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CITY OF RYE Planning Commission

Resolution

No. 19-2019

Application Name: **Midland Avenue**
Approval Type: Wetland and Watercourses Permit
Application Number: WP# 345
Project Description: Construction of a single-family home within a 100-foot wetland buffer and 100-year flood plain
Street Address: Midland Avenue
Tax Map Designation: Sheet: 146-19 Block: 1 Lots: 48 and 49
Date: November 19, 2019

WHEREAS, on October 26, 2012, Mary E. Cindrach (hereinafter "Applicant") submitted an application for Wetland and Watercourses Permit approval pursuant to Chapter 195, *Wetlands and Watercourses*, of the Rye City Code for a property, located Midland Avenue near the intersection of Playland Parkway; and

WHEREAS, the drawings submitted in connection with the application are generally entitled, *Mary E. Cindrach 32 Beck Avenue Rye, New York*, prepared by John Karell, Jr. P.E., originally dated 8/1/2012 and having the following drawing numbers, drawing titles and revision dates:

Drawing Number:	Drawing Title:	Revision Date:
1 of 5	<i>Site Plan</i>	12/4/17
2 of 5	<i>Drainage Plan and Details</i>	4/12/17
3 of 5	<i>Drainage Plan and Detail</i>	4/12/17
4 of 5	<i>Erosion Control/Tree Plan</i>	4/12/17
5 of 5	<i>Wetland Mitigation Plan</i>	4/12/17

WHEREAS, the application is considered a TYPE II Action pursuant to §617.5(c)(9) of the State Environmental Quality Review (SEQR); and

I. Property Related Facts

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WHEREAS, on or about April 28, 2011, Agnes and Frederick Cindrich (the “Owners”) purchased two parcels of property designated on the City of Rye tax map as 146.19-1-48 (“Lot 48”) and 146.19-1-49 (“Lot 49”) for a total of \$3,500 (Three Thousand and Five Hundred Dollars); and

WHEREAS, Lot 49 is a triangularly-shaped property that is unique in that all of the property lines abut mapped rights-of-way. Two of these rights-of-way, namely Midland Avenue and Playland Parkway are currently improved with streets. The third right-of-way known as Rye Lane is unimproved and abuts other undeveloped lots. Lot 48 is an approximately 6,534-square-foot lot of which an estimated 4,934 square feet (or approximately 76%) is regulated wetland.

WHEREAS, on or about March 24, 2016, the Owners sold the property designated as 146.19-1-48 (Lot 48) for \$11,125 (Eleven Thousand One Hundred and Twenty-Five Dollars); and

WHEREAS, upon information and belief, the new owners of Lot 48 combined Lot 48 with their current residential lot so that they would have a conforming lot with respect to certain setbacks; and

WHEREAS, this resolution concerns only an application to develop the parcel designated as 146.19-1-49 (the “Property”); and

WHEREAS, the Property is located in the area known as the Red Maple Swamp (a five-acre area located immediately north of Playland Parkway and west of Midland Avenue); and

WHEREAS, the Property is located in the R-5 “Residential District” zone; and

WHEREAS, the Property is approximately 24,830 +/- square feet and located entirely within the 100 year the flood zone designated as Zone AE – Flood Map No. 36119C0358F with a base flood elevation of 12.5; and

WHEREAS, the Property is approximately 0.57 acres (or 24,829 square feet) and has only about 10,477 square feet of upland area (i.e. non-wetland area); and

WHEREAS, there is no portion of the property located outside a regulated wetland or a regulated 100-foot adjacent wetland buffer; and

WHEREAS, the Property is subject to flooding due to rain events and coastal flooding and regular tidal flooding with high tide cycles reaching elevations that can inundate the wetland portion of the site and raise groundwater elevations; and

WHEREAS, the property is undeveloped and heavily wooded with a mix of mature deciduous trees ranging in size from 4- to 20-inches in diameter measured at breast height (DBH); and

WHEREAS, the property has a steep change in elevation from the front property line on Midland Avenue to the on-site wetland, which generally runs parallel to Midland Avenue. Slopes on the southern portion of the property have a vertical change of elevation of 12 feet in as little as 20 feet of horizontal distance (or a 60% slope). Slopes in the central portion of the site in the location of the proposed residence approximate nine feet of grade change in 50 feet (or an 18% slope); and

WHEREAS, the upland wetland buffer area proposed for construction between the front property line and wetland edge is very limited providing at its greatest point only 50 feet of depth and ranging down to as little as 20 feet of depth in some locations; and

WHEREAS, the Planning Commission believes that accommodating development given these site and environmental constraints requires a significantly sensitive development program; and

WHEREAS, the aggressiveness of the applicant's proposal requires increased disturbance and wetland buffer loss in order to comply with relevant City and County codes, regulations and requirements; and

WHEREAS, there are 10 undeveloped properties in the Red Maple Swamp and the City of Rye owns four of these undeveloped properties for flood control and environmental preservation purposes; and

WHEREAS, the Red Maple Swamp has significant wetland areas and provides environmental benefits to the City as it is hydrologically connected to tidal stream via two stormwater pipes located under Playland Parkway; and

WHEREAS, approximately 14,352 square feet (or 57%) of the Property consists of regulated wetland; and

II. Wetland Permit Process – Chapter 195 “Wetlands and Watercourses”

WHEREAS, Rye City Code Chapter 195 was adopted in December 1991, approximately twenty (20) years prior to the Owners purchasing the Property; and

WHEREAS, since 1991, Chapter 195 has remained essentially unchanged with the exception of minor amendments in 1992, 1993, 1997 and 2010.

WHEREAS, Chapter 195 sets forth numerous Findings of Fact relating to the importance of wetlands, including, but not limited to, controlling flooding and stormwater runoff by storing or regulating natural flows and providing open space and visual relief from intense development. *See* 195-1(A); and

WHEREAS, Chapter 195 acknowledges that one of the policies of the City of Rye shall be to limit activities that may damage wetlands to an adjacent upland site in such a way so as to not degrade these systems; and

WHEREAS, the intent of Chapter 195 clearly states that the Planning Commission shall regulate activities in such a way that the development not only conforms to applicable sediment control regulations but also that the activities do not threaten the natural environment; and

III. The Application to build a 3,582 square foot residence and impact to environment

WHEREAS, the Applicant proposes to construct a residence and related improvements including a driveway, decks, stormwater basins, drainage systems retaining walls; and

WHEREAS, the proposed residence would be 3,582 square feet, just 85 square-feet (or approximately 2.3%) shy of the 3,667 square-foot maximum permitted floor area by the City Zoning Code for the lot; and

WHEREAS, the Planning Commission and CC/AC repeatedly requested throughout the project reductions in the scope of the project in order to minimize impacts on the wetland buffer and wetland; and

WHEREAS, the Applicant's response to the Commission's concerns as to the impact of the size of the development on the wetland buffer and wetland resulted in modest plan revisions including only a 73 square-foot reduction in house size from the previous floor area of 3,663 square feet as shown on plan number Sheet 1 of 5 prepared by John Karell, Jr. P.E., titled, *Site Plan*, dated May 15, 2015 and last revised May 20, 2017; and

WHEREAS, to accommodate a project of this scale on this constrained site results in 9,544 square feet of the 10,477 square feet of wetland buffer being disturbed. This leaves *less than 9%* (or under 1,000 square feet) of the buffer to be undisturbed; and

WHEREAS, the project requires the removal of 66 trees resulting in the elimination of the wooded character of the site and the associated ecological benefits to the buffer and adjacent wetland. The plan proposes just six replacement trees, which equates to just one replacement tree for every six removed and is far from adequate. A meaningful increase in tree planting in the buffer is not possible because it is so small and consumed with other development needs. While tree removal is expected in site development, there is special concern where trees are in a flood plain and providing a benefit in terms of their uptake of high groundwater and intermittent flood waters. This uptake occurs and provides a benefit to the flood plain regardless of whether the tree is an invasive species or not; and

WHEREAS, after the applicant's successful interpretation from the City's Board of Appeals, the triangular-shaped lot with three frontages allows the front yard setback along Midland Avenue to be just eight (8) feet. The residence is wedged between this setback line and the wetland boundary. Permanent development is located as close as three (3) feet from the wetland and the majority of the development in the 100-foot buffer is less than twenty feet from the wetland; and

WHEREAS, fill is required for the proposed driveway to achieve the desired access from the proposed two-car garage on the lowest level and to Midland Avenue. The fill also increases separation of the proposed sub-surface stormwater measures from prevailing groundwater elevations and raises the lowest floor above the mapped Flood Insurance Rate Maps (FIRM) flood elevations. To compensate for the increase in fill on the north side of the Property, a cut is required on the south side of the residence to satisfy floodplain management practices and requirements. This cut area requires tree removal and the construction of a ten-foot high retaining wall in one of the most steeply sloped areas on the site.

WHEREAS, the proposed driveway on the property exceeds the amount of area for building. The applicant has claimed that the proposed driveway size and configuration is required to satisfy a Westchester County mandate that prohibits backing vehicles onto Midland Avenue (a County roadway). Alternatives are possible that reduce the amount of driveway but are challenging given the difference in elevation between Midland Avenue and the close proximity of the residence to Midland; and

WHEREAS, the Planning Commission is particularly concerned about the driveway (and driveways in general) because they have higher pollutant levels and given the close proximity to the wetland on the Property, there is a significant concern about preserving the integrity of the wetlands and the adverse water quality impacts conveyed through either overland surface water runoff or sub-surface infiltration during periods of high water table.

A. Wetland System

WHEREAS, The Planning Commission does not agree with the applicant's suggestion that the subject wetland is a low functioning wetland system; and

WHEREAS, this Commission concurs with the opinion of the Conservation Commission/Advisory Council, which stated in multiple memorandum to the Planning Commission that the wetland provides a number of functions in terms of "habitat, water quality and flood storage"; and

WHEREAS, the Planning Commission finds that this wetland is significant because it represents a sizeable wooded wetland system within a largely urbanized area consisting of small lot residential neighborhoods. The on-site wetland is part of a larger wetland that is shown on the National Wetlands Inventory of exceeding one-acre in size and is referred to locally as the "Red

Maple Swamp” and is large enough to be identified on the Natural Resources Inventory of the City’s current master plan (see Map 7, page 46); and

WHEREAS, the Planning Commission finds that preservation of this wetland and adjacent buffer is critical to maintaining the function and health of this important wetland system and development on this excessively constrained property would set an undesirable precedent for future development in the Red Maple Swamp;

B. Proposed Mitigation

WHEREAS, the scale of the applicant’s ambitious development program disturbs more than 90% of the upland wetland buffer and leaves inadequate area to provide suitable and meaningful mitigation. As mentioned above, the proposal to plant six trees is inadequate to offset the impact of the loss of 66 mature trees. The wooded character of the buffer is compromised, which will impact the adjacent wetland. Even existing non-native tree species provide important stormwater intake, habitat for wildlife and maintain the balance of shade and heat that supports existing understory vegetative conditions; and

WHEREAS, there are discrepancies between the applicant’s site plan and mitigation plan as to the amount of proposed impervious area proposed within the wetland buffer; however Sheet 1 of 5 indicates a total of 3,436 square feet of impervious area associated with building rooftop, asphalt driveway, concrete walls and walks, plus scaling of the plan shows that the two additional decks add 358 square feet for a total of 3,794 square feet of permanent man-made structures in the wetland buffer; and

WHEREAS, Sheet 5 of 5 indicates that 3,962 square feet of “landscape mitigation planting” would be provided within the wetland buffer far short of the Planning Commission’s long-standing practice for wetland permits of providing 2:1 landscape mitigation area for impervious area; and

WHEREAS, given the lack of remaining buffer area to provide sufficient mitigation, the applicant is proposing additional disturbances in the wetland itself to advance what it calls “wetland restoration/enhancement”. The plan appears to show removal (essentially clear cutting) of groundcover over much of this area with proposed replacement by a seed mix developed for forested wetland environments. This proposed replacement plan is prone to many complications with a low likelihood of success and completely changes the ecological character of the existing wetland; and

WHEREAS, the Planning Commission’s mandate is to preserve high functioning wetlands and not allow such wetlands to be disturbed with mitigation programs that may be intended to compensate for development but rather over-burden the adjacent wetland buffer; and

WHEREAS, the applicant’s plan proposes invasive shrub removal by cutting back the shrubs, then painting the stumps with an herbicide containing glyphosate (Round-up® or equivalent); and

WHEREAS, the applicant later amended the mitigation plan to not use herbicides in the wetland area, leaving unclear whether the invasive shrub removal plan will be successful or how much disturbance would be required in the wetland itself to eradicate invasive species over multiple growing seasons; and

WHEREAS, the proposed plan is troubling considering the required repeated incursions of workers and equipment into the wetland to perform construction activities and then mitigation and maintenance activities over time; and

WHEREAS, as part of the Planning Commission's review of the application, the Commission discussed the possible dedication to the City or deed restriction to prevent any future development on Lot 48, which was the second lot owned by the applicant and identified in the application. The Commission viewed this opportunity favorably, unfortunately, as stated above, the applicant subsequently sold this lot on March 24, 2016 for \$11,125.

IV. Application Process

WHEREAS, there is significant history related to the processing of this application and it is necessary to lay out the timeline to provide relevant background information and highlight the attention the Planning Commission gave to reviewing the applicant's various iterations of plans; and

WHEREAS, set forth below are the relevant dates and time periods during which the Planning Commission considered and continually processed the Applicant's applications; and

WHEREAS, the Applicant submitted an initial application to the Planning Commission on October 26, 2012; and

WHEREAS, on November 8, 2012, the City Planner emailed the Applicant noting various zoning deficiencies; and

WHEREAS, one day later, on November 9, 2012, the Applicant asked to postpone the application; and

WHEREAS, on November 10, 2012, the Planning Commission conducted a site walk of the Premises; and

WHEREAS, between the dates of December 12, 2012 to January 3, 2013, the City Planner communicated to Ann Cutignola (the applicant's planner) via two memoranda the Planning Commission's official opinion as to the application's failure to comply with the City's zoning code, in addition to other concerns regarding the application; and

WHEREAS, on September 1, 2013, after 243 days of inactivity by the Applicant, the Planning Commission received an email from Applicant's attorney, seeking an interpretation from the Building Inspector regarding the zoning of the Premises; and

WHEREAS, on March 13, 2014, after 193 days of inactivity by the Applicant and the City, Applicant's attorney resent the email dated September 1, 2013 to the Building Inspector seeking a zoning interpretation; and

WHEREAS, on June 3, 2014, Applicant's attorney, sent a letter to the Building Inspector and the City Planner, referencing the March 14, 2014 email; and

WHEREAS, an email following up on the matter was sent by Applicant's attorney on August 17, 2014; and

WHEREAS, on September 22, 2014, Applicant's attorney sent a letter stating that the lack of a response shall be construed as rendering the application compliant with all applicable zoning provisions; and

WHEREAS, on April 30, 2015, after 220 days of inactivity by the Applicant, a revised application was submitted by the Applicant to the Planning Commission; and

WHEREAS, on May 2, 2015, the Planning Commission conducted a second site walk of the Premises; and

WHEREAS, on May 5, 2015, the Planning Commission put the April 30, 2015 submission on the May 5, 2015 agenda; and

WHEREAS, on June 2, 2015, a third iteration of the application was submitted by the Applicant to the Planning Commission; and

WHEREAS, on June 9, 2015, the Planning Commission put the June 2, 2015 submission on its June 9, 2015 agenda; and

WHEREAS, on September 21, 2015, after 104 days of inactivity by the Applicant, a fourth submission was made by the Applicant to the Planning Commission; and

WHEREAS, on October 6, 2015, the Planning Commission put the September 21, 2015 submission on the November 14, 2015 agenda, upon receipt of the Applicant's request for continuation of the application; and

WHEREAS, comments on the application were thereafter sent by City Planner to Applicant in a memorandum on October 30, 2015; and

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WHEREAS, on May 23, 2016, after 206 days of inactivity by the Applicant, a fifth submission was made by the Applicant to the Planning Commission; and

WHEREAS, on June 7, 2016, the Planning Commission put the May 23, 2016 submission on its agenda; and

WHEREAS, on October 2, 2017, after 487 days of inactivity by the Applicant, a sixth submission was made by the Applicant to the Planning Commission; and

WHEREAS, on November 14, 2017, the Planning Commission put the October 2, 2017 submission on its agenda; and

WHEREAS, on December 1, 2017, the Planning Commission conducted a third site walk of the Premises; and

WHEREAS, on December 5, 2017, a seventh submission was made by the Applicant to the Planning Commission; and

WHEREAS, the December 5, 2017 submission was not put on the Planning Commission's agenda; and

WHEREAS, on January 16, 2018, Corporation Counsel emailed Applicant's attorney, stating that there is no official zoning determination on the Application and that the Planning Commission therefore was unable to process application as it deemed incomplete; and

WHEREAS, on February 21, 2018, Applicant's attorney sent a letter to the Planning Commission in regards to the Application; and

WHEREAS, on March 11, 2018, Corporation Counsel sent a letter to Applicant's attorney regarding the processing of the application; and

WHEREAS, between April 5, 2018 and July 23, 2018 several letters were exchanged between Applicant's attorney and Corporation Counsel; and

WHEREAS, Section 195-5(B) (3) states that the Planning Commission may require additional information as needed during its review of an application; and

WHEREAS, the Planning Commission is without power to interpret the local zoning code, as that power is vested exclusively in local code enforcement officials and the zoning board of appeals. *See Matter of Swantz v. Planning Bd. Of the Vil. Of Cobleskill*, 34 A.D. 3d 1159, 1160, 824 N.Y.S.2d 781 (2006); and

WHEREAS, there was no evidence in the record that demonstrated that the proposed development of the single-family residence was zoning compliant and, without such evidence, the Planning Commission could not proceed; and

WHEREAS, on August 10, 2018, Applicant submitted the application to the Building Department for the City of Rye; and

WHEREAS, on September 21, 2018, a demand letter was sent by Applicant's attorney to the City; and

WHEREAS, on October 23, 2018, a letter was delivered from the Building Department regarding the zoning compliance of the Application; and

WHEREAS, on November 26, 2018, Applicant's attorney responded via letter to the Building Department's letter, revised from a previous letter dated October 26, 2018;

WHEREAS, on November 26, 2018, a request for an interpretation was filed with the Board of Appeals ("BOA") for the City of Rye;

WHEREAS, between December 18, 2018 and May7, 2018, the BOA held hearings and/or adjourned the application, and

WHEREAS, on May 7, 2019, the BOA rendered a decision on the application, which was transmitted to Applicant's attorney; and

WHEREAS, on July 29, 2019, after 83 days of inactivity by the Applicant, an eighth submission was made by the Applicant to the Planning Commission; and

WHEREAS, on August 13, 2019, the Planning Commission put the June 26, 2019 submission on its agenda; and

WHEREAS, on September 3, 2019, an ninth submission was made by the Applicant to the Planning Commission; and

WHEREAS, the Planning Commission put the September 3, 2019 submission on its September 10, 2019 agenda; and

WHEREAS, on September 24, 2019, a public hearing was held on the application; and

WHEREAS, eight area property owners raised concerns about the impacts to the wetlands and questioned whether this proposed development was appropriate for the site including flooding impacts to their properties; and

WHEREAS, numerous residents testified to the existing flooding that occurs during rain events; and

WHEREAS, the public hearing was continued to the Planning Commission's next meeting on October 15, 2019; and

WHEREAS, the Planning Commission heard additional comments from the public and received additional information and closed the hearing on October 15, 2019; and

WHEREAS, under § 195-5(C), it states that the "Applicant shall have the burden of demonstrating that the proposed activity will be in accord with the goals and policies of this chapter and the standards set forth under § 195.5(D); and

WHEREAS, the Final Application proposes a single-family house that sits entirely within the wetland buffer as defined under Rye City Code as the "specific area surrounding a wetland/watercourse extending 100 feet horizontally away from and paralleling the wetland boundary".

NOW, THEREFORE, BE IT RESOLVED, based on the above factual background, personal observations made during site visits and inspections, hours of discussion and deliberations, and consistent with the Planning Commission's diligent attention to the entire development occurring essentially in the wetland buffer, the Planning Commission finds that the application does not satisfy the requirements §195-5.D of the Rye City Code, *Standards for Permit Decisions* and therefore must be deny it. More specifically:

The Planning Commission finds that the application does not avoid impacts to the "maximum extent practical" as required by §195-5.D(1). The proposed development program of a 3,582 square foot residence, just 85 square feet shy of the 3,667 square feet maximum permitted floor area by the City Zoning Code and related access, retaining walls, fill, stormwater and flood mitigation measures is too intense of a development for this heavily constrained site. Reducing the scope of the project and modifying the proposed design could reduce impacts and potentially increase mitigation opportunities. It is unreasonable for the applicant to assume this lot, constrained by the existence of a wetland and wetland buffer, can support a residence comparable to other residences in the area. This is an extraordinary site and requires a far more thoughtful and less aggressive development approach. All of these regulatory and environmental constraints existed before the applicant acquired the property.

BE IT FURTHER RESOLVED, the Planning Commission finds that the application does not meet the requirements of §195-5.D(1)(b). The proposed development will result in development located a mere matter of feet from the edge of the wetland. In addition, the application requires wetland disturbances in the wetland over a period of growing seasons to implement its

proposed mitigation program. The “reasonably anticipated future use” typically associated with a single-family residence will inevitably result in increased burdens on the wetland. Wetland maintenance, landscape activities, and encroachment of regulated activities will likely occur. If more buffer area were preserved to provide greater separation from future residential activities, these future impacts could be lessened, however, the site is challenging given the limited 20 to 50-foot wedge of upland area between the wetland boundary and Midland Avenue.

BE IT FURTHER RESOLVED, the applicant proposes mitigation plantings in the wetlands and other wetlands enhancements, however such mitigation is unacceptable for the reasons stated above.

BE IT FURTHER RESOLVED, that consistent with the Planning Commission’s review of applications in the wetland and wetland buffer, the Planning Commission finds that the proposed plan essentially consumes the entire wetland buffer, leaves inadequate area for appropriate mitigation outside of the wetland itself and, as such, violates Section 195-5(D)(1)(a)(4)195-5; and

BE IT FURTHER RESOLVED, the proposed intensity of the Applicant’s plan overburdens the significantly constrained site and is not consistent with the City’s local comprehensive land use plans and City regulations as required in Section 195-5(D)(1)(f); and

BE IT RESOLVED, that weighing all the factors set forth in Section 195-5(D)(1) (a), and given this Commission’s broad discretion to regulate activities in the wetland, this Application is denied.