

# MINUTES

## MANHATTAN URBAN AREA PLANNING BOARD

City Commission Room, City Hall  
1101 Poyntz Avenue

**October 15, 2018**

### MEMBERS PRESENT

Ken Ebert, *chair*  
Phil Anderson  
John Ball

Debbie Nuss  
Jerry Reynard, *vice-chair*  
Gary Stith

### MEMBERS ABSENT

Neil Parikh

### STAFF PRESENT

Chad Bunger, Asst. Director of Community Development  
John Adam, Senior Planner

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

### I. OPEN PUBLIC COMMENTS

There were none.

### II. CONSENT AGENDA

1. Approve the **MINUTES** of the October 1, 2018, Manhattan Urban Area Planning Board meeting.

**Ball moved that the Board approve the Consent Agenda; Reynard seconded. Motion passed 5–0–1, Stith abstaining.**

### III. WORK SESSION

1. Review proposal for the administration of **NONCONFORMITIES**, a part of the Unified Development Ordinance project.

Adam presented an update on nonconformities as proposed in the Unified Development Ordinance. He shared the proposed terminology changes and outlined a permitting process for the legally nonconforming properties.

Stith said he did not understand Section 35-1010-5A: Maintenance and Repair. Adam said if a nonconforming structure, regardless of the use, is damaged more than 50% it can be rebuilt but it must abide by the current standards. If something has a nonconforming use permit and is damaged less than 50%, it can be rebuilt to the extent of the existing use or to the same degree of nonconformity in regards to the structure that it

had before the damage.

Ebert asked what that fate of the properties that are deemed illegal would be. Adam said that the City will not proactively seek out illegal properties, the burden is on the property owner to get the permit. This policy does not establish a time limit to acquire the permit; someone can come in at their leisure. Those who choose not to get a permit will not get to enjoy the protection of the permit.

Ebert asked for the estimates of known nonconforming properties in the community. Bunger said approximately 500 properties are nonconforming; roughly half are legal and half are illegal according to the research. Ebert asked if those properties were nonconforming due to current use. Bunger said it was strictly based upon usage. Ebert asked if it was due to the number of living units. Bunger replied yes. Ebert asked if the analysis was confined to the ward districts. Bunger said it was citywide. There are many duplexes that were annexed into the City in a single-family district. Ebert asked if an annexed property, based upon that example, would be deemed nonconforming because it was legal when it was built in the county. Adam said yes.

Ball asked, in cases that have minor nonconformities, if they can go through the registration process and be declare conforming. Adam commented there is no protection for benign nonconformities but the City will not enforce of all setbacks in community. If a nonconformities exist; the owner will have the opportunity to prove it was established legally and will not be penalized if they have a calamity less than 50% of the value. Staff has tried to tailor regulations in the UDO to the existing structures to decrease the amount of nonconformities created.

Bunger added that structures and lots will not go through the same registration process. Article 35-1010 has standards for addressing structures that are nonconforming with setbacks, height, parking, or landscaping. There are some general protection of those nonconformities because the City will not enforce the relocation of a structure due to a setback.

Ball said he agrees with that approach because the benign nonconformities were probably legal when built.

Anderson said he is interested in the properties around the university that were converted from single-family to multi-family. He asked if those are illegal nonconforming. Adam said it is possible but they could have been converted legally.

Anderson asked if the City would know specifically. Adam said there are a few the City is aware of.

Anderson said there could be a separate category for structures that have been rezoned to become conforming but it was created in an illegal way. Adam said that is possible; the properties could be nonconforming in respect to other factors too.

Anderson asked if what the City's action would be on a illegally converted single-family

home. His biggest concern is safety of the home; as long as it is code compliant the City could be a little flexible.

Adam said if the property was upzoned to allow for that number of units at one time it may fall between the cracks. There would be no reason to acquire a permit if it now conforms. The City is also concerned about life/safety issues; they have tried mandatory inspections and registration but received push back. If the board would like to make a recommendation that inspections be considered, staff can carry that forward.

Stith asked if the rebuilding of a nonconforming structure that was damaged less than 50% would have to follow building code. Adam said yes.

Stith said that may affect room sizes or occupancy that ultimately restricts the property from returning to its previous use. Adam said all current code and regulations would need to be followed. He asked if Stith was referring to a nonconforming use permit.

Stith said if a property has a nonconforming use permit and are allowed to rebuild as it was, if it was not built to current building code, they will have to then reconfigure it to meet the current standards. Bunger asked if Stith was referring to a property damaged beyond 50%.

Stith replied less than 50%. The code would allow an owner to rebuild the structure as it was, if damaged, even if it is nonconforming to zoning regulations. That does not mean it can be rebuilt to an outdated building code; it must meet current life/safety codes. Bunger said that would apply within reason. If a structure is damaged 45% and did not meet current ceiling height, the code office may give them an exception rather than forcing them to raise the ceiling height.

Anderson said if it was damaged to the extent that would have to get a permit for reconstruction that would force the owner to bring it up to code.

Stith asked if this section of the UDO has been reviewed by the public. Adam said this is the first release of the current draft.

Stith asked if there will be efforts to share this section with interested parties. Bunger said yes, staff wanted to present it to the planning board and City Commission before releasing it to the public. This is still a draft so it is subject to comment and alteration.

Anderson asked how long this process will take. Bunger said the City is about four to six months away from formal adoption of the Unified Development Ordinance and nonconformities will be included.

Nuss said she thought the planning board was receptive to the first draft and asked if the second draft was due to concerns from the City Commission.

Bunger said staff addressed some concerns the City Commission expressed. One major change was the 50% repair threshold because the previous regulations allowed a non-

conforming property to be 100% destroyed and rebuild as it was. Staff felt this was contrary to the Comprehensive Plan and Zoning Regulations to allow a nonconforming property to continue forever.

Nuss asked when this draft will go to the commission. Bunger said October 23rd.

Ball said he supports the 50% damage threshold, it makes sense and he appreciates that addition. He is uncomfortable with the lack of future pursuit of trying to resolve the illegal structures. He is not suggesting the City actively look for illegal structures but have a procedure in place if they are discovered. He also suggested the City work with property owners that are working in good faith to make their property legal and take action against those that are identified later. This could be used as motivation for property owners to go through the registration process.

Adam said the City could use a period of amortization eliminate the nonconformity or address life/safety issues. He asked Ball if the use should be discontinued or if it should be brought up to code. Ball said at a minimum life/safety should be addressed but at a maximum they should make it conform to current zoning or at least zoning at the time it was constructed.

Stith asked if that should apply to any structure or one that has been damaged. Ball said any structure that has not been exempted due to benign nonconformities but he is referring specifically to illegal nonconforming uses that have life/safety issues. He is seeking a process that motivates owners to bring their property into conformity rather than being found by Code Enforcement.

Anderson agreed that motivation is important. The City needs to provide a tool to property owners who want to rectify the situation which can help restore neighborhoods that are blighted with nonconforming properties.

Bunger replied Section 35-1010-5D outlines procedures for unsafe structures. He agrees that there needs to be an opportunity for life/safety improvements for nonconforming properties. If a use is nonconforming; it can exist until it's damaged greater than 50%. If it is illegal; that makes it difficult because the City should not allow an illegal use to continue as long as the property owner brings the issue before the City. In that situation an abatement agreement would be created to insure the safety of current tenants.

Ball said the current process to address illegal units should be followed but there should be an additional penalty for those properties that are reported or discovered by Code Enforcement. He suggested two avenues; voluntarily acknowledging the problem and have the City's assistance mitigating the issues or being caught and penalized. Currently there is minimal consequence to not self-identify as a nonconforming property.

Bunger replied that enforcement falls within another section of the UDO and will allow the City to use enforcement based upon the circumstances. He will share the suggestion with the City Manager and City Attorney; it is a good suggestion but he does not know how it would be executed.

Stith said he is interested in the terminology "benign nonconformity". He thought that was helpful but the term is not used in the code.

Adam said the term is not intended to be in the code because it will be up to the policy makers to determine what is considered benign. He said he was trying in the memo to separate the less harmful from the more harmful nonconformities. The UDO is trying to address benign nonconformities by making them conforming. If that is not possible, property owners will still be able to seek an exception if they want to rebuild if their property is destroyed.

Stith suggested adding language to the code that allows the City to overlook nonconformities that may be considered benign. Adam replied that language may be added in Section 10-1010-1.

Ball agreed; the policy should identify circumstances that the City will not enforce due to lack of harmfulness or offense. Stith added that if it is not in the code then the City does not have the authority to overlook those properties.

Adam said properties will automatically be considered benign if they are not required to apply for a nonconforming use permit and still be allowed to exist up to 50% destruction because of the recognition that it is not harming anyone. He will work clarify that in the code.

Bunger said not all setbacks, building height, or lot coverage are benign. Some circumstances could create life/safety issues and the City wants to have the ability to pursue them.

Stith stated side yard setbacks that result in two structures being too close together causing a fire hazard as an example.

Bunger said there are other possible circumstances and staff wants to be able to address those issues if necessary.

Ball said a sub-paragraph could be added to allow the City to identify benign impacts and pursue potential issues.

Stith said it gives the City coverage. Bunger said staff will review it.

Ball said he like the addition of the benign nonconformities because helped with clarity.

Ebert asked if a property will be required to get a nonconforming use permit for a nonconformity other than use. Adam replied no.

Ebert asked if it is predominantly for the usage. Adam replied yes.

Ebert asked if a property is deemed a nonconformity under the new language and there is a calamity of less than 50% of the value, it can be rebuild as it was. Adam replied yes, if the property has a nonconforming use permit.

Ebert asked if the damage is over 50% then the nonconformity has to be eliminated. Adam said yes.

Ebert asked how properties will be notified of the permit process after the policy is adopted.

Adam said the identified nonconforming properties will be notified and a general notification for other properties. The 500 nonconforming properties were identified by comparing zoning allowance to county records and noting the discrepancies; then sorting through building permits to cite any evidence. Those properties will be told that they may obtain information from Code Services as they have agreed to make that information available for applicants. .

Ebert asked if other properties will be exposed over time. Adam said that has not been discussed yet but if a building inspector found a property that was nonconforming they would share with the owner the nonconforming use permit they could apply for.

Ebert asked if the overriding goal of the nonconformity language is to eliminate illegal scenarios.

Adam replied yes; this is a middle point between being passive and actively searching for nonconformities. There has not been political will in the past to seek out nonconforming properties and staff is hoping that this policy will a good middle ground for that.

Ebert said staff mentioned going to the BZA for variance or exception; would someone be able to get an exception for excess units.

Adam said exceptions cannot permit other uses but an owner could seek a conditional use permit if it is allowed in the zoning district. There is a provision in the policy that allows an owner to seek a conditional use permit if they address life/safety issues while reducing the number of units, bringing it close to conformance.

Ebert asked if the UDO will continue to have exceptions, variances, and conditional uses. Adam said yes, they are used to relieve development because code cannot account for all scenarios.

Stith said the language about nonconforming lots in Section 35-1010-7 could be considered a taking because it does not allow a property owner to rebuild on their substandard lot if the building is destroyed.

Bunger replied that a structure can continue if it exist on a substandard lot. If it is destroyed over 50% and it is on a substandard lot then you can still have a use there, it would just need to be the lowest and least intense use permitted by zoning. It may not be the use that previously existed on the site but they would still have the ability to develop something. The only exception to that would be a lot so small that it could not be built due to building code or was nonconforming to floodplain regulations.

Ebert asked what happens when a lot is so small that nothing is permitted. Bunger said

that is theoretically possible but they do not exist in Manhattan. If there is a parcel that small that it cannot conform to building code or a zoning district then it is probably undeveloped.

Ebert asked what the smallest minimum lot requirement is for a single family residential use. Bunger said today it is 5,000 square feet and even the current regulations says you can build on something smaller.

Anderson asked if the BZA could be involved in a scenario like this. Adam said the BZA could be involved in the bulk regulations but the property owners would have to show evidence that coming into conformance would hinder the use of the property. The section just outlines that a property can continue being used as a substandard lot.

Stith said some sections it specifies that you can appeal to the BZA but in the section referring to nonconforming lots it is not stated. Bunger said staff is trying to include all scenarios into the policy to avoid having to get approval from the BZA.

Stith said it may not be likely but he does not believe that there are no lot in Manhattan that do not meet the minimum lot size and under the proposed regulations the property owner would not be able to do anything with the lot. Adam said staff can review that to determine if BZA relief is still available or if they intended it to be unavailable. He understands that Stith would like to have that relief available.

Stith said if you take away the use of a property inadvertently, then that could be considered a taking and create legal problems. If there was a BZA relief then there is a way that someone could appeal.

Bunger said the section still allows the owner to build his home back. Nothing in the lot size requirements or the bulk requirements section says you cannot rebuild. The only reduction not allow is for front yard setbacks.

Stith asked what happens to a corner lot. Bunger said the front yard setbacks still apply; the building would just be designed to meet those setbacks which may reduce the size of the home.

Adam suggested under Section 35-1010-7A adding that a single family home can be built in a single family residential zone. The language states you can build whatever requires the least minimum lot area even if you are a substandard lot. Stith agreed. He did not understand it that way but if that is the intent then he does not have a problem with it.

Adam said it is not staff's intent to preclude single-family homes from being built because of lot size.

Stith asked if someone could still build a single family home that meets setback requirements even though the lot does not meet minimum lot size. Adam said yes.

Reynard said that is correct, if you can make the structure conform to the area of any sized lot it can be build. If there is a tiny lot, someone could build a tiny home.

Ebert said he found a lot on Osage that is 2,500 square feet and it is not common ownership with the surrounding properties. Stith said he would have been shocked if there was not a lot in Manhattan that was not smaller than 5,000 square feet. Bunger said there are many lots that are smaller than minimum but there is still buildable area.

Stith asked if you can still use a small lot for the smallest use allowed. Adam said yes.

Stith said he had a hard time understand that from reading the policy. Adam said staff would review it because the City is not interested in precluding uses because it would be considered a taking.

Ebert opened the public hearing.

Scott Seel, 132 South Dartmouth Drive, is a realtor in Manhattan and deals with many investment properties in the community. He commented that he appreciated the addition of benign nonconformities. His concerns about this topic include proving the legitimacy of a property's usage at the time it was created especially when no one may know when it was created, the flexibility of the policy pertaining to continuing use, and leaving property owners with devalued nonconforming properties. He asked the board what happens to the properties that cannot find evidence after an exhaustive search. He knows of a property that was built with four units in the '50s but has been used as a single-family home since the '80s and is now zoned single-family. He thinks the policy should allow flexibility for a situation like this to continue operating as a four-plex.

Ball commented that when an applicant is going through a registration process there may be documentation missing, then the default would go to the property owner to verify that it was conforming at some point in its history.

Seel said there were many homes in the ward districts that were built prior to zoning.

Ball said at that point; the default would go to the property owner and they would establish conformities and remove the ambiguity that exist; the process has to be that flexible. The goal is to get properties in the conforming or nonconforming categories so the illegal properties can be addressed.

Seel said property owners are not interested in gaining recognition because they do not want to draw attention to a nonconforming use. He supports converting those homes back to single-family but he wants to see the system be flexible enough to consider those that are trying to do it right.

Anderson commented that the four-plex was originally built with four units when it was legal so if it passes code inspection then the regulations should allow it.

Seel said he is concerned about the continual use of a property affecting its nonconformity status. In that situation the owner could not get a loan because it would be nonconforming as a four-plex.

Anderson said the owner wants to use the property as it was built and originally used so

that should not be an issue.

Seel said he advised the owner to seek City approval but he was concerned about drawing attention to his other properties. The perception is that asking for a blessing from the City will bring trouble for themselves rather than just continuing operating under the radar which is not good for the City or property owners.

Bunger said the most common situation is a single-family home that was converted to multi-family and has some category of nonconformity is abandonment. If the use is abandoned then it cannot retain the nonconforming use, it must convert back. In the particular situation Seel is referring to; it seems unique but he has trouble allowing the regulation to work both ways. It may have been built as four units but if it is used as a single-family home for 20 years there is a clause that would consider that an abandoned use. This policy is not referring to the structure; it is referring to the use and it is being used as a single-family home.

Seel said he understands Bunger's point, he was using that situation as an example for his question because he is concerned about the flexibility of the policy. Anderson said in this situation the property owner should be allowed to get permission from the Board of Zoning Appeals to use the property as it was originally built.

Bunger said he does not know the property specifically but if that was allowed it would be the same thing as allowing a four-plex to continue forever even when the zoning changed. It is in a single-family zoning district so the goal should be to make it into a single-family use overtime.

Seel commented that the policy should strive to bring properties up to code and make them safe but also allow for specific circumstances to prevent homes from becoming stagnant and dilapidated.

Anderson said he thinks the property should be brought up to code but allowed to be used as a four-plex. There are exceptions to zoning districts based upon the history of the community; that is why he believes it should be able to go before the BZA.

*(Seel made additional comments but due to distance from the microphone, his comments were inaudible.)*

Anderson commented that he owned a poorly converted multi-family property that was destroyed by a fire. He was able to be rebuilt within the same footprint with configuration improvements through approval by the BZA.

Ebert closed the public hearing.

## 2. **REPORTS and COMMENTS** by Board Members and Staff

Ebert shared that Ebert, Anderson, Ball, Bunger attended that work session on the river-front development and stated it was an enlightening and stimulating session.

Bunger thanked Anderson for his leadership bringing Gina Ford to the community for the riverfront development discussion. Anderson commented that Ford was impressed by Manhattan's riverfront. He hopes this effort can support flooding issues.

Meeting was adjourned at 8:32 p.m.

Submitted by Lesley Frohberg, Planning Intern