

# MINUTES

## MANHATTAN URBAN AREA PLANNING BOARD

City Commission Room, City Hall  
1101 Poyntz Avenue

**April 16, 2018**

**MEMBERS PRESENT:** Debbie Nuss (chair), Ken Ebert (vice-chair), Phil Anderson, John Ball, Jerry Reynard

**MEMBERS ABSENT:** Gary Stith, Neil Parikh

**STAFF PRESENT:** Chad Bunger, Assistant Director of Community Development; Carol Davidson, Senior Planner; John Adam, Senior Planner; Ben Chmiel, Planner II

Nuss called the meeting to order at 7:00 p.m.

### **I. OPEN PUBLIC COMMENTS**

Mel Borst, 1918 Humboldt Street, requested that the board ask Bunger to respond to his question about Section 8-302, referring to the narrative he handed out at the previous planning board meeting about the zoning exception for 210 North Evergreen Avenue.

Nuss asked Bunger if he had an update on this matter. Bunger replied the he had no updates, stating again that the City Attorney's Office advised staff not to comment because of the suit Borst had brought against the City's decision. He suggested asking the City Attorney's Office or the City Manager's Office to resolve his issues.

Nuss said the board is not in a position to answer questions to how staff interacts with the City Attorney's Office and City Manager's Office. She suggested trying to contact the City Attorney's Office. The board will continue to ask Bunger for updates on the subject, while understanding the circumstances.

Bunger commented that he appreciated Borst's concern for his neighborhood but it is a Board of Zoning Appeals process that is enforced by the City Attorney's Office. The Manhattan Urban Area Planning Board does not contribute to the administration and interpretation of the Zoning Regulations. It is an advisory and policy board for zoning and subdivision regulations; if Borst has suggestions on how to change the zoning regulations to address this issue, this would be the board to address.

Anderson said he thinks Borst's question is a fair and the City needs to provide an answer. He agrees with Nuss that he should contact the City Attorney's Office.

Borst replied that his question is about the enforcement of Zoning Regulations that were established by the board. He believes the planning board should have an interest in this topic.

Nuss reiterated that she does not believe this is the appropriate body to address the issue. There are other avenues to be pursued to get an answer that the board cannot fulfill. It is fine to bring it to the board's attention; as individual citizens they are concerned about things being processed properly, fairly, and appropriately, but the remedy for this issue is not with the planning board.

## **II. CONSENT AGENDA**

1. Approve the **MINUTES** of the April 2, 2018, Manhattan Urban Area Planning Board meeting.
2. Consider the **FINAL DEVELOPMENT PLAN** of Thomas Tract, a Commercial Planned Unit Development generally located approximately ¼ mile north of Skyway Drive, on the west side of Scenic Drive. (*Applicant: Bart Thomas; file no. RCF-18-021*)

**Ball moved that the Board approve the Consent Agenda; Reynard seconded. Motion passed 5–0–0.**

## **III. GENERAL AGENDA**

1. A **PUBLIC HEARING** to consider **REZONING** of a 19-acre (5-block) area from R-3/M-FRO/VO (Multiple-Family Residential District with the Multi-Family Redevelopment and University Overlay Districts) to UCR (Urban Core Residential District), generally located between N. Manhattan Ave. & 12th St., from Ratone St. to Vattier St., plus the north half of the blocks between N. Manhattan Avenue & 11th St. and Vattier St & Bluemont Ave. (*Applicant: City of Manhattan; file no. REZ-18-001*).

Adam presented the staff report of the Urban Core Residential District and recommended approval.

Ball asked when the idea and discussions for the Urban Core Residential began. Adam replied that the area under consideration was identified in the comprehensive plan and discussions on this topic have been going on since 2014.

Anderson said many of the single-family homes east of the university were developed into duplexes or triplexes over the last few decades. He thinks the UCR is a good idea; however, he thinks there should be a second part focusing on encouraging redevelopment and restoration of the neighborhood east of the UCR to restore the single-family homes.

Adam responded that staff uses the comprehensive plan as a guide for large planning processes, and this area was identified to be changed to UCR. The comprehensive plan did not talk about the conversion east of this area to single-family but to keep it as R-3, or higher-density residential, and transition to R-1, similar to the west side of the park. Dis-

cussion can be had on this topic but that will require a significant change to the comprehensive plan before it is enacted because it was not a part of the vision in the plan.

Anderson replied that there are many empty dwellings throughout the city and regardless, he thinks incentives like tax credits should be used to repurpose the areas.

Reynard asked if this increases the density. Adam replied yes.

Reynard asked what could be done with a corner lot that was isolated with apartments on both sides. Adam replied that like many other rezoning actions, this will result in buildings and lots becoming nonconforming. Scenarios will occur where “orphan” lots will be created. The market maybe soft for several years, so it is hard to say what may exactly happen. If we do end up with orphans, we may need to pull back at that point to grant relief; either downzoning them or putting a provision in the code allowing them to develop a four-plex. The idea of the UCR is to spur the development and make it worthwhile for people to assemble multiple lots and to buy out single-family lots. Reynard said he understands and thinks a process like described would make sense.

Nuss opened the public hearing.

Louis and Jenny Swoboda, 2108 Griffith Terrace, claimed that his lot would become an orphan lot if the area is rezoned. He said is in favor of the rezoning but his lot will be isolated due to neighboring apartment buildings. He added that currently he could build a four-plex but after the rezoning he will not and that will devalue his property. He said he and his wife are very concerned with their investment and would like more options for orphan properties following the rezoning.

Anderson asked if Swoboda’s property is currently single-family home. Swoboda replied yes, it is a rental property.

Anderson asked staff, if the rezoning was approved, would Swoboda be able to demolish the home and build a four-plex. Nuss answered no.

Adam said the minimum development area in UCR is 15,000 square feet. That is equivalent to two standard ward lots, so a single lot could not be developed.

Roger Seymour, 1181 Rock Springs Lane, said that he is in favor of this upzone, however, he agrees with the previous comments. He also claimed orphan lots will be created that will cause hardships for individuals. He suggested that this matter be tabled so staff can change it to allow for fourplexes to be built on orphaned lots. He said he is also concerned that the parking standards do not adequately addresses the parking necessary for the development; there should be at least one parking space for every bedroom. He suggested that a large parking lot be developed to serve surrounding apartments. He believes the area being upzoned should be larger. He thinks the ordinance and the comprehensive plan should be revised to reflect his suggestions.

Chris Kutz, 418 Poyntz Avenue, shared his support for the rezoning. He stated that the comprehensive plan was adopted three years ago to upzone and increase density next to campus. He said we should plan for people, not for parking lots or cars. It is important to

remember that zoning is a planning tool and we should plan for people to be near campus. The comprehensive plan supports everything that is in this rezoning and is not meant to be speculative of the market. The concept is to put density where necessary. This specific proposal meets all thirteen standards required for a rezoning to occur.

Nuss closed the public hearing.

Ebert asked if existing properties would become legally nonconforming if the rezoning was approved. Adam replied yes.

Ebert asked if current zoning allows for unattached parking.

Adam said off-site parking has to be in the same zoning district.

Chmiel added that parking has to be within 500 feet of the property. In this case you could not build a parking lot east of 12th Street.

Ball asked if developers will be required to have parking.

Adam said that the UCR parking ratio is slightly less than one parking space per bedroom. Based upon the parking study that staff conducted, this ratio will be sufficient. It also does not prevent a developer from constructing more parking if they perceive their target market will need it.

Ball asked if the parking studies were consistent with existing development in Manhattan. Adam replied yes.

Anderson asked if the orphan lots that would become legally nonconforming would frozen as a legally nonconforming property. Adam confirmed they would be frozen, but, as he noted before, truly orphaned lots can be addressed later through rezoning or amendments if necessary.

Ebert asked if staff had considered “What If” scenarios: assembling parcels by looking at uses and existing conditions to try and determine what the realistic potential for development.

Adam said no. He does not believe staff is qualified to speculate how development will unfold. This is a housing product that mimics development seen in many Midwest college towns but it will vary based on the market. This will be a tool that will be available for future development. Perhaps it could have been a larger area but the comprehensive plan gave the guidance on the extent of the rezoning.

Ball reminded the board that these recommendations did not come from the staff, they came from a group of 25–30 stakeholders and a consultant as part of a committee to look at options for the comprehensive plan. The stakeholders included developers from the community to consider an upzone and the group unanimously decided upon this area. It is now years later, and the City is now implementing these recommendations. He said there were several other recommendations in the comprehensive plan to improve housing in the community—UCR was created specifically to keep high-density residential next to the university.

Anderson asked what other communities staff referenced for comparison. Adam replied Ames, Lincoln, Fayetteville, Austin, Tulsa, perhaps others.

Ball asked if an owner could reconstruct a legally nonconforming property to the same condition as before if it burnt down. Chmiel replied yes.

Ball commented that even though the zoning change, legally nonconforming properties are grandfathered in as legally nonconforming property forever and will not be forced to tear it down.

Chmiel said Manhattan is unique because one is allowed to rebuild if completely destroyed; most communities say if 50% of the value of the property is destroyed they cannot rebuild and must conform to current zoning.

**Ball moved to recommend approval of the proposed rezoning of the identified area along N. Manhattan Ave. from R-3/M-FRO/UO (Multi-Family Residential District with the Multi-Family Redevelopment and University Overlay Districts) to UCR (Urban Core Residential District) based on the findings in the staff report; Reynard seconded.**

Reynard commented that he supports the rezoning but agrees with Mr. Seymour that the area of the district should be larger. He doesn't have a problem with the parking because it is close to the university and may encourage walking or bicycling rather than driving.

Nuss said that she supports the motion but is sympathetic to property owners who might end up with orphaned property. It is a difficult situation to be in but she also thinks that knowing that that property will be legally nonconforming will give you time to explore other possibilities. Given that this has gone through an exhaustive community process to develop, she thinks this is a reasonable first step to finding out if it will work.

**Motion passed 5-0-0.**

Nuss asked when this item will go to the City Commission. Adam replied May 1.

#### **IV. WORK SESSION**

1. Discussion of Nonconforming Uses in the Unified Development Ordinance.

Adam presented a draft "zoning verification certificate" process for handling nonconforming uses.

Nuss asked why two years was selected as the time frame for which an applicant needs to be submitted. Adam replied that there was nothing significant about two years. It seemed a reasonable period given the work load; giving too much time sometimes encourages people to procrastinate. This process would also apply when a rezoning occurs, but in those cases the window to act may be shorter.

Nuss asked who the hearing officer would be and who determines who that is. Adam said someone would have to be hired and they would be on call.

Nuss asked if this person would be city staff or administration. Adam replied no. They would want to have someone independent.

Ebert asked if the data (shown in the presentation) was citywide. Adam responded that this is only within the Traditional Neighborhood Overlay.

Ebert asked if these are known nonconformities. Adam said that staff identified the properties after comparing property data records and current zoning, and then sorted through permit records to find evidence that the property was in compliance when constructed.

Ebert asked if this verification process was only for the number of units and not encroachment of setbacks. Adam said it only addresses number of units. To remedy encroachment problems, staff is advocating a change to the rules so they can become conforming; unlike excess units, properties typical are not a nuisance because of setbacks.

Bunger pointed out that the Board of Zoning Appeals is another remedy for an encroachment into the setback. State statues prohibit use variances.

Ebert asked if the property owners of the 450 properties know that they are nonconforming. Adam replied that he assumes many do.

Ebert asked if is it up to the property owner to go through the verification process or if the city will notify all property owners. Adam said that the first necessary step is to get the word out and mail these people directly describing their options.

Anderson commented that he had to do this for his property at 1531 Leavenworth Street. It was an 11-plex build in 1925 and the zoning had changed. He had to establish all that paperwork in case something happened to it, and then he could put it back as it was. He asked how the 50% destruction is determined.

Adam said they look at the fair market value for the property and obtain an estimate of the cost to repair the damage. If the damage exceeds 50% of the value of the property it would be considered a loss. Then the owner would have the option to demolish and leave it vacant or redevelop according to the current regulations.

Anderson asked if this was based on a monetary value. Adam replied yes.

Anderson commented that he was able to rebuild his four-plex that had burnt down through a Board of Zoning Appeals process.

Ball commented that he thinks this is great effort. He understands that zoning changes may create nonconformities but they are legal because they are no fault of the property owner. He asked if there is there any consideration to be tougher on the illegally nonconforming properties.

Adam said they have discussed having an inspection as part of the process to make sure the units are up to code. It can be structurally code compliant with whatever code was in place when it was built. Staff has debated what would happen if inspectors discover illegal nonconforming properties during the inspection. For example, perhaps the property is legally nonconforming for two units but an inspector finds there are three. Staff have talked about the steps to mitigate that third unit.

Ball said he agrees. Construction codes changes frequently and trying to hold them to past construction is different than the number of bedrooms. The issue we have in Manhattan is increasing the number of bedrooms in a footprint that was not permitted that causes safety concerns.

Ball suggested that for illegally nonconforming properties they need to consider some steps to get them into legal nonconformity.

Bunger said staff have had a number of discussions on this topic. This will also go to City Commission for their input. In addition to the process, staff proposes a site and interior inspection to make sure that it is compliant with building and life-safety codes. The City has had many different zoning and building codes, and knows there are periods of time where paperwork has been lost. To determine legality beyond a reasonable doubt will be difficult, and staff recognizes that so will give some leeway. But the City will always maintain the right to enforce. If an eight-plex is in an area that has never allowed an eight-plex the City can enforce that, but in several cases a use could have been legally established, but there is not any documentation on it. Staff are trying to balance all of these elements.

Ball said he is not talking about enforcement but to get them into legal nonconformity. If it is reasonably constructed and safe, even if paperwork may have been lost, the City should defer to the property owner following the inspection. If the home is consistent with the zoning history, then give them a certificate.

Bunger said that is the point of the hearing office. If paperwork exists, staff can make a simple determination, but if a judgment needs to be made, that will be the role of the hearing officer. He thinks there will be a number of properties that will fall into that category.

Ball replied that he wanted the regulation to empower staff to defer to the property owner if it is reasonable. The only time it would need to go to the hearing officer is when there is a disagreement between the staff and property owner. He said he would like to get all these properties validated. Bunger said that is staff's goal too.

Nuss asked what the property owners recourse would be if they disagree with the hearing officer. Adam said that would be the end of the process. There is no appeal. Bunger added that the aggrieved party could file an appeal in district court.

Nuss opened the public hearing.

Sara Fisher, 811 Osage Street, commented that she lives in a neighborhood with many nonconforming properties. She said it seemed very generous to not impose consequences for illegal nonconforming structures.

Ball agreed, he thinks the regulations for illegal nonconforming properties need to be more aggressive. It should not be allowed to be left illegal.

Fisher said from her perspective it is very generous and it doesn't begin to reconcile the issue of all the illegal structures.

Anderson commented that property owners should be motivated to make their property legally nonconforming, especially when trying to sell it because realtors are going to share with buyers that the property is illegally nonconforming, making it much more difficult to sell. He thinks this is a positive step to rectify the abuse to single-family homes that has occurred over many years.

Roger Seymour, 1181 Rock Springs Lane, said he has had properties become nonconforming due to downzoning and had asked for a grandfather letter. He said he does not feel that property owners should have the burden of providing information that their property is legal, he feels it should be up to City staff to find that information and grant grandfather letters.

Nuss closed the public hearing.

Bunger said Seymour was referring to a process called an "opinion of legal nonconformity". It is an application the City used to provide to property owners. He said they were more evaluative than fact-based. Neighborhoods opposed and challenged opinions, and the process was very labor intensive. Staff is trying to make a process that is more firm so that property owners of nonconforming properties could have the option to receive a legally nonconforming certificate. Large-area rezones do not occur often, so staff would be able to assist property owners in this process in those circumstances.

Turning to the comments made about strictness, Bunger said if it is legally nonconforming one can maintain and use the property and build it back if destroyed. If it is illegally nonconforming, the City's intent is that it become conforming.

Ball replied that he recommends being tougher with the illegal ones. If the property is reasonable and is consistent with zoning history, the City should give deference to the property owner and give them legal nonconforming status. If it is illegal, the owner should bring it into legal nonconformity.

Nuss asked if the board agrees with Ball's view of this topic.

Anderson said he agrees. This could be a valuable tool to address concerns in neighborhoods.

Ebert said he was curious how it would look to bring an illegal nonconforming property to legal nonconforming status.

Ball suggested that if, for example, a property owner converted a three-bedroom unit into a six-bedroom unit—despite that not ever being allowed by zoning—the owner could bring it into legal nonconformity by converting it back to three.

Bunger asked if in the past the zoning district allowed for four dwelling units but today it has six dwelling units. He would consider it an illegal use and would enforce that, requiring it to be converted to the current zoning of a single-family district if it went from an RM to R-1. He thinks the right enforcement is to bring it to what is legal in that zoning district which would be one dwelling, not use previous zoning regulations.

Ball said he is using a softer standard. Bunger wants to bring it to current zoning but he is following the grandfather clause. To bring it into compliance you can bring it back to four or bring it to one. He is just looking to put some process in place so that their successors are not discussing the illegally nonconforming houses. He just wants a process that begins getting properties into conformance.

Reynard commented that properties being sold should be monitored using technology to determine if it is legal or not. If the zoning is checked and it is determined that it exceeds the maximum number of bedrooms, then the buyer would know its nonconforming. He suggested preventing the sale of property until it becomes conforming.

Adam asked if Reynard was suggesting the City actively monitor real estate transactions.

Ball commented that he did not want to put the City in the role of monitoring all real estate sales and validating that the properties are being advertised correctly. That is a buyer's responsibility.

Reynard said the buyer should have protection from sellers by knowing the zoning of the property.

Ball said when he buys a commercial property he checks all that information including zoning issues and building permits because that is his responsibility as the buyer.

Reynard commented that not everyone is as diligent as him.

Anderson commented that you need a good realtor. Reynard said a good realtor should check. There needs to be a check to keep sellers honest. He asked how we can make sure that properties being sold are legal.

Bunger commented that you can easily find the current zoning of a property and that ability will only improve through the UDO process. Staff hopes to better define properties through the zoning verification process. There will always be some doubts if there is not documentation, but an owner should retain basic property rights. There needs to be a middle ground between validation and an illegal property.

Adam asked Reynard what the next step would be if the City monitored property sales and found a nonconforming property.

Reynard said he would like to see the realtors know that this is a tool for them to better represent the buyers and the sellers. If realtors know this information, he said he believes they will tell buyers and potentially prevent the sale.

Nuss commented that she thinks realtors already do that to some degree because they are aware of the zoning issues. They will take you into a property and say this is zoned for a four-plex, but you will see that have created six apartments and would advise you to negotiate with the seller to mitigate that issue.

Ball commented that there are also legal liabilities associated with it. If the city intervenes with a commercial sale, they are liable. He said the City should share zoning information and giving owners validation certificates stating that they are legally nonconforming.

Ebert said there are other checks and balances in place like lenders and attorneys. Not every sale occurs through a realtor but if there is a lender they share that information. He thinks there should be some form of recourse that would follow a illegal nonconforming use. He suggested giving some relief to illegal nonconforming properties during the validation period but after two years become more strict.

Reynard asked if you can get title insurance on an illegal property. Bunger said title insurance would not address the use, just who owned it and if they have the right to sell it.

Reynard asked if you have the right to sell an illegal nonconforming property. Nuss said yes, if you own it.

Reynard said he would like to stop that. If an owner cannot sell a illegal nonconforming property, that forces them to make it conforming.

Ball reiterated that illegal nonconformity occurs when is property owners improperly modified a property in a way that was not consistent with any zoning that has existed there in the past.

Nuss said the other thing to consider as the UDO is being developed is if we are addressing issues that give people the opportunity to develop illegal nonconforming properties and are we closing any kind of “loopholes”. She asked if there would be mechanisms to prevent illegal nonconforming properties.

Adam said the avenues people use to circumvent the building permit process will not be changed by the UDO. The City requires building permits now, but those who ignore it now will continue to ignore it.

Nuss said part of it is diligence of community members to report and make people aware. People should not be afraid to report a property.

Adam said the ReportIt app has been a good tool and the City may need to promote that again to remind people it exists.

2. REPORTS and COMMENTS by Board Members and Staff

Ball commented that he is sympathetic to property owners during zoning changes, however, the community evolves and changes and this has been under consideration for a long time. If the UCR develops as anticipated, property will be more valuable in the future and we grandfather what is there giving them the option to leave it there forever.

Anderson said he is glad the discussion of illegal nonconforming properties occurred because he thinks that tool will be an important step to begin to resolve some of the housing issues. An issue he heard at the affordable housing meeting was the lack of safe housing and most of the unsafe housing comes from the illegal nonconforming properties.

Bunger announced that there will be a new section of the "How Do UDO?" blog posted Wednesday sharing information on bicycle parking. He reported that the Flint Hills Regional Conference is May 16; if multiple board members are attending please tell staff so it can be advertised.

Nuss asked if the City would pay registration for planning board members to attend. Bunger replied that he would ask.

Meeting was adjourned at 8:54 p.m.

Submitted by Lesley Frohberg, Planning Intern