



Roll Call Number

Agenda Item Number

57

Date August 28, 2017

**RESOLUTION HOLDING HEARING ON
PROPOSED AMENDMENTS TO THE ZONING ORDINANCE REGARDING
BUSINESSES SELLING LIQUOR, WINE AND/OR BEER**

WHEREAS, on August 14, 2017, by Roll Call No. 17-1364, the City Council received a communication from the City Plan and Zoning Commission advising that at a public hearing held on July 20, 2017, its members voted 10-0 in support of a motion to recommend **APPROVAL** of proposed amendments to Sections 134-3 and 134-954 of the Zoning Ordinance of the Des Moines Municipal Code to add and clarify the intended definitions of "alcoholic beverage" and "50% of sales", the form of accounting information necessary to overcome a presumption of non-compliance with the percentage requirements for sales of alcoholic beverages by gas station/convenience stores, restaurants, and tobacco stores, and prohibited accounting practices related to alcoholic beverage sales; and

WHEREAS, the proposed text amendments are attached hereto and on file in the office of the City Clerk; and

WHEREAS, on August 14, 2017, by Roll Call No. 17-1364, it was duly resolved by the City Council that the proposed adoption of amendments to Sections 134-3 and 134-954 be set down for public hearing on August 28, 2017 at 5:00 p.m. in the City Council Chambers at the Municipal Service Center; and

WHEREAS, due notice of said hearing was published in the Des Moines Register, as provided by law, setting forth the time and place for hearing on said proposed amendments to the Zoning Ordinance; 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, any and all objections to said proposed amendments to the Zoning Ordinance be and the same are hereby overruled, and the hearing is closed.

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-2-

MOVED by _____ to approve the proposed adoption of amendments to Sections 134-3 and 134-954 of the Zoning Ordinance of the Des Moines Municipal Code, subject to final passage of the enacting ordinance.

FORM APPROVED:

Glenna K. Frank
Glenna K. Frank, Assistant City Attorney

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
COLEMAN				
GATTO				
GRAY				
HENSLEY				
MOORE				
WESTERGAARD				
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

July 24, 2017

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 July 20, 2017, a City initiated amendment to the Chapter 134 Zoning Ordinance text regarding changes to regulations for businesses selling liquor, wine, and/or beer.

COMMISSION RECOMMENDATION:

After public hearing, the members voted 10-0 as follows:

<u>Commission Action:</u>	<u>Yes</u>	<u>Nays</u>	<u>Pass</u>	<u>Absent</u>
Francis Boggus				X
Dory Briles				X
JoAnne Corigliano				X
David Courard-Hauri	X			
Jacqueline Easley	X			
Jann Freed	X			
John "Jack" Hilmes	X			
Lisa Howard	X			
Carolyn Jenison				X
Greg Jones	X			
William Page	X			
Mike Simonson	X			
Rocky Sposato	X			
Steve Wallace	X			
Greg Wattier				X

APPROVAL of approval of the proposed amendments to Chapter 134 changing regulations for businesses selling liquor, wine, and/or beer. (10-2017-5.02)

RECOMMENDATION TO THE P&Z COMMISSION

Staff recommends approval of the proposed amendments to Chapter 134 changing regulations for businesses selling liquor, wine, and/or beer.

STAFF REPORT TO THE PLANNING COMMISSION

I. GENERAL INFORMATION

Proposed amendments to Chapter 134 of the Municipal Code are attached. These amendments would modify the definition of "Alcoholic Beverage" to ensure that all ingredients of a beverage are accounted for together in a sale whether prepared together or sold separate. The amendment further delineates that the sale of such "Alcoholic Beverage" is not the sale of food. The amendments also make revisions to require a report of findings based on an agreed upon procedures for demonstrating compliance with percentages of sales. This is for enforcing and determining the appropriate category of business selling liquor, wine, and/or beer. Finally, the proposed text amendments include a provision prohibiting division of the accounting for separate ingredients of an "Alcoholic Beverage". This is intended to prevent skewing the percentage of revenue towards food items in an attempt to remain within the definition of "Restaurant".

SUMMARY OF DISCUSSION

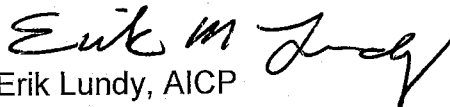
Jacqueline Easley asked if anyone was present to speak on this item. None were present or requested to speak.

COMMISSION ACTION:

John "Jack" Hilmes moved staff recommendation for approval of the proposed amendments to Chapter 134 changing regulations for businesses selling liquor, wine, and/or beer.

Motion passed 10-0.

Respectfully submitted,


Erik Lundy, AICP
Senior Planner

EML:clw
Attachment

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:

Accessory building means a structure on the same lot with, separate from, and of a nature customarily incidental and subordinate to the principal structure and intended for the storage of equipment and materials of the principal use. Trailers, semi-trailers, tents, motor vehicles and component parts thereof are not accessory buildings. A structure which might otherwise be considered an accessory building, but which is connected to the principal structure by a breezeway or other extension of the principal structure containing a functional roof and floor shall, for the purposes of this ordinance i) lose its status as an accessory building; ii) become part of the principal structure; and, iii) shall be subject to all restrictions applicable to a principal structure.

Accessory use means a use on the same lot with and of a nature customarily incidental and subordinate to the principal use or structure.

Adult entertainment business means as follows:

- (1) *Adult bookstore* means an establishment having as a significant portion of its stock in trade books, films, magazines and other periodicals which are distinguished or characterized by an emphasis on matter depicting or describing sex acts or specified anatomical areas.
- (2) *Adult motel* means a motel wherein material is presented which is distinguished or characterized by an emphasis on depicting or describing sex acts or specified anatomical areas.
- (3) *Adult motion picture arcade* means any place to which the public is permitted or invited wherein coin- or slug-operated or electronically, electrically or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by an emphasis on matter depicting or describing sex acts or specified anatomical areas.
- (4) *Adult motion picture theater* means an enclosed building used for presenting material distinguished or characterized by an emphasis on matter depicting or describing sex acts or specified anatomical areas for observation by patrons therein.
- (5) *Sexual encounter center* means any business, agency or person who, for any form of consideration or gratuity, provides a place where three or more persons, not all members of the same family, may congregate, assemble or associate for the purpose of engaging in sex acts or exposing specified anatomical areas.

(6) *Sex acts and specified anatomical areas.* For purposes of the subsections (1) through (5) of this definition, the terms "sex acts" and "specified anatomical areas" mean as follows:

- a. *Sex acts* means any sexual contact, actual or simulated, either natural or deviate, between two or more persons, or between a person and an animal, by penetration of the penis into the vagina or anus, or by contact between the mouth or tongue and genitalia or anus, or by contact between a finger of one person and the genitalia of another person or by use of artificial sexual organs or substitute therefor in contact with the genitalia or anus.
- b. *Specified anatomical areas* include the following: human genitals, pubic region, buttocks, and female breasts below a point immediately above the top of the areola.

Alcoholic beverage means any beverage containing more than one-half of one percent of alcohol by volume including alcoholic liquor, wine, and beer and includes all of the component ingredients of the beverage whether mixed into one beverage or sold separately to the same customer, regardless of intent.

Alley means a public way, other than street, 20 feet or less in width affording secondary means of access to abutting property.

Apartment hotel means a building containing both dwelling units and rooming units, used primarily for permanent occupancy.

Assisted living residential facility means a building consisting of individual dwelling units where meals and assistance for daily living activities are provided to the residents, who are primarily elderly persons. Such facility must be licensed as a residential care facility, intermediate care facility or nursing facility under I.C. § 135C.1 et seq.

Automobile sales and storage lot means an open off-street area where two or more operable motor vehicles are stored or offered or displayed for sale or advertising purposes.

Basement means a story having part but not more than one-half of its height below grade. A basement is counted as a story for the purpose of height regulations.

Bed and breakfast means a dwelling other than a restaurant, motel or shelter for the homeless where lodging and meals are provided for compensation to three or more persons.

Boardinghouse means a building, other than a hotel, where for compensation meals or lodging and meals are provided for three or more persons.

Building means any structure designed or intended for the support, enclosure, shelter or protection of persons, animals or property, but not including signs or billboards.

Building frontage means that wall or side of a building which is adjacent and most nearly parallel to a street.

Building height of means the vertical distance between two elevations computed as follows: The lower elevation is the average of the highest and lowest elevations of that portion of the lot between the building and a perimeter line five feet from the building; and the higher elevation is either the highest point of the coping of a flat roof, or the deck line of a mansard roof, or the average of the elevations of the eaves and ridge of a gable, hip or gambrel roof. The

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 1/4 mile	CUP 40% of sales 150 feet	CUP 40% of sales 150 feet
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
Tobacco Stores	Not Allowed	CUP 25% 500 feet 1/4 mile	CUP 25% 150 feet	CUP 25% 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. **The sale of an alcoholic beverage is not 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.
 - 5) *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.
 - 6) *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.
 - 7) *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.
 - 8) *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, 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, 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-report of findings showing compliance with the percentage requirements of this section for gas station/convenience stores, food sales establishments and retail sales establishments, prepared and verified by a certified public accountant as the result of an agreed-upon procedures engagement, identifying the total dollar volume of all sales receipts, and separately identifying the total dollar volume of sales-gross receipts 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-report of findings showing compliance with the percentage requirements of this section for restaurants, prepared and verified by a certified public accountant as the result of an agreed-upon procedures engagement, 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-report of findings showing compliance with the percentage requirements of this section for tobacco stores, prepared and verified by a certified public accountant as the result of an agreed-upon procedures engagement, identifying the total dollar volume of all

sales receipts, and separately identifying the total dollar volume of gross receipts 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.

- g. 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), (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), (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.

h. Prohibited Accounting for Alcoholic Beverages.

The sale of an alcoholic beverage and any of its component ingredients whether mixed into one beverage or sold separately to the same customer, regardless of intent, shall not be divided for accounting purposes under this chapter.