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THE MILE HIGH CITY

Development Services

201 West Colfax Ave., Suite 203
Denver, CO 80202
p: 720.865.2982

www.denvergov.org/developmentservices

Accessory Use Determination: Dog Play Yard Accessory to Primary Use--- Eating and Drinking Establishment.

Date of decision: October 16th 2014 (Revised 6/10/2020)

Mike O'Flaherty, Zoning Administrator

Background:

38th Avenue Properties, LLC (the “Applicant”) owns the parcels located at 4120 and 4132 West 38th Avenue, Denver, Colorado (the “Property”). The Applicant operates an Eating/Drinking Establishment with an accessory Outdoor Eating and Serving Area on the Property called “The Bark Bar”. The Bark Bar also includes an unpermitted outdoor dog play yard contained within a fence where patrons are allowed to let their dogs play. The Applicant was issued an Order to Cease & Desist (“C & D”) operation of this unpermitted accessory use on April 25th 2014. The Applicant appealed the C & D to the Denver Zoning Board of Adjustment and was granted additional time (6 months) to comply with the C & D.

Because an outdoor dog play yard (a “Dog Play Yard” or “DPY”) is not currently listed in the Denver Zoning Code (“DZC”) as an allowable Accessory Use to an Eating/Drinking Establishment, the Applicant submitted an Application for Determination of Unlisted Accessory Use to allow a DPY and an allowance for patrons to consume beverages (including alcohol) in a DPY in the U-MS-3 zone district (the “Application”). The Application was accepted for review per DZC section 12.4.6 on August 12, 2014. Given the novelty and complexity of this proposed unlisted accessory use determination, the Applicant agreed in its Application to extend the time within which the Zoning Administrator would make this determination from 30 days to a reasonable amount of additional time as is necessary to make the requested determination.

Summary of Analysis:

The Zoning Administrator’s analysis and decision on the Application are made pursuant to DZC section 12.4.6 which establishes a procedure whereby the Zoning Administrator may determine whether an unlisted accessory use may be allowed in one or more zone districts. Per this section, the Zoning Administrator’s decision on the Application is limited to a determination of whether Dog Play Yards are an allowable Accessory Use to Eating/Drinking Establishments located in the U-MS-3 zone district based on the Review Criteria set forth in DZC section 12.4.6.4. This decision necessarily precedes the question of whether the unpermitted DPY currently operated at The Bark Bar is appropriate. Were the Zoning Administrator to determine that a DPY is an allowable Accessory Use to an Eating/Drinking

Establishment, the Zoning Administrator would then determine the zoning procedure required to legally establish such use (i.e., zoning permit, zoning permit with limitations, zoning permit with informational notice, or zoning permit with special exception review) and the Applicant would be required to comply with such procedure. However, for the reasons stated herein, the Zoning Administrator finds that he cannot clearly determine that a Dog Play Yard is an allowable Accessory Use in the U-MS-3 zone district; as such, a Dog Play Yard may be allowed as an Accessory Use to an Eating/Drinking Establishment in the U-MS-3 zone district only by a City Council-approved text amendment to the DZC. *See DZC section 12.4.6.1.B.*

In reaching this decision, the Zoning Administrator evaluated a DPY's characteristics and impacts against the characteristics and impacts of other unenclosed/outdoor accessory uses that are allowed in the U-MS-3 zone district, including outdoor eating and serving areas, outdoor entertainment, outdoor retail sale and display, outdoor storage, drive-thrus, keeping of animals, and outdoor kennel and exercise runs. This analysis included comparing the physical characteristics (e.g., size/area of accessory uses in relation to primary uses, enclosure and screening requirements, separation between primary and accessory uses, separation between accessory uses and surrounding uses and protected districts, locational and surface requirements of accessory uses, etc.), operational characteristics (e.g., hours of operation, interrelation with primary use, number of allowable animals, etc.) and external impacts of a DPY with the physical and operational characteristics and external impacts of permitted accessory uses in the U-MS-3 zone district.

Where the character and impacts of a DPY appeared similar in nature with other accessory uses allowed in the U-MS-3 zone district, the Zoning Administrator considered whether the magnitude, extent, and duration of impacts were also comparable. The Zoning Administrator then considered whether mitigation techniques used for other uses and mitigation techniques proposed by Applicant would adequately mitigate impacts of a DPY.

To inform this analysis, the Zoning Administrator consulted with the Manager of CPD, the City Attorney's Office, and other agencies and staff, including the Directors of Public Health Inspections, Animal Control, and Excise and Licenses.

Findings:

1. A Dog Play Yard is not clearly incidental, subordinate, customary to, and commonly associated with operation of an Eating/Drinking Establishment. (DZC § 11.7.1.1)

DZC section 11.7.1.1 states accessory uses shall be clearly incidental, subordinate, customary to and commonly associated with the operation of the primary use. The Zoning Administrator disagrees with the Applicant's assertion that the growth of outdoor eating areas and retail establishments in Denver that allow *leashed* dogs and revisions to the City's Food Establishment and Serving Rules and Regulations, section 8-106, adopted May 8, 2014, to permit dog owners to bring dogs into outdoor serving areas only when certain conditions are met demonstrate that a DPY is customary and commonly associated with Eating/Drinking Establishments. The nature of an outdoor eating area that allows leashed dogs at tables with their owners is different in kind than a DPY, and the increased popularity and acceptance of the former does not support a finding that a DPY is customary and commonly associated with an Eating/Drinking Establishment. In the former scenario, the number of dogs is limited by nature to the

number of tables in an outdoor area; dogs remain leashed and under the immediate control of owners, and dogs are not freely interacting with other dogs and other patrons. In the DPY scenario proposed by the Applicant, the number of dogs is limited to the total square footage of the yard divided by 80 with no upper limit, dogs are unleashed and presumably at times separated by gate from their owners¹, and dogs freely interact with other dogs and other patrons and staff in the DPY. Moreover, the City's Food Establishment and Serving Rules and Regulations do not currently allow private off-leash dog yards.

2. Zoning Administrator approval of a DPY accessory to an Eating/Drinking Establishment is not consistent with the intent of the DZC. (DZC § 12.4.6.4.A.1)

The DZC is intended to balance conservation and development by, among other things, providing for compatible transitions of use between existing and new development and providing clear and consistent procedures for appropriate and effective public involvement for land use and development decisions. *See* DZC sections 1.1.2.C & F. It is important to note that most U-MS-3 zone districts in Denver are mapped on commercial corridors such as Colfax Avenue, Federal Boulevard, and Broadway. These commercial districts are typically one lot in depth and typically abut lower intensity residential zoned land. Were the Zoning Administrator to find that DPYs are an allowable accessory use to Eating/Drinking Establishments per DZC section 12.4.6, such a decision would pave the way for DPYs to open within U-MS-3 zone districts abutting residential zoned land throughout the City. The Zoning Administrator finds that a broader public conversation is required to determine whether a DPY provides a compatible transition of use with residential development and finds that the administrative review process set forth in DZC section 12.4.6 does not, in this case, provide appropriate and effective public involvement for the Zoning Administrator to clearly determine that a DPY is an appropriate accessory use to an Eating/Drinking Establishment in the U-MS-3 zone district. A City Council approved text amendment preceded by an inclusive public process is appropriate in this case and would allow for more in-depth community input regarding protection of adjacent residential uses and acceptable measures to mitigate potential impacts, particularly noise impacts.

3. A Dog Play Yard accessory to an Eating/Drinking Establishment is not consistent with the intent of U-MS-3 Zone District (DZC § 12.4.6.4.A.2)

Per DZC section 5.2.5.1.C, the intent of the U-MS-3 zone district is to ensure new development contributes positively to established residential neighborhoods and character and improves the transition between commercial development and adjacent residential neighborhoods. It is reasonable to conclude that a DPY would negatively impact adjacent residential neighborhoods and worsen the transition between commercial development and adjacent residential neighborhoods. The Application suggests a separation of 20 feet² from an unenclosed DPY to a residential structure or any zone lot in an SU, TU, or RH zone district. While 20 feet may be an adequate measure for an accessory kennel or dog run in which case no more than 3 dogs would be present, this distance likely falls well short of mitigating the noise impacts of barking dogs (and patrons' and staff's efforts to verbally control dogs) in the numbers proposed by the Application (square footage of the yard divided by 80 with no upper limit). It is not

¹ The DPY is separated by gate from the outdoor eating and drinking area (the "patio"). Under the Applicant's proposal food may only be served and consumed in the patio and enclosed eating and drinking area; as such, there presumably will be times when dogs' owners may be able to see their dogs but may not be able to quickly reach them.

² The City assumes the Bark Bar's DPY is more than 20 feet from the adjacent residential district, yet the City has received complaints about barking dogs and people yelling within the yard.

feasible in the context of an administrative review for the Zoning Administrator to gather the data and information necessary to analyze and determine what distance, if any, would adequately transition the proposed accessory use and adjacent residential neighborhoods. To this point it bears mentioning again that most U-MS-3 zone districts are one lot in depth and typically abut lower intensity residential zoned land. Given the U-MS-3 zone district's common adjacency to residential zoned land and the need for separation between DPYs and residential uses to mitigate impacts on the latter, the Zoning Administrator finds that he cannot clearly determine administratively that a DPY is an allowable accessory use to an Eating/Drinking Establishment in the U-MS-3 zone district.

4. The impacts of a Dog Play Yard are of a greater magnitude and extent than other unenclosed accessory uses allowed in the U-MS-3 Zone District. (DZC § 12.4.6.4.B.1)

As explained in the Summary of Analysis above, the Zoning Administrator evaluated a DPY's characteristics and external impacts against characteristics and external impacts of other unenclosed/outdoor accessory uses that are allowed in the U-MS-3 zone district.

A DPY is found to have physical characteristics similar to other accessory uses and the Zoning Administrator finds that a DPY could reasonably be limited in size, enclosure, and surface requirements in a manner similar to other accessory uses. However, as explained under criterion 3 above, the Zoning Administrator finds that greater separation between a DPY and residential uses likely is required than the 20 feet proposed by the Applicant. The Zoning Administrator also finds that the operational characteristics and external impacts of a DPY are significantly different when compared to other accessory uses, particularly with respect to the noise impacts of barking dogs and of patrons' and staff's verbal efforts to control dogs. It is the finding of the Zoning Administrator that the proposed Dog Play Yard accessory use would create noise impacts of a greater magnitude, duration and frequency than comparable accessory uses to a degree that cannot be reasonably limited by Zoning Administration nor controlled by Zoning Administration inspections staff upon receipt of complaints.

In addition, the separation of a DPY from the eating and drinking use presents unique challenges not present with other accessory uses. When disturbances occur—such as, excessive barking, dog to dog altercations, dog to patron altercations, and dog to staff altercations—a dog owner might be some distance away from his or her unleashed dog and might not even be physically in the dog yard but, rather, in the enclosed or unenclosed eating and drinking area thereby causing a delay in response from the owner.

The Zoning Administrator finds that imposing limitations on the proposed use (as the Zoning Administrator is authorized to do under DZC section 12.4.6) on such things as hours of operation, number of dogs, manner of controlling of dogs, separation requirements, screening requirements, etc., at least without greater community input, may not sufficiently address the noise impacts of a DPY. Because the Zoning Administrator finds that these typical mitigation techniques may not adequately address the noise impacts of a DPY on adjacent uses, the Zoning Administrator cannot clearly conclude that a DPY is an allowable accessory use to an Eating/Drinking Establishment in the U-MS-3 zone district.

5. Beverage allowance

Applicant has requested approval to include an allowance for drinks to be served within the area of the Dog Play Yard. This request has not been considered at this time because the findings of this review do not support approval of the DPY as an accessory use to an Eating and Drinking Establishment.

6. Conclusion

Under DZC section 12.4.6, the Zoning Administrator concludes that an outdoor Dog Play Yard cannot be administratively determined to be an allowed use accessory to an Eating and Drinking Establishment for all the reasons stated herein. Per DZC section 12.4.8, this decision may be appealed to the Board of Adjustment within 15 days from the decision date stated on this letter. Additionally, the Applicant may pursue a legislative path to a DZC text amendment to afford an inclusive community dialogue about the appropriateness of this use.