

★ **Roll Call Number**

Agenda Item Number

39

Date August 27, 2012

WHEREAS, on August 13, 2012, by Roll Call No. 12-1251, it was duly resolved by the City Council that the proposal to amend Section 134-954 of the Zoning Ordinance regarding the allowed location and manner of operation of businesses engaged in the sale of liquor, wine and beer as more fully described in Exhibit "A" attached hereto, be set down for hearing on August 27, 2012, at 5:00 p.m., in the Council Chambers at City Hall; and

WHEREAS, due notice of the hearing was published in the Des Moines Register as provided by law on August 16, 2012; and

WHEREAS, in accordance with the notice, those interested in the proposed amendments, both for and against, have been given opportunity to be heard with respect thereto and have presented their views to the City Council; NOW, THEREFORE,

BE IT RESOLVED, by the City Council of the City of Des Moines, Iowa:

That upon consideration of the facts, statements of interested persons and arguments of counsel, the objections to said proposed amendments to the Zoning Ordinance be and the same are hereby overruled, and the hearing closed.

MOVED by _____ to adopt and approve, subject to final passage of the enacting ordinance.

FORM APPROVED:

Roger K. Brown

Roger K. Brown
Assistant City Attorney

G:\SHARED\LEGAL\BROWN\Ch134\Liquor\2012\RC Hrg.doc

(Council Communication No. 12-462)

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
COLEMAN				
GRIESS				
HENSLEY				
MAHAFFEY				
MEYER				
MOORE				
TOTAL				

MOTION CARRIED

APPROVED

Mayor

CERTIFICATE

I, DIANE RAUH, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

City Clerk

**Proposed amendments to the Zoning Ordinance
regarding businesses engaged in the sale of liquor, wine and beer.**

Sec. 134-954. Selling of liquor, wine and beer.

The use of land in all districts for the sale of alcoholic liquor, wine and beer is subject to the restrictions set forth in this section.

- a. The sale of alcoholic liquor, wine and beer is permitted only in the zoning districts and subject to the conditions applicable to the business identified in the table below:

	Sale of Alcoholic Liquor		Sale of Wine and Beer	
	C-1, C-1A & D-R Districts	C-2, NPC and less restrictive Districts	C-1, C-1A & D-R Districts	C-2, NPC and less restrictive Districts
Food Sales Establishments and Retail Sales Establishments				
Limited (less than 10,000 sq ft)	Not Allowed	CUP 40% of sales 500 feet 1/4 mile	CUP 40% of sales 150 feet	CUP 40% of sales 150 feet
General (10,000 sq ft or larger, but less than 40,000 sq ft)	CUP 40% of sales 75 feet	CUP 40% of sales 75 feet	40% of sales 75 feet	40% of sales 75 feet
Large (40,000 sq ft or larger)	40% of sales 75 feet	40% of sales 75 feet	40% of sales 75 feet	40% of sales 75 feet
Gas Station/ Convenience Stores (not allowed in D-R)	Not Allowed	CUP 40% of sales 500 feet 1/4 mile	40% of sales 150 feet (C-1 & C-1A only)	40% of sales 150 feet
Liquor Stores	Not Allowed	CUP 500 feet 1/4 mile	Not Allowed	CUP 150 feet
Restaurants	50% of sales 75 feet	50% of sales 75 feet	50% of sales 75 feet	50% of sales 75 feet
Taverns and Night Clubs (not allowed in C-1 and C-1A)	CUP (D-R only)	CUP 150 feet	CUP (D-R only)	CUP 150 feet

Where used in the table above the following terms shall have the meaning identified below:

- 1) CUP means that a conditional use permit must be obtained for such use as further provided in this section.
- 2) 40% of sales means that no more than 40 percent of the gross receipts from sales from the premises may be derived from the sale of alcoholic liquor, wine, beer or tobacco products.

- 3) 50% of sales means that at least 50 percent of the gross receipts by a restaurant must be derived from the sale of prepared food and food-related services.
- 4) 75 feet means that the premises occupied by such use must be separated by at least 75 feet from any church, school, public park or licensed child care facility as defined by I.C. ch. 237A. However, this condition is not applicable in the C-3, C-3A, C-3B, C3-R and D-R Districts.
- 5) 150 feet means that the premises occupied by such use must be separated by at least 150 feet from any church, school, public park or licensed child care facility as defined by I.C. ch. 237A. However, this condition is not applicable in the C-3, C-3A, C-3B, C3-R and D-R Districts.
- 6) 500 feet means that the premises occupied by such use must be separated by at least 500 feet from any church, school, public park or licensed child care facility as defined by I.C. ch. 237A. However, this condition is not applicable in the C-3, C-3A, C-3B, C3-R and D-R Districts.
- 7) 1/4 mile means that the premises occupied by such use must be separated by at least one-fourth mile from any other limited food sales establishment, limited retail sales establishment, gas station/convenience store and liquor store engaged in the sale of alcoholic liquor. However, in the C-3, C-3A, C-3B, C3-R and D-R Districts this condition is only applicable to liquor stores.

	Sale of Alcoholic Liquor		Sale of Wine and Beer	
	C-1, C-1A & D-R Districts	C-2, NPC and less restrictive Districts	C-1, C-1A & D-R Districts	C-2, NPC and less restrictive Districts
Food Sales Establishments				
Limited	Not allowed	Condition 2	Condition 2	Condition 2
General	Condition 1	Condition 1	Condition 1	Condition 1
Large	Condition 1	Condition 1	Condition 1	Condition 1
Gas Station/ Convenience Stores (not allowed in D-R)	Not allowed	Condition 2	Condition 1	Condition 1
Liquor Stores	Not allowed	Condition 3	Not allowed	Condition 3
Restaurants	Condition 1	Condition 1	Condition 1	Condition 1
Retail Sales Establishments				
Limited	Not allowed	Condition 2	Condition 2	Condition 2
General	Condition 1	Condition 1	Condition 1	Condition 1
Large	Condition 1	Condition 1	Condition 1	Condition 1
Taverns and Night Clubs (not allowed in C-1 and C-1A)	Condition 3	Condition 3	Condition 3	Condition 3

Condition 1: Allowed subject to a 75 foot separation from any church, school, public park or licensed child care center as defined by I.C. ch. 237A; and, subject to no more than 40 percent of gross receipts being from the sale of liquor, wine, beer or tobacco products.

However, the separation requirement is not applicable in the C-3, C-3A, C-3B, C3-R and D-R downtown riverfront district.

~~Condition 2: Allowed subject to receipt of a conditional use permit from the board of adjustment as provided in this section below; subject to a 150 foot separation from any church, school, public park or licensed child care center as defined by I.C. ch. 237A; and, subject to no more than 40 percent of gross receipts being from the sale of liquor, wine, beer or tobacco products. However, the separation requirement is not applicable in the C-3, C-3A, C-3B, C3-R and D-R downtown riverfront district.~~

~~Condition 3: Allowed subject to receipt of a conditional use permit from the board of adjustment as provided in this section below, and subject to a 150 foot separation from any church, school, public park or licensed child care center as defined by I.C. ch. 237A. However, the separation requirement is not applicable in the C-3, C-3A, C-3B, C3-R and D-R downtown riverfront district.~~

- b. A conditional use permit is required for the use of a premises for the sale of alcoholic liquor, wine or beer, under the circumstances identified in subsection (a), above. The board shall grant such a conditional use permit only where the business, when operated in conformance with such reasonable conditions as may be imposed by the board, satisfies the following criteria:
1. The business conforms with the conditions identified in subsection (a), above.
 2. The proposed location, design, construction and operation of the particular use adequately safeguards the health, safety and general welfare of persons residing in the adjoining or surrounding residential area.
 3. The business is sufficiently separated from the adjoining residential area by distance, landscaping, walls or structures to prevent any noise, vibration or light generated by the business from having a significant detrimental impact upon the adjoining residential uses.
 4. The business will not unduly increase congestion on the streets in the adjoining residential area.
 5. The operation of the business will not constitute a nuisance.
- c. Any conditional use permit granted by the board of adjustment for the use of a premises for the sale of alcoholic liquor, wine and beer shall be subject to the following general conditions, together with such additional special conditions as may be reasonably required by the board to ensure that the criteria in subsection (b), above, are satisfied:
1. Any parking area provided for the use of customers of the business shall be illuminated at an intensity of at least one footcandle of light on the parking surface at all times. The entire site shall be landscaped and illuminated so as to minimize hiding places for possible criminal activity.
 2. The business shall comply with article IV of chapter 42 of this Code pertaining to noise control. The business shall have no outside speakers or amplified sound except when used in compliance with a type E sound permit.
 3. Any such business must comply with the following requirements:

- (a) Every limited food sales establishment, limited retail sales establishment and gas station/convenience store shall display alcoholic liquor only in a locked case or behind a counter accessible only to employees. Any other business selling alcoholic liquor for off premises consumption shall either: i) display alcoholic liquor only in a locked case or behind a counter accessible only to employees; ii) employ an electronic security cap or tag system on all containers of alcoholic liquor on display; or iii) have more than one employee on duty at all times the business is open to the public.
 - (b) Conspicuously post 24-hour contact information for a manager or owner of the business near the main public entrance.
 - (c) Institute a strict no loitering policy, conspicuously post one or more "No Loitering" signs, and cooperate with police in addressing loitering on the premises.
 - (d) Not dispense alcoholic beverages ~~No sale of alcoholic beverages shall be made~~ from a drive-through window.
- 4. Litter and trash receptacles shall be located at convenient locations inside and outside the premises, and operators of such business shall remove all trash and debris from the premises and adjoining public areas on a daily basis.
 - 5. The conditional use permit is subject to amendment or revocation if the operation of the business becomes a nuisance or exhibits a pattern of violating the conditions set forth in the conditional use permit.
 - 6. If the zoning enforcement officer determines at any time that the operation of such a business exhibits a pattern of violating the conditions set forth in the conditional use permit, the zoning enforcement officer may apply to the board to reconsider the issuance of the conditional use permit for such business. A copy of such application and notice of the hearing before the board on such application shall be provided to the owner of such business at least 30 days in advance and shall also be provided to all owners of record of property within 250 feet of the subject property. If the board finds that the operation of such business exhibits a pattern of violating the conditions set forth in the conditional use permit, the board shall have the authority to amend or revoke the conditional use permit.

- d. Upon reasonable suspicion that any gas station/convenience store, food sales establishment or retail sales establishment derives more than 40 percent of its gross receipts from sales, from the sale of alcoholic liquor, wine, beer or tobacco products, the zoning enforcement officer may require that the owner or operator of the business demonstrate within 45 days that during the prior six months no more than 40 percent of its gross receipts from sales are derived from the sale of alcoholic liquor, wine, beer or tobacco products. In such event it shall be presumed that more than 40 percent of the gross receipts from sales are derived from the sale of alcoholic liquor, wine, beer or tobacco products, which presumption may be overcome by the business timely furnishing a statement prepared and verified by a certified public accountant identifying the total dollar volume of all sales, and separately identifying the total dollar volume of sales derived from the sale of alcoholic beverages, from the sale of tobacco products, and from the sale of all other merchandise and food exclusive of alcoholic beverages and tobacco products, from the business premises in the preceding six months.

- e. Upon reasonable suspicion that any restaurant does not derive at least 50 percent of its gross receipts from the sale of prepared food and food-related services, the zoning enforcement officer may require that the owner or operator or the restaurant demonstrate within 45 days that during the prior six months at least 50 percent of its gross receipts were derived from the sale of prepared food and food-related services. In such event it shall be presumed that less than 50 percent of the restaurant's gross receipts are derived from the sale of prepared food and food-related services, which presumption may be overcome by the business timely furnishing a statement prepared and verified by a certified public accountant identifying the total dollar volume of all receipts, and separately identifying the total dollar volume of gross receipts derived from the sale of alcoholic beverages, and from the sale of prepared food and food-related services exclusive of alcoholic beverages and tobacco products, from the business premises in the preceding six months. A business that declares a use as a gas station/convenience store, food sales establishment, retail sales establishment, or restaurant shall be required to submit, upon demand from the zoning enforcement officer, sales and other business records, or an audit prepared and verified by a certified public accountant, stating the percentage of gross revenue of the business derived from sales of merchandise other than tobacco products, liquor, wine and beer.
- ef. All gas stations/convenience stores, food sales establishments, retail sales establishments and restaurants which have not continuously held an alcoholic liquor license or a beer or wine permit since July 1, 2012, ~~June 1, 2011~~, shall comply with the requirements of subsections (a), (b) (c) and (d) above. Any gas station/convenience store, food sales establishment, retail sales establishment or restaurant which has continuously held an alcoholic liquor license or a wine or beer permit since June 1, 2012, ~~June 1, 2011~~ shall comply with subsections (a), (b), (c) and (d) above, exclusive of any changed separation requirements, commencing on December 31, 2013, and prior to that date shall continue to be subject to the general regulations regarding legal nonconforming uses set forth in sections 134-155 and 134-1351. ~~requirements of subsection (1) of Section 134-954, as it existed on December 1, 2010.~~

(O.7226, 7830, 8215, 8242, 8388, 9186, 9213, 9460, 10,142, 10,391, 10,823, 10,940, 11,009, 11,069, 11,083, 11,185, 11,300, 11,376, 11,410, 11,507, 11,761, 12,012, 13,067, 13,179, 13,232, 13,377, 13,484; C91, § 2A-17(H); O.13,588; C00, § 134-954; O.14,980, 15,046, 15,059)

August 8, 2012

Item 39
Call # _____

Honorable Mayor and City Council
City of Des Moines, Iowa

Members:

Communication from the City Plan and Zoning Commission advising that at their meeting held August 2, 2012 the following action was taken regarding a City Council Initiated request to amend the Zoning Ordinance Text in Chapter 134 with regard to regulation of businesses selling liquor, wine and beer.

COMMISSION RECOMMENDATION:

After public hearing, the members voted 11-0-1 as follows:

Commission Action:	Yes	Nays	Pass	Absent
JoAnne Corigliano	X			
Shirley Daniels	X			
Jacqueline Easley	X			
Tim Fitzgerald			X	
Dann Flaherty	X			
John "Jack" Hilmes	X			
Ted Irvine	X			
Greg Jones	X			
William Page	X			
Christine Pardee	X			
Mike Simonson	X			
CJ Stephens	X			
Vicki Stogdill				X

APPROVAL of the amendment to Chapter 134 with regard to regulation of businesses selling liquor, wine, and beer. (10-2013-5.01)

STAFF RECOMMENDATION TO THE P&Z COMMISSION

Staff recommends approval of the proposed ordinance.

STAFF REPORT

I. GENERAL INFORMATION

On April 19, 2012, the Des Moines City Council imposed a temporary moratorium on the commencement of any new business selling alcoholic liquors for off-premises consumption and upon the conversion of any existing business to one selling alcoholic liquors for off-premises consumption, from any business premises that is operated as a Limited Food Sales Establishment,



CITY PLAN AND ZONING COMMISSION
ARMORY BUILDING
602 ROBERT D. RAY DRIVE
DES MOINES, IOWA 50309 -1881
(515) 283-4182

ALL-AMERICA CITY
1949, 1976, 1981
2003

Limited Retail Sales Establishment, Gas Station/Convenience Store, or Liquor Store. The moratorium was subsequently extended and is currently set to expire on August 28, 2012.

On June 25, 2012, Staff presented alternatives for regulation of such establishments at a City Council Workshop. The City Council directed staff to prepare an ordinance for consideration (see attached).

In general, the proposed ordinance would:

- Require any new Limited Food Sales Establishment, Limited Retail Sales Establishment, Gas Station/Convenience Store or Liquor Store selling liquor to be separated by at least ¼ mile from any existing Limited Food Sales Establishment, Limited Retail Sales Establishment, Gas Station/Convenience Store or Liquor Store selling liquor.
- Require any new Limited Food Sales Establishment, Limited Retail Sales Establishment, Gas Station/Convenience Store or Liquor Store selling liquor to be separated by at least 500 feet from any church, school, park or licensed daycare.
- Require any new Limited Food Sales Establishment, Limited Retail Sales Establishment, Gas Station/Convenience Store or Liquor Store selling beer or wine to be separated by at least 150 feet from any church, school, park or licensed daycare.
- Require any General Food Sales Establishment or General Retail Sales Establishment to obtain a Conditional Use Permit from the Zoning Board of Adjustment (subject to the existing separation requirement of 75 feet from a church school, park or licensed daycare).
- Enhance Conditional Use Permit Standards to include the following:
 - Increase exterior lighting and eliminate hiding places, but not detrimentally impact adjoining residential uses.
 - Post “No Loitering” signs.
 - Require permit for outside speakers for amplified sound at background levels.
 - Clearly impose burden of proof on applicant to demonstrate compliance.
 - Require Limited Food / Retail, Convenience Stores to display liquor in a locked cabinet or behind a counter in an area accessible only to employee.
 - Require other establishments, except Limited Food/Retail, Convenience-stores, to
 - Employ an electronic security cap or tag system on liquor bottles, or
 - Have more than one employee in the store at all times.
 - Require business owner contact information to be posted in prominent location within the store.

II. ADDITIONAL APPLICABLE INFORMATION

A public information meeting was held on July 27, 2012 from 4:30 PM to 8:00 PM in the City Council Chambers. Post-card notices were mailed to all existing establishment who are licensed to sell beer, wine and liquor for off-premise consumption. Notices were also mailed to all pending applicants for such licenses. A summary of the comments from that meeting will be provided at the Plan and Zoning Commission hearing on August 2, 2012. It is anticipated that on August 13, 2012 the City Council will set a date of public hearing for August 27, 2012. If the Council wants changes to the proposed ordinance and does not waive second and third readings on August 27, 2012, the moratorium will have to be extended to accommodate the additional readings.

SUMMARY OF DISCUSSION

Mike Ludwig presented staff report and recommendation.

Ted Irvine asked staff about the enforcement of the ordinance.

Mike Ludwig stated most of the enforcement is complaint based. A key provision of the Conditional Use Permit is that if there are complaints and it is determined that from the zoning enforcement staff's perspective that a nuisance exists, the Zoning Board of Adjustment may consider revocation of the Conditional Use Permit.

Ted Irvine asked if there is something in the requirements that the "grandfathered" businesses would trigger compliance with the new ordinance if there are complaints of nuisance.

Mike Ludwig stated that any expansion is subject to the new Conditional Use Permit. As they come up for their renewals staff would do a review of zoning to determine their grandfathered status and then attempt to get compliance with some of those operational standards at that time.

Ted Irvine asked if the audit requests have a timing requirement.

Mike Ludwig stated that if the zoning officer requests verification of sales the applicant must provide information regarding the preceding 6-months sales within 45 days of the request. There is a difference in the Council taking action regarding a liquor license issuance and the Zoning Board of Adjustment reviewing a Conditional Use Permit Application.

Dann Flaherty asked about a sunset provision for those who are legal non-conforming.

Mike Ludwig stated no there are no sunset provisions for those who are legal non-conforming except for compliance with the 40% sales requirement by December 31, 2013.

CHAIRPERSON OPENED THE PUBLIC HEARING

There was no one to speak in favor of the applicant's request.

The following spoke in opposition of the applicant's request:

Chris Pose Attorney 317 6th Avenue, Suite 300 representing Iowa CVS Pharmacy not really in opposition but in support of some modification of the proposed ordinance. He asked that the documents with the modification request be received and filed. Mr. Pose stated that Iowa CVS Pharmacy believes it is not the requirements that are set forth in the conditional use process it is the possibility of having another meeting and having the prejudices weigh into it. In the meeting with staff they stated that this ordinance is not intended to address a problem that has arisen with the operation of the pharmacies in the sale of liquor as they exist today. Instead it has been to address the possibility that there may be sham pharmacy erect themselves so they can claim they are a pharmacy and then gain the provision of it. Therefore, they propose to put the drugstores in the large component and say that the drugstores had to be 12,000 square feet or larger and that would cover most, it not all of the existing Walgreens Store in Des Moines and would cover anything that CVS would build. In addition, they created a definition for drugstores which is retail sales establishment of a minimum 12,000 square feet which contains a minimum of 900 square feet of area devoted to the sale of prescription medicines which are lawful pursuant Iowa and Federal Law. Drugstores must also have a drive-thru for prescription medicine sales but shall not deliver alcoholic liquor, wine, or beer to consumers via the drive-thru window. Drugstores do not include Grocery Stores.

Jacqueline Easley asked if CVS has any locations in mind yet.

Chris Pose stated yes, they have two locations in mind. One is at 2nd and Euclid the other is at SE 14th and Park Avenue. They have a location in Ankeny that has been approved.

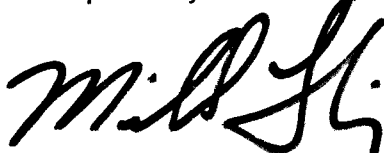
CHAIRPERSON CLOSED THE PUBLIC HEARING

COMMISSION ACTION:

Ted Irvine moved staff recommendation to approve the proposed ordinance and receive and file the proposal from Iowa CVS.

Motion passed 11-0-1 (Tim Fitzgerald abstained)

Respectfully submitted



Michael Ludwig, AICP
Planning Administrator

MGL:clw

cc: File

**Proposed amendments to the Zoning Ordinance
regarding businesses engaged in the sale of liquor, wine and beer.**

Sec. 134-954. Selling of liquor, wine and beer.

The use of land in all districts for the sale of alcoholic liquor, wine and beer is subject to the restrictions set forth in this section.

- a. The sale of alcoholic liquor, wine and beer is permitted only in the zoning districts and subject to the conditions applicable to the business identified in the table below:

	Sale of Alcoholic Liquor		Sale of Wine and Beer	
	C-1, C-1A & D-R Districts	C-2, NPC and less restrictive Districts	C-1, C-1A & D-R Districts	C-2, NPC and less restrictive Districts
Food Sales Establishments and Retail Sales Establishments				
Limited (less than 10,000 sq ft)	Not Allowed	CUP 40% of sales 500 feet 1/4 mile	CUP 40% of sales 150 feet	CUP 40% of sales 150 feet
General (10,000 sq ft or larger, but less than 40,000 sq ft)	CUP 40% of sales 75 feet	CUP 40% of sales 75 feet	40% of sales 75 feet	40% of sales 75 feet
Large (40,000 sq ft or larger)	40% of sales 75 feet	40% of sales 75 feet	40% of sales 75 feet	40% of sales 75 feet
Gas Station/ Convenience Stores (not allowed in D-R)	Not Allowed	CUP 40% of sales 500 feet 1/4 mile	40% of sales 150 feet (C-1 & C-1A only)	40% of sales 150 feet
Liquor Stores	Not Allowed	CUP 500 feet 1/4 mile	Not Allowed	CUP 150 feet
Restaurants	50% of sales 75 feet	50% of sales 75 feet	50% of sales 75 feet	50% of sales 75 feet
Taverns and Night Clubs (not allowed in C-1 and C-1A)	CUP (D-R only)	CUP 150 feet	CUP (D-R only)	CUP 150 feet

Where used in the table above the following terms shall have the meaning identified below:

- 1) *CUP* means that a conditional use permit must be obtained for such use as further provided in this section.
- 2) *40% of sales* means that no more than 40 percent of the gross receipts from sales from the premises may be derived from the sale of alcoholic liquor, wine, beer or tobacco products.

- 3) *50% of sales* means that at least 50 percent of the gross receipts by a restaurant must be derived from the sale of prepared food and food-related services.
- 4) *75 feet* means that the premises occupied by such use must be separated by at least 75 feet from any church, school, public park or licensed child care facility as defined by I.C. ch. 237A. However, this condition is not applicable in the C-3, C-3A, C-3B, C3-R and D-R Districts.
- 5) *150 feet* means that the premises occupied by such use must be separated by at least 150 feet from any church, school, public park or licensed child care facility as defined by I.C. ch. 237A. However, this condition is not applicable in the C-3, C-3A, C-3B, C3-R and D-R Districts.
- 6) *500 feet* means that the premises occupied by such use must be separated by at least 500 feet from any church, school, public park or licensed child care facility as defined by I.C. ch. 237A. However, this condition is not applicable in the C-3, C-3A, C-3B, C3-R and D-R Districts.
- 7) *1/4 mile* means that the premises occupied by such use must be separated by at least one-fourth mile from any other limited food sales establishment, limited retail sales establishment, gas station/convenience store and liquor store engaged in the sale of alcoholic liquor. However, in the C-3, C-3A, C-3B, C3-R and D-R Districts this condition is only applicable to liquor stores.

b. A conditional use permit is required for the use of a premises for the sale of alcoholic liquor, wine or beer; under the circumstances identified in subsection (a), above. The board shall grant such a conditional use permit only where the business, when operated in conformance with such reasonable conditions as may be imposed by the board, satisfies the following criteria:

- 1. The business conforms with the conditions identified in subsection (a), above.
- 2. The proposed location, design, construction and operation of the particular use adequately safeguards the health, safety and general welfare of persons residing in the adjoining or surrounding residential area.
- 3. The business is sufficiently separated from the adjoining residential area by distance, landscaping, walls or structures to prevent any noise, vibration or light generated by the business from having a significant detrimental impact upon the adjoining residential uses.
- 4. The business will not unduly increase congestion on the streets in the adjoining residential area.
- 5. The operation of the business will not constitute a nuisance.

c. Any conditional use permit granted by the board of adjustment for the use of a premises for the sale of alcoholic liquor, wine and beer shall be subject to the following general conditions, together with such additional special conditions as may be reasonably required by the board to ensure that the criteria in subsection (b), above, are satisfied:

- 1. Any parking area provided for the use of customers of the business shall be illuminated at an intensity of at least one footcandle of light on the parking surface at all times. The entire site shall be landscaped and illuminated so as to minimize hiding places for possible criminal activity.

2. The business shall comply with article IV of chapter 42 of this Code pertaining to noise control. The business shall have no outside speakers or amplified sound except when used in compliance with a type E sound permit.
 3. Any such business must comply with the following requirements:
 - (a) Every limited food sales establishment, limited retail sales establishment and gas station/convenience store shall display alcoholic liquor only in a locked case or behind a counter accessible only to employees. Any other business selling alcoholic liquor for off premises consumption shall either: i) display alcoholic liquor only in a locked case or behind a counter accessible only to employees; ii) employ an electronic security cap or tag system on all containers of alcoholic liquor on display; or iii) have more than one employee on duty at all times the business is open to the public.
 - (b) Conspicuously post 24-hour contact information for a manager or owner of the business near the main public entrance.
 - (c) Institute a strict no loitering policy, conspicuously post one or more "No Loitering" signs, and cooperate with police in addressing loitering on the premises.
 - (d) Not dispense alcoholic beverages from a drive-through window.
 4. Litter and trash receptacles shall be located at convenient locations inside and outside the premises, and operators of such business shall remove all trash and debris from the premises and adjoining public areas on a daily basis.
 5. The conditional use permit is subject to amendment or revocation if the operation of the business becomes a nuisance or exhibits a pattern of violating the conditions set forth in the conditional use permit.
 6. If the zoning enforcement officer determines at any time that the operation of such a business exhibits a pattern of violating the conditions set forth in the conditional use permit, the zoning enforcement officer may apply to the board to reconsider the issuance of the conditional use permit for such business. A copy of such application and notice of the hearing before the board on such application shall be provided to the owner of such business at least 30 days in advance and shall also be provided to all owners of record of property within 250 feet of the subject property. If the board finds that the operation of such business exhibits a pattern of violating the conditions set forth in the conditional use permit, the board shall have the authority to amend or revoke the conditional use permit.
- d. Upon reasonable suspicion that any gas station/convenience store, food sales establishment or retail sales establishment derives more than 40 percent of its gross receipts from sales, from the sale of alcoholic liquor, wine, beer or tobacco products, the zoning enforcement officer may require that the owner or operator of the business demonstrate within 45 days that during the prior six months no more than 40 percent of its gross receipts from sales are derived from the sale of alcoholic liquor, wine, beer or tobacco products. In such event it shall be presumed that more than 40 percent of the gross receipts from sales are derived from the sale of alcoholic liquor, wine, beer or tobacco products, which presumption may be overcome by the business timely furnishing a statement prepared and verified by a certified public accountant identifying the total dollar volume of all sales, and separately identifying the total dollar volume of sales

derived from the sale of alcoholic beverages, from the sale of tobacco products, and from the sale of all other merchandise and food exclusive of alcoholic beverages and tobacco products, from the business premises in the preceding six months.

- e. Upon reasonable suspicion that any restaurant does not derive at least 50 percent of its gross receipts from the sale of prepared food and food-related services, the zoning enforcement officer may require that the owner or operator or the restaurant demonstrate within 45 days that during the prior six months at least 50 percent of its gross receipts were derived from the sale of prepared food and food-related services. In such event it shall be presumed that less than 50 percent of the restaurant's gross receipts are derived from the sale of prepared food and food-related services, which presumption may be overcome by the business timely furnishing a statement prepared and verified by a certified public accountant identifying the total dollar volume of all receipts, and separately identifying the total dollar volume of gross receipts derived from the sale of alcoholic beverages, and from the sale of prepared food and food-related services exclusive of alcoholic beverages and tobacco products, from the business premises in the preceding six months.

- f. All gas stations/convenience stores, food sales establishments, retail sales establishments and restaurants which have not continuously held an alcoholic liquor license or a beer or wine permit since July 1, 2012, shall comply with the requirements of subsections (a), (b) (c) and (d) above. Any gas station/convenience store, food sales establishment, retail sales establishment or restaurant which has continuously held an alcoholic liquor license or a wine or beer permit since June 1, 2012, shall comply with subsections (a), (b), (c) and (d) above, exclusive of any changed separation requirements, commencing on December 31, 2013, and prior to that date shall continue to be subject to the general regulations regarding legal nonconforming uses set forth in sections 134-155 and 134-1351..

(O.7226, 7830, 8215, 8242, 8388, 9186, 9213, 9460, 10,142, 10,391, 10,823, 10,940, 11,009, 11,069, 11,083, 11,185, 11,300, 11,376, 11,410, 11,507, 11,761, 12,012, 13,067, 13,179, 13,232, 13,377, 13,484; C91, § 2A-17(H); O.13,588; C00, § 134-954; O.14,980, 15,046, 15,059)

LILLIS O'MALLEY OLSON MANNING POSE & VAN DIKE LLP

WILLIAM J. LILLIS
MICHAEL W. O'MALLEY
EUGENE E. OLSON
DANIEL L. MANNING
CHRISTOPHER R. POSE
ADAM C. VAN DIKE
JOEL B. TEMPLEMAN*
BRIDGET O'MALLEY KAUTZKY
*LICENSED IN IOWA & ILLINOIS

ATTORNEYS AT LAW
(ESTABLISHED 1917)
317 SIXTH AVENUE, SUITE 300
DES MOINES, IOWA 50309-4127
TELEPHONE (515) 243-8157
FAX (515) 243-3919
WWW.LILLISOMALLEY.COM

JOHN CONNOLLY, JR. (1891-1975)
GEORGE E. O'MALLEY (1905-1982)
JOHN CONNOLLY III (1918-1998)
BERNARD J. CONNOLLY (1920-1970)
C. I. MCNUTT (1901-1958)
STREETAR CAMERON (1957-2008)

RUSSELL J. HANSEN
RETIRED

Writer's Direct E-Mail: cpose@lolaw.com

August 2, 2012

The Honorable Chair & Members of
the Plan & Zoning Commission
400 Robert D. Ray Drive
Des Moines, IA 50309

Re: Proposed Liquor Zoning Ordinance Amendments

Honorable Chair and Members of the Commission:

Our law firm represents Iowa CVS Pharmacy, LLC. Our client believes that free standing pharmacies such as it plans to open and operate in the City of Des Moines should be able to be distinguished from general retail establishments as are described in the proposed amendments. Our client further believes that it should not have to go through a conditional use permit process in order to be able to make the sale of alcoholic liquor.

Free standing pharmacies are not a problem for regulation as targeted by these ordinance amendments.

We have modified the proposed amendments to Section 134-954 to exclude drug stores from the general retail category. The zoning ordinance allows a drug store to be operated beginning in the C-1 zoning district.

We ask that you receive and file these requests as part of your hearing on this matter this evening.

Sincerely,



Christopher R. Pose
For the Firm

CRP/dj
Enclosure
cc: Wayne Lum
Treg Charlton
Tom Lowe *formerly known as* CONNOLLY O'MALLEY LILLIS HANSON OLSON LLP

Proposed amendments to the Zoning Ordinance regarding businesses engaged in the sale of liquor, wine and beer.

Sec. 134-954. Selling of liquor, wine and beer.

The use of land in all districts for the sale of alcoholic liquor, wine and beer is subject to the restrictions set forth in this section.

- a. The sale of alcoholic liquor, wine and beer is permitted only in the zoning districts and subject to the conditions applicable to the business identified in the table below:

	Sale of Alcoholic Liquor		Sale of Wine and Beer	
	C-1, C-1A & D-R Districts	C-2, NPC and less restrictive Districts	C-1, C-1A & D-R Districts	C-2, NPC and less restrictive Districts
Food Sales Establishments and Retail Sales Establishments				
Limited (less than 10,000 sq ft)	Not Allowed	CUP 40% of sales 500 feet 1/4 mile	CUP 40% of sales 150 feet	CUP 40% of sales 150 feet
General (10,000 sq ft or larger, but less than 40,000 sq ft)	CUP 40% of sales 75 feet	CUP 40% of sales 75 feet	40% of sales 75 feet	40% of sales 75 feet
Large (40,000 sq ft or larger) and Drugstores (12,000 sq ft or larger)	40% of sales 75 feet	40% of sales 75 feet	40% of sales 75 feet	40% of sales 75 feet
Gas Station/ Convenience Stores (not allowed in D-R)	Not Allowed	CUP 40% of sales 500 feet 1/4 mile	40% of sales 150 feet (C-1 & C-1A only)	40% of sales 150 feet
Liquor Stores	Not Allowed	CUP 500 feet 1/4 mile	Not Allowed	CUP 150 feet
Restaurants	50% of sales 75 feet	50% of sales 75 feet	50% of sales 75 feet	50% of sales 75 feet
Taverns and Night Clubs (not allowed in C-1 and C-1A)	CUP (D-R only)	CUP 150 feet	CUP (D-R only)	CUP 150 feet

Where used in the table above the following terms shall have the meaning identified below:

- 1) *CUP* means that a conditional use permit must be obtained for such use as further provided in this section.
- 2) *40% of sales* means that no more than 40 percent of the gross receipts from sales from the premises may be derived from the sale of alcoholic liquor, wine, beer or tobacco products.

- 3) *50% of sales* means that at least 50 percent of the gross receipts by a restaurant must be derived from the sale of prepared food and food-related services.
- 4) *75 feet* means that the premises occupied by such use must be separated by at least 75 feet from any church, school, public park or licensed child care facility as defined by I.C. ch. 237A. However, this condition is not applicable in the C-3, C-3A, C-3B, C3-R and D-R Districts.
- 5) *150 feet* means that the premises occupied by such use must be separated by at least 150 feet from any church, school, public park or licensed child care facility as defined by I.C. ch. 237A. However, this condition is not applicable in the C-3, C-3A, C-3B, C3-R and D-R Districts.
- 6) *500 feet* means that the premises occupied by such use must be separated by at least 500 feet from any church, school, public park or licensed child care facility as defined by I.C. ch. 237A. However, this condition is not applicable in the C-3, C-3A, C-3B, C3-R and D-R Districts.
- 7) *1/4 mile* means that the premises occupied by such use must be separated by at least one-fourth mile from any other limited food sales establishment, limited retail sales establishment, gas station/convenience store and liquor store engaged in the sale of alcoholic liquor. However, in the C-3, C-3A, C-3B, C3-R and D-R Districts this condition is only applicable to liquor stores.

7)8) *Drugstores* - means a retail sales establishment of a minimum 12,000 square feet which contains a minimum of 900 square feet of area devoted to the sale of prescription medicines which are lawful pursuant Iowa and Federal Law. Drugstores must also have a drive-thru for prescription medicine sales but shall not deliver alcoholic liquor, wine or beer to consumers via the drive-thru window. Drugstores does not include Grocery Stores.

- b. A conditional use permit is required for the use of a premises for the sale of alcoholic liquor, wine or beer, under the circumstances identified in subsection (a), above. The board shall grant such a conditional use permit only where the business, when operated in conformance with such reasonable conditions as may be imposed by the board, satisfies the following criteria:
 1. The business conforms with the conditions identified in subsection (a), above.
 2. The proposed location, design, construction and operation of the particular use adequately safeguards the health, safety and general welfare of persons residing in the adjoining or surrounding residential area.
 3. The business is sufficiently separated from the adjoining residential area by distance, landscaping, walls or structures to prevent any noise, vibration or light generated by the business from having a significant detrimental impact upon the adjoining residential uses.
 4. The business will not unduly increase congestion on the streets in the adjoining residential area.
 5. The operation of the business will not constitute a nuisance.
- c. Any conditional use permit granted by the board of adjustment for the use of a premises for the sale of alcoholic liquor, wine and beer shall be subject to the following general

conditions, together with such additional special conditions as may be reasonably required by the board to ensure that the criteria in subsection (b), above, are satisfied:

1. Any parking area provided for the use of customers of the business shall be illuminated at an intensity of at least one footcandle of light on the parking surface at all times. The entire site shall be landscaped and illuminated so as to minimize hiding places for possible criminal activity.
 2. The business shall comply with article IV of chapter 42 of this Code pertaining to noise control. The business shall have no outside speakers or amplified sound except when used in compliance with a type E sound permit.
 3. Any such business must comply with the following requirements:
 - (a) Every limited food sales establishment, limited retail sales establishment and gas station/convenience store shall display alcoholic liquor only in a locked case or behind a counter accessible only to employees. Any other business selling alcoholic liquor for off premises consumption shall either:
 - i) display alcoholic liquor only in a locked case or behind a counter accessible only to employees; ii) employ an electronic security cap or tag system on all containers of alcoholic liquor on display; or iii) have more than one employee on duty at all times the business is open to the public.
 - (b) Conspicuously post 24-hour contact information for a manager or owner of the business near the main public entrance.
 - (c) Institute a strict no loitering policy, conspicuously post one or more "No Loitering" signs, and cooperate with police in addressing loitering on the premises.
 - (d) Not dispense alcoholic beverages from a drive-through window.
 4. Litter and trash receptacles shall be located at convenient locations inside and outside the premises, and operators of such business shall remove all trash and debris from the premises and adjoining public areas on a daily basis.
 5. The conditional use permit is subject to amendment or revocation if the operation of the business becomes a nuisance or exhibits a pattern of violating the conditions set forth in the conditional use permit.
 6. If the zoning enforcement officer determines at any time that the operation of such a business exhibits a pattern of violating the conditions set forth in the conditional use permit, the zoning enforcement officer may apply to the board to reconsider the issuance of the conditional use permit for such business. A copy of such application and notice of the hearing before the board on such application shall be provided to the owner of such business at least 30 days in advance and shall also be provided to all owners of record of property within 250 feet of the subject property. If the board finds that the operation of such business exhibits a pattern of violating the conditions set forth in the conditional use permit, the board shall have the authority to amend or revoke the conditional use permit.
- d. Upon reasonable suspicion that any gas station/convenience store, food sales establishment or retail sales establishment derives more than 40 percent of its gross receipts from sales, from the sale of alcoholic liquor, wine, beer or tobacco products, the zoning enforcement officer may require that the owner or operator of the business demonstrate within 45 days that during the prior six months no more than 40 percent of its gross receipts from sales are derived from the sale of alcoholic liquor, wine, beer or tobacco products. In such event it shall be presumed that more than 40 percent of the

gross receipts from sales are derived from the sale of alcoholic liquor, wine, beer or tobacco products, which presumption may be overcome by the business timely furnishing a statement prepared and verified by a certified public accountant identifying the total dollar volume of all sales, and separately identifying the total dollar volume of sales derived from the sale of alcoholic beverages, from the sale of tobacco products, and from the sale of all other merchandise and food exclusive of alcoholic beverages and tobacco products, from the business premises in the preceding six months.

- e. Upon reasonable suspicion that any restaurant does not derive at least 50 percent of its gross receipts from the sale of prepared food and food-related services, the zoning enforcement officer may require that the owner or operator or the restaurant demonstrate within 45 days that during the prior six months at least 50 percent of its gross receipts were derived from the sale of prepared food and food-related services. In such event it shall be presumed that less than 50 percent of the restaurant's gross receipts are derived from the sale of prepared food and food-related services, which presumption may be overcome by the business timely furnishing a statement prepared and verified by a certified public accountant identifying the total dollar volume of all receipts, and separately identifying the total dollar volume of gross receipts derived from the sale of alcoholic beverages, and from the sale of prepared food and food-related services exclusive of alcoholic beverages and tobacco products, from the business premises in the preceding six months.
- f. All gas stations/convenience stores, food sales establishments, retail sales establishments and restaurants which have not continuously held an alcoholic liquor license or a beer or wine permit since July 1, 2012, shall comply with the requirements of subsections (a), (b) (c) and (d) above. Any gas station/convenience store, food sales establishment, retail sales establishment or restaurant which has continuously held an alcoholic liquor license or a wine or beer permit since June 1, 2012, shall comply with subsections (a), (b), (c) and (d) above, exclusive of any changed separation requirements, commencing on December 31, 2013, and prior to that date shall continue to be subject to the general regulations regarding legal nonconforming uses set forth in sections 134-155 and 134-1351..

(O.7226, 7830, 8215, 8242, 8388, 9186, 9213, 9460, 10,142, 10,391, 10,823, 10,940, 11,009, 11,069, 11,083, 11,185, 11,300, 11,376, 11,410, 11,507, 11,761, 12,012, 13,067, 13,179, 13,232, 13,377, 13,484; C91, § 2A-17(H); O.13,588; C00, § 134-954; O.14,980, 15,046, 15,059)

Draft of July 26, 2012
Proposed BWL Text (Pose Changes)