
MEMORANDUM

To: City of Madison Plan Commission
From: Assistant City Attorney John Strange
Date: July 21, 2021
Re: Explanation of Proposed Core Changes to Madison’s Demolition Ordinance

This memorandum briefly describes key changes contained in the draft demolition ordinance and explains why I believe it is legally necessary for the City to make the first of these key changes in order to avoid future legal challenges related to the City’s review of demolitions.

1. The draft ordinance removes consideration of proposed future uses from the demolition ordinance.

As you know, Plan Commission reviews requests for demolition under M.G.O. § 28.185. Under the current ordinance, the Plan Commission approves the demolition *and* the proposed future use as part of its demolition review. The draft ordinance retains the requirement that the Plan Commission approve the demolition, but removes consideration of the proposed future use. The draft ordinance proposes this change because using a demolition ordinance to deny an otherwise permitted use is likely illegal and using the demolition ordinance to review an otherwise conditional use is redundant.

Zoning is a legislative power. *See State e rel. Carter v. Harper*, 182 Wis. 148 (1923). The State Legislature has granted cities this legislative power in Wis. Stat. § 62.23(7)(am). Using this power, cities use zoning to divide land into districts and then regulate uses within those districts. Wis. Stat. § 62.23(7)(b). They do this by passing ordinances – either text amendments or map amendments – pursuant to the specific processes outlined in state law. *See Wis. Stat. § 62.23(7)(d); Heitman v. City of Mauston*, 226 Wis. 2d 542, 555 (1999)(“Any change in zoning enacted without following the procedures mandated by the Legislature would be void.”) Regarding permitted uses, the Wisconsin Supreme Court has recognized that “permitted uses...allow a landowner to use his or her land...*as of right*... and that rights of ownership and use of property have long been recognized by this state and constitutionally protected.” *Town of Rhine vs. Bizzell*, 2008 WI 76, ¶ 19, 311 Wis. 2d 1.

Like other cities in Wisconsin, Madison regulates land use in districts through a mix of permitted and conditional uses. Madison’s Zoning Code defines a Permitted Use as one “which may be lawfully established in a particular district or districts, provided it conforms with all requirements and regulations of the district in which such use is located.” M.G.O. § 28.211 (2019). When Madison enacts an ordinance creating a permitted use in a particular district, it places a “P” next to that use in the relevant use charts. Once Madison does this, it creates a right to that permitted use until it enacts another zoning ordinance removing the “P” from the chart using those same state required procedures. In my opinion, Plan Commission cannot bypass the required legislative process and action by using the demolition ordinance

to deny an otherwise still permitted use on an ad hoc case-by-case basis. In layman’s terms, it would be prohibiting a permitted use without properly removing the “P” from the chart. If it did so, I believe the City would very likely face a court challenge on the basis that it interfered with a constitutionally protected right.¹ Thus, at a minimum, I believe the City needs to take some action to remove the consideration of proposed future permitted uses from the demolition ordinance in order to avoid future legal challenges.

To be absolutely clear, the same constitutional analysis does not apply to the consideration of proposed future conditional uses because conditional uses are not “by right” uses. However, conditional uses are already separately reviewed by the Plan Commission pursuant to M.G.O. § 28.183. Accordingly, providing for separate review of conditional uses under the demolition ordinance is redundant. In addition to eliminating this redundancy, removing the consideration of conditional use would allow the city to completely remove approval of proposed future uses from the standards section of the demolition ordinance, thus clarifying the Plan Commission’s jurisdiction and focusing it on the demolition itself.

The changes removing consideration of proposed future use are contained in Subsection (9) of the proposed ordinance and will be discussed again briefly below.

2. The draft ordinance clarifies that all demolitions must be reviewed for historic significance prior to being considered for demolition.

Subsection (7) of the draft ordinance requires that each structure proposed for demolition be reviewed by the Landmarks Commission for historic significance. The subsection also sets out the review process that applies depending on the Landmarks Commission’s determination related to historic significance. Finally, the subsection reiterates that nothing contained in the demolition ordinance removes the necessity that an applicant proposing to demolish a landmark or structure in a historic district also must receive a Certificate of Appropriateness under Ch. 41.

3. The draft ordinance creates an avenue for the City to allow administrative approval of demolitions under certain circumstances.

With few exceptions, the current demolition ordinance requires Plan Commission approval for all demolitions. The proposed ordinance creates Subsection (8), which creates an avenue for the City to allow administrative approval of demolition under certain circumstances. Proposed Sub. (1)-(3) are demolitions that already are essentially allowed administrative approval under the current ordinance. Sub. (4) provides for administrative approval for demolitions where the resulting project will include city-funded affordable housing. Most significantly, this section creates a provision where more administrative approvals could be added as deemed appropriate by policy makers.

¹ This issue almost came to pass relative to a project at 3630 Milwaukee Street. I wrote a memo to the Common Council regarding that project, which can be found at the following link:
<https://madison.legistar.com/View.ashx?M=F&ID=8189677&GUID=6FB3342E-D994-4064-9B73-0C6E0D6A3773>

4. The draft ordinance maintains many of the same demolition standards, removes consideration of proposed future uses, and adds a standard relative to naturally occurring affordable housing.

Subsection (9) of the proposed ordinance sets the standards for demolition approval. As noted above, missing from this section relative to the current ordinance is consideration of the proposed future use. Otherwise, the standards remain largely the same with one addition. In an effort to begin addressing the impact of demolition on naturally occurring affordable housing (i.e., displacement), this subsection includes a new standard that requires applicants for demolition to examine the impact of the proposed demolition on naturally occurring affordable housing and then consider ways to reduce any negative impact that may result. In order to give Plan Commission some familiarity in applying this new standard, it is worded similarly to other existing standards, including, for example, relocation of buildings. The City must be careful not to run afoul of the state preemption of inclusionary zoning ordinances, Wis. Stat. § 66.1015, which is why this standard requires applicants to examine impacts and consider alternatives, but stops short of requiring replacement affordable units.

5. The draft ordinance creates a definition section that references the demolition definition contained in M.G.O. § 28.211 and creates a definition of naturally occurring affordable housing.

As noted above, the proposed ordinance creates a new standard relative to naturally occurring affordable housing. So, the ordinance also includes, in Subsection (2) a definition of naturally occurring affordable housing: “Naturally Occurring Affordable Housing. Residential properties that are affordable to low- and moderate-income households, but are unsubsidized by any federal program.”

Again, the purpose of this memorandum is to highlight key changes included in the proposed demolition ordinance and provide an analysis relative to the legal considerations driving at least one of those changes. This Memorandum does not list every edit or change contained in the draft ordinance. Staff will be available on Monday night to review the proposed ordinance, answer questions, and incorporate feedback as the City considers next steps with regard to the demolition ordinance.