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UNLISTED ACCESSORY USE DETERMINATION: OUTDOOR OFF-LEASH DOG ENCLOSURE ACCESSORY TO EATING PLACE

WATERING BOWL PROPOSAL FOR ACCESSORY OUTDOOR OFF-LEASH DOG ENCLOSURE

REQUEST FOR UNLISTED ACCESSORY USE DETERMINATION

On January 19, 2018, the Watering Bowl business owner, 5411 Leetsdale LLC, ("applicant") applied for a formal zoning determination whether its unpermitted operation of an outdoor off-leash dog enclosure could be permitted (and come into zoning compliance) as an "unlisted accessory use" under Former Chapter 59, Section 59-38(a)(10). The subject property is already permitted for a primary Eating Place use and accessory Outdoor Eating/Serving Area (patio).

SUBJECT PROPERTY & ZONE DISTRICT

The "subject property" at 5411 Leetsdale Drive is approximately one-half acre in size. One stand-alone building (approximately 6,075 square feet) is sited on the northeast quadrant of the property, in the rear one-half of the site. An outdoor patio, enclosed on all sides by fencing, is attached to the west side of the building, and measures approximately 4,600 square feet in area. A surface parking lot is located between the building and Leetsdale Drive, and provides adequate off-street parking for the subject property's use. Leetsdale Drive is the subject property's only abutting street; Leetsdale is a major arterial street and state highway (Colorado Highway 83), with a 2015 daily average traffic count of close to 40,000 vehicles at the Holly and Leetsdale intersection, located just east of the subject property. See aerial Map #1 below.

The subject property is zoned PUD #627, a Former Chapter 59 zone district approved by City Council in 2009. The property is owned by Priddy's Auction Galleries, Inc., and the sole commercial tenant in the building is the applicant, doing business as Watering Bowl. Community Planning and Development (CPD) approved a zoning permit on April 12, 2013, for the subject property and building allowing its use (of the entire space) for a primary "Eating Place" (restaurant and bar), with an accessory outdoor eating/serving patio. (Under PUD #627 and Former Chapter 59, an "Eating Place" use is defined as: "A retail establishment primarily engaged in the sale of prepared food and/or drinks within a completely enclosed structure." FC59, Sec. 59-2(100).)

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Map #1; Subject Property and Surrounding Land Uses

According to the applicant, the Watering Bowl business has been in continuous operation since November 2013, and – since its opening – has allowed its customers to have their dogs off-leash on the outdoor patio. The outdoor patio space is enclosed by fences, and provides seating and tables for customers, as well as space for off-leash dogs to roam and play. See photos below.

The use of the outdoor patio by off-leash dogs is not allowed under PUD #627 as accessory to a primary eating/drinking establishment land use. (PUD #627 references applicable Former Chapter 59 accessory use standards.) The Watering Bowl business has been cited for violating its applicable PUD restrictions by establishing the off-leash dog enclosure without a valid zoning permit. Accordingly, the applicant seeks this unlisted use determination as authorization for issuance of a zoning permit to continue its outdoor off-leash dog enclosure operation and activity.

OTHER APPLICABLE CITY LAWS

Under current Denver food safety and animal protection law, dogs must be kept on-leash on any outdoor patio where commercial food/drink service is occurring, and provided the subject business arranges for the appropriate state and local licenses. Denver law prohibits off-leash dogs on outdoor patios where commercial service of food and beverages is occurring. Other Denver laws and rules may apply but they were not considered for this determination.

D.R.M.C., Chapter 8, allows private off-leash dog enclosures (sometimes referred to as private dog parks) only when expressly authorized by the Denver Department of Public Health & Environment ("DDPHE") manager or by duly-adopted DDPHE rules and regulations. DDPHE has issued draft rules for the allowance of private outdoor off-leash dog enclosures; the draft rules are available for public review and comment, but as of the date of this determination, have not been adopted by DDPHE.

In response to the Watering Bowl's request for this unlisted use determination, the DDPHE manager (Robert McDonald) emailed the applicant's owner and Watering Bowl operator (Justin Henry) a letter on June 6, 2018, to authorize the outdoor off-leash dog enclosure under his D.R.M.C., Chapter 8 authority, provided that the applicant agree to several animal protection and public safety conditions specified in the letter. A copy of the DDPHE conditions letter dated June 6, 2018, is attached to this use determination as Exhibit A. As of the date of this determination, the applicant has not agreed to all of the conditions, and is not authorized by DDPHE to operate the outdoor off-leash dog enclosure.

APPLICABLE ZONING RULES & REVIEW CRITERIA

Under PUD #627, adopted by Denver City Council in 2009, accessory uses are expressly allowed "as regulated by the Denver Zoning Code." (PUD #627, p. 6.) Because City Council approved PUD #627 before the current Denver Zoning Code was adopted in 2010, I find that PUD #627, when it refers to the "Denver Zoning Code" is referring to Former Chapter 59, which was the only Denver zoning code in effect in 2009.

Former Chapter 59 ("FC59") regulates accessory uses in Sections 59-87 and 59-38(a)(10). FC59, Section 59-87, establishes general allowances and limitations for accessory uses, and then specifies accessory uses allowed in different categories of zone districts, distinguishing accessory uses allowed in "residential and business zone districts" from those allowed, for example, in mixed-use zone districts. *See* FC59, Sec. 59-87(a), (b), and (c).

PUD #627 does not state which FC59 zone district accessory use allowances apply, but, because the permitted primary uses in PUD #627 are limited to office, retail, restaurant/bar, and vehicle parking – all commercial and no residential uses – I find that the most applicable accessory use allowances in FC59

are those for the B-3 business zone district (Section 59-87(b)(2)b.) and the MS (Main Street) family of zone districts (Section 59-87(b)(2)c.).

Generally applicable conditions for all accessory uses allowed in FC59 residential and business zone districts, including the B-3 and MS zone districts, include the following conditions relevant to this use determination. Namely, an accessory use must:

1. "…be clearly incidental and customary to and commonly associated with the operation of the use by right."
2. "…be operated and maintained under the same ownership and on the same zone lot as the use by right…."
3. "…not include structures or structural features inconsistent with the use by right."
4. "…not include residential occupancy in a detached structure…."

FC59, Sec. 59-87(b)(1)a., -b., and -c.

FC59 provides for a variety of specific accessory uses allowed in the B-3 and MS zone districts, but an outdoor off-leash dog enclosure accessory to an Eating Place, is not specifically listed as allowed in Section 59-87. *See, for example*, FC59, Sec. 59-87(b)(2). In cases where Section 59-87 does not adequately cover whether a proposed accessory use is allowed or not, the Zoning Administrator is given express authority in FC59, Section 59-38(a)(10) to:

> "Determine and impose limitations on accessory uses and structures not covered in sections 59-87 and 59-88. In fulfilling this responsibility, the zoning administrator shall determine what uses are common and customary to a specific use by right and if the use is incidental to the specific use by right; and impose limitations which shall be uniform throughout the zoning district on specific accessory uses taking into consideration the intensity of the accessory use, numbers, the space required by the accessory use and the effect on adjacent property."

ANALYSIS

IS THE OUTDOOR OFF-LEASH DOG ENCLOSURE INCIDENTAL TO THE SUBJECT PROPERTY'S PRIMARY EATING PLACE USE?

The entire subject zone lot, according to Denver Assessor records, is 23,594 square feet in land area. The zone lot area occupied by the outdoor off-leash dog enclosure, which is coterminous with the Watering Bowl's permitted outdoor eating/serving area (patio), is an estimated 4,600 square feet, or about 20% of the total zone lot area. The indoor Eating Place use occupies approximately 6,075 square feet of floor area inside the only primary building on the zone lot. Accessory surface parking occupies an estimated 10,200 square feet of the zone lot, or about 43% of the total zone lot area.

While the Eating Place primary use operates daily year-round with few exceptions, the accessory outdoor off-leash dog enclosure operates only as weather permits. The outdoor off-leash dog enclosure operates only during hours the Eating Place is open, and only patrons of the Watering Bowl may use the outdoor off-leash dog enclosure. Dogs are not permitted off-leash inside the building.

In terms of its relative physical scale and the nature of its operation, as described above, I find that the proposed outdoor off-leash dog enclosure land use is incidental or secondary to the primary Eating Place use permitted on the subject property.

IS THE OUTDOOR OFF-LEASH DOG ENCLOSURE COMMON AND CUSTOMARY TO THE SUBJECT PROPERTY'S PRIMARY EATING PLACE USE?

An unlisted accessory use must be common and customary relative to the permitted primary use, in this case the primary Eating Place use. FC59, Sections 59-87(b)(1)a and 59-38(a)(10).

Denver law already allows dog-owners to bring their dogs onto outdoor patios accessory to restaurants and bars. This speaks to Denver's growing national reputation as a "dog-friendly" city.[1] Of course, those same laws require dogs on outdoor patios to be on-leash, presumably for three main reasons: (1) to prevent dogs from running away – primarily because most outdoor patios in Denver are not completely enclosed by fences or walls; (2) to prevent dogs from accessing human food and drink being served and consumed around them; and (3) to prevent dogs from interacting with each other unsupervised or unattended.

Over the past 4-5 years, the business model of allowing restaurant/bar patrons to bring their dogs and let them run off-leash in a protected, specifically designated outdoor enclosure is becoming more popular across the country and in Colorado. In an unscientific internet search, CPD staff confirmed at least 9 examples of bars or restaurants in Colorado and nationally with outdoor, enclosed off-leash dog play areas. Nationally, examples were found in: Asbury Park, NJ; Dallas, TX; Austin, TX; Atlanta, GA; Seattle, WA; and Charlotte, NC. Within Colorado and outside Denver city limits, similar businesses to the Watering Bowl are in Colorado Springs (Pub Dog Colorado), Lafayette (Romero's K9 Club), and Adams County (Ugly Dog Sports Café). Social media reviews and comments display a strong demand and appreciation from dog-owners for dog-friendly businesses like these.

See Exhibit B to this determination for a list of these 9 restaurant/bar businesses with outdoor off-leash dog enclosures, links to their websites, and information on their operations, including whether food and/or drink are allowed inside the off-leash dog enclosure.

Given recent trends in Denver, Colorado and nationally to create more "dog-friendly" businesses such as those researched above, where customers can both patronize the business and safely enjoy their dogs' company off-leash, I find that the Watering Bowl's outdoor off-leash dog enclosure use is common and customary to a primary Eating Place use on the subject property.

[1] Rover, the dog-loving community website based out of Seattle, Washington, released their Top 8 Most Dog Friendly Cities in America Right Now list and Denver came up on top (for 2016).

IS THE ACCESSORY USE OPERATED & MAINTAINED UNDER THE SAME OWNERSHIP & ON THE SAME ZONE LOT AS THE USE BY RIGHT?

All accessory uses allowed under FC59 to operate in a business zone district must be operated and maintained under the same ownership and on the same zone lot as the use by right. FC59, Section 59-87(b)(1)b.

In this case, the accessory outdoor off-leash dog enclosure is operated and maintained by Watering Bowl LLC, the same owner as the primary Eating Place use by right. The accessory outdoor off-leash dog enclosure is also located immediately adjacent to the primary use on the same zone lot.

DOES THE ACCESSORY USE INCLUDE STRUCTURES OR STRUCTURAL FEATURES INCONSISTENT WITH THE USE BY RIGHT?

Accessory uses allowed under FC59 to operate in a business zone district cannot include structures or structural features inconsistent with the primary use. FC59, Section 59-87(b)(1)c.

In this case, the accessory outdoor off-leash dog enclosure includes surrounding fences, constructed of either wood or metal, intended to enclose and secure the off-leash dog enclosure. The ground of the enclosure is covered with Astroturf-like material, and the enclosure area is furnished with temporary chairs, tables, and sun umbrellas.

The accessory outdoor off-leash dog enclosure includes structures and structural features that are similar or identical to those commonly found on an outdoor patio accessory to a restaurant or bar. In this case, there are no permanent or temporary structures or structural features inconsistent with the primary Eating Place use-by-right.

DOES THE ACCESSORY USE INCLUDE RESIDENTIAL OCCUPANCY IN A DETACHED STRUCTURE?

All accessory uses allowed under FC59 to operate in a business zone district cannot, with limited exceptions not applicable here, include residential occupancy in a detached structure. FC59, Section 59-87(b)(1)d.

In this case, the accessory outdoor off-leash dog enclosure does not include actual or proposed residential occupancy in a detached accessory structure.

WHAT EFFECT DOES THE ACCESSORY USE HAVE ON ADJACENT PROPERTY?

For accessory uses not specifically covered under FC59, Section 59-87, the Zoning Administrator must determine not only whether the use is common and customary to the specific primary use and ensure that the accessory use satisfies generally applicable conditions (see discussion above), but also what uniform limitations should be imposed on such use in the subject zone district, considering, among other things, the effect of such accessory use on adjacent property. FC59, Section 59-38(a)(10).

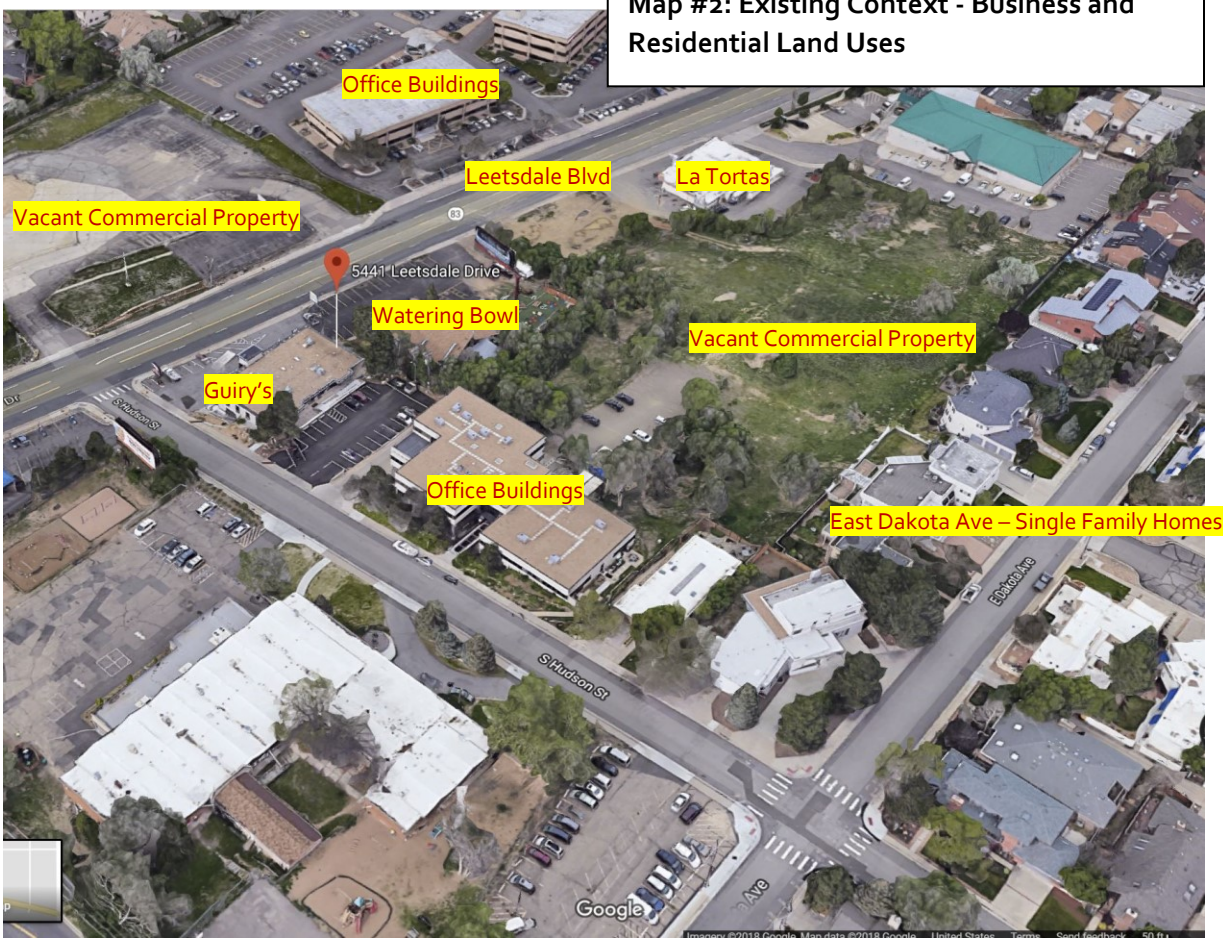
In the specific case of the Watering Bowl, the primary business and accessory outdoor off-leash dog enclosure are sited within a unique geography that mitigates, to a substantial extent, potential adverse

impacts on neighboring commercial and residential properties. The fully-fenced accessory outdoor off-leash dog enclosure abuts the west side of the primary building, and sits far back from Leetsdale Drive and the public sidewalk abutting the street. Further, there is a surface parking lot between the primary building and street so that there is little to no opportunity for dogs at the business to see or interact with dogs or humans passing by.

The subject property at 5441 Leetsdale Drive slopes significantly upward from the right-of-way edge to the rear of the zone lot and parcel – about a 13-feet difference in elevation. Most of that rear sloped area is filled with mature trees. Moreover, there is substantial vacant land (comprised of two separate assessor parcels) located between the subject property and the closest residential properties atop East Dakota Avenue to the north. The closest residential homes are located approximately 300 feet away from the outdoor off-leash dog enclosure and are nearly 35 feet higher in elevation.

There is also a large parcel of vacant land between the Watering Bowl's outdoor off-leash dog enclosure and the nearest commercial business (Las Tortas Restaurant) to the west. To the east, because the outdoor off-leash dog enclosure is also adjacent to the primary building's west side, the primary building provides a buffer between the dog yard and the nearest commercial business located on Leetsdale Drive to the east – Guiry's Color Source (a retail paint/home decorating store). See aerial image below.

Map #2: Existing Context - Business and Residential Land Uses



Leetsdale Drive, a 5-lane state highway at this location, separates the subject property from commercial and residential properties to the south, creating a substantial manmade buffer from potential external impacts, such as noise or odor, related to operation of the Watering Bowl's outdoor off-leash dog enclosure.

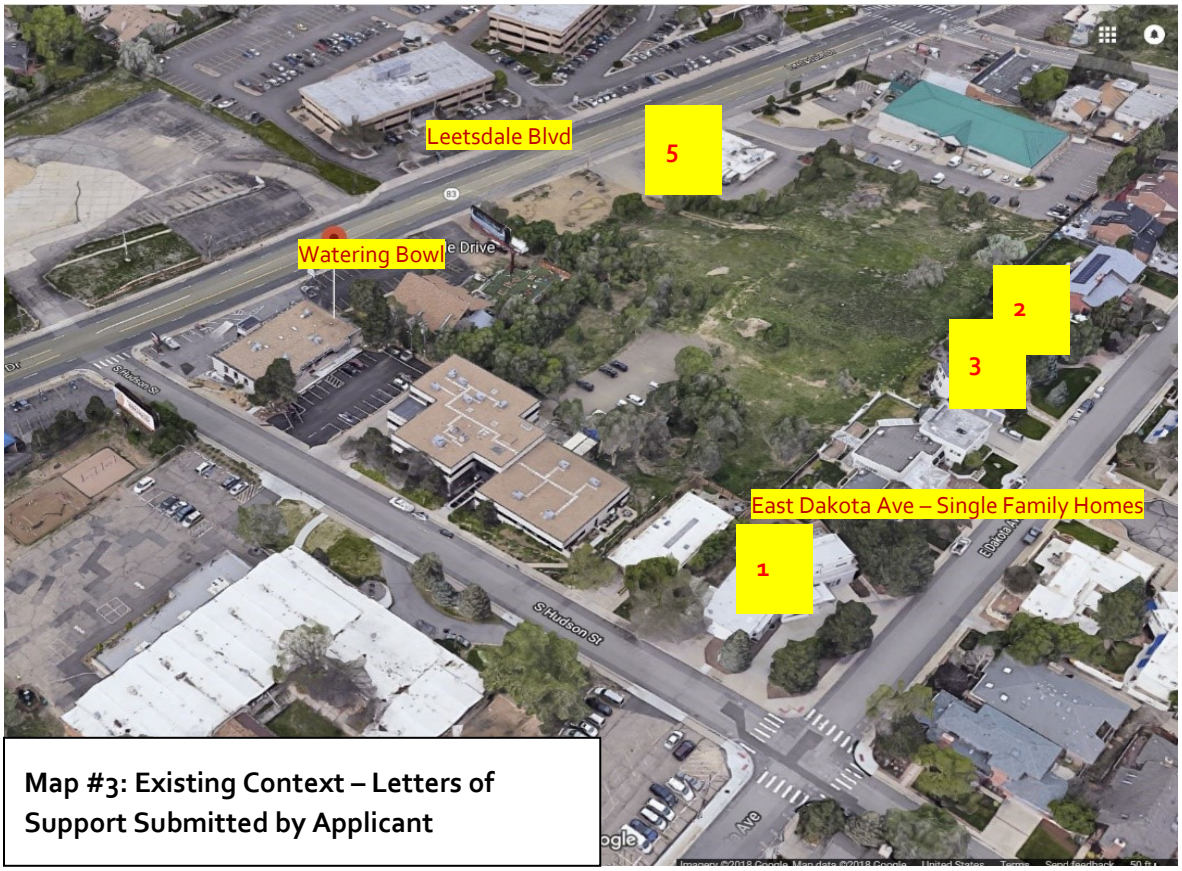
Watering Bowl, as part of its application for this determination, submitted a noise pollution survey, which reported no measurable degree of noise from barking dogs in the ambient noise environment that already exists on the subject property, primarily due to substantial background traffic noise from Leetsdale Drive. See Exhibit C to this determination.

During its past several years of operation without required city approvals, the Watering Bowl has been the subject of only 1 neighbor complaint regarding noise from the outdoor off-leash dog enclosure (a call into Denver's 3-1-1). Further, according to DDPHE records for 2016 reviewed by the Watering Bowl, of the 1,255 barking dog complaints and 697 dog bite/malicious/aggressive dog complaints received by DDPHE's animal protection inspections unit in 2016, none were for the Watering Bowl and its outdoor off-leash dog enclosure. The Watering Bowl also submitted evidence from their commercial liability insurance carrier showing no bodily injury or other types of liability claims against their policy between June 9, 2016 and October 24, 2017 (the latter was the date of the requested claim report).

The Watering Bowl also submitted letters of support for this determination from the following 5 properties, several of which are closely located to the subject property, and all of which assert no adverse impacts from operation of the Watering Bowl's outdoor off-leash dog enclosure:

1. 5430 E. Dakota Ave – Residence
2. 5300 E. Dakota Ave – Residence
3. 5320 E. Dakota Ave – Residence
4. 5237 E. Dakota Ave – Residence (not shown in image below)
5. 5307 Leetsdale Drive – Business

See aerial image below of properties submitting letters of support (numbered 1-5 as listed above), and Exhibit D for copies of those letters.



Map #3: Existing Context – Letters of Support Submitted by Applicant

Accordingly, under current conditions related to surrounding land uses, existing traffic/noise from Leetsdale Drive, and the existing unique site topography, the Watering Bowl's outdoor off-leash dog enclosure is substantially buffered from neighboring residential properties and commercial businesses, resulting in complete or substantial mitigation from the use's potential adverse impacts such as noise, glare, or odor.

CONCLUSION AND REASONABLE LIMITATIONS

Based on the evidence provided by the applicant in its application for determination of an unlisted accessory use and on the analysis above, I find that that an outdoor off-leash dog enclosure may be allowed at the subject property as an accessory use that is incidental, common and customary to the primary Eating Place use. As authorized by Former Chapter 59, Section 59-38(a)(10), the Zoning Administrator may attach reasonable limitations to the allowance of an unlisted accessory use, which must be uniform throughout the subject zone district to any other instances of this unlisted accessory use.

Accordingly, the following general limitations shall apply to the allowance for an accessory outdoor off-leash dog enclosure in PUD #627:

1. The subject unlisted accessory use shall be called an "outdoor off-leash dog enclosure" and is allowed, subject to these limitations, only in the PUD #627 Zone District as accessory to a primary Eating Place use.
2. A zoning permit shall be required to establish or expand an accessory "outdoor off-leash dog enclosure."
3. The accessory outdoor off-leash dog enclosure shall be setback a minimum of 20 feet from any zone lot line abutting a public named or numbered street.
4. The perimeter of the entire land area used for the accessory outdoor off-leash dog enclosure shall be enclosed by a fence or wall that is a minimum of 4 feet in height.
5. Dogs shall be allowed into the accessory outdoor off-leash dog enclosure only during the operating hours of the primary Eating Place use. Only dogs of customers of the Eating Place use shall be allowed to use the accessory outdoor off-leash dog enclosure; it shall not be open for use by the general public.
6. In addition to the general enforcement authority granted to Community Planning and Development ("CPD") to address a violation of Former Chapter 59, CPD shall have the authority to enforce if the permittee for an accessory outdoor off-leash dog enclosure violates any provision of DRMC, Chapter 8 (Animals), including any rules or regulations applicable to the subject property promulgated thereunder.
7. (*Amended August 27, 2018*) Watering Bowl shall obtain all required permits, including but not limited to zoning permits, and shall comply with all applicable City ordinances, rules, and regulations.

Approved by:

_____

Tina Axelrad, Zoning Administrator

Date: June 19, 2018 (amended August 27, 2018)

Attached Exhibits:

Exhibit A: Conditions Letter from Robert McDonald, DDPHE Executive Director, to Mr. Justin Henry, dated June 6, 2018

Exhibit B: List of Colorado and Other National Restaurant/Bar Businesses with Outdoor Off-Leash Dog Enclosures

Exhibit C: Applicant-Submitted Noise Pollution Study for 5411 Leetsdale Drive

Exhibit D: Applicant-Submitted Letters of Support from Near-By Properties

Exhibit A:
Conditions Letter from Robert McDonald, DDPHE Executive Director, to Mr. Justin Henry, Dated June 6, 2018

Exhibit B:

List of Colorado and Other National Restaurant/Bar Businesses with Outdoor Off-Leash Dog Enclosures

Exhibit C:

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