MANDAN PLANNING AND ZONING COMMISSION
MANDAN CITY HALL BUILDING
JANUARY 28, 2019

The Planning and Zoning Commission of Mandan duly met in session in the meeting room of the Mandan City Hall on January 28, 2019, at 5:30 p.m. CDT.

ROLL CALL

Commissioners Present: Boehm, Klemisch, Klein, Knoll, Helbling, Laber, Liepitz, Frank, Renner, Camisa, Robinson

Commissioners Absent: Leingang

Commissioner Knoll motions to approve the December 19, 2018 minutes. Commissioner Laber seconds. Upon vote, the motion passes unanimously.

PUBLIC HEARINGS

Chair Robinson moves item #5 on the agenda, to the first public hearing.

1. A request from Mitzel Builders, Inc. for approval of a master subdivision plat of the proposed Lakewood 10th Addition. Said addition is an unplatted portion of Outlot A in the east ½ in Section 1, Township 138N, Range 81W, in the City of Mandan, of the 5th Principal Meridian, Morton County, North Dakota. The property is located in the McKenzie Drive SE & Oxbow Trail SE area.

A. Staff report.

John Van Dyke, City Planner, describes the request. The property is south of the wastewater treatment plant and east of the Heart River. The masterplan calls for single-family homes, a manufactured home development and self-storage. It is currently in the 100 year flood plain and in close proximity to the Lower Heart levee system. Several adjacent properties are in opposition to the masterplan. There are concerns complaints will increase because of odors from the wastewater plant.

Commissioner Karl Liepitz arrives at 5:34 p.m.

John says it does not align with the Future Land Use Map. The map shows that area reserved for open space. The land is adjacent to the levee and there are flood concerns. The masterplan does not align with the Mandan Land Use and Transportation Plan map. In addition, there are 2 studies in process that may follow the US Army Corp of Engineers levee recertification and FEMA/ND State Water Commission remapping of the floodplain that affects this property.

Commissioner Deb Klein arrives at 5:37 p.m.

The Engineering & Planning Department recommends denial of the masterplan for the following reasons:

1. The proposed master planned subdivision does not align with the Future Land Use Map, which denotes Open Space (See Exhibit 6).

2. The proposed master planned subdivision does not align with Goal 1, Policy 4, specifically related to protection of sensitive natural features (See Exhibit 7).

3. The proposed master planned area includes property that is subject to remapping efforts in-process by the Federal Emergency Management Agency/North Dakota State Water Commission which may have significant impacts on how the property can or should be developed, if at all.

4. The proposed master planned area includes property that is affected by a United States Army Corps of Engineering levee recertification which may have significant impacts on how the property can or should be developed, if at all.

5. The City of Mandan's construction standards that apply following removal from the floodplain based on fill (LOMR-F) do not adequately address basement construction and create the potential for increased loss of life and property and therefore more intense development is inappropriate until changes to the floodplain ordinance have been adopted.

Commissioner Liepitz asks John to explain how these areas can be removed from the Floodplain when fill is brought in. John says he and Shawn, Building Official, are having discussions about this.

Chair Robinson says FEMA now starts measuring their base flood elevation at the lowest level of a structure, like a basement rather than the main floor. He is on the Lower Heart Water Resource Board and they are working with FEMA on recertification. The CORP of Engineers only deals with structures (levee/dike). FEMA on the mapping. They submitted a plan to FEMA last week. Who knows how long the review will take. He knows there cannot be a permanent removal of dirt within 500' of the levee. He does not know how the CORP looks at it when there is excavation and fill back in. Detention or retention ponds would be an issue within 500' of the levee.

Dot asks John what specifically is the commission tasked with on determining a yes or no on this item. John says what the development should look like.

B. Open public discussion.

Bryan Zuroff, Mountain Plains LLC. They are working for Mitzel on this development. A Future Land Use Plan was put out in 2015. Mitzel has indicated he was not in discussions or approached regarding the Future Land Use Plan. It is government overreach when you start telling people how to develop their land with zero input. Mr. Mitzel is aware a large amount of fill needs to be brought in. It is not in anyone's interest to build below the 100 year base flood elevation. The entire area is over 80 acres and is only 1 or 2 feet below that right now. FEMA does go by the basement or crawl space elevations for flood insurance. They were hoping to have preliminary work done this spring or summer. They know getting through the government regulation side can really slow things down.

Chair Robinson says they will hear back about the FEMA recertification sometime in 2019. There will be permitting and regulation on the federal side.

Mayor Helbling thinks there are too few access points. Bryan says the city requires 2 access points. There is a 3rd in the 10-20 year plan. Bryan says the original Lakewood masterplans has shown this area as residential. Mayor Helbling says he was around when Mitzel purchased this property and Mitzel was made aware that the city did not want this area developed. It was discussed heavily.

Commissioner Liepitz says meetings were held to create the Future Land Use Map. The map is not binding, however he thinks there would have to be good reasons as to why we would deviate from it.

Bryan says the Lakewood development has been in process for the last 20 years. Before the current Future Land Use Map, the area was always planned as residential.

Commissioner Klein says this property is bottom land of the Heart River. It was never meant for development. She lived through the 2011 flood. Her home was never in the 100 year flood plain. She wasn't supposed to flood. She doesn't understand why we would want to put people in jeopardy.

Commissioner Laber says she was involved in the 2015 Future Land Use Study. It was all over the news/tv. Bryan says they are going off information that was given to them.

Chair Robinson says the map in the packet is the current FEMA 100 year flood plain map. There is a new proposed map out there.

Bryan says there is some land in this development that is not in the floodplain with a foot or two above the flood elevation. There is discussion on whether all the property is in the floodplain or not, looking at different maps.

Tony Goetzfried, lives directly across the Dead Heart. He says if they fill that area to bring it out of the flood plain, it will change their property. Will they be assessed for a bridge that would be built across the Heart? Where will water from retention ponds go? Landowners on his side of the Heart would be opposed to a mobile home court across the way.

Bryan says stormwater runoff after development cannot exceed pre-development. Mitzel would pay for 100% of the crossings not counting a possible future McKenzie Drive crossing. The manufactured homes are an idea right now. They would be located more to the south.

Kevin Nelson, Mountain Plains LLC. He says as professional engineers it is their duty to protect the health, safety and welfare of the public. All processes at the federal, state and local level will be followed properly in regards to bringing fill in to elevate out of the 100 year flood plain to ensure safety. If FEMA is remapping, they will find out if something changes when they go to their permits. This development should advance because right now it is open land that if left dormant could become an eyesore. There are wildlife and vector concerns with vacant land in your backyard. The development would also bring in city taxes. The developer is looking for the best possible use of the land. The ownership of the land can be negotiated with the developer, if this development doesn't go through. They have planned the lots in case a bridge doesn't cross the Heart the lots can be configured into residential lots. They are allowing configuration in case right of way is needed for a bridge.

John Van Dyke says the owners' rights of the land are not being hampered. It is currently zoned ag and if the commission were to grant the development to go forward a preliminary plat and zone change would need to be processed. He thinks if the commission allows this land to be developed as proposed, there needs to be a justifiable reason to deviate from the Future Land Use plan that was adopted by the city.

C. Close public discussion.

Commissioner Laber says she is not comfortable approving this before the FEMA determination and vetting the development as proposed.

Commissioner Frank says the map in the packet is deceptive. Mayor Helbling says the map is deceptive to some degree. John says they are the current FEMA maps and there is no intended deception.

D. Commission's action.

Commissioner Laber motions to deny the proposed Lakewood 10th Masterplan for the following reasons: ***1.*** *It does not align with the Future Land Use Map.* ***2.*** *It does not align with Goal 1, Policy 4, specifically related to protection of sensitive natural features.* ***3.*** *It includes property that is subject to remapping efforts in-process by the Federal Emergency Management Agency/North Dakota State Water Commission which may have significant impacts on how the property can or should be developed, if at all.* ***4.*** *It includes property that is affected by a United States Army Corps of Engineering levee recertification which may have significant impacts on how the property can or should be developed, if at all.* ***5.*** *The City of Mandan's construction standards that apply following removal from the floodplain based on fill (LOMR-F) do not adequately address basement construction. Commissioner Camisa seconds. Upon vote, the motion to deny is passed with the following vote: Boehm-aye, Klemisch-aye, Klein-aye, Knoll-aye, Helbling-aye, Laber-aye, Liepitz-aye, Frank-nay, Renner-aye, Camisa-aye, Robinson-aye.*

2. Consider Ordinance No. 1291 to amend and re-enact Sec. 101-1-3, 105-1-4 (c) (2), and Sec. 105-4-1 (2) (a) and (b) of the Mandan Municipal Code related to the sale of fireworks and placement of fireworks stands.

A. Staff report.

John Van Dyke, City Planner, describes the item. The only change in the ordinance since the last time this was brought before the commission is the removal of the setback from residential. He included a draft of a temporary use application/permit so the commissioners can see what that would look like. It is similar to the county's. The operator of the stand will need a city temporary use permit and the state license issued by the Morton County Sheriff.

B. Open public discussion.

Andy Zachmeier, Morton County Commissioner and Morton County Planning & Zoning, says the sheriff couldn't be here tonight, but he texted Andy and said he will follow ND Century Code. If it does not follow the Century Code, he will not approve the permit. Andy does not see a problem as long as it is agreeable with the county's regulations. It seems to be ok.

C. Close public discussion.

D. Commission's action.

Commissioner Liepitz motions to approve Ordinance No. 1291. Commissioner Boehm seconds. Upon vote, the motion passes unanimously.

3. Consider Ordinance No. 1299 to amend and re-enact Section 101-1-3 and 105-1-5 (e) of the Mandan Municipal Code related to Cremation Facilities.

A. Staff report.

John Van Dyke, City Planner, describes the item. This came before the commission in November. Since then, John has collected comments from various funeral homes. He altered some of the requirements. Exhibits 1-3 are comments from funeral homes. They asked for a larger setback.

B. Open public discussion.

David Wise, DaWise Perry Funeral Services, says the suggested increase in setback requirements did not come from him. In North Dakota, there have been 10 crematories put in place by a crematory manufacturer called Mathews, based out of Florida. Crematories are not something you want right next to somebody's house. Bismarck's setback is 50' from property lines. Where he is currently located on Memorial Highway he has approximately 70,000 square feet. With a 200' from each property line, he is looking at having to meet not only 200,000 square feet, but an addition 150,000 square feet to be able to put in a piece of equipment to provide a more and more common practice. He agrees with setbacks from a residence, but does not agree with a 300' setback where he would have to purchase 8 acres of land in Mandan, because this is where he wants to stay. He would like to build a new facility with everything in one location, similar to what Bismarck Funeral Home has. There has been all kinds of emissions tests and he contacted a couple crematory manufacturers and all the emissions are well below what the state of ND allows. If they weren't below, the ND Health Department would intervene. There is noise from the machine that would only be heard if there were no walls around it. If he builds a new building, it will be soundproof. He would like to see a 200' setback from residential, not commercial. Fargo's is 50' from each property line. None of the larger cities in North Dakota require a 300' setback.

Commissioner Liepitz asks Mr. Wise to clarify the math in the acreage he would need. Mr. Wise displays a map of property he would like to relocate to. He outlines a 200' circumference with his new building in the middle. A piece of the property he would possibly want to change to residential, but it would not have a 200' setback from his building. He would like to place the building closer to Highway 1806. To meet a 300' setback he would have to purchase additional land. He would have to purchase anywhere from 6.5 to 8 acres to meet the setback from Living Water Church and the residential and may still be impeding. He would like to see 200' from residential. Would it be 200' from his building or from the equipment? John thinks clarifying language would have to be added to probably define the structure.

Commissioner Frank asks John if a 300' setback requirement from a property line would have the same issue in an industrial area as it does in a residential area, not being able to put

it next to anything. John says that is correct. It would be limited. John says there is plenty of industrial and Ag land in the ETA.

Commissioner Laber clarifies with John the setback is onerous on a new crematorium coming in and not what is built close by afterward.

Commissioners discuss how they want to define a crematorium and the setback requirements.

C. Close public discussion.

E. Commission's action.

Commissioner Laber motions to approve Ordinance No. 1299 conditional upon a definition of crematory facilities be added by the time it goes to city commission for consideration and the setback be 100' from a property line except along adjacent public right-of-ways. Commissioner Camisa seconds. Upon vote, the motion passes unanimously.

4. Consider an ordinance to amend and re-enact Sec. 6-1-6 related to possession of animals and enact Sec. 105-1-16 related to possession and care of chickens within city limits.

A. Staff report.

John Van Dyke, City Planner, describes the item. This ordinance is the product of several residents noting interest in housing chickens in town, more specifically a request by Travis Dengel who provided a brief presentation in fall 2018. Additional information was provided to Planning & Zoning including a brief survey of communities in North Dakota that allow chickens.

Presently, the code does not allow chickens unless as a part of a commercial-scale operation. The code as outlined in Exhibit 1 would allow up to four (4) chickens per lot with several restrictions to mitigate negative impacts to neighboring property owners.

A preliminary draft ordinance was constructed and sent to city departments and several other agencies for review as is typical for ordinances and development applications. Minor adjustments were made based on feedback from the Building Department, Public Works, and Morton County Planning and Zoning. Exhibit 1 is the ordinance following these minor adjustments.

Finally, Exhibit 4 provides an acknowledgement of understanding of the requirements and responsibilities which the applicant and owner will be required to sign prior to the issuance of a permit. This will help ensure compliance as permits are issued.

B. Open public discussion.

Commissioner Renner says Section 105-1-16 part E states the planner or his/her designee shall make the determination of what is "close proximity". He thinks it is too vague. He asks John how are you going to determine close proximity. John says this is to avoid those applicants that own multiple adjacent properties. For example, downtown you typically have

25' lot widths with one person owning several lots with one house on it. He wants to make the discretion that is one applicant, one overall lot.

Commissioner Renner points out part F, number 4, that states construction drawings include least one of the following. He says there is not a definition there as well. He asks John if the applicant has to explain how and what they are building with before he issues a permit. John says they are going to have to be prepared to explain what they are building it with. That will give him a chance to discuss it with the building official to make sure they are meeting the requirements.

Chair Robinson asks if there is a follow up plan to ensure they are following the guidelines. John says he can take a look as part of the permitting process. He can record the inspection on the permit.

Commissioner Knoll asks John if he will the one going out to do the inspections. John says it falls under other duties as assigned.

Commissioner Camisa finds urban chickens to be a problematic concept regardless if other cities are doing it. The neighbors are now going to have to put up with chickens. Twenty feet is not going to stop the odor and other issues. He thinks it should stay in the ETA. Not one resident he talked to was in support of chickens. Enforcement is another issue. Who is going to field the complaints? Is John going to go out every time? It may work on larger lots in newer subdivision that are on the outskirts of town, but what about the smaller lots in the middle of town?

John thinks it should be kept simple. If smaller lots become a concern, the setbacks can be increased. The permit will need to be renewed annually. If there have been issues, the permit can be revoked.

Commissioner Laber says there is a certain amount of ancillary noise living in an urban area. To get away from it and have complete quiet you would probably have to live outside the ETA.

Travis Dengel is present and voices his support for the chicken ordinance. He thinks John did a good job putting it together. He said the chickens are no worse than a dog kennel. If kept up, it causes no problems.

Andy Zachmeier, County Commissioner, "I think this ordinance as presented is a very good start. What I'm concerned about is the science behind it. The constitutional right to freedom to farm basically states that farmers and ranchers have the right to employ modern technologies and modern standards, which means modern science. So, what's the modern science for 4 chickens? Is it just a copy and paste from a different city ordinance? Which is fine, but what did that city use for their modern standard? The modern standard is what is going to be important here. Right now we're talking about chickens. I don't think this goes far enough when ND Administrative Code under Agriculture describes all types of poultry to include pheasants, wild game, turkeys, ducks, water fowl, ostriches, emus. Right now it's chickens what happens when somebody wants to have a turkey and they want to have a certain breed of turkey that gets no larger than your average meat sized chicken? When I read through some of this it does look like there is some basis of science on how the runs must be constructed, how the coops must be constructed. Somebody with a smaller house may still have the square footage enough to have at least one chicken or one piece of poultry. The

other concern I would have is the extraterritorial is that the county is not going to enforce a city ordinance. What Sheriff's Deputy is going to go out at 4 o'clock in the morning because somebody's hen or somebody's rooster is crowing? It isn't going to happen. What's your scientific basis for excluding roosters? Now I work in law enforcement. Let me tell you I've been to plenty barking dog calls. Three o'clock in the morning, 4 o'clock in the morning knock on the door, the owner comes to the door. You got to bring your dog in. It usually takes 4 or 5 violations before you can finally send it to court to have it adjudicated and that's a barking dog. I think the same argument can be made for a crowing rooster. If you don't have it in a soundproof facility, then getting the same number of complaints, eventually there's going to have to be enforcement. The other part is try to call it any type of nuisance, especially in the territorial. There is an ND Attorney General's opinion that the county cannot enforce any type of agricultural as a nuisance and it came out of a Morton County case, north on 1806, by Harmon Lake. That had to do with a large animal feed lot, which at the time never said they couldn't have animals in recreational zoning. It was how many animals per acre. Still supposed to be based on good, solid science. Eventually, the Attorney General's Office said the county has no authority on anything in agriculture calling it a nuisance. I really do feel that this ordinance should include any type of poultry. I don't know how this board would act if somebody came in and said I have a couple geese I would like to raise. I went to NDSU and these are the standards for raising geese and I measured the square footage of my yard, I have enough square footage. That's the kind of doors that are being opened. I also have to remind the committee there is nothing I can find anywhere in state law between the Attorney General's Office and the Association of Counties that has a definition of what a farmer or rancher is. Basically, it's whatever somebody wants to claim as their farming or ranching enterprise. It falls totally to the state to set the rules and regulations. So, one of the things on this ordinance is to exempt the extraterritorial. Because right now the county would have no authority to enforce this rule on behalf of the city and I would question the cities authority to enforce it on the extraterritorial. Another Attorney General's opinion on a zoning violation that's a nuisance on a junk yard that is out on Sunny Road. The city was taking enforcement action to a certain point where someone found the Attorney General's opinion that says the nuisance complaint falls back to the county to enforce. The county doesn't have a proper nuisance ordinance, which we now have a formal complaint to the county to enforce that piece of property, which I know we're going to have to build a nuisance ordinance and then address it at that point. If the city doesn't have the authority to address a nuisance ordinance in the extraterritorial, how are you going to address a nuisance ordinance on any type of livestock in extraterritorial? Attorney Brown should be asked to weigh in on some of these concerns and how this would be enforced in the extraterritorial or the State's Attorney's be asked."

Chair Robinson says the draft ordinance states within city limits. It doesn't reference the ETA at all.

Mayor Helbling thinks the enforcement would be no different than a barking dog.

Commissioner Klemisch says he lives down the street from somebody who occasionally has pheasants, geese, pigeons and hunting dogs. He doesn't know if he has them legally and personally he doesn't care. The only nuisance is a little bit of cooing now and then. Dogs make more noise than that. There is no smell problem. This ordinance is for Mandan residents to have a minimum number of chickens. Roosters can be annoying and that would concern him.

C. Close public discussion.

D. Commission's action.

Commissioner Klemisch motions to approve the ordinance as written. Commissioner Laber seconds. Upon vote, the motion passes with the following vote: Boehm-aye, Klemisch-aye, Klein-aye, Knoll-nay, Helbling-aye, Laber-aye, Liepitz-aye, Frank-aye, Renner-aye, Camisa-nay, Robinson-aye

5. Consider Ordinance No. 1301 to amend and re-enact portions of Subpart B – Land Development and Public Services of the Mandan Municipal Code related to Telecommunications Facilities (Small Cells).

A. Staff report.

John Van Dyke, City Planner, describes the item. The commission discussed this a couple months ago. John had a meeting with Commissioner Laber and a representative from Verizon. He made the changes suggested by Commissioner Laber. He then resent it to Verizon for their review. Because we are not discussing the fees here, Verizon opted to attend the City Commission meeting when the fees will be discussed.

B. Open public discussion.

Mayor Helbling's concerns are maintenance and possible accidents in the right-of-way. He thinks it should probably go on private land.

Commissioner Frank says the mayor brings up a good point and she asks John what the cell provider's liabilities are. Is the city or public absolved of accidents/damage that may occur to the equipment? John says the ordinance is a skeleton of what would form a master agreement between the city and the provider. A lot of those specifics would be outlined on how those incidents would be handled. There is a part in the ordinance that references this.

Chair Robinson asks if there is a reason they chose the right-of-way. John says it is easier for them to deal with one large property owner than many individual owners.

Commissioner Laber says on page 11, section 9C the provider dedicates the property to the city. The city owns the light poles the fixture will be attached to. So, the city will own the fixture and the light pole. The reason for the fee is in case city staff has to go replace a part. Public Works will have 5 units stored at the shop in case they need to change one out. That is why there is the annual fee. Every 15 years there is a renewal fee where the city can negotiate with the provider, if need be. The entire contract would be reviewed every 15 years. This is new, so there is no way to know the true cost. It is like owning stocks/bonds in utilities, however that utility is in public right-of-way because it has been determined it is a public good. Examples are electricity, natural gas and fiber optics. Cell phones are increasingly becoming important to the public.

Mayor Helbling doesn't agree with the city being responsible. The city isn't responsible for other utilities.

There is discussion on the length of the contract. John can change it to 10 years.

John thinks the master agreement would specify a lot of the details like ownership, liability, etc.

Commissioner Liepitz thinks the ordinance should be tabled because it is large and there are many questions and it is getting late.

C. Close public discussion.

D. Commission's actions.

Commissioner Laber motions to recommend approval of Ordinance 1301 as it pertains to the R3.2 zoning modifications and remove the 5G Telecommunications and Small Cell portion to come back at a later time under a different ordinance. Commissioner Frank seconds. Upon vote, the motion passes unanimously.

Commissioner Laber motions to adjourn. Commissioner Frank seconds. Motion passes unanimously.

Meeting adjourns at 8:26 p.m.