600	\$37,700	\$24,600	\$62,300

Food will thus represent 34.74% of total food and alcoholic beverage sales.

16. Premises in Portland and Multnomah County with DA licenses have had the following average sales:

	<u>FOOD</u>	<u>ALCOHOLIC BEVERAGES</u>	<u>TOTAL FOOD & ALCOHOLIC BEVERAGES</u>
Portland	\$34,540	\$20,691	\$55,231
Multnomah County	\$38,064	\$21,489	\$59,553

17. The City of Portland, with a population of 368,100, presently has 313 DA and DB-licensed premises in operation. Multnomah County, with a population of 564,500, has 380 DA and DB licenses in operation.

18. The nearest DA outlet to Applicants' proposed premises is Harvey's Restaurant and Lounge, which is located next door. The licensee of Harvey's is the lessor of Applicants' premises and supports the application.

19. There are nine other existing DA outlets within approximately six blocks of Applicants' premises. One of these, the Acropolis Everett, is closed. The eight open premises are as follows: Ray's Ordinary Bar and Grill, Wilf's Station, Republic Cafe, Magic Garden Restaurant and Lounge, Rickshaw Charlie's, Tuck Lung, The Fish Place, and Club 101.

20. Applicants intend to permit service groups and clubs to use the premises for fund-raising events. Applicants also will rent the premises for group use.

21. The remodeling of the premises will cost \$60,000. Applicants expect that it will be complete by approximately April 1, 1984.

22. Applicants believe that hard liquor will enhance their dining service and will provide patrons with a choice.

23. The Commission has approximately 60 DA licenses available for issuance.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The existence of sufficient licensed premises in the locality set out in an application shall weigh against granting the application. For purposes of this section, the applicant's community will be a 10-mile radius for dispenser licenses and a two-mile radius for other licenses, unless the applicant establishes that a substantial portion of the patronage of the premises is or would be from a larger or smaller area. OAR 845-05-030(1).

The evidence does not establish the number of premises within 10 miles of Applicants's premises. There is thus no factual basis for concluding that this criterion provides a reason for denying the application. OAR 845-05-040(2)(c)

states that the existence of more than one dispenser license per 2,000 population in the community is prima facie evidence that the community is "adequately served." However, as that rule is a different rule from the one cited above and as it is not clear that "adequate service" is the same concept as "sufficient licensed premises," the relevance of OAR 845-05-040(2)(c) is questionable.

2. 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).

Applicants' proposed form of entertainment is unique within 20 miles, and in fact within 200 miles, according to the evidence. Dining service will be available one hour before the beginning of the first show and will continue during the show or shows. Furthermore, the meal service will occur in the same room in which the entertainment is presented. The entertainment will thus be part of the dining "atmosphere." As the entertainment is unique, the dining atmosphere will also be unique. Applicants are therefore entitled to preference under this criterion.

It should be noted that one of the arguments presented by the staff in this connection is that the Commission's decision relating to an application for a Dispenser Class A license in the trade name Wilde Oscar's supports a denial of preference

under this criterion. The staff's analysis of the Wilde Oscar's decision is as follows:

In this case, cabaret entertainment was substantially different but did not override the other unfavorable criteria, because the entertainment and the alcoholic beverages were the primary focus of the business rather than the food service."

The Commission's conclusion regarding uniqueness in the Wilde Oscar's matter reads, in its entirety, as follows:

"The evidence establishes that the cabaret style entertainment offered at Wilde Oscar's is very unusual in the Portland area. Only one other premises offers a similar form of such entertainment. The evidence further establishes that Wilde Oscar's has a history of success for providing such entertainment and enjoys a reputation in the area as a center for such entertainment. However, the Commission concludes that this factor is not sufficient to outweigh the factors weighing against granting the license."

The factors cited in the Order as weighing against the granting of the license are sufficiency of licensed premises in the area and lesser services offered by Applicant. The Order says nothing about entertainment and alcoholic beverages being the primary focus of the business. The analysis of the Wilde Oscar decision argued by the staff is thus not supportable.

3. Preference in licensing may be given to an applicant showing that the public is not being adequately served by dispenser outlets in the applicant's community as defined in OAR 845-05-030(1). Evidence that there is more than one license per 2,000 people in the applicant's city or county will be prima facie evidence that the applicant's community is being adequately served. OAR 845-05-040(2)(c)

Both Portland and Multnomah County have more than one dispenser outlet per 2,000 population. Applicants are not entitled to preference under this criterion.

4. Unfavorable consideration may be given to an application if the applicant will provide meal service at no more than one meal per day. OAR 845-05-040(3)(d).

Applicants intend to serve only one meal per day. Although the unique style of entertainment offered at the premises makes that decision rational, this criterion nevertheless provides a basis for denying the application.

5. Unfavorable consideration may be given to an applicant if the applicant's premises will be operated primarily as a tavern rather than as a restaurant, as indicated by factors emphasizing the sale of alcoholic liquor to a greater degree than food service. OAR 845-05-040(3)(e)(B).

The staff cites two facts to support the use of this criterion as a basis for denial. First is the fact that the premises will consist of one room. However, that fact does not indicate emphasis one way or the other. Second, the staff notes that Applicants estimate that alcoholic beverage sales will be approximately 65 percent of total sales of food and alcoholic beverages. The Commission concludes that this estimate establishes that Applicants will emphasize the sale of alcoholic liquor to a greater degree than food service and that this criterion therefore is a basis for denying the application.

6. Unfavorable consideration may be given to an applicant if the 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).

Applicants' estimated sales figures are significantly below the average at existing premises in Portland and Multnomah County. This indicates that the premises will serve fewer patrons than the average existing premises. Applicants' hours of operation are also relatively limited. On the other hand, Applicants do propose to rent the premises for banquets or meetings and will also permit organizations to use the premises for fund-raising events. Applicants are also making a substantial investment in the premises. The seating capacity will be fairly large. It should also be noted that the providing of entertainment in a form not found locally may reasonably be regarded as a service.

The staff's refusal letter asserts that the menu for Applicants' premises "offers a limited variety and number of meals compared with other applicants for Dispenser Class A licenses in the city of Portland and Multnomah County." However, no evidence was offered to support this assertion.

The Commission concludes that, although Applicants' sales will be lower than the average, the other factors noted are sufficient to indicate that the services and facilities offered

by Applicants will not be less than those provided by other premises. This criterion therefore does not provide a basis for denying the application.

7. The total number of licensed premises dispensing distilled liquor shall not exceed one for each 2,000 population in the state. ORS 472.110(4).

This statute limits the total number of DA licenses available for issuance throughout the state. As this "quota" is not exhausted, the statute does not provide a basis for denying the license. The bases for denying licenses are stated in ORS 472.160 and OAR 845-05-005 through 845-05-070.

ULTIMATE CONCLUSIONS OF LAW

Although Applicants' premises will offer unique entertainment, the Commission concludes that this factor is outweighed by the fact that the premises will emphasize the sale of alcoholic liquor over the sale of food and will serve only one meal per day. The license should therefore be denied. OAR 845-05-040(3)(e)(B), 845-05-040(3)(d).

FINAL ORDER

It is hereby ordered that the application for Dispenser Class A license by The Last Laugh Inc., in the trade name The Last Laugh, 426 NW Sixth Avenue, Portland, Oregon 97209, be DENIED.

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

Dated this 24th day of May, 1984.

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.