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November 30, 2016

By email troach@whiteplainsny.gov and Overnight Delivery
Thomas M. Roach, Mayor
City of White Plains
City Hall
255 Main Street
White Plains, New York 10601

Re: French-American School of New York v. Mayor Thomas Roach and the Common Council of the City of White Plains
Supreme Court of the State of New York, Westchester County
Index Number: 2067/2015
Hon. Joan B. Lefkowitz

Dear Mayor Roach:

This office represents The Gedney Association (hereinafter the "Association") in connection with certain issues which have arisen in the context of the above-referenced lawsuit.

As you are aware, the Association is opposed to the application submitted by the French-American School of New York (hereinafter "FASNY") seeking approvals to construct and operate a private elementary and secondary school on the property formerly owned by the Ridgeway Country Club.

As you are also aware, your office and the Common Council of the City of White Plains (hereinafter "Common Council") have executed a Stipulation of Settlement in connection with the above-referenced litigation (hereinafter "Stipulation of Settlement") pursuant to resolution passed by the Common Council on September 6, 2016. The Stipulation of Settlement directed, among other things, submission of an "Alternative Plan" which purports to limit development to only a portion of the property owned by FASNY. The Association is steadfastly opposed to any settlement which would authorize the development to proceed as proposed.

The Stipulation of Settlement states, among many other items, that the Common Council must:

> "determine whether the Alternative Plan is on or involves or affects any 'Environmentally Sensitive Site or Feature' as defined in §2.4 of the City Zoning Ordinance."

To say the least, the Association is perplexed regarding the need to make such a determination inasmuch as the entirety of the property owned by FASNY has already been determined to be an

"Environmentally Sensitive Site or Feature" (hereinafter "ESS") as defined in §2.4 of the Zoning Ordinance of the City of White Plains (hereinafter "Zoning Ordinance") and Chapter 3-5 of the City of White Plains Municipal Code (hereinafter "Municipal Code"). Those provisions were adopted in order to provide broad and expansive protections to properties which are classified as an ESS. The legislative intent is clearly set forth in Section 3-5-1 of the Municipal Code:

> Sec. 3-5-1. - Findings and legislative intent.
> In order to meet the city's stewardship responsibility under the New York State Environmental Quality Review Act ("SEQRA"), Article 8 of the Environmental Conservation Law and the regulations thereunder promulgated by the Department of Environmental Conservation (the "DEC Regs.") and to protect its natural resources, ecological systems, open space, natural beauty, and the value of property within the city, it is necessary to assure that full consideration is given to the natural features enumerated herein. It is in the general interest of the health, safety and welfare of the inhabitants of the City of White Plains to encourage protection of water bodies, watercourses and watersheds, wetlands and aquifer recharge areas, mature trees, habitat for flora and fauna, steep slopes, highly erodible soils, rock outcroppings, and other natural features of the land. Protection of the features stabilizes and preserves real property values, encourages, passive recreation and appreciation of aesthetic and scenic beauty, and safeguards the public from flooding and erosion.

FASNY's submission of an "Alternative Plan" which purports to limit development to only a portion of the entire FASNY property under application does not and cannot act to change the established status of the entire FASNY property as an ESS. Further, any consideration regarding potential modification of the status of the property under application as an ESS must be part of the public hearing process in connection with the Special Use Permit and Site Plan Approval applications which will allow for comprehensive public input. This issue should not and must not be determined by virtue of a resolution on the Common Council's administrative calendar without adequate public notice and any opportunity for the public to be heard.

As you are also aware, the property under application consists of four (4) parcels which have been denominated Parcel A, Parcel B, Parcel C, and Parcel D. The current "Alternative Plan" purports to limit development to Parcel A only. In its "Alternative Plan" submission, FASNY has advanced the notion that Parcel A is not an ESS and, therefore, that the Common Council should pass a resolution to that effect. It is also our understanding that such a resolution may be considered for adoption as

early as the meeting of the Common Council scheduled for Monday, December 5, 2016. It is the Association's position that any such resolution must fail.

The Common Council has already determined that all of the properties owned by FASNY--Parcel A, Parcel B, Parcel C, and Parcel D--constitute a "Development Site" as defined by the Zoning Ordinance. A copy of a memorandum regarding this issue prepared by the attorneys representing FASNY dated December 6, 2012 and acknowledging this fact is enclosed for your convenience. Further, the Common Council passed the following resolution regarding the FASNY application on August 1, 2011:

> "The Property [Parcel A, Parcel B, Parcel C and Parcel D] which is the subject of the Application is an environmentally sensitive site with multiple environmentally sensitive features including features including a New York State registered wetland".
>
> "The Property [Parcel A, Parcel B, Parcel C and Parcel D] is located in the Mamaroneck River Watershed and the Property has been identified in te Watershed Advisory Committee 4 (WAC-4) Management Plan dated January 2001 to be part of a 'wetland system on the north and south sides of Ridgeway Avenue in White Plains including state-designated wetland No. G-7 north of Ridgeway and the wetland at Club Pointe residential complex south of Ridgeway Avenue' which the WAC-4 Plan identifies as of extraordinary functional value to water quality in the subwatersheds of the Mamaroneck and Sheldrake rivers and Mamaroneck Harbor".

Further, the Common Council, in its adopted Findings Statement under the New York State Environmental Quality Review Act (hereinafter "SEQRA") regarding the FASNY application determined as follows:

> "WHEREAS, the FASNY property, consisting of four separate parcels of land with road access from 400 Ridgeway and Hathaway Lane, is an environmentally sensitive site under Section 4.4.25 of the Zoning Ordinance and Chapter 3-5 of the Municipal Code, and, at approximately 129 acres, is one of the largest open space properties in the City of White Plains".
>
> "It represents an activity that meets or exceeds the threshold of a project that involves physical alteration of 10 acres."
>
> "It is located in the Mamaroneck River Watershed".

> "The environmentally sensitive features of the Project Site are located primarily on two of the four parcels, Parcels C and D and include wetlands. In addition, there are portions of the Project Site on all parcels that have steep slopes and portions that experience impacts from storm water run off that must be managed and, as a result preclude of limit potential development in certain areas."
>
> "Finding B-1 - The entire Project Site is an environmentally sensitive site. Significant potential stormwater impact could result from the development of the site unless mitigated through property designed and constructed stormwater management techniques and infrastructure".

Finding B-1 as set forth above is particularly relevant and, indeed, dispositive of this issue. The Common Council found that "[t]he entire Project Site [including Parcel A] is an environmentally sensitive site". It is important to note that at no time did FASNY purport to contest this finding and determination by the Common Council. Further, nothing has transpired since the issuance of that finding on December 19, 2013 which could result in the Common Council reaching the exact opposite conclusion. Throughout this entire process, the entire property under application--Parcel A through Parcel D--was always considered a "Development Site" as defined in §2.4 of the Zoning Code. Further, this "Development Site" was always considered to be an ESS as defined in §2.4 of the Zoning Code and Chapter 3-5 of the Municipal Code. That conclusion cannot and must not change.

Further, while it appears that development is limited to Parcel A by virtue of the "Alternative Plan", FASNY has also submitted a "Conservation Easement Exhibit" regarding Parcel D. In essence, Parcel D, an undisputed ESS, is being preserved in an effort to mitigate negative impacts resulting from the development Parcel A. That purported mitigation effort inextricably connects Parcel A with Parcel D. Therefore, even if Parcel B and Parcel C could be removed from the overall "Development Site" presently under application (which cannot occur as discussed above) there is no question that Parcel A and Parcel D are part of one unified "Development Site". As such, Parcel A was, is, and continues to be an ESS.

The motivation behind FASNY's desire to have the Common Council pass a resolution stating that Parcel A is not an ESS could not be more transparent. Section 4.4.25.4.2 of the Zoning Code states as follows:

> "For any proposed action requiring approval under §4.4.25 of this Ordinance [the development of an ESS], the affirmative vote of two-

> thirds or more of the Members of the approving agency [herein the Common Council] shall be required."

Essentially, in order to approve the "Alternative Plan" submitted by FASNY, a minimum of five (5) members of the Common Council must vote in favor of the application. If Parcel A is deemed to no longer be an ESS then it would appear that a simple majority of a minimum of four (4) affirmative votes would be required to approve the "Alternative Plan".

FASNY must not be permitted to avoid the clear requirement for approval of its "Alternative Plan" by two-thirds of the Common Council as required by Zoning Ordinance §4.4.25.4.2. And certainly this result must not obtain by a "delisting" of Parcel A by virtue of simple majority vote of the Common Council. Advancement of this position is a blatant and unlawful attempt to avoid the clear mandate of §4.4.25.4.2 of the Zoning Ordinance and must not be permitted.

However, even if the Common Council were to consider Parcel A to be a "Development Site" as defined in §2.4 of the Zoning Code totally independent from Parcel B, Parcel C, and Parcel D, Parcel A is nonetheless an ESS. Enclosed herewith is a report prepared by Dr. Steven Danzer, Ph.D. dated November 29, 2016 (hereinafter "Danzer Report"). Dr. Danzer is soil scientist, professional wetland scientist, and arborist with a Ph.D in renewable natural resource studies. Dr. Danzer's comprehensive analysis undisputably concludes that Parcel A, on its own, constitutes an ESS as defined in §2.4 of the Zoning Ordinance and Chapter 3-5 of the Municipal Code.

Indeed, Section 3-5-3 of the Municipal Code states as follows:

> "The following thresholds shall determine that a site or feature is environmentally sensitive:
>
> (a) Any site, property or location which is traversed by, on the bank of, or within one hundred (100) feet of any river, creek, stream, brook or other flowing watercourse."

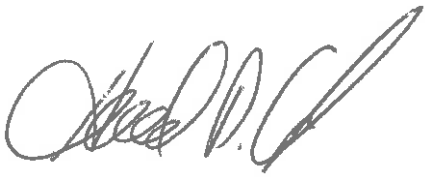
The Danzer Report conclusively demonstrates that Parcel A is within one hundred (100) feet -- in this case 61 feet -- from a flowing watercourse. (See Danzer Report at pp. 1-5.) In that regard, conspicuously absent from FASNY's "Alternative Plan" submission is any analysis whatsoever regarding Sec. 3-5-3(a) of the Municipal Code. This omission is glaring in the context of the Danzer Report and further evidences FASNY's desperation in seeking to avoid the clear requirements of Section 4.4.25.4.2 of the Zoning Ordinance which mandates that any approval of the "Alternative Plan" must be by an affirmative vote of two-thirds or more of the Common Council.

Secondly, the Danzer Report specifically identifies features located on Parcel A itself reinforcing its status as an ESS and recommending further analysis to verify same. (See Danzer Report at pp. 5-10.) The Common Council is obligated in its role as Lead Agency under SEQRA to require FASNY to conduct such additional tests and analyses as set forth in the Danzer Report in order to evaluate the status of the observed features.

As noted above, FASNY is requesting that the Common Council reverse its previous determination that Parcel A is an ESS. It is doing so for one reason and one reason only--to avoid the two-thirds super majority vote which is required in order to approve its "Alternative Plan". There is no valid reason which could be advanced to change that requirement at this point in time. It is respectfully submitted that such a "delisting" of Parcel A is inappropriate and unlawful based upon the construction of all applicable Zoning Ordinance and Municipal Code provisions, combined with the resolutions and findings issued by the Common Council as set forth above. The environmental concerns in connection with this application are extremely significant. That is the precise reason why the Common Council mandated a two-thirds affirmative vote for any development project which will impact an ESS. In order to approve such an application, a two-thirds super majority vote is mandated.

Thank you for your consideration.

Very truly yours,



Howard D. Avrutine

HDA/cr
Enclosures

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City Clerk of the City of White Plains

Memo

To: John Callahan

From: Michael D. Zarin, Esq.
Meredith Black, Esq.

Client: FASNY

Re: Miscellaneous Zoning Issues

Date: December 6, 2012

This Memorandum addresses several zoning issues raised by various City Departments, which need to be clarified so that FASNY can begin to prepare and submit the FEIS to the City in a timely manner.

DISCUSSION

1. Zoning

A. "Development Site"

Questions have been raised regarding the applicability of "Development Site" regulations to the FASNY Application. More precisely, should the FASNY site be considered as one development parcel for zoning purposes as we were previously advised, or as four (4) separate zoning parcels as has now been newly posited by some.

Initially, as mentioned previously, this issue was discussed at length, and supposedly resolved at a meeting with the relevant City Staff held on May 8, 2012. At that meeting it was determined specifically that the City would consider FASNY's property a "Development Site," and as such certain of the dimensional (coverage, FAR, Accessory Structures) and use regulations would by applied across the entire property, as opposed to each lot individually. This made eminent sense to all at the meeting. Certain other provisions regarding yards/setbacks were also discussed at that meeting as they relate to a Development Site. We have the notes from those meetings. The DEIS was prepared based upon these agreements and assumptions.

The White Plains Zoning Code ("Code") defines a "Development Site" as "[t]he entire site designated by the 'site plan' or special permit approving agency as the area to which the dimensional and 'use' regulations of this Ordinance shall apply; *notwithstanding the subdivision or divided ownership of such site*." (emphasis added)

Code, Section 2.4. This language provides specifically that the "approving agency [i.e. City Council in this case] has the authority to make the determination of whether dimensional and use regulations apply to a site regardless of subdivision or divided ownership." Id.

In her Memorandum, Advisor Habel suggests that unless a "Development Site" is specifically provided for in Section 5.3 of the Code, it is not permitted. First, this is contrary to the position she originally took, including as presented at the May 8th Meeting. She references the description of the RM-2 zone in the Schedule of Dimensional Uses that includes a footnote indicating that "Dimensional requirements apply to the entire area classified an Urban Renewal site, and are not applied to any individual areas, notwithstanding the subdivision or divided ownership of such site."

Moreover, Advisor Habel's new position conflicts with several basic axioms of statutory construction. In the first instance, since zoning regulations are in derogation of common law, they must be strictly construed against the municipality . . . [and] in favor of the property owner. See Allen v. Adami, 39 N.Y.2d 275, 277 (1976); Bonded Concrete Inc. v. Zoning Bd. of Appeals of Town of Saugerties, 268 A.D.2d 771 (3d Dep't. 2000) (holding that courts must strictly construe a zoning code against the municipality, particularly where a contrary interpretation would subject the landowner's property to a lengthy and involved process not contemplated by site plan approval).

Further, "[a] statute of legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent." N.Y. Statutes § 97; see also U.S. v. Robinson, __ F.3d __, 2012 WL 5971545 (2d Cir. Nov. 30, 2012) ("[T]he words of a statute are *not* to be read in isolation; statutory interpretation is a 'holistic endeavor.'" (citation omitted, emphasis in the original); Albany Law School v. N.Y.S. Off. of Mental Retardation & Dev. Disabilities, 19 N.Y.3d 106, 945 N.Y.S.2d 613, 620 (2012) ("[I]t is well settled that a statute must be construed as a whole and that its various sections must be considered with reference to one another."); Onondaga County Sav. Bank v. Love, 166 Misc. 697, 3 N.Y.S.2d 428, 434 (Sup. Ct. 1938) ("'Language, however strong, must yield to what appears to be the intention, and that is to be found, not in the words of the particular section alone, but by comparing it with other parts or provisions of the general scheme of which it is a part.'" (citation omitted)); N.Y. Statutes §98(a) ("All parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof.").

While admittedly the only section in the Zoning Code that expressly refers to a "Development Site" is Section 6.7.28, concerning the Transfer of "Excess Gross Floor Area," a holistic review of the Zoning Code shows that this term is meant to apply throughout. There are numerous provisions in the Code where dimensional requirements are applied to the entire site, and the site is treated as one development site where there is a common use and ownership of the related parcels. See Section 5.3 of the Code. In a "Planned Senior Residential Development District," for example, "[a]ll dimensional requirements shall apply to the entire District and are not applied to any individual areas

notwithstanding subdivision or divided ownership of areas within the District." Code, Section 5.8.3. Similarly, in a "conservation district," which is permitted on properties located in the R1-30, R1-20, R1-12.5, R1-1-7.5, and R1-5, "the average coverage of the land with building over the entire property shall not exceed the amount permitted in the zoning district in which it is located." Code, Section 5.7.3.4.3. Neither of these districts includes a reference to the development site footnote listed in Section 5.3. The text of the Code clearly intends for all properties in common ownership with one intended use to be treated logically as one development site.

Indeed, the plain language of Section 6.7.28 shows that it is up to the approving agency to designate the "Development Site" for zoning purposes. The Code indicates that "'excess gross floor area' on a 'lot' or *designated* 'development site' may be transferred to a non-contiguous *designated* 'development site.'" Code, § 6.7.28.2 emphasis added). The clear language of Section 2.4 supports this result.

Ultimately, and perhaps most fundamentally, in statutory construction, again, as you are surely aware, the Code's plain language must govern the application of dimensional and use regulations. See, e.g., N.Y. Statutes § 76; Ellington Const. Corp. v. Zoning Bd. Of Appeals of Inc. Vill. Of New Hempstead, 77 N.Y.2d 114, 121 (1990) "[I]f the statute is unambiguous and its meaning evident from the language. . . we need look no further"). Section 2.4 of the Code explicitly states that a "Development Site" can encompass various tax lots regardless of subdivision or divided ownership. This also makes sense from a practical zoning perspective.

There is no rational reason for the City Council to treat the FASNY property as different parcels for zoning purposes. Such a position would cause an unreasonable, absurd, and discriminatory result in contravention of multiple axioms of statutory construction. As you know, statutes are to "be given a reasonable construction, it being presumed that a reasonable result was intended by the Legislature." N.Y. Statutes § 143; see also N.Y. Statutes § 145 ("A construction which would make a statute absurd will be rejected."); N.Y. Statutes § 146 ("A statute should be construed in a manner which will not work hardship or injustice."); N.Y. Statutes § 147 ("The court should adopt a statutory construction which will produce equal results and avoid unjust discrimination."); N.Y. Statutes § 148 ("In accordance with a presumption of the legislative intention, the courts will construe a statute in order to avoid mischievous or disastrous consequences.").

Respectfully, it would be unduly restrictive and unfair to treat any property with one intended use as multiple development sites. The primary reason it appears this issue is even being raised here is because the FASNY Property is divided by roads. Otherwise, the Property could be merged. In reality there are many Development Sites that have roads or driveways running through them.

Accordingly, the use of "Development Site" should be permitted in the R1-30 zone with respect to FASNY's Property so long as it is affirmed by the Common Council.

B. Use Regulations

Lots without a Principal Use

In her Memorandum, Advisor Habel also raises questions regarding the accessory use of lots without a principal use since by definition an accessory use may not be located on a lot without the principal use to which it is accessory, and that it cannot be accessory to another accessory use. Assuming the FASNY Property is treated as one "Development Site," which it should, this issue become irrelevant. In viewing the FASNY site as one development site, as it should, uses are applied to the entire site, such that accessory uses on Parcels B and C may be accessory to the principal uses located on Parcels A and D.

The Conservancy as a "Use"

Assuming that the FASNY Site is viewed as separate parcels for development purposes, Advisor Habel posits that the designation of the Conservancy, as a specific and separate use, would not be a permitted use in a residential zone.

First, assuming this is a rationale interpretation, which it is not, the "Conservancy" could be re-labeled as open space on FASNY's Application. This re-designation would remove the question of whether the use is permitted as a principal, or accessory use in the R1-30 Zone. It would essentially operate as the functional equivalent of a residential back yard (which does not require a specific use designation). Unfortunately this alternative would result in the loss of public access to this open space since such use would not be permitted as "none of the special permit approvals of existing private schools include provision for shared use or lease of athletic facilities by other private schools or private individuals, groups, or organizations." Nor would FASNY be permitted to provide parking for the "open space."

As a second option, the Conservancy could be designed as a "Use of the City of White Plains," which is a Permitted Principal use in the R1-30 Zoning District. Code Section 5.1. FASNY's Application proposes the Conservancy as a privately held, public amenity. FASNY has offered to fund, secure, and maintain the Conservancy, while making it available to the general public 365 days a year from dawn to dusk. In the DEIS, FASNY made it clear that the Conservancy is a public amenity that it is willing to develop with the City, and its residents, and formalize with a Conservation Easement or other appropriate legal documentation. Designating the Conservancy as a "City Use" would also obviate the issue that "none of the special permit approvals of existing private schools include provision for shared use or lease of athletic facilities by other private schools or private individuals, groups, or organizations." We therefore submit as an

alternative position (albeit unnecessary in our opinion) that the Conservancy portion of FASNY's Application could be considered a "Use" of the City of White Plains, and a permitted principal use under the Code.

We would prefer that the Conservancy be considered part-and-parcel of the FASNY Application, and that a separate and distinct "use" not be assigned to this open space. We know of no precedent where a community applies a specific use designation to open space proffered as part of a larger land development application. Such a regulation would have the unintended consequence of stifling the provision of open space and public access to such open space. We submit that this is contrary to the City's Comprehensive Plan.

Accessory Uses Require Separate Special Permits

Advisor Habel further opined for the first time in her Memorandum that swimming pools, tennis courts, basketball courts, and other similar facilities are structures that each require their own special permit since they "possess characteristics of such unique and special form that each specific "use" must be considered as an individual case."

Respectfully, this is a matter of semantics, and displays an overly onerous and irrational approach to Zoning. To the extent regulations control the development of swimming pools, tennis courts, and other similar court facilities, the Applicant understands that those regulations require compliance. The Applicant also acknowledges that to the extent specific special permit criteria exist for said uses, they must be addressed. We respectfully submit, however, that separate applications for each of these specific uses are not required, but rather fall within the purview of the overall Special Permit and Site Plan Application for the school. We know of no other communities that regulate separate Special Uses on the same property.

C. Dimensional Regulations

Yards

Many questions have been raised by City Staff as to how lots are defined and interpreted under the Code as applied to FASNY's property. The Applicant and City staff have defined Parcels A and D differently based on their respective interpretations of the Code. An analysis and effect of these interpretations are provided below.

The Applicant defined Parcels A and D solely as Corner Lots. Under the Code "[a] 'lot' located at the junction of two or more intersecting 'streets' where the interior angle formed by the intersection of the 'streets' is 135 degrees or less" is considered a "Corner Lot." Code Section 2.4. Based on this information, the property owner may elect the front yard and designate the other yards accordingly. As shown on FASNY's plans and noted in the DEIS, for Parcel A the Applicant designated Ridgeway as its front yard (requiring a 75 ft. setback), Gedney Esplanade as its rear yard (requiring a 15 ft. setback), and the other yards as side yards (requiring a 25 ft. setback for each).

With respect to Parcel D, the Applicant designated Bryant Avenue as its front yard (requiring a 75 ft. setback), Ridgeay as its rear yard (requiring a 15 yard setback), and the other yards as side yards (requiring a 25 ft. setback for each).

Certain City Staff have indicated that Parcel A should be considered a "Corner Lot" *and* a "Through Lot." First, there is no specific definition for "Through Lots" in the Code. The general, undefined term "through lot" is discussed as part of the "Front Lot Line" definition. The "Front Lot Line" definition notes that "[i]n addition, in the case of a through lot having lot frontage on two streets, the front yard setback and all other requirements of this Ordinance applicable to front yards shall apply for both streets."

This definition conflicts, however, with Section 4.4.9 of the Code, which provides that "[t]he owner of a 'corner lot' in a residence district may elect either 'yard' fronting on a 'street' as the 'front yard,' *with any other 'yard' fronting on a 'street' then becoming a 'side yard.'*" (emphasis added). We believe that Parcels A and D are clearly "Corner Lot[s]," and that FASNY's proposed yard designations are ones that meet the intent of the Zoning Regulations and allow for a rational layout of project elements that protect adjoining residential properties.

Setbacks

Another issue with respect to the designation of Parcels A and D as "Corner Lots," and the defining of the appropriate yard setbacks, is relevant to agreeing on the setbacks for "off-street parking" from Hathaway.

The Applicant submits that since Parcels A and D abut other Corner Lots,[1] the setbacks are defined by Section 8.6.3 of the Code. Section 8.6.3. of the Code states, that "in the case of 'corner lots,' off-'street'' parking spaces' shall be set back from the side 'street' line a distance equal to the 'front yard' requirements on such side 'street,' unless 'corner lots' are back to back, in which case such off-'street' 'parking spaces' shall be set back at least 10 feet." As such, the Applicant need only provide a 10 foot setback from Hathaway for off-street parking. In contrast, some have suggested that under Section 4.4.9 of the Code, the Applicant must apply for a waiver of the average setback of existing buildings from Hathaway because off-street parking needs to be at least 40 feet from Hathaway.

The Applicant respectfully disagrees with this interpretation. The applicable part of Section 4.4.9 of the Code states that "if on the 'street' chosen for the 'side yard,' the approving agency . . . finds that there is an average setback of existing 'buildings,' from which no 'building' departs too greatly, *the agency* [i.e. the Common Council] . . . *may* require the 'side yard' on such 'corner lot' to be equal in depth to such average setback." The Code does not require that the Applicant seek a waiver of Section 4.4.9. Instead, it places an affirmative duty on the Common Council to impose any more

[1] Parcel A abuts the Corner Lot located at the intersection of Ridgeway and Murchinson. Parcel D abuts the Corner Lot located at the intersection of Northdale Road and Southdale Road.

restrictive setbacks. Unless and until such time as the Common Council indicates that it would require increased side yard setback for off-street parking a waiver from the Applicant is not required. As a practical matter, application of this increased side yard setback would require an entire redesign of the lower school parking lots since those lots, with the exception of the pre-existing non-conforming parking lot, generally have a 25 foot setback from Hathaway.

STEVEN DANZER, PHD & ASSOCIATES LLC
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November 29, 2016

TO: City of White Plains

FROM: Steven Danzer Ph.D.

- Soil Scientist – Certified Nationally by the Soil Science Society of America (#353463).
  – Registered with the Society of Soil Scientists of Southern New England.
- Professional Wetland Scientist - PWS #1321, Society of Wetland Scientists.
- Arborist - CT DEEP License S-5639.

- Ph.D. - Renewable Natural Resource Studies.

RE: FASNY Parcel A, 400 Ridgeway, White Plains.

INTRODUCTION

At the request of The Gedney Association, I have reviewed the application materials submitted to date to the City of White Plains regarding the proposed development on Parcel A, 400 Ridgeway.

The purpose of my professional review was to render an expert opinion regarding the following question: Is Parcel A an "*environmentally sensitive site and feature*" as defined in Section 3-5 of the City of White Plains Municipal Code?

SUMMARY FINDINGS

1. Based upon field conditions and the definitions within the City of White Plains Municipal Code, Parcel A is an environmental sensitive site due to its proximity to a watercourse located off-site.

2. Based upon the Applicant's data and their written discussion, there are sufficient indicators (soils, hydrology and vegetation) within Parcel A for areas to meet the wetland

definition under the Section 3-5-2(b) 2 of the City of the White Plains Municipal Code. It is recommended that the Applicant provide further detail regarding the extent and gross area of this wetland to determine if the site is also considered Environmentally Sensitive under Section 3-5-3(b) of the City of White Plains Municipal Code.

ANALYSIS and DISCUSSION

1.0 Characterization of the Off-site Watercourse

1.1 Watershed Source and Route

Under existing conditions, Parcel A is underlain by a subsurface drainage network. The route of this network is depicted on sheet SP-02 of the Applicant's site plan as a 10' wide storm sewer easement.

This subsurface drainage corridor is documented and then discussed within the application materials. The corridor was historically part of a larger surface watercourse and/or wetland system that the Applicant contends that was physically modified sometime prior the 1950s and possibly even prior to the development of the Ridgeway golf course in the 1920s.

The mapped system conveys subsurface flow that originates from Parcel B (located north of Parcel A). The system also apparently collects flow from Parcel A from a secondary network of unmapped subsurface drainage pipes, lawn drains, and inlets, referenced in the application materials, which underlay the golf course. This secondary unmapped system intercepts runoff, subsurface flow and groundwater from Parcel A and then discharges it into the mapped drainage system.

The route of the mapped drainage corridor is as follows: The piped watercourse flows southerly from Gedney Esplanade, crosses underneath Parcel A, and flows southerly towards Ridgeway street. The flow then exits the site in two parallel pipes under Ridgeway street. The piped watercourse then discharges into an open, flowing watercourse on the Westchester Hills Golf Club property directly across Ridgeway street from Parcel A, 61 feet from the Parcel A property line.

After daylighting on the Westchester Hills property, the watercourse then flows southerly roughly another 130 feet before entering another culvert. It then flows through a pipe underneath the parking lot and tennis courts, and daylights again immediately south of the tennis courts. The watercourse then flows south where it eventually connects to the Mamaroneck River, and ultimately flows into Long Island Sound. The watercourse is part of an important water system in the county.

The section of the watercourse that is located on the Westchester Hills Golf Club property is a matter of public record and as such is viewable on several publically available data sources. These public records and data sources include (but are not limited to):

1. The watercourse's outline is depicted on the Westchester County Planning Department - Streams and Rivers GIS map (http://giswww.westchestergov.com/gismap/) and again in the application materials as a "Westchester County Stream" in Figure 3.4-1 of the DEIS.

2. The watercourse's outline is also depicted on the NYSDEC Environmental Resource Mapper (http://www.dec.ny.gov/gis/erm/) map view layer.

3. The watercourse is also fully viewable with the aid of Google Earth aerial view (https://www.google.com/maps) and with the aerial view layer from the NYSDEC Environmental Resource Mapper (see attached map).

1.2 Characterization as a Watercourse

The watercourse on the Westchester Hills property is a fully functional watercourse, exhibiting the physical, ecological and hydrological characteristics that a flowing watercourse would reasonably be expected to exhibit.

For instance, it has a defined channel and bank (albeit reinforced in places by decaying masonry and/or rip rap), evidence of scour and deposits of recent alluvium and detritus, and (based upon my field verification) has flowing water for a duration longer than any particular storm incident (i.e. surface flow was observable during field investigation even though the last rainfall event had occurred several days earlier). The watercourse's hydrologic flow regime can be characterized as either perennial or intermittent, but not ephemeral. Therefore the watercourse is an intermittent or perennial watercourse, and not simply a "ditch" on the landscape (ditches have ephemeral flow as an immediate response to a storm event, while watercourses have intermittent or perennial flow since unlike ditches they do not rely on stormwater runoff for hydration).

The watercourse also has ecological function due to a very modest level of habitat within its channel environment, and hydrological function due to its ability to intercept and convey groundwater and surface flow from the upstream watershed, as well as its ability to provide channel storage capacity.

1.3 Characterization as a Water Resource

Section 3-5-2 (a) (Environmentally sensitive sites and features) of the City of White Plains Municipal Code defines water resources as:

> *(a) including **perennial or intermittent watercourses**, ponds, lakes, reservoirs, retention basins and watersheds therefor.*

Based upon the existing field conditions documented above, it is my professional opinion that this landscape feature (the watercourse) located on the Westchester Hills Golf property qualifies as a "Water resource" as defined in the City Code as a perennial or intermittent watercourse.

Beyond my field appraisal, it should be noted that there were additional observations documented within the Applicant's own application materials which further corroborate the classification of this feature as a "water resource". These observations include:

1. Direct reference to this feature by the Applicant's Draft Environmental Impact Statement (DEIS) p 4-4 as a "surface water stream".

2. Direct reference to this feature by the Applicant's DEIS p 4-17 as a "surface water stream".

3. Direct reference to this feature by the Applicant's DEIS p 4-21 as an "open channel".

4. Direct reference to this feature by the Applicant's DEIS p 4-17 as a "surface water stream".

5. Direct reference to this feature by the Applicant's Final Environmental Impact Statement pp 3.4-1-2 as a "stream" as well acknowledgment of this segment of watercourse as being mapped as a stream by Westchester County Planning Department.

6. Direct reference to this feature by the Applicant's Wetland Delineation Report (Appendix E-1) three times (pps. 21, 23, and 25) as a "stream" as well as disclosure of a historic USGS topographic map from 1899 showing the surface water drainage (stream) on Parcel A "that was presumably piped/buried and which resurfaces south of Ridgeway street".

1.4 Thresholds and Conclusions

Since the watercourse qualified as a water resource (pursuant to section 3-5-2 of the Municipal Code), the distance from this watercourse to the Parcel A property boundary was quantified with the aid of a tape measure. **The distance was measured to be 61 feet**, as measured from the

beginning of the watercourse on the on the Westchester Hills Golf Course (i.e. the channelized discharge area, located at the terminus of the dotted line depicted on the Applicant's Sheet SP-02)(see attached sketch) to the southern property boundary of Parcel A directly across the street.

Section 3-5-3 (a) (Thresholds, criteria, measurements) of the White Plains Municipal Code cites the following qualifying threshold to determine that a site or feature is environmentally sensitive:

> *(a) Any site, property or location which is traversed by, on the bank of, or within one hundred (100) feet of any river, creek, stream, brook or other flowing watercourse.*

The watercourse located on the Westchester Hills Golf Course is 61 feet from the property boundary of the site (Parcel A), well within the 100 foot threshold for qualifying Parcel A as an environmentally sensitive site.

Therefore it is my conclusion that Parcel A is an "environmentally sensitive site" pursuant to the White Plains Municipal Code.

2.0 On-site Wetlands

2.1 Review of Applicant's Jurisdictional Conclusions

There is no dispute among the reviewing parties that Parcel A has been cleared of natural vegetation prior to, or during the development of the golf course, and then primarily maintained as grass ever since.

However, the jurisdictional ramifications of this land-use history are at dispute.

The Applicant initially contends that the clearing of vegetation on Parcel A prior to the effective date of the wetland regulations automatically renders such areas as "*non-wetland*" (Wetlands Delineation Report- Appendix E-1, p 13). They base their argument on a quote from that the 1989 Federal Interagency Manual (adopted by the City of White Plains to define wetlands).

The Applicant quotes:

> "…Federal Interagency Manual (1989): "In cases where recent human activities have caused these changes, it may be necessary, to determine the date of the alteration or disturbance for legal purposes. If the activity occurred prior to the effective date of

> regulation or other jurisdiction, it may not be necessary to make a wetland determination for regulatory purposes." The effective date of Section 404 of the Clean Water Act is 1977…"

A careful reading of this passage reveals that the manual in fact does not suggest that an alteration or disturbance will automatically render an area as non-wetlands from the perspective of the City of White Plains Municipal Code.

Rather, the manual indicates that prior disturbance *may* render the area as not subject to regulatory jurisdiction from the federal level of regulation (i.e. the US Army Corp permitting process). That is what is meant by the "legal purposes" reference in the above quote. The Applicant is confusing the issue of wetland definition with the issue of agency jurisdiction/administration, and then confuses federal jurisdiction/administration of the federal permitting process with the City of White Plains jurisdiction/administration approval process.

Simply put, when the City of White adopted the use of the 1987 Federal Interagency Manual to provide a definition of wetlands (under section 3-5-2 of the City Of White Plains Municipal Code), the City, as an independent government entity, had no reason to *solely* submit to the jurisdictional administration of another governmental entity. Had it been the intent of the City of White Plains to defer solely to a federal agency the administration of its local wetland regulatory program, the City would have never formulated its own section of municipal code language regarding wetland regulation, under Section 3-5 and otherwise. The City did borrow a wetland definition from the federal government (as well as a wetland definition from the NY State) but they never intended to borrow the federal (or state) administration of the City's regulatory program. That they left to the City Code. According to the City code, an area which meets the wetland definition in the Code, regardless of prior or current land-use, is a wetland, and is therefore subject to regulation/administration by the City, under Section 3-5 and otherwise.

2.2 Special Analysis and Review of Applicant's Wetland Investigation Data

As discussed in the above section, to determine whether an area is wetland under the definition provided in Section 3-5-2(b)2 of the White Plains Municipal Code, the Applicant has to follow the procedures of the 1989 Federal Interagency Manual. Since the site has been altered or disturbed, the Applicant is obligated to proceed to the "Special Analysis" section in the 1989 Federal Interagency Manual.

It should be noted that the applicant contends on p.17 of the Wetland Delineation Report that they only needed to proceed to the "Special Analysis" *as a theoretical exercise* since they believe the Army Corps lacks jurisdiction on the site due to the date of the landscape alterations. I respectfully disagree (as per the discussion above) that the broader legal question of Army Corps legal jurisdiction has any bearing on the question of whether the area meets the City of White Plains definition of a wetland, and have concluded that the "Special Analysis" is obligatory and not a theoretical exercise. This is because regardless of prior landscape

modifications, there is still a need to determine if the area is wetland or not under Section 3-5-2(b)2 of the White Plains Municipal Code, and to do that requires proceeding to the "Special Analysis" procedures of the 1989 Federal Interagency Manual.

2.21 Soils

Hydric soils were documented on the site and on the adjacent FASNY parcels.

The FASNY Wetland Delineation report (Appendix E-1, p. 6) reports that thirty-two (32) soil investigation points were examined throughout the greater Site (which includes Parcels A, B, C, & D), of which fourteen (14) of these points were found to meet the hydric soil criteria contained in the City of White Plains delineation methodology (1989 Federal Interagency Manual). According to Figure 5 of that same report, twelve (12) of the investigation points were located on Parcel A itself, of which **four (4) sampling points on Parcel A were found to meet the hydric soil criteria**.

2.22 Hydrology

On page 19 (and again on page 22) of the Wetland Delineation Report the Applicant does state that **there are areas on Parcel A that may have wetland hydrology**.

To quote (p 19):

> "…As discussed previously in this report, portions of the golf course are mapped by the NRCS with soil mapping units that contain hydric soils (See Figure 5). These areas were examined in the field and in some cases show hydric characteristics which may be relict features (from past hydrology, now eliminated) **or may reflect current hydrologic conditions**…" (emphasis added in bold)

On page 12 of the Wetland Delineation Report the Applicant also comments that existing hydrology on site may be sufficient to result in development of hydric soils.

To quote (p 12):

> "….This suggests that initial construction of the golf course (regrading, contouring) may have added less permeable soil material in the upper horizons. Rock or less-permeable hardpan horizons were also encountered frequently throughout the course at depths within 12-18" below the surface. Fill material, regrading and basic golf course operations (mowing/irrigation) over time may have contributed to soil compaction. Such modifications to the golf course land areas can decrease soil permeability and allow hydric soil indicators to develop over time. Fifty (50) or more years have passed since initial construction of the golf course. **This is an adequate length of time for modified soils to develop hydric features. Whether the hydric soil indicators are native to the**

parent soil or of more recent origin is immaterial with respect to the Federal hydric soil determination. Portions of the Site clearly meet one or more hydric soil indicators and where this occurs the soils qualify as hydric…" (emphasis added in bold).

2.23 Vegetation

The applicant notes (p. 6 of the Wetland Delineation Report) that none of the investigation points on the site (of which 12 of the points are located on Parcel A) meet the plant community assessment procedure described in the 1989 Federal Interagency manual. In other words, there was no observable wetland vegetation present within the sample sites during their field investigation.

However, it should be noted that Parcel A, despite the fact the area is no longer being used as a golf course, is still being actively and artificially maintained with grass cover, with regular mowing. It is reasonable to conclude, given the documented soils and hydrology that in the absence of regular mowing that wetland vegetation would reemerge for observation.

The Applicant argues that the momentary lack of wetland vegetation is a permanent (and legal) condition rather than a temporary condition. To that end, they offer a short digression on this issue (p. 14 of the Wetland Delineation Report) noting that land conversions prior to the implementation of the Federal Clean Water Act and the US Army Corp Permitting Program do not come under today's Corps regulatory jurisdiction, and that the current vegetative suppression is now a "normal circumstance".

However, it is my opinion that this line of argument is a red herring relative to this review, since the Applicant is not submitting these application materials under Federal jurisdiction but under City of White Plains jurisdiction. There is nothing in the City of White Plains Municipal Code that exempts lands from City of White Plains regulatory jurisdiction because of prior alterations, disturbances, or current land-uses with regard to *defining* an area as wetland.

2.3 Conclusions - Wetland Definition

For an area to meet the City of White Plains definition of a wetland (pursuant to Section 3-5-2(b) of the City Code) the area has to either meet the definition provided by the New York State Freshwater Wetlands Act or the definition provided in the 1989 Federal Interagency Manual.

Regarding the 1989 Federal Interagency Manual, by the Applicant's own documentation, there are areas within Parcel A that have both hydric soils and hydrology. Furthermore, it is reasonable to expect that given the site conditions documented in the application materials that there are

areas within Parcel A that would exhibit wetland vegetation as well, if the temporary mowing disturbance was discontinued for the course of a growing season.

The Applicant argues within their own materials that the temporary lack of vegetation should be viewed as a permanent condition rather than a temporary condition and therefore precludes the designation of the area as wetlands. A substantial amount of discussion within the application materials involves application of the 1987 federal wetland definition and subsequent amendments to this definition rather than application of the 1989 Interagency Manual. This is because current Army Corp permitting is based upon the 1987 Army Corp manual rather than the 1989 Interagency Manual. The 1989 manual was never adopted on the federal level.

The differences between the two manuals are relevant to the analysis of this site. The 1989 Interagency Manual, adopted by the City of White Plains, is more expansive than the earlier 1987 Army Corp manual (which is still used for federal permitting) concerning procedures and inferences with regard to absent wetland indicators under unaltered conditions.

Under the 1989 manual, for unaltered sites, if hydric soils and wetland hydrology are present, a delineator may be able to assume that the vegetation can be hydrophytic.

Furthermore, under the 1989 Interagency Manual, wetland hydrology can be *inferred* from hydric soils or from characteristics of vegetation under unaltered conditions, even in the absence of direct observation.

The Applicant's own position regarding the landscape alterations impacts upon existing hydrology and vegetation is contradictory.

On one hand, the Applicant appears to be contending that the site is "permanently" hydrologically altered. This view is not based on existing conditions but primarily based on their application of cited case law that applies to federal permitting only. Their basic argument is that the underdrains on the golf course are permanent and predate Army Corp permitting. Likewise, the active vegetative suppression within the fairways as a land-use practice is a "grandfathered" activity relative to the federal regulations (ironically ignoring the fact that there is no longer a working golf course there); therefore the current vegetative suppression on the former golf course is "permanent" as well.

On the other hand, the Applicant also admits there may be areas on the site in which wetland hydrology *currently exists* (as cited and discussed in above section 2.22 of this report), either due to lack of alteration in certain areas, or due to a permanent hydrological effect of prior landscape manipulation.

Either way, as the Applicant documents, there is both wetland hydrology and wetland soil within Parcel A. Therefore it is also reasonable to conclude, using the 1989 Interagency Manual, that in the absence of the temporary vegetative suppression and ground keeping, that there are areas within Parcel A which will support wetland vegetation.

Therefore it is my conclusion, based upon the Applicant's data and their discussion, that there are sufficient indicators (soils, hydrology and vegetation) for areas within Parcel A to meet the wetland definition under the Section 3-5-3(b) 2 of the City of the White Plains Municipal Code.

2.4 Conclusions – Environmental Sensitive Site and Feature

As discussed in the above section, according to the City of White Plains Municipal Code, there are wetlands within Parcel A. The question now is to what extent?

The application materials are incomplete as the Applicant has not presented sufficient information to derive the gross area or boundaries of the wetland area. Therefore it is not possible at this time to determine if the site is Environmentally Sensitive under Section 3-5-3(b) of the City of White Plains Municipal Code.

(It should be noted that regardless of Section 3-5-3(b), the site still meets the definition of Environmentally Sensitive under Section 3-5-3(a) due to the watercourse.)

It is recommended that the Applicant provide further detail regarding the extent and gross area of this wetland, so that the City can understand if the area meets any of the thresholds cited in Section 3-5-3(b).

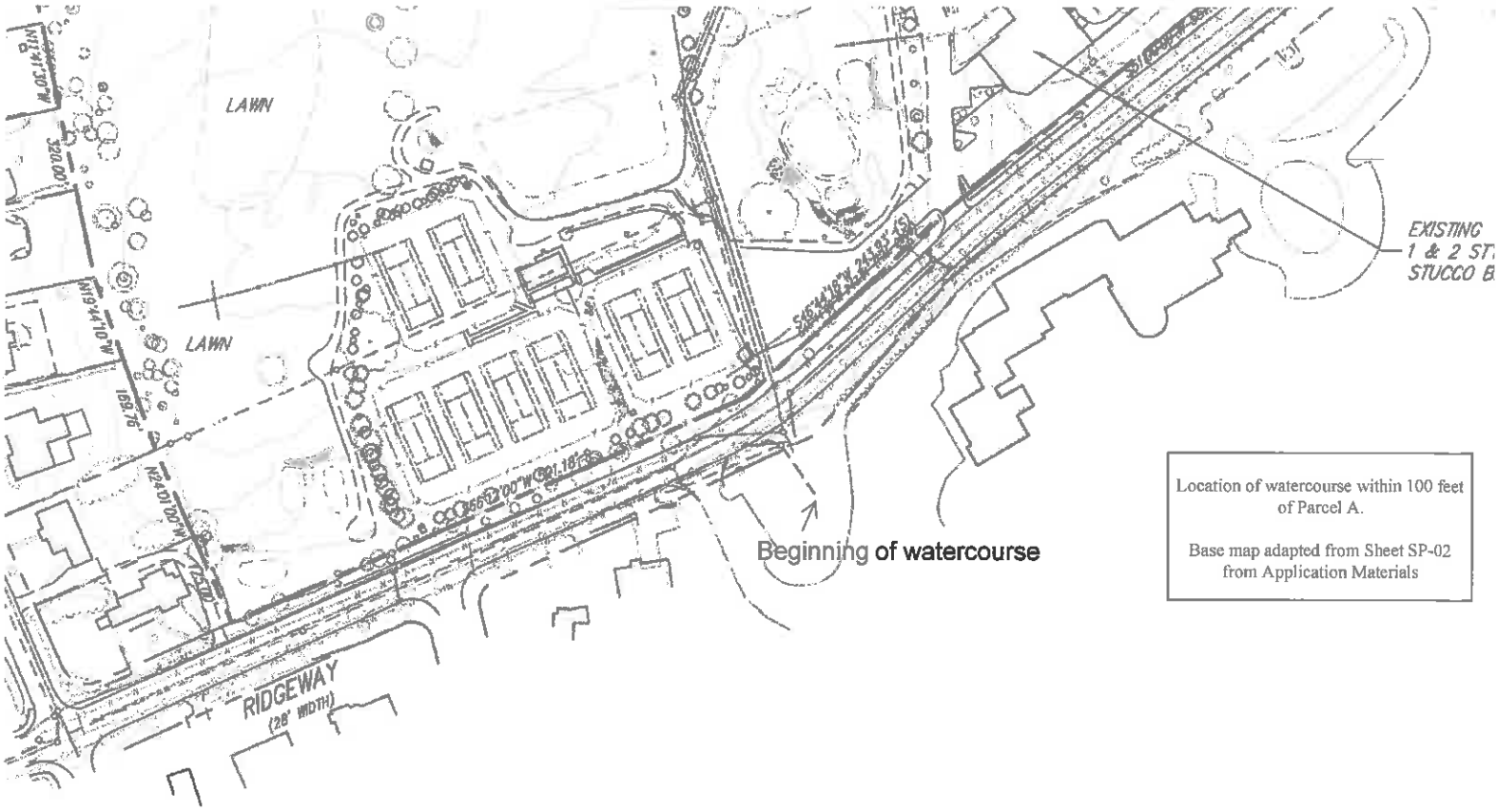
It should be noted that in addition to the conclusions of this report, the FASNY Environmental Findings Statement states under "FINDING B-1" that "**The entire Project Site is an environmentally sensitive site**". There are additional references to the site's environmental sensitivity under findings C-1 and D-2 as well.

Respectfully submitted,

Signed,

Steven Danzer Ph.D.
Professional Wetland Scientist
Soil Scientist

Attachments
1. Map: watercourse located on SP-02
2. Aerial view: ERM


LAWN
LAWN
EXISTING
1 & 2 ST
STUCCO B
Beginning of watercourse
RIDGEWAY
(28' WIDTH)
Location of watercourse within 100 feet of Parcel A.
Base map adapted from Sheet SP-02 from Application Materials

Watercourse on Westchester Hills Property

November 22, 2016

1:1,128

0 0.0125 0.025 0.05 mi

0 0.02 0.04 0.08 km

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