

ORDINANCE NO. 14,807

AN ORDINANCE to amend the Municipal Code of the City of Des Moines, Iowa, 2000, adopted by Ordinance No. 13,827, passed June 5, 2000, as heretofore amended, by repealing Sections 78-61, 78-62, 78-63, 78-64, 78-65, 78-66, 78-67, 78-68, 78-69.01, 78-70, 78-70.01, 78-71, 78-72, 78-73 and 78-74 thereof, and enacting new Sections 78-61, 78-62, 78-64, 78-66, 78-67, 78-68, 78-69.01, 78-70, 78-70.01, 78-71, 78-72, 78-73 and 78-74, and by adding and enacting a new Section 78-10, regarding the regulation of transient merchants and the sale of merchandise from temporary locations or structures.

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

Section 1. The Municipal Code of the City of Des Moines, Iowa, 2000, adopted by Ordinance No. 13,827, passed June 5, 2000, as amended by Ordinance No 14,190 passed December 16, 2002, by Ordinance No. 14,745 passed February 25, 2008, and by Ordinance No. 14,750 passed March 24, 2008, be and is hereby amended by repealing Sections 78-61, 78-62, 78-63, 78-64, 78-65, 78-66, 78-67, 78-68, 78-69.01, 78-70, 78-70.01, 78-71, 78-72, 78-73 and 78-74 thereof, and enacting new Sections 78-61, 78-62, 78-64, 78-66, 78-67, 78-68, 78-69.01, 78-70, 78-70.01, 78-71, 78-72, 78-73 and 78-74, and by adding and enacting a new Section 78-10, regarding the regulation of transient merchants and the sale of merchandise from temporary locations or structures, as follows:

**Sec. 78-10. Limitation on retail premises.**

No person shall engage in the business of displaying for sale, or selling, food, beverages or merchandise within the city from any vehicle, trailer, tent, or temporary structure or from any temporary location or place, except:

- (1) *Permitted premises.* Activities conducted in compliance with a certificate of occupancy issued pursuant to section 134-151, or entirely within a building in compliance with Chapter 134.
- (2) *Yard sales.* The casual and occasional sales of used household goods by the owner thereof to the public, on a nonreceiving basis, if the seller, at the time of the sale, is not engaged for profit in the business of selling goods of that or a similar nature, so long as such sales are not conducted in excess of four consecutive days and no more than two times annually.

- (3) *Licensed use of right-of-way.* Sales activities conducted in compliance with an entertainment district license, a sidewalk sales permit, a farmers' or public market permit, or a sidewalk cafe license or lease issued for the premises pursuant to article VII of chapter 102 of this code.
- (4) *Street Use Permit.* Sales activities conducted in compliance with a street use permit issued pursuant to article XVI of chapter 102 of this code.
- (5) *Special Permits.* Sales activities conducted pursuant to a special permit issued by the zoning board of adjustment pursuant to division 3 of article IV of chapter 134 of this code.
- (6) *Peddlers.* Sales activities conducted in compliance with a peddlers license issued pursuant to article II of this chapter.
- (7) *Transient merchants.* Sales activities by a transient merchant which are conducted in compliance with a transient merchant license issued pursuant to article III of this chapter, or which are exempt from the requirement to obtain a transient merchant license under section 78-62.
- (8) *Parks.* The sale of food and beverages in public parks and rivers with permission of the park and recreation board.
- (9) *Emergency response sites.* Sales of food and beverages at the site of an emergency or disaster with the permission of the police chief, fire chief or public works director.

#### **Sec. 78-61. Definitions.**

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

*Food service establishment* shall have that meaning established by section 481-30.2 of the Iowa Administrative Code.

*Licensed premises* means an area approved for the operation of a transient merchant business under authority of a transient merchant license issued pursuant to this article.

*Pushcart* means a non-motorized cart which is self-propelled by the operator.

*Transient merchant* means a person, principal or agent who engages in a merchandising business from a temporary location or structure in the city, and who, for the purpose of carrying on such business, hires, leases or occupies any land, structure, trailer or truck for the exhibition and sale of such goods, wares or merchandise and including the sale of any article, food, beverage, fruit, vegetable or farm product; provided however that the following types of sales activities shall not constitute sales by a transient merchant:

- (1) *Yard sales.* The casual and occasional sales of used household goods by the owner thereof to the public, on a nonreceiving basis, if the seller, at the time of the sale, is not engaged for profit in the business of selling goods of that or a

similar nature, so long as such sales are not conducted in excess of four consecutive days and no more than two times annually.

- (2) *Licensed use of right-of-way.* Sales activities conducted in compliance with an entertainment district license, a sidewalk sales permit, a farmers' or public market permit, or a sidewalk cafe license or lease issued for the premises pursuant to article VII of chapter 102 of this code.
- (3) *Street Use Permit.* Sales activities conducted in compliance with a street use permit issued pursuant to article XVI of chapter 102 of this code.
- (4) *Special Permits.* Sales activities conducted pursuant to a special permit issued by the zoning board of adjustment pursuant to division 3 of article IV of chapter 134 of this code.
- (5) *Peddlers.* Sales activities conducted in compliance with a peddlers license issued pursuant to article II of this chapter.
- (6) *Parks.* The sale of food and beverages in public parks and rivers with permission of the park and recreation board.
- (7) *Emergency response sites.* Sales of food and beverages at the site of an emergency or disaster with the permission of the police chief, fire chief or public works director.

#### **Sec. 78-62. Exceptions.**

The following sales by transient merchants do not require a license under this article; however, section 78-74 of this article shall apply to the conduct of all sales by transient merchants:

- (1) The sale of food from a pushcart in the C-3, C-3A, C-3B, C-3R and D-R zoning districts.
- (2) The sale of raw fruits and/or vegetables.
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- (3) The sale of natural Christmas trees during the months of November and December.
- (4) Sales activities by a charitable, educational or religious organization which is exempt from taxation under section 501(c)(3) of the United States Internal Revenue Code when the proceeds thereof shall be applied to the payment of the expenses thereof and to the charitable or religious object for which the charitable or religious society exists, provided that such sales are not conducted by such organization in excess of three consecutive days in any 7-day period at the same location.
- (5) Sales activities conducted on property zoned for retail sales use and owned by a non-profit corporation where such sales activities are sponsored by the non-profit corporation and are limited to the weekends in the months of June through August.

**Sec. 78-63.** (not used)

**Sec. 78-64. License required.**

- (a) Except for those exempt activities identified in section 78-62, every transient merchant shall, before offering for sale any goods, wares or merchandise in the city, obtain a license for their sale from the city clerk as provided in this article.
- (b) A three-day transient merchant license shall permit the operation of the licensed business at the licensed premises during three consecutive days. A thirty-day transient merchant license shall permit the operation of the licensed business at the licensed premises during thirty consecutive days. An annual transient merchant license shall permit the operation of the licensed business at the licensed premises during one calendar year.

**Sec. 78-65.** (not used)

**Sec. 78-66. Application for license.**

Every transient merchant shall apply to the city clerk for a transient merchant license at least three business days prior to use by providing the following information upon a form to be provided by the city clerk:

- (1) The full name, age, permanent address and phone number of the applicant.
- (2) A description of the merchandise to be sold.
- (3) The business name and address.
- (4) The starting date and duration of the proposed sale, and the specific hours, not less than six consecutive hours in every 24 hour period, when the site will be vacated as required by section 78-74(i).
- (5) The address of the private property where the sale will be held, and the name and address of the property owner or person in control of that property.
- (6) A written statement from the property owner or person in control of the property listed in subsection (5) of this section that the applicant is authorized to use the property for a sale on the proposed dates.
- (7) The period of time the applicant has been engaged in the same or similar business, and the jurisdictions in which the applicant has previously conducted business in the last year.
- (8) A description of the structure, vehicle, tent, trailer or other configuration from which the sale will be conducted.
- (9) A site sketch which identifies the location of the licensed premises and the required three off-street parking spaces in relationship to the adjoining streets, public sidewalks, and property lines.
- (10) The application must be accompanied by a copy of all required permits and licenses, including but not limited to, a retail sales tax permit issued by the Iowa Department of Revenue and the appropriate food establishment license issued by the Iowa Department of Inspections and Appeals.

- (11) Written permission from a street use permit applicant if the proposed location for sales are within one thousand (1,000) feet of the perimeter of a street use closure for an event when an application is on file with the city clerk for a street use permit or when the street use permit has been issued.
- (12) A description of how bathroom facilities will be provided to satisfy the requirements of section 78-69.

**Sec. 78-67. Site requirements.**

A transient merchant license shall not be issued unless the licensed premises upon which the transient merchant operates satisfies the following requirements. A transient merchant shall maintain the licensed premises in a condition that satisfies the following requirements for the duration of the license.

- (a) *All licensed premises.* The licensed premises for all transient merchants shall conform with the following requirements:
  - (1) All applicable requirements of this article, the City Code, the Iowa Code and the Iowa Administrative Code.
  - (2) The licensed premises must be within a commercial or industrial zoning district.
  - (3) The licensed premises cannot be upon a parcel having a residential use as its principle use.
  - (4) All trailers, vehicles, tents, equipment, and areas used for the storage, display or sale of food or merchandise must be located on a paved surface outside required zoning setback for structures under chapter 134 and outside any required fire lanes and drive approaches.
  - (5) The licensed premises must provide at least three paved off-street parking spaces served by a paved driveway from the public right-of-way, provided however that no off-street parking is required in the C-3, C-3A, C-3B, C-3R and D-R zoning districts. The transient merchant may share parking required by chapter 134 for use by an existing business on the site, if the available parking is sufficient to serve the normal operations of both. The available parking shall be presumed to be insufficient to serve the normal operations of both businesses if within the past year the operation of a transient merchant at the site has caused an overflow of customer or employee parking into the street or other private parking lots in the vicinity.
  - (6) Bathroom facilities must be provided for the business workers on the licensed premises or by agreement for the use of bathroom facilities located within 500 feet of the licensed facilities.
  - (7) Only one transient merchant at a time may operate upon a parcel. A transient merchant license shall not be issued for the operation of more than one transient merchant on a parcel on the same day.
- (b) *Licensed premises for three day licenses.* The licensed premises for all transient merchants holding a three day transient merchant license shall conform with the following additional requirements:

- (1) No three day license shall be issued for the operation of a transient merchant at a site within 10 days before or 10 days after the term of any transient merchant license previously applied for and not denied for the same site.
- (c) *Licensed premises for thirty day and annual licenses.* The licensed premises for all transient merchants holding a thirty day or annual transient merchant license shall conform with the following additional requirements:
  - (1) Any seating area provided for customer use must be located on a paved surface.
- (d) *Additional requirements for a food service establishment.* The licensed premises for any transient merchant which operates as a food service establishment shall conform to the following additional requirements.
  - (1) The business shall comply with the requirements established by Iowa Administrative Code §481-31.7 for a mobile food unit/pushcarts.
  - (2) Bathroom facilities must be provided for the business workers and customers on the licensed premises or by agreement for the use of bathroom facilities located within 500 feet of the licensed facilities.

**Sec. 78-68. Cash bond.**

- (a) Except as provided in paragraph (c) below, no transient merchant license shall be issued until the applicant has delivered to the city clerk a cash bond for no less than \$200.00. The bond shall be held to indemnify and pay the city any penalties or costs incurred in the enforcement of any of the sections of this article and indemnify or reimburse any purchaser of goods, wares, merchandise or stock for any judgment which may be obtained by a purchaser for damages in any action commenced within three months from the date of purchase, due to misrepresentations as to the kind, quality or value of such goods, wares, merchandise or stock, whether the misrepresentations were made by the owner or by his or her servants, agents or employees, either at the time of making the sale or through any advertisement of any character, printed or circulated, with reference to such stock of goods, wares or merchandise or any part thereof.
- (b) A single bond may be used for all licenses obtained by the same transient merchant.
- (c) The balance of the bond shall be released by the city clerk and returned to the applicant upon request by the applicant at any time more than four months after expiration of all transient merchant licenses for which the cash bond was provided, unless the city clerk has received notice of a pending action in the state or federal courts seeking a judgment upon a claim eligible for payment from the bond. Except as otherwise provided by court order, the city clerk shall not release any bond during the pendency of any such action.

**Sec. 78-69.01. Priority of street use events, refund of license fee.**

- (a) Subject to paragraph (d), no transient merchant license shall be issued for sales on a parcel on the same day as, and within one thousand (1,000) feet of the perimeter of a street closure made under authority of an approved street use permit, unless written permission from the applicant for the street use permit for operation of the transient merchant has been filed with the City Clerk.

- (b) Subject to paragraph (d), upon issuance of a street use permit the city clerk shall immediately give notice to any applicants then seeking a transient merchant license for sales on the same day as the street use event at a location within one thousand (1,000) feet of the perimeter of such street closure, informing the transient merchant that their application will not be granted for each day of the street closure, unless written permission from the applicant for the street use permit for operation of the transient merchant is filed with the city clerk.
- (c) The application for a transient merchant license shall contain a notice stating substantially as follows:

"Transient merchant licenses will not be issued for sales on the same day as, and at a location within one thousand (1,000) feet of the perimeter of a street closure made under authority of a previously issued street use permit, unless written permission from the applicant for the street use permit for operation of the transient merchant has been filed with the city clerk prior to issuance of the transient merchant license. This limitation shall not apply to street use permits issued for events that occur more than four (4) times per calendar year."
- (d) The priority given to an event for which a street use permit is issued, and the denial of a transient merchant license for sales within one-thousand feet of the perimeter of the street closure, shall not apply to those street use events which occur more than four (4) times per calendar year.
- (e) The issuance of a street use permit shall not affect any previously issued transient merchant license.

**Sec. 78-70. License issuance.**

- (a) A transient merchant license shall not be issued more than fifteen days in advance of the commencement of the term of the license. Prior to issuance of three-day or thirty-day transient merchant license the City shall confirm that no street use permit has been issued for an event that limits operation of the transient merchant pursuant to section 78-69.01.
- (b) A transient merchant license shall be denied to any applicant who has operated a transient merchant business in material violation of any of the requirements of this article or any other chapter of this Code within the prior 180 days.
- (c) The city clerk or the city clerk's designee shall, upon satisfaction that the information provided in an application for a transient merchant license is true and correct, and that the requirements of this article for issuance of the license have been satisfied, and upon payment of the license fee and posting of the cash bond required by this article, issue the license.
- (d) The city clerk shall deny any application for the operation of a transient merchant business that does not conform with all applicable requirements of this article, the City Code, the Iowa Code and the Iowa Administrative Code.

**Sec. 78.70.01. Appeal of denial.**

- (a) In the event an application for a transient merchant license is denied, the city clerk or the city clerk's designee shall cause notice of such denial to be promptly communicated to the applicant or the applicant's representative by phone at the phone number provided in

the application. Written notice shall also be sent to the applicant at the business address identified in the application informing the applicant of the denial, the reasons therefore, and the applicant's right to appeal the denial to a hearing officer by giving written notice of appeal to the city clerk within 10 days after the written notice is mailed.

- (b) In the event the denial of a application is timely appealed, the city clerk or the city clerk's designee cause notice of the hearing to be served upon the licensee by personal service at least three business days prior to the date set for the hearing, or by regular mail addressed to the licensee at the licensee's business address as shown on the application a minimum of five days prior to the date set for the hearing. Such notice shall inform the licensee of the time, date and place of hearing. The time within which to file the appeal may be extended by the city clerk or the city clerk's designee for good cause shown.
- (c) If, after such hearing, the hearing officer makes a finding based on substantial evidence that the application and the proposed location and manner of operation of the business conforms to the requirements of this article and to all other applicable requirements of this Code, the hearing officer shall order the issuance of the license. Otherwise, the license shall be denied. The hearing officer may continue the hearing for good cause shown.
- (d) The applicant may appeal the decision of the hearing officer to the city council by filing a written notice of appeal with the city clerk within 10 days after the decision is entered of record. Failure to timely file such written notice of appeal shall constitute a waiver of the right to appeal the decision of the hearing officer. The notice of appeal shall state the grounds for such appeal and shall be delivered personally or by certified mail to the city clerk.
- (e) The hearing on an appeal to the city council shall be scheduled within 20 days of the receipt of notice of appeal. The hearing may be continued for good cause. After such hearing the city council may affirm or reverse the decision of the hearing officer. Such determination shall be contained in a written decision and shall be filed with the city clerk within three days after the hearing or any continued session thereof. The hearing shall be confined to the record made before the hearing officer, the arguments of the parties or their representatives, any additional evidence which was not available at the time of the hearing before the hearing officer, and any other information the city council deems necessary.

**Sec. 78-71. Transferability of license.**

Transient merchant licenses issued under this article shall not be transferable.

**Sec. 78-72. Renewal of license.**

Annual and thirty-day transient merchant licenses may be renewed for the same period so long as there have been no violations of this article, upon payment of the fee required by section 78-69 of this article and upon posting of the cash bond required by section 78-68 of this article. Three-day transient merchant licenses are not subject to renewal.

**Sec. 78-73. Suspension or revocation of license.**

- (a) Whenever the city clerk or the city clerk's designee finds that the licensee or the licensee's employees or agents has furnished any false information required under this

article or has violated or failed to comply with any of the requirements of this article or any other chapter of this Code, the city clerk or the city clerk's designee may give notice to the licensee of the city's intent to suspend or revoke the license. (b) Notice of the city's intent to suspend or revoke a license shall be served upon the licensee by personal service or by service upon a cashier for the business at a licensed premises, or by regular mail addressed to the licensee at the licensee's business address as shown on the application a minimum of five days prior to the date set for the hearing. Such notice shall inform the licensee of the time, date and place of a hearing before a hearing officer where the suspension or revocation shall be considered and shall set out briefly the reasons therefore.

- (c) If, after such hearing, the hearing officer makes a finding based on substantial evidence that a violation of this article or another chapter of this Code did in fact take place as alleged, the hearing officer may suspend or revoke the license or deny its renewal; the determination of whether to so suspend, revoke or deny such license shall be in the discretion of the hearing officer and shall be dependent upon the circumstances surrounding the violation and its severity. The hearing officer may continue the hearing for good cause shown.
- (d) The applicant may appeal the decision of the hearing officer to the city council by filing a written notice of appeal with the city clerk within 10 days after the decision is entered of record. Failure to timely file such written notice of appeal shall constitute a waiver of the right to appeal the decision of the hearing officer. The notice of appeal shall state the grounds for such appeal and shall be delivered personally or by certified mail to the city clerk.
- (e) The hearing on an appeal to the city council shall be scheduled within 20 days of the receipt of notice of appeal. The hearing may be continued for good cause. After such hearing the city council may affirm or reverse the decision of the hearing officer. Such determination shall be contained in a written decision and shall be filed with the city clerk within three days after the hearing or any continued session thereof. The hearing shall be confined to the record made before the hearing officer, the arguments of the parties or their representatives, any additional evidence which was not available at the time of the hearing before the hearing officer, and any other information the city council deems necessary.
- (f) A licensee whose license has been revoked shall not be eligible for another such license for a period of 180 days after such revocation.

**Sec. 78-74. Prohibited acts.**

- (a) No transient merchant shall sell to any person situated in a motor vehicle upon any public street, alley, driveway access, or public way.
- (b) No transient merchant shall have more than one sign. Such sign shall be located outside the required front yard setback area designated by chapter 134 of this Code. Such sign shall have a single face or two parallel faces, with each face not to exceed 24 square feet in area. Such sign shall be securely anchored so as to prevent its displacement by weather. Vehicle signs painted or attached directly to the body of the vehicle shall not be subject to this limitation.

- (c) No transient merchant shall conduct a transient sale with a display and sale area in excess of 1,000 square feet, but in no event shall any one dimension exceed 50 feet.
- (d) No transient merchant shall conduct a transient sale with a display height in excess of 15 feet.
- (e) No transient merchant shall display wares or products without anchoring or affixing such wares or products in such a manner so as to prevent their displacement by weather conditions.
- (f) No transient merchant shall conduct a transient sale within the setback area designated by chapter 134 of this Code. No transient merchant shall sell, display or store merchandise or equipment outside the boundaries of the area designated for the operation of such business in a license issued pursuant to this article.
- (g) No transient merchant shall conduct a transient sale without displaying the license required by this article and a valid sales tax permit for such business within the place of sale in a manner such that it is readily visible to all persons attending the sale.
- (h) No transient merchant shall operate the business in a manner that violates any applicable food and sanitation laws.
- (i) A transient merchant shall remove all equipment, temporary structures, temporary toilet facilities, garbage, and any vehicle or trailer used in the operation of the business from the licensed premises and the underlying parcel at least six hours out of every 24 hour period. No transient merchant shall permit any equipment, temporary structures, temporary toilet facilities, garbage, vehicle or trailer used in the operation of the business to remain on the licensed premises or the underlying parcel during the hours identified for the site to be vacant in a license issued pursuant to this article. However, the requirements of this subsection (i) shall not apply to the sale of raw fruits and vegetables, natural Christmas trees, live plants and nursery stock.
- (j) No private property owner shall allow, permit or authorize any person to conduct a transient sale without the license required by this article.
- (k) No private property owner or lessee shall allow, permit, or authorize the use of any property within the control of the private property owner or lessee in violation of any of the sections of this article.
- (l) No transient merchant shall operate the business in a manner that violates the Noise Control Ordinance of the City of Des Moines set forth in article IV of Chapter 42 of this Code.

Sec. 2. This ordinance shall be in full force and effect from and after the later of January 15, 2009, or its passage and publication as provided by law.

FORM APPROVED:

Roger K. Brown, Assistant City Attorney

Christine Hensley, Mayor ProTem

Attest:

I, Diane Rauh, City Clerk of the City of Des Moines, Iowa, hereby certify that the above and foregoing is a true copy of an ordinance (Roll Call No. 08-1977), passed by the City Council of said City at a meeting held November 10, 2008 signed by the Mayor ProTem on November 10, 2008 and published as provided by law in the Business Record on November 24, 2008. Authorized by Publication Order No. 6365.

Diane Rauh, City Clerk