



FORMER CHAPTER 59 (FC59) UNLISTED ACCESSORY USE DETERMINATION: OFF-LEASH PLAY AREA ACCESSORY TO EATING PLACE

PROPOSAL

The owner of the bar and restaurant Skiptown, located at 3833 and 3839 Steele Street, has requested an unlisted use determination to clarify the rules for establishing an accessory use in the I-1 zone district under Former Chapter 59. This unlisted accessory use determination is meant to clarify the activity of an Off-Leash Play Area as accessory to an Eating Place primary use. This determination is intended to clarify where this accessory use may be permitted in the City and County of Denver and to establish limitations on the use to control for external effects on neighboring properties.

BACKGROUND

Since 2014, the Zoning Administrator has received four requests for unlisted use determinations for uses that resembled the proposed Off-Leash Play Areas accessory use. Three of the previous proposals have been approved through Zoning Administrator use determinations. Two of those determinations were narrowly focused on individual sites because they had custom zoning through a Planned Unit Development (PUD) and because there was not a clear indication that a broader application was necessary or appropriate at the time. In September 2023, the Zoning Administrator published an unlisted use determination for the same type of use, which was applicable to a broad set of Denver Zoning Code zone districts but none that retain the Former Chapter 59 zoning designation. This determination applies to the Former Chapter 59 Main Street zone districts (MS-1, MS-2, and MS-3); the Mixed Use zone districts (R-MU-20, R-MU-30, C-MU-10, C-MU-20, C-MU-30, and T-MU-30); several business zone districts (B-3, B-4, B-A-3, and B-A-4); and all Industrial zone districts (I-0, I-1, and I-2).

WHAT IS AN OFF-LEASH PLAY AREA?

An Off-Leash Play Area as an accessory use to an eating place primary use is a dedicated space for dogs that is fenced off and physically separate from the primary use, and may be located within an enclosed structure or may be unenclosed. It is very common in Denver and around the country for eating and drinking establishments to allow dogs on patios; the proposed accessory use expands on this activity by designating an area where dogs can have more freedom to run and play while their owners eat and drink. There are more than 90 such establishments with play areas in the United States with at least three located in Colorado. Many restaurants in Denver have pet-friendly patios where dogs can accompany their owners while leashed; the proposed use is distinct in that it reserves an area of the site strictly for dogs to run and play unleashed. The Off-Leash Play Area would be subject to the restrictions outlined at the end of this document to mitigate concerns about an overconcentration of dogs and noise, and to ensure the safety of dogs and patrons.

ADDITIONAL NECESSARY REVIEW

The Denver Department of Public Health and Environment (DDPHE) is tasked with protecting animal welfare, as well as food safety for humans. The applicant at the site located at 3833 and 3839 Steele Street obtained approval from DDPHE for the outdoor Off-Leash Play Area before submitting for zoning permit review, and future applicants would be required to do so, as well.

All proposals for the Off-Leash Play Area accessory use will be required to obtain a Zoning Permit subject to authorization of an outdoor eating area exception by the Board of Adjustment prior to establishment of this accessory use, according to the findings stated in FC59 Sec. 59-54(3)(u)(1)(i)(ii). This procedure involves a public hearing and requires the Board of Adjustment make findings that affirm that the use is compatible with neighboring properties. Importantly, item (ii) requires that the Board find, "The application contains provisions which ensure that the exception will not substantially or permanently injure the appropriate use of neighboring conforming properties."

APPLICABLE RULES

DENVER ZONING CODE

The unlisted use determination for off-leash play areas, issued on September 5, 2023, discussed how the use meets the criteria under Denver Zoning Code Sec. 12.4.6. Therefore, this determination will not apply to properties with a Denver Zoning Code zoning designation.

FORMER CHAPTER 59

When the Denver Zoning Code was adopted in 2010, a legislative rezoning brought much of the city into its purview. However, properties with waivers and/or conditions, properties in Planned Unit Developments (PUDs) based on FC59 standards, and other properties with approved planned developments, planned building groups, or other specific development plans remained under FC59. Today, roughly 20 percent of the city retains a zoning designation under FC59.

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)).

Generally applicable conditions for all accessory uses allowed in FC59 residential and business zone districts, including the main street and industrial 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.

In addition, the provision for Industrial accessory uses will also apply in those districts and is addressed below:

In industrial zone districts accessory uses operated partially or entirely within the structure containing the use by right or use by special review, the gross floor area within such structure utilized by accessory uses (except garages, loading docks, and company dining rooms) shall not be greater than twenty (20) percent of the gross floor area of the structure containing the use by right or use by special review.

Under Former Chapter 59, Sec. 59-38, the Department of Zoning Administration has the authority 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

ARE OFF-LEASH PLAY AREAS INCIDENTAL TO THE PRIMARY EATING PLACE USE?

An unlisted accessory use must be “incidental” relative to a permitted use-by-right (FC59 Sec. 59-38).¹ The Off-Leash Play Area is characterized by an enclosure on the same zone lot as a primary eating place use. Although the footprint of the enclosure may result in a large portion of the zone lot being used for the accessory use, the driving factor for visits to the site will remain the eating place primary use. The business model is built on the relationship between the eating place and the Off-Leash Play Area.

Additionally, the limitations proposed on such uses in the conditions section at the end of this document will ensure that such Off-Leash Play Areas will remain incidental in nature to the eating place primary use. Therefore, when an establishment operates within the proposed limitations, the Zoning Administrator finds that it will be incidental or secondary to this nonresidential primary use.

ARE ACCESSORY OFF-LEASH PLAY AREAS COMMON AND CUSTOMARY TO THE PRIMARY EATING PLACE USE?

An unlisted accessory use must be “common and customary” relative to a permitted use by-right. In the case of the proposed unlisted use, the primary use by-right is an eating place. Based on the frequency of the request for this type of accessory use, and the growing popularity of the same type of use around the country and within Colorado, the Zoning Administrator finds that it is common and customary for an Off-Leash Play Area for dogs to be accessory to a primary nonresidential use, particularly those that would be defined as an Eating Place under Former Chapter 59. There are over 90 similar uses throughout the country with three of those located within Colorado. On August 16, 2023, the *Denver Post* highlighted nine dog-friendly bars and restaurants operating in the Colorado; two of those included off-leash dog play areas in Littleton and Lafayette much like the one proposed by Skiptown.²

The zone districts where this use will be permitted are likely to contain or be near existing multi-family buildings, where pet owners may need outdoor space to take their dogs. There are gaps in available dog parks, according to the Department of Parks and Recreation, particularly in the west and southwest areas of the city. The proposed site is in the northern area of the city in the Clayton neighborhood, which is not officially designated as an area with a ‘service gap’ in the realm of dog parks. However, this determination would permit this accessory use in more areas of the city, thereby potentially allowing more neighborhood-serving, pet-friendly uses in proximity to where people live.

The proposed Off-Leash Play Area is both indoors and outdoors. While the indoor component of the proposed use diverges from the typical outdoor-only patio configuration for a dog play area associated with an eating place, this configuration will both contain many of the potential impacts as well as share

¹ The Cambridge Dictionary defines incidental (adj.) as: “less important than the thing something is connected with or part of.” <https://dictionary.cambridge.org/us/dictionary/english/incidental>.

² “Dog dog-friendly spots in metro Denver that will keep your pup’s tail wagging.” *Denver Post*. August 16, 2023. <https://www.denverpost.com/2023/08/16/dog-friendly-bars-and-restaurants-patios-denver-colorado/>.

many more similarities with the other outdoor configurations operating throughout Colorado. Based on the common and customary practice of bringing dogs to restaurants and to other public places, together with the proposed limitations described at the end of this document, the Zoning Administrator finds that the Off-Leash Play Area accessory use can be considered common and customary to the primary eating place use in the zone districts proposed to allow this accessory use.

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 proposed Off-Leash Play Area is located on the same zone lot as the primary eating place use and is operated by the same ownership entity. In fact, the limitations included in this determination require that any accessory Off-Leash Play Areas in any permitted zone district be located on the same zone lot as the primary use.

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, Sec. 59-87(b)(1)c.). In this case, the accessory outdoor off-leash play area includes surrounding fences. The accessory Off-Leash Play Area includes structures that are similar or identical to those commonly found on an outdoor patio accessory to a restaurant or bar, such as fencing and seating. In this case, there are no permanent or temporary structures or structural features inconsistent with the primary Eating Place use-by-right.

SUCH USE DOES NOT INCLUDE RESIDENTIAL OCCUPANCY EXCEPT BY PERSONS EMPLOYED ON THE PREMISES AND THE IMMEDIATE FAMILIES OF SUCH EMPLOYEES.

The accessory use does not include residential occupancy.

IN INDUSTRIAL ZONE DISTRICTS ACCESSORY USES OPERATED PARTIALLY OR ENTIRELY WITHIN THE STRUCTURE CONTAINING THE USE BY RIGHT OR USE BY SPECIAL REVIEW, THE GROSS FLOOR AREA WITHIN SUCH STRUCTURE UTILIZED BY ACCESSORY USES (EXCEPT GARAGES, LOADING DOCKS, AND COMPANY DINING ROOMS) SHALL NOT BE GREATER THAN TWENTY (20) PERCENT OF THE GROSS FLOOR AREA OF THE STRUCTURE CONTAINING THE USE BY RIGHT OR USE BY SPECIAL REVIEW.

The proposed Off-Leash Play Areas within the I-1 zone district will make up approximately 3,171 square feet of area within the 25,389 square-foot structure containing the use (or 12.4 percent). Therefore, the proposed accessory use would not exceed the 20 percent threshold of this provision. This limitation is included in the requirements at the end of this document and would be applied to future proposals for this accessory use under Former Chapter 59.

ZONING ADMINISTRATOR SHALL 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 EFFECT ON ADJACENT PROPERTY

The Off-Leash Play Area as an accessory use will be subject to use limitations that restrict where it can be located in relation to protected districts, the number of dogs relative to the size of the Off-Leash Play Area, and require a special review by the Board of Adjustment prior to establishing the accessory use. These limitations will be uniformly applied within and across the zone districts where it is permitted.

By providing consistent standards, this unlisted use determination imposes limitations on the unlisted use that will promote more favorable interactions within the neighborhood by being sensitive to the impacts on different types of residences. This unlisted use may offer a benefit to pet owners in neighborhoods with more multi-unit housing options; the location requirements would prevent this use from being located adjacent to lower density residential zone districts.

The locations where this accessory use would be permitted under this determination are shown on the map on the following page. Areas excluded due to their proximity to protected districts are shaded in black:

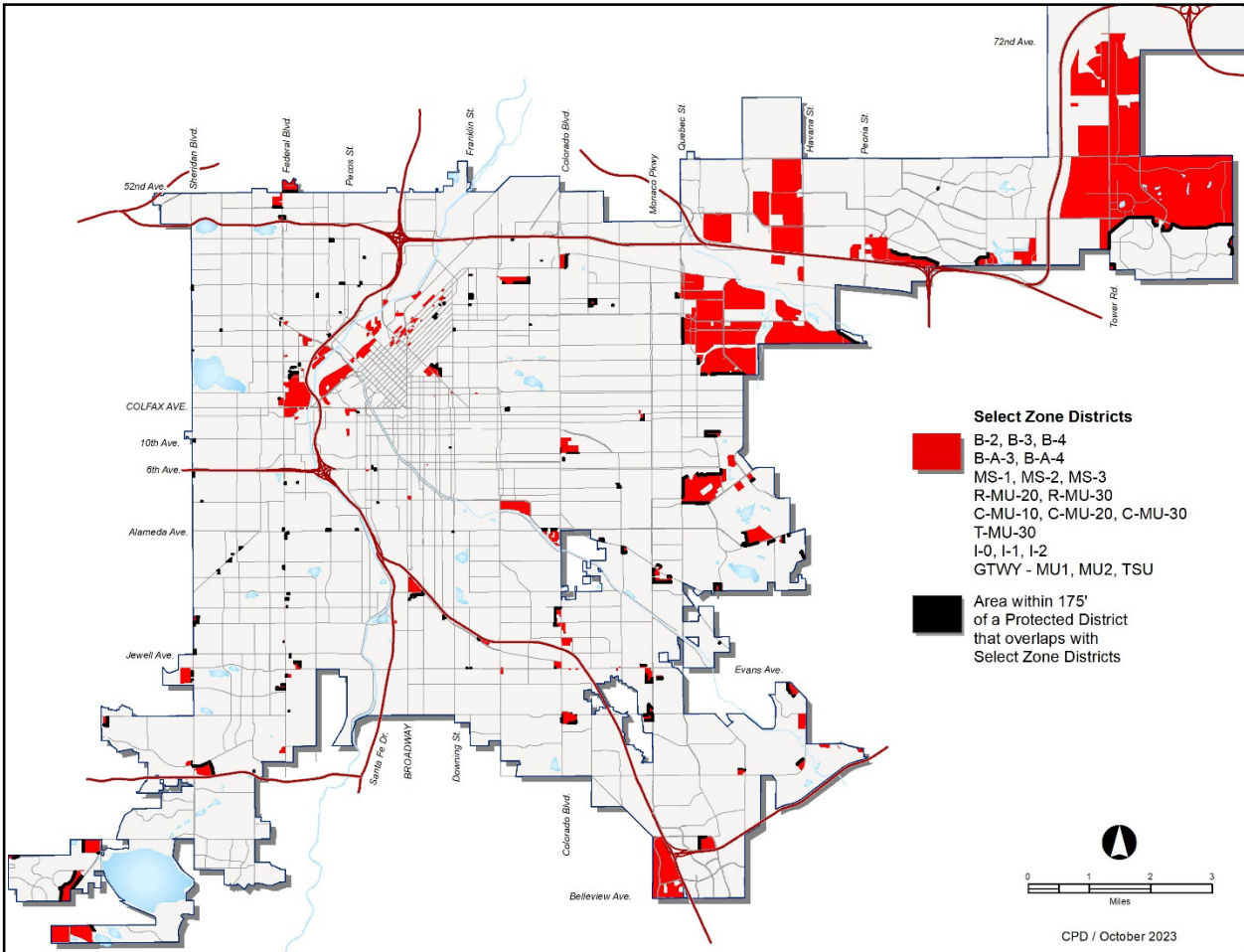


Figure 1: Map of Allowed Zone Districts

CONCLUSION AND REASONABLE CONDITIONS

Based on the analysis above, I find that that an Off-Leash Play Area is allowed as an accessory use that is incidental, common, and customary to primary eating and drinking establishment uses:

1. **Name of Unlisted Accessory Use:** Off-Leash Play Area
2. **Definition of Unlisted Accessory Use:** An enclosure that is dedicated as space for domesticated dog breeds to be off-leash together with their owners, who maintain control of and responsibility for their dogs within the dedicated space. The dedicated off-leash play area may be located indoors or outdoors and is permitted only in conjunction with a primary eating and drinking establishment use.

Accordingly, the following **Conditions** shall attach to the allowance for an accessory Off-Leash Play Area:

Off-Leash Play Area – Accessory to a Primary Eating Place

1. **Where Allowed:** Use is permitted as accessory to a permitted primary eating place use and where the following requirements can be met.
 - a. **Use shall only be allowed in the following zone districts, as established in Former Chapter 59:**
 - MS-1
 - MS-2
 - MS-3
 - R-MU-20
 - R-MU-30
 - C-MU-10
 - C-MU-20
 - C-MU-30
 - T-MU-30
 - B-2
 - B-3
 - B-4
 - B-A-2
 - B-A-3
 - B-A-4
 - I-0
 - I-1
 - I-2
 - Gateway (MU₁, MU₂, TCU & TSU)
 - b. Use may not be located adjacent to a "Protected Zone District," as that term is defined in the Denver Zoning Code, Article 13, Division 13.3.
2. **Required use review and permit approval(s):** A Zoning Permit subject to authorization of an outdoor eating area exception by the Board of Adjustment is required prior to establishment of this accessory use. The applicable portion of the outdoor eating area exception procedure is limited to the findings stated in FC59 Sec. 59-54(3)(u)(1)(i) and (ii).
3. **Applicable Use Limitations:** Where permitted, an accessory Off-Leash Play Area use shall comply with the following limitations, in addition to any limitations applicable to the use under Former Chapter 59:
 - a. The accessory use shall be located on the same zone lot as the primary use.
 - b. The accessory use shall be separated from the primary eating place use by fencing or similar delineating structure. The accessory use shall also be separated from the public right-of-way and primary uses on adjacent zone lots by fencing or similar delineating structure. Fence or wall height regulations can be found in the district standards for the subject zone district.
 - c. The Off-Leash Play Area shall be separated from the nearest residential zone district or residential use by at least 30 feet, as measured from the nearest point of the Off Leash Play Area to the nearest point of the zone district boundary or zone lot boundary containing the residential use.
 - d. The off-leash play area shall be posted with clearly visible signs that state the maximum capacity of the off-leash area for dogs. Maximum capacity shall be calculated based on the gross area of the entire off-leash area, using the following formula: a minimum of 40-square feet of gross area for each dog allowed.
 - e. In industrial zone districts, accessory uses operated partially or entirely within the structure containing the use-by-right, the gross floor area within such structure utilized by an Off-Leash Play Area and other accessory uses (except garages, loading docks,

and company dining rooms) shall not be greater than twenty (20) percent of the gross floor area of the structure containing the use-by-right.

- f. There shall be no glare from lighting on the zone lot projected onto residential uses. To ensure glare is controlled, all external lights shall have full cut off fixtures.
- g. Operating hours of the outdoor portion of the Off- Leash Play Area shall be limited to 8 a.m. to 8 p.m. Sunday through Saturday. The eating place may operate outside of these hours, but the outdoor portion of the Off-Leash Play Area must be closed to all customers and all off-leash dogs outside the allowed hours. Operating hours may be modified by the Board of Adjustment pursuant to a request made by the Applicant as part of the application for authorization of an off-leash play area, outlined in Condition 2 of this Determination. In determining whether to grant the request, the Board shall consider evidence introduced as to:
 - (1) Distance from the nearest point of the outdoor portion of the Off-Leash Play Area to a zone district including residential uses as a Permitted Use without limitations,
 - (2) Use of amplified sound from the outdoor portion of the Off-Leash Play Area,
 - (3) Lighting design, and
 - (4) Design and/or operational commitments by the Applicant to mitigate noise and lighting impacts onto adjacent residential zone districts.

This use determination is a final decision of the Zoning Administrator and may be appealed to the Denver Board of Adjustment for Zoning within 15 days from the date of this determination according to FC59 § 59-54.1, Administrative Review.

Approved by:



Tina Axelrad, Zoning Administrator

Issued: October 20, 2023

Revised: November 9, 2023