

Plan Commission  
Meeting of November 22, 2021  
Agenda #19, Legistar 68079 (ADUs)

*Note: All data in this letter is based on the Assessor's full data table as it existed on-line as of May, 2021.*

### **Opening up Neighborhoods**

The ADU proposal will purportedly open up neighborhoods to new residents. That will not be true for a lot of neighborhoods.

#### Planned Development Districts

Of the 47,912 single-family lots, 4,126 are in Planned Development districts (8.6%) - areas such as Wexford Village, Grandview Commons and Door Creek. The proposed ordinance does not include PD zoning as a permitted use for ADUs. Plus, many (all?) also have protective covenants.

#### Declaration of Protective Covenants, Conditions and Restrictions

Vast areas of single-family housing in Madison are covered by a Declaration of Protective Covenants, Conditions and Restrictions (or a similarly named document) filed with the Dane County Register of Deeds. These Declarations often restrict the use on any given single-family lot to one single family dwelling.

Take, for example, Alder District 9. There are approximately 3,500 single-family and vacant residential lots (about 500 vacant lots that would support a dwelling). Of that, 928 are zoned PD (26%). At least 2,181 lots are covered by a Declaration (61%). Most Declarations are quite clear that only one single-family residence can be constructed on a lot. Other Declarations state that use is restricted to single-family uses (leaving open the possibility of an interpretation allowing for more than one single-family dwelling on any given lot) – but then go on to specify the minimum square footage of the dwelling. The minimum square footage in each Declaration exceeds the 1,000 square feet maximum specified in the proposed ordinance (the lowest is 1,450 square feet). Thus, these single family lots will not be available for an ADU.

District 9 has, at most, about 450 lots (13%) where an ADU might be possible. (I say "at most" because I may have missed a subdivision with Declarations.) District 9 is not unique. In particular, many areas of more recent agricultural land conversion have similar Declarations.

The use of Declarations dates back to at least 1950. Declarations of that era were often limited to construction and did not get into ongoing issues such as regulating fencing. Often the Declarations state that only one single-family home is permitted on a lot. Some Declarations do not provide a termination date and since ongoing issues are not regulated, homeowners may be unaware that the Declarations still exist. Take, for example, Sunset Hills: "a" single-family dwelling is allowed on each lot; there is not any termination date; and, the restrictions can be enforced by any owner in law or equity. Might owners in these type of areas look for restrictions and seek to enforce them when another resident seeks to build an ADU?

Some Declarations do terminate. For example, Whitetail Ridge, a 1994 development, restricted to single family, with median home values assessed at \$231,300 - the restrictions terminated after 5 years. Thus, this relatively modest area could have ADUs, unlike the Blackhawk and Greystone subdivisions (where only one detached single-family home is allowed per lot and the median assessment is \$628,900).

Most Declarations of more recent vintage are forever, unless after the initial period (generally, 25-30 years), the majority of owners (or more) vote to make a change in the restrictions or terminate them. All of the District 9 Declarations covering the 2,181 single-family homes are forever, unless terminated by a member vote.

One could argue that these restrictions/covenants are a modern form of redlining – keeping out residents of more limited means rather than specifically only allowing Caucasians. Will by-right ADUs primarily be located in the less prosperous areas of the City?

Why should only some residents have the right to protect their “distinctive style?” (While those living in a sea of modest one-story homes could have a neighbor’s 2-story ADU looming over them and looking down on their backyard.) See, for example, Acacia Ridge:

“WHEREAS, Declarant desires to provide for the maintenance and enhancement of property values and amenities in said Development, and for the preservation of properties and improvements thereon, as well as, for the preservation of the Development’s distinctive style, and to prevent the erection, or maintenance of poorly designed or constructed improvements.”

The City recognizes that homeowners associations (the enforcers of the Declarations after the developer turns over authority) can restrict uses otherwise permitted by the City. For example, in the City’s tourist rooming home brochure:

Do I need my Home Owner’s Association (HOA) permission to operate a TRH?  
The City of Madison is not a party to and does not enforce any private homeowners’ association regulations. Property owners should review private regulations that apply to the property they or their tenants wish to use as a TRH since these regulations may restrict an owner from allowing the dwelling to be used as a TRH.

### Condominiums

There are condos that are single-family homes, such as the “Cottages at Chapel View Condominiums.” This kind of single-family home would also not be able to add an ADU by-right due to condo restrictions (the Cottages are single-family only, approval of the associations’ architectural board is required for exterior changes, leasing requires approval). Or The Trillium at Craig Avenue (147 units), which also requires architectural board approval (any proposal needs to be in harmony with the other units and needs to be aesthetically desirable).

### Density

The Mayor’s news and update page of 10/28 states: “Accessory dwelling units are also a way to increase housing density in neighborhoods without large development projects.” (Perhaps not, based on all the restrictions/covenants in place in so many of those areas.) The staff memo (document #4 of Legistar 68079) states: “Allowing and easing the creation of ADUs is one important way for growing cities to support more housing options in lower-density residential areas where single-family detached homes are often the predominant land use.”

But this proposed ordinance will allow dense areas to become even denser.

An example is District 6's Ward 42. Ward 42 is not a "lower-density residential areas where single-family detached homes are often the predominant land use." There are 596 lots ranging from single family to 7 units: 272 lots, less than half, are single family. With just counting the zoning categories affected by this ordinance, Ward 42 has a density of 18 dwelling units/acre and a median lot size of 4,356 sq.ft. All of these lots' zoning classifications (TR-C4, TR-V1, TR-V2) would permit a by-right ADU under the proposed ordinance if the requirements could be met. All of the 596 lots can already have at least a 3-unit as a permitted use. (Note: there are over 500 additional housing units on commercial properties, such as an apartment above a store or apartment buildings ranging from 10-141 units, and on lots zoned PD.)

Though ADUs would be by-right in Ward 42, ADUs would not be allowed at the Blackhawk and Greystone subdivisions (which have a density of 2.8 units/acre and a median lot size of 14,623 sq. ft.).

**Other issues:**

1. The DR1, DR2, TR-C1, TR-C2 and TR-C3 districts do not permit a two-family twin dwelling. As explained by staff in 2014 when the ordinance was amended to allow such structures in TR-C4:

"The "Traditional" residential districts currently prohibit all two-family twin dwellings, primarily over concerns over compatibility with traditional building forms. Contemporary examples of side-by-side twins typically include prominent garages along street-facing façades and are considered a suburban building form. The more traditional or urban form is more commonly a "flat" style residence with one dwelling unit on the ground floor and one on the upper floor. The less common "townhouse-style" twins are side-by-side residences but do not typically have attached garages, with or without garage doors facing streets. ... The prohibition of attached garages with street-facing doors is an important character distinction that restricts the development of suburban-style twins in this district."

This form of ADU is one shown in staff materials as an attached ADU. Thus, although the building form does not fit these districts, the proposed ordinance would permit them as an ADU.

2. Does it make sense to include mixed-use districts? There are existing single-family uses in NMX, TSS and CC-T. However these are historic uses – new single-family requires conditional use approval, as do new 2-units. Yet creating a second unit through an ADU would be permitted by-right under the proposed ordinance.

NMX: 26 single-family, last one was built in 1956.

TSS: 37 single-family, last one was built in 1941, 6 are in a historic district.

CC-T: 46 single-family, last one was built in 1999.

TR-U2, with 13 single-family dwellings, also requires conditional use approval for new single-family and 2-units.

3. How can a building larger than the home be an "accessory" dwelling? 3,208 single-family homes in the affected zoning districts have under 900 sq.ft. of living space.
4. How will the City know whether a single-family home is owner occupied? The ADU approval letters requiring a deed restriction (since 2018) provide:  
"The property owner shall execute a restrictive covenant providing that the Accessory Dwelling Unit may only be used when the property is owner-occupied"

Will the City be annually confirming the owner occupancy requirement? Or will it rely upon neighbor complaints? And if the property is found to not be owner-occupied, what will the City do? Evict whomever is living in the ADU?

5. Why should TR-P have greater protections than other zoning codes? TR-P has these additional restrictions:
  - The lot shall have a minimum area of five thousand (5,000) square feet.
  - The lot shall have a minimum width of fifty (50) feet for corner lots and sixty (60) feet for interior lots.
  - A detached accessory dwelling unit shall be located only above a detached garage of the single-family dwelling on the same lot.

The TR-P properties are in the former agricultural lands in Alder Districts 1, 3, 9 and 17. Thus, like with Declarations of Covenants, the newer single-family properties receive protection while the older parts of the City are told that aesthetics are not of concern.

There are 5,500 properties in the affected zoning districts with under a 5,000 sq. ft. lot. Those residents are deserving of the protections granted to TR-P residents, as are those with narrow lots that generally are very close to neighboring structures.

6. In zoning districts that allow 2-units (SR-C3, SR-V1, SR-V2, TR-C4, TR-V1, TR-V2, TR-U1, TR-P), how will it be determined whether a structure is an ADU or a permissible 2-unit? If, for example, an owner wants to create an attached ADU (not a garage conversion), is that a 2-unit twin or an ADU? It appears makes a difference for setbacks.

MGO 28.131 provides a side yard, and a back yard, setback of 3 feet (see page 4 of the proposed ordinance) for accessory structures. The proposed changes to "Accessory Dwelling Unit in Districts Other than the TR-P District" (page 3) provides that "minimum setback requirements shall be those for accessory building or structures of the underlying zoning district." Thus, it seems that an accessory building can always be 3 feet from the side/rear property line, regardless of the underlying zoning district.

The zoning districts that permit 2-family dwellings generally have side yard setbacks of 5-6 feet (TR-R has 30 feet). So in these districts an ADU could be placed 2-3 feet closer to the property line than a 2-family twin or a 2-family 2-unit. And it makes a bigger difference for rear yard setback – which are more along the lines of 25-30 feet or 25% of the lot depth. It is one thing to have a garden shed situated 3 feet from the property line. It is another to have a 2-story, 25 foot high ADU – the use is much more intrusive.

If, instead, the setbacks of the particular zoning district do apply to an ADU, then I suggest modifying the setback language in MGO 28.131(1)(d)2. and 3. to exclude ADUs:

2. In a rear yard setback, except for an accessory dwelling unit, a minimum of three (3) feet from any property line.
  3. In a side yard setback, except for an accessory dwelling unit, if located behind the rear plane of the principal building at the time of construction, a minimum of three (3) feet from any property line.
7. The Plan Commission has not rubber stamped ADU conditional uses. One was denied, one was placed on file, and at least one had additional conditions placed as a result of Plan commission review. Does that show that ADUs need approval? True, two rejections is not a lot. But since the Plan Commission has only placed on file 37 matters since 2013 and denied 2 matters, having two of those be in connection with an ADU becomes more significant.

The Plan Commission also approved two ADUs that would not comply with "located behind the rear plane of the principal building at the time of construction."

### **Alternative**

Of the zoning districts covered by this proposed ordinance, there are 6 districts which do not allow any 2-family dwellings: SR-C1, SR-C2, TR-C1, TR-C2, TR-C3, and TR-R. These 6 districts have 86% (about 37,500) of the single-family homes potentially affected by this proposed ordinance.

An option that could be explored is to allow two-family twin and two-family 2-unit for SR-C1, SR-C2 and TR-R. This would allow for garage conversions, basement conversions and second-story conversions to an ADU by-right, and the requirements, such as maximum square footage, could be placed in the supplemental regulations. Similarly, TR-C1, TR-C2 and TR-C3 could allow two-family 2-unit ADUs (but not the two-family twin due to the explanation above regarding building form in traditional districts).

In SR-C3, SR-V1, SR-V2, TR-C4, TR-V1, TR-V2, TR-U1, and TR-P districts, it appears these type of conversions can already be done without conditional use approval since at least 2 units is already a permitted use. For example, a nearby neighbor just converted a single-family to a potential 3-unit by adding kitchens on two floors (bathrooms already existed) without any need for conditional use approval in the TR-V1 district. In DR1 and DR2, a basement or second-story conversion may fall under a two-family two-unit.

In all districts, new construction would require conditional use approval. If a resident wants to build a detached ADU, add a second-story ADU over a garage, or build a new attached structure (a two-family twin), conditional use approval would be required.

I believe this approach balances the need for additional housing with protecting neighborhood character. Conversion does not alter character very much, while new construction could easily do so. It would offer a limited measure of protection to older neighborhoods – not the broad protections provided by Declarations of Covenants which cover so much of the City, but at least a chance for neighbors to explain to the Plan Commission their potential concerns.

Respectfully Submitted,  
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