



Accessory Dwelling Units: A Provocative Alternative to Traditional Housing

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Definition and Introduction

The United States Department of Housing and Urban Development defines an Accessory Dwelling Unit (ADU) as “a habitable living unit added to, created within, or detached from a primary one-unit Single Family dwelling, which together constitute a single interest in real estate. It is a separate additional living unit, including kitchen, sleeping, and bathroom facilities.”¹

As baby boomers age, issues regarding retirement financing and elder care demand more attention and new solutions. Younger generations tend to favor limiting carbon footprints and emphasizing travel and experience over the values of traditional home ownership. Television shows like A & E’s Tiny House Nation and HGTV’s Tiny House Hunters are running multiple seasons and gaining in popularity, presenting alternative housing options. The number of realtors and construction companies that cater to the smaller, more minimalist dwellings continue to grow. Whether to support children with some sort of affordable housing, provide a cost-efficient place for retirees, or simply to provide housing alternatives, providing an additional living unit accessory to a single-family dwelling is an economical alternative in which the general public has shown interest.

This article discusses some of the pros and cons of ADUs and introduces some of the practical and legal considerations

municipalities are likely to encounter when considering regulating ADUs.

Perceptions of Benefits/ Drawbacks of ADUs

Citizens have voiced fears that ADUs will infringe on many traditional notions of the public peace and good order by overcrowding neighborhoods, exacerbating noise issues, parking, and privacy, and modifying or effectively eliminating single-family districts. Some residents argue the issues raised above will culminate to have a detrimental effect on property values. Others have raised issues such as the negative impact of the proximity of accessory units to neighboring structures on the expected use and enjoyment of private property under the codes in effect when they bought or built their homes.

Opponents also argue that ADUs, specifically when used as short-term rentals, change the nature of neighborhoods by introducing a transient resident population that affects the stability of the neighborhood and opens up the area to the possibility of increased crime and suspicious individuals.

However, other community members view ADUs as an excellent solution to combat the shortage of available, affordable, and sustainable housing. Many communities do not have the space to provide additional housing units and new apartment or condo complexes are frequently out of price range for many residents. Those in favor argue ADUs are

a win-win situation because they provide affordable housing to those seeking alternatives to traditional housing, while also providing the homeowner with extra income.

As stated earlier, the current population is aging and ADUs provide a unique opportunity to have elderly family members downsize and move closer to their support system, yet still have the independence of living alone. Proponents also argue that ADUs accommodate extended families seeking to stay together and live closer.

ADUs provide options for residents who cannot afford high home prices including the significant down payment. ADUs also support those who do not want the responsibility of home ownership. Some argue that the vision of suburbia where every individual owns a house is outdated and newer more flexible housing options should be made available.

Typically, ADUs are much more energy efficient, given their smaller size and availability of environmentally friendly products. ADUs also reduce the amount of land used for a housing option, limiting the impact on additional housing development.

Municipalities must balance the viewpoints of those accustomed to traditional home ownership and those seeking alternative housing options. Municipalities are tasked with determining how and when to regulate.

Authority to Regulate

ADUs are not defined in or directly regulated by state law. The administrative code allows for accessory buildings, subject to fire regulations, leaving considerable leeway to municipalities to regulate accessory structures and dwellings. The state statutes define “dwelling” as any building that contains one or 2 dwelling units and a “dwelling unit” is a structure or that part of a structure which is used or intended to be used as a home, residence, or sleeping place by one person or by two or more persons maintaining a common household, to the exclusion of all others.² The state law thus allows attached or unattached accessory dwelling units without providing any specific and direct regulation of those units.

The lack of statutory direction provides municipalities significant leeway in defining and customizing ADU regulations to meet the needs of a specific town, village, or city. This can be a blessing and a curse in light of the many different public perceptions and interests on regulating ADUs and the myriad of regulatory considerations a municipality is compelled to consider when composing legislation addressing ADUs. The following reviews the topics that Wisconsin municipalities have addressed in their ADU regulations.

Ownership

Ownership of the principal use serves to emphasize the accessory and incidental nature of the ADU to the principal use and is an important aspect of the use. Wisconsin municipalities that have ADU regulations have considered:

- Requiring the dwelling units to be owned by the same person
- Prohibiting the conveyance of an ADU independent of the principal use

- Requiring the property owner to reside either in the primary dwelling unit or ADU as his/her permanent and legal address

While there is little law in Wisconsin on ADUs at this point, the Utah Supreme Court upheld a zoning ordinance restricting the renting of ADUs to only owner-owned residences.³ A non-residing homeowner challenged the restriction, but the Utah Supreme Court concluded the zoning ordinance was valid because it protected the city’s justifiable and legitimate interest in preserving the character of a single-family residential neighborhood.⁴

Regulating the ADU

As there is little limitation from the state, municipalities can regulate consistent with the intent and purpose of their zoning codes to preserve the public interests normally preserved by zoning codes (public peace, safety, and peaceful repose, etc.). As the most common concerns with ADUs stem from privacy, overcrowding, esthetics, and other issues affecting the use of neighboring properties, municipalities that have regulated ADUs have enacted regulations that include:

- Expressly limiting the number of ADUs per lot
- Creating requirements for lots housing ADUs
 - Minimum lot area
 - Limiting location to a corner lot or lot adjacent to an alley
 - Setting usable open space requirements
 - Setback limitations other than those for other accessory uses
- Limiting maximum floor area size
 - By square footage, or
 - As a percent of the total lot area

- Addressing esthetics
 - Requiring roof pitch consistency
 - Requiring consistency in design with the principal dwelling
 - » Trim and eaves
 - » Window orientation
 - » Exterior finishes
 - » Building height
- Building ingress and egress
 - Location of access
 - Hard surfacing
 - Fire access
- Designated off-street parking
 - Based on occupancy
 - Not permitting increase of on-site parking facilities
 - Requiring parking based on zoning requirements for dwelling units
- Requiring minimum floor size for each dwelling unit
- Specifying occupancy limitations

Current municipal regulations also include provisions limiting detached ADUs to above garage locations and requiring that the mandatory minimum floor size for the single-family dwelling does not go below the minimum floor size in the zoning district as a result of accommodating the ADU.

Where Can They Go?

To the extent that ADUs are accessory to a single-family dwelling use, the appropriate district for the ADU is limited to districts that permit single-family use. That does not mean that ADUs have to be permitted in all districts that permit single-family uses or that they have to be treated the same in each district. Examples of options that have been considered include:

- Limiting detached ADUs to single family residential districts (as the lots are usually larger)
- Allowing detached ADUs in certain residential districts (as accessory to single family uses in that district)
- Allowing detached ADUs only in certain districts and internal ADUs in others
- Requiring conditional use permit (CUP) review in some zones and only plan submission in other zones

Municipalities may customize options, depending on different zoning districts that permit single-family uses and other factors unique to the concerns raised in the municipality and the nature of its zoning districts.

Plan Submission and Conditional Use Permits

ADUs are subject to building and housing code requirements. Consequently, building plans will be submitted and subject to permits before construction. To address some of the concerns up front and allow for public input, a site review process such as a conditional use permit procedure or other committee review is uniformly used to regulate ADUs in Wisconsin.

The use of a conditional use permit (CUP) process provides the opportunity for public hearing and the imposition of project-specific conditions. However, it is not prudent to simply use the HUD definition of a CUP cited at the beginning of this article and state that ADUs are subject to a CUP. Current

law is reasonably read to require that any conditions imposed under a CUP should have their origin in the zoning code. In other words, simply imposing a CUP requirement on all ADUs may not accomplish the desired regulatory reach the community may wish to have. The municipality needs to do its homework and address the issues listed above in its codes to facilitate the effective use of the CUP.

Short-Term Rental Interplay

Section 66.1014, Wis. Stats. provides that a political subdivision may not enact or enforce an ordinance that prohibits the rental of a residential dwelling for seven consecutive days or longer, so long as the owner or operator of the residential dwelling has obtained a permit from the Department of Agriculture, Trade and Consumer Protection and a short-term rental permit from the political subdivision. Such license shall allow the owner/operator to rent the residence for more than seven consecutive days limited to a total of 180 days per year.

Wisconsin Statute sec. 66.1014 defines residential dwelling as any building, structure, or part of the building or structure, that is used or intended to be used as a home, residence, or sleeping place by one person or by two or more persons maintaining a common household, to the exclusion of all others. Hence, an ADU that is approved as a mother-in-law's flat today may be an Airbnb tomorrow. Municipalities should remain cognizant of the applicability of the short-term rental law as they craft ADU regulations.

Conclusion

Wisconsin municipalities that have gone through the regulation process for ADUs have encountered considerable public input and debate. The public attention and tension between traditional housing and housing alternatives such as ADUs presents a complicated topic that requires a patient and cautious approach and close collaboration with planning staff and legal counsel when crafting ADU regulations.

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1. <https://www.hud.gov/sites/dfiles/OCHCO/documents/4000.1hsnghlossry.pdf>
2. Wis. Admin Code SPS § 320.05(4); Wis. Stat. § 101.61(1).
3. *Anderson v. Provo City Corp.*, 2005 UT 5, ¶ 19, 108 P.3d 701, 708.
4. *Id.*

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