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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,
 Robert L. and Julie A. Brinkman) CONCLUSIONS OF LAW,
 DE FRISCO'S) AND ORDER
 99 W. 10th)
 Eugene, Oregon 97401)
 - - - - -)
 Lane County)

A hearing in the above matter was held on the 28th day of April, 1983, in Eugene, Oregon, before Hearings Examiner Jill Thompson. The record was held open until May 15, 1983 to allow Applicants to submit further documents. The Applicants appeared in person and were not represented by legal counsel. The Commission was not represented by legal counsel. The Commission having considered the record of the hearing, the Proposed Order of the Hearings Examiner, and the entirety of the Criteria for the Issuance and Maintenance of Licenses and applicable statutes and regulations, enters the following:

FINDINGS OF FACT

1. Robert and Julie Brinkman have applied for a Dispenser Class A (DA) license at DE FRISCO'S, 99 W. 10th, Eugene, Oregon. The Applicants now hold a Retail Malt Beverage (RMB) license at De Frisco's; it was granted in September, 1981.

2. Commission staff recommended denial of the application on January 17, 1983, citing the following:

- a. ORS 472.160(1). There are sufficient licensed premises in the locality set out in the application, and the granting of a license in the locality set out in the application is not demanded by public interest or convenience.

OAR Chapter 845-05-030(1), 05-040(1), 05-040(3)(f). The Regulatory Staff believes that there are sufficient licensed premises in the locality set out in the application in that currently within Lane County there are 105 dispenser licenses either issued or committed, and further, within the City of Eugene, there are 54 dispenser licenses either issued or committed which appear to adequately serve the area. The Staff was aware that actual gross sales at your premises for the past year indicate average gross sales of \$30,735 per month, and food sales of \$12,581 per month. You also submitted a projection which indicates that if a dispenser license were granted you would experience average monthly food sales of \$20,151. The Staff believed that these projections were overly optimistic and since you failed to provide a reliable basis for their compilation the Staff chose to consider your actual gross sales for a basis of comparison with other dispenser outlets. Existing dispenser outlets located within Lane County are averaging \$48,986 per month in total sales, including \$30,860 in food sales, as well as dispenser outlets located within the City of Eugene which are averaging \$60,167 per month in total sales, including \$37,746 in food sales. A comparison of your actual gross sales with those existing dispenser outlets in Lane County and the City of Eugene was an indication to the Staff that existing dispenser outlets are providing greater service to the public and that preference should not be given to your application based upon your actual or projected gross sales. The Staff further notes as a basis of comparison that your premises contains no banquet facilities or other special amenities or characteristics. This was a further indication to the Staff that unfavorable consideration should be given to your application.

- b. OAR Chapter 845-05-040(1), 05-040(2)(b). Preference in licensing may be given to applicants showing that their 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. The Staff believed that your breakfast, lunch and limited dinner menus failed to provide any type of dining service which would be considered unique or substantially different in

quality or type from that offered by other licensees within a 20-mile radius. This was an indication to the Staff that unfavorable consideration should be given to your application.

- c. ORS 472.110(4) provides that there shall be no more than one dispenser license issued for each 2,000 population in the state. The statewide population is 2,656,185, allowing for 1,328 dispenser licenses, plus 100 additional Dispenser Class A licenses authorized by the 1979 Legislative Assembly, and an additional 25 licenses authorized by the 1981 Legislative Assembly, for a total of 1,453. Presently there are 1,378 dispenser licenses issued or committed.

The Commission is not required to issue all of its statutory quota of licenses to all qualified applicants. Battle Creek Golf Course, Inc. v. OLCC, 21 Or. App. 179, 183-84, 534 P2d 204 (1975). It may consider future license applicants as well as present applicants in determining if issuance of the license is in the "public interest or convenience." ORS 472.160(1). The Commission Staff has numerous dispenser license applications on file and is aware of many applications which will be forthcoming.

3. As of June 22, 1983, the Commission had 55 DA and DB licenses available for issuance.

License and population distribution in the area is as follows:

<u>CITY/COUNTY</u>	<u>POPULATION</u>	<u>QUOTA</u>	<u>DA/DB COMMITTED AND OPERATING</u>
City of Eugene	106,100	53.05	49
Lane County	275,000	137.5	101

4. De Frisco's is located in a three-story building in the Eugene downtown mall; the inside premises contains 3,500 square feet and is on the ground floor with other retail occupants. The upper two floors contain offices. De Frisco's inner facility seats 150.

5. A banquet room seating 100 is available to De Frisco's on the third floor of the building. The room has bar facilities; meals would be transported from De Frisco's kitchen on the ground floor via an elevator. De Frisco's itself has a banquet/meeting room which will accommodate up to 75 (this seating is included in the figure shown in Finding of Fact No. 4). Apparently the staff did not consider this room as a banquet facility because it cannot be closed off from the rest of the premises. Applicants have two or three banquets in that room monthly. Holiday Inn often refers banquet requests which it cannot accommodate to De Frisco's.

6. In addition to its indoor facilities, De Frisco's recently expanded into the building's inner courtyard space which abuts De Frisco's front wall. By doing so, they added 1,500 square feet of outdoor cafe-style service area, which they call De Frisco's Terrace. The area is enclosed by movable waist-high wrought iron fences on two sides, the premises front wall on a third side, and a platformed ice cream and espresso counter on the fourth side. It is open to the building's third-story roof, which is skylighted. Applicants have full food service in this area, but do not serve alcoholic beverages there. The Terrace has shrubs, plants and small trees.

7. De Frisco's is open from 7:00 a.m. until 1:30 a.m. during the week, 10:00 a.m. until 1:30 a.m. Saturdays, and noon until 1:30 a.m. Sundays.

8. Applicant's breakfast menu offers 12 kinds of omelette, eggs Benedict, crumpets, croissants, pastry and juices.

There is no difference between the existing lunch and dinner menu, which offers seven hot and cold deli-style sandwiches, five salads, daily crepe and quiche specials served with a salad, and an additional daily special served with soup or salad. The specials consist of the following entrees: four kinds of chicken dishes, tempura, gnocchi, two kinds of sole, lasagne, enchiladas, pizza, haddock, two kinds of frittata, stuffed pork chops, flautas, fondue, shrimp curry, moussaka, barbecued ribs, oysters, beef Stroganoff, and omelettes.

Applicants also feature a daily soup special which they treat as an entree. The dessert menu changes daily. They offer six kinds of hot and cold appetizers.

9. Sandwich prices range from \$2.50 to \$3.90. Half sandwiches are available for \$1.95. The daily crepe or quiche special is \$3.50; lunch specials are \$3.75; dinner specials are \$4.25; the daily soup special is \$2.25 per bowl. The appetizers range from \$1.25 to \$2.95.

10. If Applicants are granted a DA license, they plan to institute the following dinner menu (in addition to the above):

Fettucine	\$5.75
Chicken Cordon Bleu	7.50
Chicken Teriyaki	6.75
Beef Stroganoff	7.75
Additional Daily Special	

All of the above will be served with soup, salad, homemade pasta and bread.

11. Applicants offer an extensive specialty beer list and a varied wine list.

12. Applicants' average monthly sales distribution for the period November, 1982 through March, 1983 was as follows:

<u>GROSS SALES</u>	<u>FOOD</u>	<u>BEER & WINE</u>	<u>GAMES</u>	<u>FOOD SALES RATIO</u>
\$31,958	\$14,975	\$16,156	\$827	46.8%

13. Applicants project the following sales receipts and distribution will occur if they receive a DA license:

<u>GROSS SALES</u>	<u>FOOD</u>	<u>BEER & WINE</u>	<u>DISTILLED LIQUOR</u>	<u>GAMES</u>	<u>FOOD SALES RATIO</u>
\$40,596	\$20,151	\$17,194	\$2,173	\$1,443	49.6%

14. The figures listed in Finding of Fact No. 13 are not those first presented to the Commission. After reviewing Applicants' original projections, the regional Licensing staff informed them that the figures were probably too low and their dinner menu and other comparative facilities too limited to justify grant of a DA license. Applicants subsequently submitted the above projections.

15. Regional Licensing staff felt that the revised projections had no rational basis in fact, and that they had been arbitrarily increased to obtain a license. In fact, Applicants had substantially changed their plans and premises during the time between submitting their first and second sales projections. These changes included expanding their dining space by 43 percent; adopting a new and more elaborate dinner menu to be

used if a DA is granted; negotiating with the building management the use of the third-floor banquet facility; hiring a pastry cook; advancing their opening hours to 7:00 a.m. from 10:00 a.m. during the week; and purchasing a new commercial stove and oven with double the capacity of their previous equipment.

16. Applicants arrived at their revised sales projections by increasing their current dinner patron average 20 percent, and computing that figure against an average dinner price of \$5.50. They also included increased breakfast sales because of their earlier opening hours. Their basis for that projection was an expected patronage level of half that experienced by a similar restaurant computed against an average breakfast price of \$2.75. They did not increase their current lunch trade of 200 per day with an average price of \$2.85.

17. The average monthly food sales at the 10 DA premises against which De Frisco's was compared is \$17,154, and their gross sales average is \$33,098. Of the 10, four have lower average food sales than does De Frisco's without a DA license; three have lower average gross sales.

18. De Frisco's has early 20th century oak furnishings inside, and has arranged its tables and booths to provide the maximum possible privacy. It is the only restaurant in a 20-mile radius to provide outside cafe-style seating that is protected from the weather, and is the only establishment in that area which also features an ice cream and espresso bar.

19. The Commission has received six letters from Eugene-area businesses; letters from two representatives of the City of Eugene Business Assistance Team; a letter from Lane County Environmental Health Division; and a petition signed by 211 individuals, supporting De Frisco's application. Both letters from the City's Business Assistance Team stressed the economic benefit to the City as a whole which would be provided if De Frisco's were granted greater privileges.

20. A substantial number of De Frisco's patrons are businesspeople who work in the downtown area or who are conference visitors, particularly at the Eugene Centre convention facilities, in the city staying in downtown accommodations. A secondary source of patrons is people attending events held at the Hult Center.

21. The atmosphere at De Frisco's is particularly conducive to small business meetings held over lunch or dinner. The only other suitable area downtown for such meetings is the lobby lounge in the Hilton.

22. Including both banquet facilities, De Frisco's seats in excess of 250. Of the 10 premises in the comparison survey, only one offered greater seating.

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 total number of licensed premises dispensing distilled liquor pursuant to this chapter shall not in the aggregate at any time exceed one such licensed premises for each 2,000 population in the state, determined according to the last available estimated quarterly State Board of Higher Education figures. ORS 472.110(4).

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.

. . .

(c) The public is not being adequately served by dispenser outlets, if any, in the applicant's community as defined in OAR 845-05-030(1). Evidence that there is more than one dispenser 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).

Applicants have established that a substantial number of their patrons are drawn from the downtown mall business population, both local and visiting. A secondary source of patrons is people coming from or going to the Hult Center.

There are 55 DA/DB licenses available for issuance statewide as of June 22, 1983. Both the City of Eugene and Lane County are undersubscribed according to the statutory quota. (Finding of Fact No. 3.) De Frisco's gross and food sales averages realized without a dispenser license exceed those of some of the DA-licensed facilities used in the Commission's comparison survey. (Finding of Fact No. 17.)

Because of the undersubscription and Applicants' current revenues, the Commission finds that there are insufficient licensed premises in the area to meet existing demand.

2. An application for a dispenser license may be granted or denied on the basis of a comparison with other existing dispenser licenses in the same city or county or with other pending applications for such licenses any where in the state, as provided in sections (2) and (3) of this rule. OAR 845-05-040(1).

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).

De Frisco's is unique to the area in that it offers an outdoor cafe-type landscaped setting which is protected from the elements. Its ice cream/espresso counter, antique furnishings and unintrusive atmosphere are substantially different from other establishments in the area. While the menu is not unique, neither is it limited, considering Applicants' proposed dinner menu.

The Commission finds that a preference for licensing based on the criterion listed in OAR 845-05-040(2)(b) has been established.

3. 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).

De Frisco's has two banquet facilities. Its total seating capacity is greater than all but one of the establishments in the Commission's comparison survey. Its gross and food sales averages already exceed several of those listed on the survey. Its projected sales figures are reasonable, and probably conservative. There was no evidence that De Frisco's would provide lesser services or facilities than existing outlets in the area. The Commission finds that this criterion does not provide a basis for unfavorable consideration.

ULTIMATE CONCLUSIONS OF LAW

The application by Robert and Julie Brinkman for a DA license at De Frisco's should be granted. The public is not being adequately served by existing dispenser outlets in the area; De Frisco's offers unique and substantially different services and amenities; and the Applicants do not provide lesser services, facilities or economic benefit than existing outlets.

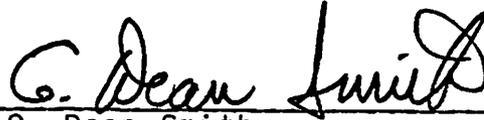
FINAL ORDER

It is hereby ordered that the application by Robert L. and Julie A. Brinkman for a Dispenser Class A (DA) license at De Frisco's, 99 W. 10th, Eugene, Oregon be GRANTED subject to the following conditions:

1. Applicants' dinner menu shall not be diminished in terms of the number of full dinner entrees offered beyond that described in Finding of Fact No. 10.
2. Applicants shall not discontinue full meal service in the outside area of their premises, now called De Frisco's Terrace.

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

Dated this 18th day of July, 1983.



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.