

Date May 19, 2014

HEARING ON PROPOSED AMENDMENTS TO THE ZONING ORDINANCE TO REGULATE THE ALLOWED LOCATION AND OPERATION OF TOBACCO STORES THAT SELL ALCOHOLIC BEVERAGES FOR OFF PREMISES CONSUMPTION, AND CONDITIONALLY APPROVING SAME

WHEREAS, the City Plan and Zoning Commission has advised that at a public hearing held on May 1, 2014, its members voted 11-0 in support of a motion to recommend approval of proposed amendments to the Zoning Ordinance to define tobacco store and to regulate the allowed location and operation of tobacco stores that sell alcoholic beverages for off premises consumption, as more fully shown by Exhibit "A" attached hereto.

WHEREAS, on May 5, 2014, by Roll Call No. 14-0692, it was duly resolved by the City Council that the proposed amendment to the Zoning Ordinance, be set down for hearing on May 19, 2014, 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 May 8, 2014; 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 the proposed amendments, subject to final passage of the enacting ordinance.

FORM APPROVED:


 Roger K. Brown, Assistant City Attorney

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
COLEMAN				
GATTO				
GRAY				
HENSLEY				
MAHAFFEY				
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

Exhibit "A"

Proposed amendments to the Zoning Ordinance to regulate the allowed location and operation of tobacco stores that sell alcoholic beverages for off premises consumption

Sec. 134-3. Definitions.

The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

...
Tobacco Store means a place of business primarily engaged in the retail sale of tobacco and tobacco related products, provided however that no more than 25% of the gross receipts from sales shall be derived from the sale of alcoholic liquor, wine or beer, and all sales of alcoholic liquor, wine or beer are for off-premises consumption only.
 ...

(O.7226, 7546, 7830, 7975, 8215, 8251, 8388, 8944, 9022, 9213, 9460, 9794, 9903, 10,157, 10,194, 10,258, 10,377, 10,391, 10,524, 10,553, 10,823, 10,940, 11,069, 11,083, 11,122; 11,148, 11,197, 11,314, 11,376, 11,698, 11,815, 11,906, 12,012, 12,031, 12,032, 13,124, 13,475, 13,477, 13,478; C91, § 2A-3, C00, §134-3, O.13,832, 13,839, 13,889, 14,124, 14,668, 14,768, 14,979, 15,046, 15,059, 15,133, 15,181, 15,182)

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 12,000 sq ft)	Not Allowed	CUP 40% of sales 500 feet	CUP 40% of sales 150 feet	CUP 40% of sales 150 feet

		1/4 mile		
General (12,000 sq ft or larger, but less than 40,000 sq ft)	40% of sales 75 feet	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
<u>Tobacco Stores</u>	<u>Not Allowed</u>	<u>CUP</u> <u>25%</u> <u>500 feet</u> <u>1/4 mile</u>	<u>CUP</u> <u>25%</u> <u>150 feet</u>	<u>CUP</u> <u>25%</u> <u>150 feet</u>
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) 25% means that no more than 25% of the gross receipts from sales shall be derived from the sale of alcoholic liquor, wine or beer.
- 45) *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.

56) 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.

67) 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.

78) 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 and tobacco 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 and tobacco 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. Upon reasonable suspicion that any tobacco store derives more than 25% of its gross receipts from sales from the sale of alcoholic liquor, wine or beer, 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 25% of the gross receipts from sales were derived from the sale of alcoholic liquor, wine or beer. In such event it shall be presumed more than 25% of its gross receipts from sales are derived from the sale of alcoholic liquor, wine or beer, 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.

fg. All gas stations/convenience stores, food sales establishments, retail sales establishments, tobacco stores 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), (d), ~~and (e)~~ and (f) above. Any gas station/convenience store, food sales establishment, retail sales establishment, tobacco store or restaurant which has continuously held an alcoholic liquor license or a wine or beer permit since July 1, 2012, shall comply with subsections (a), (b), (c), (d), ~~and (e)~~ and (f) 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, 15,133)



May 9, 2014

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 May 1, 2014 the following action was taken regarding a City Council initiated request to amend the Zoning Ordinance Text in Chapter 134 to define tobacco store and to regulate the allowed location and operation of tobacco stores.

COMMISSION RECOMMENDATION:

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

Commission Action:	Yes	Nays	Pass	Absent
Dory Briles	X			
JoAnne Corigliano	X			
Jacqueline Easley				X
Tim Fitzgerald	X			
Dann Flaherty	X			
Jann Freed				X
John "Jack" Hilmes	X			
Ted Irvine	X			
Greg Jones	X			
William Page	X			
Christine Pardee				X
CJ Stephens	X			
Vicki Stogdill	X			
Greg Wattier	X			

APPROVAL of the amendment to Chapter 134 to define tobacco store and to regulate the allowed location and operation of tobacco stores. (10-2014-5.01)

STAFF RECOMMENDATION TO THE P&Z COMMISSION

Staff recommends approval of the proposed text amendment.

STAFF REPORT TO THE PLANNING COMMISSION

I. GENERAL INFORMATION

On December 6, 2010, the Zoning Ordinance was amended by Ordinance No. 14,980 to include tobacco sales with alcohol sales when determining whether a business is classified as a liquor store or as a food/retail sales establishment. This Ordinance also lowered the percentage of revenues that a business can derive from the sale of alcoholic liquor, wine, beer, and tobacco products without being classified as a liquor store, from 50 percent to 40 percent. Businesses then in existence were allowed until December 31, 2013, to conform to the new requirement that no business other than a liquor store can derive more than 40% of its revenues from the sale of alcoholic liquor, wine, beer and tobacco products. These changes have caused retail businesses that primarily sell tobacco products to be classified as "liquor stores", which is impacting multiple businesses in the City.

On March 26, 2014, the Regulation and Ordinance (R&O) Subcommittee of the City Plan and Zoning Commission recommended that a new business type called "Tobacco Store" be added to the Zoning Ordinance in order to better regulate businesses that primarily sell tobacco products. The proposed Zoning Ordinance Text Amendment would define "Tobacco Store" within City Code Section 134-3 as follows:

Tobacco Store means a place of business primarily engaged in the retail sale of tobacco and tobacco related products, provided however that no more than 25% of the gross receipts from sales shall be derived from the sale of alcoholic liquor, wine or beer.

In addition, the R&O Subcommittee recommended that "Tobacco Store" be included within the regulations for selling liquor, wine, and/or beer as contained in Section 954 of the City Code. The proposed text amendments would allow a "Tobacco Store" in a "C-2", "NPC", or less restrictive district to sell alcoholic liquor, wine, and/or beer in accordance with a Conditional Use Permit from the Zoning Board of Adjustment so long as no more than 25% of the gross receipts shall be derived from the sale of alcoholic liquor, wine, and/or beer and so long as the site is at least 500 feet from any church, school, public park, or licensed child care facility. The proposed text amendments would allow a "Tobacco Store" in a "C-1", "C-1A", "D-R", "C-2", "NPC", or less restrictive district to sell wine and/or beer only (no alcoholic liquor) in accordance with a Conditional Use Permit from the Zoning Board of Adjustment so long as no more than 25% of the gross receipts shall be derived from the sale of alcoholic liquor, wine, and/or beer and so long as the site is at least 150 feet from any church, school, public park, or licensed child care facility.

The proposed text amendments would also allow the City's Zoning Enforcement Officer to request the operator of a "Tobacco Store" provide an audit in order to demonstrate that the business is operating as a "Tobacco Store". The following text would be added to City Code Section 134-954(f):

Upon reasonable suspicion that any tobacco store derives more than 25% of its gross receipts from sales from the sale of alcoholic liquor, wine or beer, 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 25% of the gross receipts from sales were derived

from the sale of alcoholic liquor, wine or beer. In such event it shall be presumed more than 25% of its gross receipts from sales are derived from the sale of alcoholic liquor, wine or beer, 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.

SUMMARY OF DISCUSSION

Dann Flaherty asked if anyone was present to speak on Items #2 & #3. None were present or requested to speak.

Greg Jones made a motion to move Items #2 and #3 to the consent agenda. Motion carried 11-0. Christine Pardee was not yet in attendance.

CHAIRPERSON OPENED THE PUBLIC HEARING

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

COMMISSION ACTION:

Ted Irvine moved staff recommendation to approve the proposed text amendment.

Motion passed 11-0 (Christine Pardee was not yet in attendance).

Respectfully submitted,



Michael Ludwig, AICP
Planning Administrator

MGL:clw

cc: File