

CITY OF MIDDLEBURG HEIGHTS, OHIO

Ordinance No. 2008- 19

Introduced By: Requirement of Law

AN ORDINANCE ENACTING CHAPTER 1363 OF THE MIDDLEBURG HEIGHTS CODIFIED ORDINANCE ENTITLED "CONTROLLING RIPARIAN SETBACKS AND WETLANDS SETBACKS"

Whereas, flooding is a significant threat to public health and safety and public and private property in the City of Middleburg Heights, and riparian areas and wetlands lessen flood damage by slowing runoff, enabling water to soak into the ground, and releasing it slowly over time; and,

Whereas, stream bank erosion in the City of Middleburg Heights is a significant threat to public health and safety and public and private property, and riparian areas and wetlands slow the rate of runoff and, stabilize stream banks by anchoring the soil, thus reducing the erosive force of runoff and strengthening banks against high-velocity stream waters; and,

Whereas, vegetated riparian areas aid in filtering and trapping sediments, nutrients, chemicals, salts, septic discharge and other pollutants from runoff and floodwaters, thus helping to protect surface and ground water quality; and

Whereas, the Cuyahoga Soil and Water Conservation District, the Natural Resources Conservation Service of the United States Department of Agriculture, the Ohio Environmental Protection Agency, and the United States Environmental Protection Agency recommend riparian setbacks as a valuable tool in an overall natural resource management program for flood risk reduction, erosion control, water quality management, and aquatic life habitat protection; and,

Whereas, 40 Codified Federal Register (CFR) Parts 9, 122, 123, and 124, referred to as NPDES Storm Water Phase II, require designated communities, including this City of Middleburg Heights to develop a Storm Water Management Program to address the quality of storm water runoff during and after soil disturbing activities; and,

Whereas, Article XVIII, Section 3 of the Ohio Constitution grants municipalities the legal authority to adopt rules to abate soil erosion and water pollution by soil sediments; and,

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF
MIDDLEBURG HEIGHTS, STATE OF OHIO, AS FOLLOWS:

Section 1: That Chapter 1363 of the Middleburg Heights Code is hereby enacted to read as follows:

1363.01 PUBLIC PURPOSE: It is hereby determined that the system of streams and wetlands within Middleburg Heights contributes to the health, safety and general welfare of its residents. The purpose of this Riparian and Wetland Setback Ordinance is to assist in the preservation of water quality within the streams of Middleburg Heights and to help protect residents of the City from property loss or damage because of flooding or other impacts of the stream. This ordinance will further the following objectives:

- A. Protect the receiving stream's physical, chemical, and biological characteristics and to maintain stream functions.
- B. Reduce flood impacts by absorbing peak flows, slowing the velocity of floodwaters, and regulating base flow.
- C. Assist in stabilizing the banks of streams and wetlands to reduce bank erosion and the downstream transport of sediments eroded from stream and wetland banks.
- D. Reduce pollutants in streams and wetlands by filtering, settling, transforming and absorbing pollutants in runoff before they enter streams and wetlands.
- E. Prevent unnecessary stripping of vegetation and loss of soil, especially adjacent to water resources and wetlands.
- F. Benefit Middleburg Heights economically by minimizing encroachment on stream channels and reducing the need for costly maintenance and repairs to roads, embankments, sewage systems, ditches, water resources, wetlands, and storm water management practices that are the result of inadequate storm water control due to the loss of riparian areas and wetlands.
- G. Protect and maintain the native vegetation of riparian and wetland areas by implementing specifications for the establishment, protection and maintenance of vegetation along streams and wetlands within Middleburg Heights jurisdiction.

1363.02 DISCLAIMER OF LIABILITY: Failure of the City of Middleburg Heights to enforce the provisions of this ordinance shall not relieve the owner from the responsibility for conditions or damages that may result from a failure to comply, and shall not result in the City of Middleburg Heights, its officers, employees, or agents being responsible for any condition or damage resulting from a failure to comply with applicable requirements.

1363.03 CONFLICTS, SEVERABILITY, NUISANCES & RESPONSIBILITY:

- 1. This ordinance is not intended to interfere with, abrogate, or annul any other ordinance, rule or regulation, statute, or other provision of law. The requirements of this ordinance should be considered minimum requirements, and where any provision

ordinance, rule or regulation, or other provision of law, whichever provisions are more restrictive or impose higher protective standards for human health or the environment shall be considered to take precedence.

2. If a court of competent jurisdiction declares any clause, section, or provision of these regulations invalid or unconstitutional, the validity of the remainder shall not be affected thereby.
3. These regulations shall not be construed as authorizing any person to maintain a private or public nuisance on their property or to violate any other applicable laws. Compliance with the provisions of this regulation shall not be a defense in any action to abate such nuisance or comply with applicable laws.
4. Compliance with the provisions of this regulation shall not relieve any person from responsibility for damage to any person otherwise imposed by law.
5. These regulation shall not be construed to relieve any person from complying with all applicable state and federal laws, including but not limited to laws requiring authorization prior to impacts streams or wetlands.
6. The standards set forth herein and promulgated pursuant to this ordinance are minimum standards; therefore this ordinance does not intend nor imply that compliance by any person will ensure that there will be no contamination, pollution, nor unauthorized discharge of pollutants.

1363.04 CONSULTATIONS: In implementing these regulations the City of Middleburg Heights Engineer or other City of Middleburg Heights officials may consult with the local county Soil and Water Conservation District (SWCD), state and federal agencies and other technical experts as necessary. Any costs associated with such consultations may be assessed to the applicant or his or her designated representative.

1363.05 DEFINITIONS, as used in this ordinance:

APPROVING AUTHORITY: The official responsible for administering the applicable program(s).

BEST MANAGEMENT PRACTICE (BMP): Means schedules of activities, prohibitions of practices, maintenance procedures and other management practices (both structural and non-structural) to prevent or reduce the pollution of surface waters of the state. BMP's also include treatment requirements, operating procedures and practices to control plant and/or construction site runoff, spillage or leaks, sludge or waste disposal or drainage from raw material storage.

CITY: Shall mean the City of Middleburg Heights and its designated representatives.

CONSERVATION: The wise use and management of natural resources.

DAMAGED OR DISEASED TREES: Trees that have split trunks; broken tops; heart rot; insect or fungus problems that will lead to imminent death; undercut root systems that put the tree in imminent danger of falling; leaning as a result of root failure that puts the tree in imminent danger of falling, or any other condition that puts the tree in imminent danger of being uprooted or falling.

DEVELOPMENT AREA: Any tract, lot, or parcel of land, or combination of tracts, lots or parcels of land, which are in one ownership, or are contiguous and in diverse ownership, where earth-disturbing activity is to be performed.

DUMPING: The grading, pushing, piling, throwing, unloading or placing of soil or other material.

EARTH DISTURBING ACTIVITY: Any grading, excavating, filling, or other alteration of the earth's surface where natural or man-made ground cover is destroyed.

EROSION: The process by which the land surface is worn away by the action of water, wind, ice or gravity.

EXISTING: In existence at the time of the passage of this ordinance and these regulations.

FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA): The agency with overall responsibility for administering the National Flood Insurance Program.

GRADING: Earth disturbing activity such as excavation, stripping, cutting, filling, stockpiling, or any combination thereof.

IMPERVIOUS COVER: Any surface that cannot effectively absorb or infiltrate water. This includes roads, streets, parking lots, rooftops, and sidewalks.

INTERMITTENT STREAM: A natural channel that may have some water in pools but where surface flows are non-existent or interstitial (flowing through sand and gravel in stream beds) for periods of one week or more during typical summer months.

LARGER COMMON PLAN OF DEVELOPMENT OR SALE: A contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under one plan.

NATIONAL WETLANDS INVENTORY MAP: Wetland maps that were created by the Fish and Wildlife Service, United States Department of Interior.

NATURAL RESOURCES CONSERVATION SERVICE (NRCS): An agency of the United States Department of Agriculture, formerly known as the Soil Conservation Service (SCS).

NPDES PERMIT: A National Pollutant Discharge Elimination System Permit issued by Ohio EPA under the authority of the USEPA, and derived from the Federal Clean Water Act.

NOXIOUS WEED: Any plant species defined by the Ohio Department of Agriculture as a "noxious weed" and listed as such by the Department. For the purposes of this regulation, the most recent version of this list at the time of application of these regulations shall prevail.

OHIO EPA: The Ohio Environmental Protection Agency.

OHIO WETLANDS INVENTORY MAP: Wetland maps that were created by the Natural Resources Conservation Service, USDA and the Ohio Department of Natural Resources.

ORDINARY HIGH WATER MARK: Means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clean, natural line impressed on the bank, shelving, changes in the character or soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

PERSON: Any individual, corporation, partnership, joint venture, agency, unincorporated association, municipal corporation, township, county, state agency, the federal government, or any combination thereof.

PERENNIAL STREAM: A natural channel that contains water throughout the year, except possibly during periods of extreme drought.

PROFESSIONAL ENGINEER: A person registered in the State of Ohio as a Professional Engineer, with specific education and experience in water resources engineering.

QUALIFIED FORESTER: Any forester employed by the Ohio Department of Natural Resources, Division of Forestry, or any person attaining the credential of Certified Forester as conferred by the Society of American Foresters.

QUALIFIED WETLAND PROFESSIONAL means an individual competent in the areas of botany, hydric soils, and wetland hydrology, and is acceptable to the City of Middleburg Heights Engineer.

REDEVELOPMENT: The demolition or removal of existing structures or land uses and construction of new ones.

RETENTION BASIN: A storm water management pond that maintains a permanent pool of water. These storm water management ponds include a properly engineered/designed volume dedicated to the temporary storage and slow release of runoff waters.

RIPARIAN SETBACK: Means the transition area between flowing water and terrestrial (land) ecosystems composed or if composed of trees, shrubs, and surrounding vegetation

serve to stabilize erodible soil, improve both surface and ground water quality, increase stream shading, enhance wildlife habitat or perform other functions consistent with the purposes of these regulations. Those lands within the City of Middleburg Heights which are alongside streams, and which fall within the area defined by the criteria set forth in these regulations.

SEDIMENT: Solid material, both mineral and organic, that is in suspension, is being transported, or has been moved from its site of origin by wind, water, gravity or ice, and has come to rest on the earth's surface either on dry land or in a body of water.

SEDIMENT CONTROL: The limiting of sediment being transported, by controlling erosion or detaining sediment-laden water, and allowing the sediment to settle out.

SEDIMENT POLLUTION: A failure to use management or conservation practices to control wind or water erosion of the soil and to minimize the degradation of water resources by soil sediment in conjunction with land grading, excavating, filling, or other soil disturbing activities on land used or being developed for commercial, industrial, residential, or other purposes.

SOIL CONSERVATION SERVICE, USDA: The federal agency now titled the "Natural Resources Conservation Service," which is an agency of the United States Department of Agriculture.

SOIL DISTURBING ACTIVITY: Clearing, grading, excavating, filling, or other alteration of the earth's surface where natural or human made ground cover is destroyed and which may result in, or contribute to, soil erosion and sediment pollution.

STORM WATER CONTROL PLAN: A written plan designed to control soil erosion, sediment pollution and post-construction storm water runoff that complies with Sections 1367.07 through 1367.12 of the City of Middleburg Heights Code.

SOIL EROSION AND SEDIMENT CONTROL PRACTICES: Conservation measures used to control sediment pollution and including structural practices, vegetative practices and management techniques.

SOIL SURVEY: The official soil survey produced by the Natural Resources Conservation Service, USDA in cooperation with the Division of Soil and Water Conservation, ODNR and the local Board of County Commissioners.

STORM WATER CONVEYANCE SYSTEM: All storm sewers, channels, streams, ponds, lakes, etc., used for conveying concentrated storm water runoff, or for storing storm water runoff.

STREAM: A surface watercourse with a well-defined bed and bank, either natural or artificial, which confines and conducts continuous or periodical flowing water in such a way that terrestrial vegetation cannot establish roots within the channel.

USEPA: The United States Environmental Protection Agency.

WATER RESOURCES: All streams, lakes, ponds, wetlands, water courses, waterways, drainage systems, and all other bodies or accumulations of surface water, either natural or artificial, which are situated wholly or partly within, or border upon this state, or are within its jurisdiction, except those private waters which do not combine or affect a junction with natural surface waters.

WETLAND: Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs, and similar areas.

WETLAND, OHIO EPA CATEGORY 2 WETLANDS: Those wetlands classified by the Ohio EPA as Category 2 wetlands under OAC 3745-1-54 (C) (2), or current equivalent Ohio EPA classification, in accordance with generally accepted wetland functional assessment methods acceptable to the U.S. Army Corps of Engineers and Ohio EPA at the time of application of this regulation.

WETLAND, OHIO EPA CATEGORY 3 WETLANDS: Those wetlands classified by the Ohio EPA as Category 3 wetlands under OAC 3745-1-54(C)(3), or current equivalent Ohio EPA classification, in accordance with generally accepted wetland functional assessment methods acceptable to the U.S. Army Corps of Engineers and Ohio EPA at the time of application of this regulation.

WETLAND SETBACK: Those lands within the City of Middleburg Heights that fall within the area defined by the criteria set forth in these regulations.

1363.06 APPLICABILITY: The provisions of this ordinance shall apply to all lands within the jurisdiction of the City of Middleburg Heights. No development shall be approved or issued by the City, including a preliminary plan, building (involving land disturbing activities), or zoning approval, without full compliance with the terms of these regulations where applicable.

The Riparian Setback requirements set forth below apply to all streams with a defined bed, bank or channel within the City of Middleburg Heights legal jurisdiction. The presence of streams requiring protection must also be confirmed in the field.

The Wetland Setback requirements set forth herein shall apply to all Category 2 and Category 3 wetlands within the City of Middleburg Heights legal jurisdiction. If a wetland delineation is required, it shall be performed by a Qualified Wetland Professional under guidelines established by the U.S. Army Corp of Engineers and the Ohio Environmental Protection Agency.

This ordinance shall not apply to agricultural operations that are covered by an approved NRCS conservation plan or other plan acceptable to the approving authority. The following are exempt from the terms and protection of this ordinance: grassy swales, roadside ditches, drainage ditches create at the time of a subdivision to convey storm water to another system, tile drainage systems, and stream culverts.

1363.07 ESTABLISHMENT OF RIPARIAN SETBACKS:

1. Riparian Setbacks are established on all streams covered by this ordinance. Streams addressed by this ordinance are those which meet the definition of "stream" in Section 1367.05 of these regulations and are indicated on at least one of the following maps:
 - A. USGS topographical map
 - B. Soil maps located in the Soil Survey of Cuyahoga County, Ohio, USDA, NRCS.
2. Widths of Riparian Setbacks are measured as horizontal map distance outward from the ordinary high water mark on each side of the stream and are established as follows:
 - A. A minimum of 50 feet on each side of all streams draining an area greater than 20 square miles.
 - B. A minimum of 25 feet on each side of all streams draining an area up to 20 square miles.
 - C. Where the 100-year floodplain is wider than the Riparian Setback on either or both sides of the stream, the Riparian Setback shall be extended to the outer edge of the 100-year floodplain. The 100-year floodplain shall be defined by FEMA or determined by the project engineer conducting a hydrologic analysis of the project area in conformance with standard engineering practices and approved by the City of Middleburg Heights Engineer.
 - D. Where wetlands are identified within a riparian setback, the minimum riparian setback width shall be extended to the outer boundary of the wetland. In addition, a Wetland Setback shall be established to the extent detailed in these regulations.
3. Preservation of Riparian Setback areas: Except as otherwise provided in this regulation, Riparian Setbacks shall be preserved in their natural state, except that non-conforming structures and non-conforming uses existing at the time of passage of this regulation may be continued in their existing state as determined in the NON-CONFORMING STRUCTURES OR USES IN RIPARIAN SETBACK AREAS section of these regulations.
4. If an applicant has received legal authorization under applicable state and federal laws to fill a wetland/stream or relocate a stream, then the setback requirements shall not apply to those portions of the wetland/stream that have been filled or relocated.
5. An applicant shall be responsible for delineating the Riparian Setback, and identifying this setback on all subdivisions, land development plans, and/or building permit applications. This delineation shall be done at the time of application of the preliminary plans, or all plans that are required, or at the time of submission of any permit applications. This delineation may be done by a metes and bounds, or higher level, survey and shall be subject to the review and approval of the City.

6. No approval or permits for projects that involve soil disturbing or land clearing activities shall be issued by the City prior to delineation of the Riparian Setback in conformance with these regulations.
7. Prior to any soil disturbing activity, the Riparian Setback shall be clearly delineated with construction fencing or other suitable material by the applicant on site, and such delineation shall be maintained throughout soil-disturbing or land clearing activities. The delineated area shall be maintained in an undisturbed state unless otherwise permitted by these regulations. All fencing shall be removed when a development project is completed.
8. Upon completion of an approved subdivision/property/parcel split, land development, or other improvement, the Riparian Setback shall be permanently recorded on the plat records of the City.

1363.08 ESTABLISHMENT OF WETLAND SETBACKS:

1. Where there are wetlands protected under federal and/or state law, wetland setbacks are established as follows:
 - A. A minimum of 120 feet surrounding and including all Ohio EPA Category 3 Wetlands, or current equivalent Ohio EPA classification.
 - B. A minimum of 75 feet surrounding and including all Ohio EPA Category 2 Wetlands, or current equivalent Ohio EPA classification.
2. Wetland Setback Averaging: The City may allow modifications of the standard Riparian Setback width for wetlands on a case-by-case basis by averaging buffer widths. Averaging of buffer widths may only be allowed where a Qualified Wetland Professional demonstrates to the satisfaction of the City that:
 - A. It will not reduce wetland functions or functional performance;
 - B. The wetland contains variations in sensitivity due to existing physical characteristics or the character of the buffer varies in slope, soils, or vegetation, and the wetland would benefit from a wider buffer in places and would not be adversely impacted by a narrower buffer in other places;
 - C. The total area contained in the buffer area after averaging is no less than that which would be contained within the standard buffer; and
 - D. The buffer width is not reduced to less than 75% of the standard width.

1363.09 PROCEDURE FOR WETLAND SETBACKS:

1. No change to parcel boundaries or land use change:

- A. Upon filing a request for a building permit that does not involve changing of any parcel boundaries or changes in land use, the applicant will check for indicators of wetlands on the National Wetlands Inventory maps, and Ohio Wetlands Inventory map, and the Cuyahoga County Wetlands Inventory (if applicable). A photocopy of the applicable section of each map will be attached to the permit application.
 - B. If a potential wetland is shown on any of the maps or if there is reason for the City or the applicant to believe that an unmapped wetland exists on or within 120 feet of the project site the applicant will retain a Qualified Wetland Professional to evaluate the proposed project site for wetlands or wetland buffer areas. If after such evaluation, no wetland or wetland buffer areas are found, the applicant shall submit a letter from the Qualified Wetland Professional with the preliminary plat or permit application verifying his or her negative findings.
2. New residential or commercial or other type development and projects involving a change to parcel boundaries or a land use change: Upon filing a request for approval of a preliminary plat or building permit for new residential, commercial or other type of development that involves changes in any parcel boundaries or changes in land use, the applicant or his or her designated representative shall retain a Qualified Wetland Professional to survey the proposed development site for wetlands. If no wetlands are found, the applicant or his or her designated representative shall submit a letter with the preliminary plat or permit application verifying that a Qualified Wetland Professional has surveyed the site and found no wetlands. The City may waive the requirement to perform a survey if the applicant demonstrates to the City's satisfaction that no wetlands are within 120 feet of the project site.
3. If wetlands are found during either of the reviews set forth above, the following procedures shall be followed:
 - A. A Qualified Wetland Professional, acceptable to the City of Middleburg Heights Engineer, shall determine the presence of Ohio EPA Category 2 or 3 wetlands (or current equivalent Ohio EPA classification) on the proposed development site using the latest version of the Ohio Rapid Assessment Method for wetland evaluation approved at the time of application of this regulation. Acceptance of this determination shall be subject to approval by the City of Middleburg Heights Engineer
 - B. If Ohio EPA Category 2 or 3 wetlands (or current equivalent Ohio EPA classification) are located on the proposed development site, the applicant or his or her designated representative shall delineate these wetlands and the wetland setback in conformance with these regulations. The applicant or his or her designated representative shall identify all delineated wetlands and their associated setbacks on all property subdivision/property/parcel split plans, land development plans, and/or permit applications submitted to the City of Middleburg Heights.
 - 1) Wetlands shall be delineated by a site survey, approved by the City of Middleburg Heights, using delineation protocols accepted by the US Army

Corps of Engineers and the Ohio EPA at the time of application of this regulation. If conflict exists between the delineation protocols of these two agencies, the delineation protocol that results in the most inclusive area of wetland shall apply.

- 2) Wetland setbacks shall be delineated through a metes and bounds, or higher level, survey subject to approval by the City of Middleburg Heights.
- C. Prior to any soil or vegetation disturbing activity, the applicant or his or her designated representative shall delineate wetland setbacks on the development site in such a way that they can be clearly viewed, and such delineation shall be maintained throughout construction.
- D. No approvals or permits shall be issued by the City prior to delineation of wetland setbacks in conformance with this regulation.
4. Upon completion of an approved property subdivision/property/parcel split, commercial development or other land development or improvement, riparian and wetland setbacks shall be permanently recorded on the plat records for the City of Middleburg Heights and shall be maintained as open space thereafter through a permanent conservation easement. A third party, not the landowner or permittee or the City of Middleburg Heights, which is allowed by state law, shall be given the conservation easement. If no third party will accept the conservation easement, the City of Middleburg Heights shall accept it and protect it in perpetuity.

1363.10 MITIGATION FOR IMPACTS TO RIPARIAN AREAS AND WETLAND SETBACK AREA:

1. If an applicant can demonstrate to the satisfaction of the City Engineer that intrusion within the delineated Riparian Setback boundary is necessary to accomplish the purposes of a project, then the applicant must provide mitigation for that impact. The applicant shall develop a plan for mitigation and submit it to the City Engineer for review and approval. For a plan to be approvable it must meet the following minimum requirements:
 - a. Mitigation for an impact will be required based on the location of the intrusion. The closer the intrusion to the stream, the more mitigation that will be required. The Riparian Setback area for the stream corridor calculated in accordance with the method specified in Section 1363.07(1) of this ordinance shall be divided into two zones. Zone 1 extends from 0 to 25 feet from the stream edge; Zone 2 extends from 25 feet to the outer edge of the setback corridor. Intrusion into these zones will require the following mitigation within the same Watershed Assessment Unit (14-digit HUC scale:
 - i. An applicant shall provide mitigation equal or greater than four times the total area disturbed in the stream and within Zone 1 of the site being developed shall be mitigated within Zone 1 of the

mitigation location. At least a fourth of the mitigation area shall be mitigation in the form of stream restoration in accordance with guidelines developed by the City of Middleburg Heights. The remaining mitigation can be in the form of restoration or protection.

- ii. An applicant shall provide mitigation equal or greater than three times the area disturbed within Zone 2 of the site being developed shall be mitigated within Zone 1 and/or 2 of the mitigation location.
 - b. All mitigation shall, at a minimum include conserved or restored setback zone, and should be designed to maximize the ecological function of the mitigation. Including mitigation at the stream edge along with associated setback areas is one way to maximize ecological function. The applicant shall demonstrate to the satisfaction of the City Engineer that the mitigation provided will have equivalent or greater ecological value than the riparian area impacted by the project. Mitigation shall be protected in same manner as existing Riparian Setback areas under this ordinance.
2. If an applicant can demonstrate to the satisfaction of the City Engineer that intrusion within the delineated wetland setback is necessary to accomplish the purposes of a project, then the applicant must provide mitigation for that impact. The applicant shall develop a plan for mitigation and submit it to the City Engineer for review and approval. For a plan to be approvable it must meet the following minimum requirements
- a. Mitigation for an impact will be required based on the location of the intrusion, the closer the intrusion to the wetland, the more mitigation that will be required. The Wetland Setback area for a wetland is calculated in accordance with the method specified in Section 1363.08(1) of this ordinance shall be divided into two zones. Zone 1 extends from 0 to 25 feet from the wetland edge and Zone 2 extends from 25 feet to the outer edge of the setback area. Intrusion into these zones will require the following mitigation within the same Watershed Assessment Unit (14-digit HUC scale:
 - i. An applicant shall provide mitigation equal or greater than four times the total area disturbed within Zone 1 of the site being developed.
 - ii. An applicant shall provide mitigation equal or greater than two times the area disturbed within Zone 2 of the site being developed.
 - b. The mitigation may include buffer zone or wetland restoration or enhancement. The applicant shall demonstrate to the satisfaction of the City Engineer that the mitigation provided will have equivalent or greater ecological value than the riparian area impacted by the project.

Mitigation shall be protected in same manner as existing Wetland Setback areas under this ordinance.

1363.11 USES PERMITTED IN RIPARIAN AND WETLAND SETBACKS:

1. By-Right Uses Without A Permit: The following uses are permitted by right within the Riparian and Wetland Setbacks without prior approval, provided they are not prohibited by any other applicable law. Open space uses that are passive in character shall be permitted in Riparian Setbacks, including, but not limited to, those listed in these regulations. No use permitted under these regulations shall be construed as allowing public trespass on privately held lands.
 - A. Recreational Activity. Passive recreational uses, as permitted by federal, state, and local laws, such as hiking, fishing, hunting, picnicking, and similar uses. Structures associated with recreational activity, including limited boardwalks, pathways constructed of pervious material, picnic tables, and wildlife viewing areas are permitted.
 - B. Removal of Damaged or Diseased Trees. Damaged or diseased trees may be removed. Because of the potential for felled logs and branches to damage downstream properties and/or block ditches or otherwise exacerbate flooding, logs and branches resulting from the removal of damaged or diseased trees that are greater than 6 inches in diameter shall be anchored to the shore ore removed from the 100 year floodplain.
 - C. Revegetation and/or Reforestation. Riparian and wetland setbacks may be revegetated with non-invasive plant species.
 - D. Maintenance of lawns, gardens and landscaping. Lawns, gardens and landscaping that existed at the time this ordinance was passed may be maintained as long as they are not increased in size.
 - E. Removal of deposited flood debris. The accumulation of flood debris within a channel can exacerbate potential flooding problems. The City reserves the right to, at any time; enter a stream area to remove deposited flood debris. Care shall be taken to ensure that the disturbance to the riparian setback is minimized during these events.
 - F. Placement of storm water retention or detention facilities. Storm water facilities may be allowed within the Riparian Setback and Wetland Setback if:
 - a. Storm water quality treatment that is consistent with current state standards is incorporated into the basin.
 - b. The storm water quality treatment basin is located at least 50 feet from the ordinary high water mark of the stream.
2. By-Right Uses With A Permit The following uses are permitted within the Riparian and Wetland Setbacks with prior approval of the design by the City of Middleburg

Heights Engineer, provided they are not prohibited by any other applicable law:

A. Selective Harvesting of Timber. Selective harvesting of timber may be allowed upon presentation of a Forest Management and Harvest Plan prepared by a Qualified Forester and accepted by the City of Middleburg Heights Engineer.

- 1) Any landowner harvesting timber for sale shall post a \$1,000 performance guarantee with the City of Middleburg Heights. This performance guarantee shall be in the form of a Security Bond, Escrow Account, Certified Check or Cash, and it shall be held until completion of the timber-harvesting operation.
- 2) Due to the potential for felled logs and branches to damage downstream properties and/or to block ditches or otherwise exacerbate flooding, logs or branches resulting from permitted selective harvesting that are greater than 6 inches in diameter at the cut end shall be cut into sections no longer than 6 feet or removed from the 100-year floodplain. Harvested trees or felled logs and branches that are part of a designed and approved Stream bank Stabilization and Erosion Control Measure shall be allowed to remain in a designated watercourse.
- 3) The Forest Management and Harvest Plan must:
 - a) Show that the site will be adequately stocked after the approved selective harvest. "Adequately stocked" shall be defined as the residual stocking level greater than the B-Level on the Allegheny Hardwood Stocking Guide produced by the United States Forest Service, or other United States Forest Service stocking guides as dictated by the forest City of Middleburg Heights to be harvested.
 - b) Show that trees located less than 25 feet from the ordinary high water mark will not be impacted by the proposed harvesting.
 - c) Include a map of the site. This map shall specify the location of any skid and haul roads required for transporting harvested trees and fire wood from riparian and wetland setbacks.
 - d) Include the method to be used to transport harvested trees from riparian and wetland setbacks.
 - e) Specify the erosion control Best Management Practices that will be employed during and after the proposed harvest. These erosion control practices shall be in conformance with the Ohio Department of Natural Resources, Division of Forestry's BMPs for Erosion Control on Logging Jobs in Ohio.
 - f) Provide the US Army Corps of Engineers and the Ohio EPA Wetland and Stream protection permit numbers and the associated permit requirements.

- B. Stream bank Stabilization and Erosion Control Measures. Stream bank stabilization and erosion control measures may be allowed provided that such measures are ecologically compatible and substantially utilize natural materials and native plant species where practical. The stream bank stabilization and erosion control measures shall only be undertaken upon approval of a Storm Water Control Plan by the City of Middleburg Heights
- C. Crossings. Crossings of streams and through Riparian Setbacks by publicly and privately owned roads, drives, sewer and/or water lines and public and private utility transmission lines shall only be allowed upon approval of a Crossing Plan by the City of Middleburg Heights Engineer. Such crossings shall minimize disturbance in riparian setbacks stream substrate and shall mitigate any necessary disturbances. Soil erosive materials will not be used in making stream crossings. Such crossings must also comply with applicable state and federal law, including U.S. Army Corps of Engineer and/or Ohio EPA permits, if such permits are required.
- D. Construction of Fencing. Construction of fencing shall be allowed with the condition that reasonable efforts be taken to minimize the destruction of existing vegetation, provided that the fence does not impede stream or flood flow, and the disturbed area is replanted to the natural or preexisting conditions before the addition of the fence, as approved by the City of Middleburg Heights Engineer.
- E. Dredging. Dredging may be allowed to be performed for the potential purpose of flood control. In order for the City to approve of dredging of an open channel, a hydrologic/hydraulic engineering study must first be performed and approved by the City Engineer; and that this study indicates that the dredging of a particular watercourse will help minimize future flooding problems. In addition, the dredging activity must be accordance with all applicable state and federal law.

1363.12 USES PROHIBITED IN RIPARIAN AND WETLAND SETBACKS: The following uses are specifically prohibited within the Riparian and Wetland Setback:

- 1. Construction. There shall be no structures of any kind, except as permitted under these regulations.
- 2. Dredging or Dumping. There shall be no drilling, filling, or dumping of soil, spoils, liquid, or solid materials or dredging, except for non-commercial composting of uncontaminated natural materials, and except as permitted under the *USES PERMITTED IN RIPARIAN AND WETLAND SETBACKS* section of these regulations.
- 3. Roads or Driveways. There shall be no roads or driveways permitted in riparian and/or wetland setback area, except as permitted under the *USES PERMITTED IN RIPARIAN AND WETLAND SETBACKS* section of these regulations. There shall be no roads or driveways or roads permitted in wetlands or streams without a permit issued by the US Army Corps of Engineers and/or the Ohio EPA.

4. Motorized Vehicles. There shall be no use of motorized vehicles, except as permitted under the *USES PERMITTED IN RIPARIAN AND WETLAND SETBACKS* section of these regulations.
5. Disturbance of Natural Vegetation. There shall be no disturbance, including mowing, of the natural vegetation, except for such conservation maintenance that the landowner deems necessary to control noxious weeds; for such plantings as are consistent with this regulation; for such disturbances as are approved under the *USES PERMITTED IN RIPARIAN AND WETLAND SETBACKS* section of these regulations; and for the passive enjoyment, access, and maintenance of landscaping or lawns existing at the time of passage of this regulation. Nothing in this regulation shall be construed as requiring a landowner to plant or undertake any other activities in riparian and wetland setbacks.
6. Parking Lots. There shall be no parking lots or other human-made impervious cover, except as permitted under the *USES PERMITTED IN RIPARIAN AND WETLAND SETBACKS* section of these regulations.
7. New Surface and/or Subsurface Sewage Disposal or Treatment Areas. Riparian and wetland setbacks shall not be used for the disposal or treatment of sewage except in accordance with local county Board of Health regulations in effect at the time of application of this regulation.

1363.13 NON-CONFORMING STRUCTURES OR USES IN RIPARIAN AND WETLAND SETBACKS

1. A non-conforming use within a Riparian and/or Wetland Setback which is in existence at the time of passage of this regulation, and which is not otherwise permitted under these regulations, may be continued. However, the use shall not be changed or enlarged unless it is permitted under these regulations. For example, the existing building footprint or roofline may not be expanded or enlarged in such a way that would move the structure closer to the stream or wetland.
2. If damaged, destroyed or discontinued, a non-conforming structure or use may be repaired or restored within two years from the date of damage/destruction/discontinuation or the adoption of these regulations, whichever is later, at the property owners own risk. This section shall also not prohibit ordinary repairs to a residence or residential accessory building that are not in conflict with other provisions in this regulation.
3. In the case of a non-conforming structure within a riparian or wetland setback, the City of Middleburg Heights will allow a ten (10) foot maintenance access zone measured perpendicular to the structure, to temporarily extend further into the setback as long as disturbance to existing vegetation is minimized and vegetation is restored to the pre-existing state, as near as practical, upon completion. If any soil disturbance in a wetland will occur as part of any such maintenance activity, a permit from the U. S. Army Corps of Engineers or the Ohio EPA, as appropriate, must be submitted prior to the onset of the soil disturbing activity.

4. In the case of a non-conforming residential structure, the City of Middleburg Heights Engineer may allow minor upgrades to the structure that extend further into the riparian setback, such as awnings and pervious decks/patios, provided the modifications do not extend more than ten (10) feet further toward the stream or wetland than the original foundation of the structure existing at the time of passage of this regulation, and further provided that the modification will not impair the function of the riparian zone nor destabilize any slope nor stream bank, as determined by the City of Middleburg Heights Engineer. Expansions larger than ten (10) feet must be obtained through the variance process.
5. In the case of existing dedicated City roadways within the riparian setback, the City of Middleburg Heights reserves the right to enter into the riparian setback to perform typical activities associated with the operation and maintenance of roadways. These activities include, but are not limited to, salt application during freezing temperatures, road and shoulder stabilization, repair and/or replacement of existing guardrail, the construction of new guardrail based upon safety concerns, and the widening of pavement or bike paths, based upon traffic studies. The City shall ensure that disturbance to existing vegetation is minimized, and vegetation is restored to the pre-existing state, as near as practical, upon completion.
6. In the case of existing hydraulic structures, such as storm conduits and culverts, within the riparian setback, the City of Middleburg Heights reserves the right to enter into the riparian setback to perform typical activities associated with the operation and maintenance of these structures. These activities include, but are not limited to, the inspection of structures, maintenance and repair of structures, and the replacement of structures. Additionally, if supported by a proper engineering study, the City reserves the right to increase the size of any hydraulic structure within the riparian setback, or add to the structure to improve the hydraulic function of the structure, such as adding a headwall to a culvert. The City shall ensure that disturbance to existing vegetation is minimized, and vegetation is restored to the pre-existing state, as near as practical, upon completion.
7. In the case of existing utilities within the riparian setback, the City of Middleburg Heights reserves the right to grant permission to utility companies to enter into the riparian setback to perform typical activities associated with the inspection, maintenance, replacement, of any and all existing utilities within the riparian setback. The utility company shall ensure that disturbance to existing vegetation is minimized, and vegetation is restored to the pre-existing state, as near as practical, upon completion.

1363.14 VARIANCES WITHIN RIPARIAN AND WETLAND SETBACKS

1. The City of Middleburg Heights through the Board of Zoning and Building Appeals may grant a variance from this regulation as provided herein. In determining whether there is unnecessary hardship or practical difficulty such as to justify the granting of a variance, the City of Middleburg Heights shall consider the potential harm or reduction in stream and/or wetland area functions that may be caused by a proposed structure or use. The City of Middleburg Heights shall also consider in determining

whether to grant a variance whether the severity of the burden imposed by this regulation upon an individual's property rights would constitute a taking without just compensation under the Takings Clause of the Fifth Amendment of the United States Constitution.

2. In making a variance determination, the City of Middleburg Heights shall consider the following:
 - A. Varying the front, rear and side yard setback before the riparian and wetland setbacks are varied.
 - B. Variances should not be granted for asphalt or concrete paving in the riparian and wetland setbacks in any situation where gravel or porous pavement (i.e., porous pavers, and similar products) would be practicable and feasible.
3. In making a variance determination, the City of Middleburg Heights may consider the following:
 - A. The soil type natural vegetation of the parcel, as well as the percentage of the parcel that is in the 100-year floodplain. The criteria of the City of Middleburg Heights's flood damage prevention regulations may be used as guidance when granting variances in the 100-year floodplain.
 - B. The extent to which the requested variance impairs the flood control, soil erosion control, sediment control, water quality protection, or other functions of the riparian and/or wetland area. This determination shall be based on sufficient technical and scientific data.
 - C. The degree of hardship this regulation places on the landowner, and the availability of alternatives to the proposed activity.
 - D. Soil disturbing activities permitted in a riparian and/or wetland setback through variances should be implemented in order to minimize clearing to the extent possible, and to include Best Management Practices necessary to minimize soil erosion and maximize sediment control.
 - E. The presence of significant impervious cover or smooth vegetation such as maintained lawns, in riparian setback areas compromises their benefits to the City of Middleburg Heights.
 - F. A reduction in storm water infiltration into the soil in wetland areas will occur.
 - G. A requested above ground fence does not increase the existing area of mowed grass or lawn.
 - H. Modifying parking requirements before varying the riparian setback.
 - I. Modifying building shape, size or design to avoid or minimize intrusion into the

riparian setback.

- J. In the case of a lot made unbuildable or to which no economically viable use exists as a result of this regulation, consider the minimum variance needed to make it buildable or restore economic viability for an appropriately sized and compatibly designed structure, while following the guidance provided in this section.
- K. Whether the variance will increase the likelihood for flood or erosion damage to either the applicant's property or to other properties.
- L. Culverting of streams should be avoided.
- M. Whether the variance will result in the need for artificial slope or bank stabilization measures that could interfere with the function of the riparian zone.

1363.15 BOUNDARY INTERPRETATION & APPEALS PROCEDURE

- 1. When an applicant or his or her designated representative disputes the boundary of a Riparian or Wetland Setback or the ordinary high water mark of a watercourse, the applicant or his or her designated representative shall submit documentation to the City of Middleburg Heights which describes the boundary, the applicant's proposed boundary, and justification for the proposed boundary change.
- 2. The City of Middleburg Heights shall evaluate this documentation and shall make a written determination within a reasonable period of time, not to exceed sixty (60) days, a copy of which shall be submitted to the applicant. If during this evaluation the City of Middleburg Heights requires further information, it may be required of the applicant. In the event that the City of Middleburg Heights requests such additional information, the sixty (60) day limit on the City of Middleburg Heights's review shall be postponed until the applicant provides such information.
- 3. Any party aggrieved by any Wetland or Riparian Setback determination under this regulation may appeal to the Board of Zoning Appeals.
- 4. During the interpretation and appeals procedure, the City of Middleburg Heights reserves the right to consult with any outside expert, as the City deems necessary.

1363.16 INSPECTION OF RIPARIAN AND WETLAND SETBACK

- 1. The delineation of riparian and/or wetland setbacks shall be inspected by the City of Middleburg Heights or its designee, as follows:
 - A. Prior to any soil disturbing activities authorized by the City of Middleburg Heights under for a property subdivision/property/parcel split, land development plan, and/or building permit. The applicant or his or her designated representative shall provide the City of Middleburg Heights with at least five (5) working days notice prior to starting soil disturbing or land clearing activities.

B. Prior to starting any of the activities authorized by the City of Middleburg Heights under the *USES PERMITTED IN RIPARIAN AND WETLAND SETBACKS* section of these regulations, the applicant or his or her designated representative shall provide the City of Middleburg Heights with at least five (5) working days notice prior to starting such activities.

C. Any time evidence is brought to the attention of the City of Middleburg Heights that uses or structures are occurring that may reasonably be expected to violate the provisions of these regulations.

1363.17 VIOLATIONS: No person shall violate or cause or knowingly permit to be violated any of the provisions of this regulation, or fail to comply with any of such provisions or with any lawful requirements of any public authority made pursuant to this regulation, or knowingly use or cause or permit the use of any lands in violation of this regulation or in violation of any permit or variance granted under this regulation.

1363.99 PENALTIES:

1. Whoever knowingly violates or fails to comply with any provision of this regulation is guilty of a misdemeanor of the third degree and shall be fined no more than one thousand dollars (\$500.00) or imprisoned for no more sixty (60) days, or both, for each offense.
2. A separate offense shall be deemed committed each day during or on which a violation or noncompliance occurs or continues.
3. Upon notice from the City of Middleburg Heights, or its designated representative, that work is being performed contrary to this regulation, such work shall immediately stop. Such notice shall be in writing and shall be given to the owner or person responsible for the development area, or person performing the work, and shall state the conditions under which such work may be resumed; provided, however, in instances where immediate action is deemed necessary for public safety or the public interest, the City of Middleburg Heights may require that work be stopped upon verbal order pending issuance of the written order.
4. The imposition of any other penalties provided herein shall not preclude the City of Middleburg Heights, by or through its Law Director and/or any of his or her assistants, from instituting an appropriate action or proceeding in a Court of Proper Jurisdiction to prevent an unlawful development or to restrain, correct or abate a violation, or to require compliance with the provisions of this regulation or other applicable laws, or ordinances, rules, regulations, orders or determinations of the City of Middleburg Heights.

Section 2: It is hereby found and determined that all formal actions of this Council concerning and relating to the passage of this Ordinance were adopted in an open meeting of this Council, and that all deliberations of this Council and any of its committees that resulted in such formal actions were in meetings open to the public, in compliance with

all legal requirements, including Chapter 107 of the Middleburg Heights Code and Section 121.22 of the Ohio Revised Code.

Passed: 2/26/08

Attest: Mary Ann Meola
Clerk of Council

Presented To Mayor: 2/27/08

[Signature]
President of Council
Approved On: 2/27/08
[Signature]
Mayor

	Yea	Nay
Budney	<input checked="" type="checkbox"/>	
Ali	<u>ABSTAIN</u>	
Sheppard	<input checked="" type="checkbox"/>	
Castelli	<input checked="" type="checkbox"/>	
Herron	<input checked="" type="checkbox"/>	
Bortolotto	<input checked="" type="checkbox"/>	
Guttmann	<u>ABSENT</u>	

I, Mary Ann Meola Clerk of the Council of the City of Middleburg Hts., Ohio, hereby certify that Ord. 2008-19 adopted by the Council of the City of Middleburg Hts., on 2/24/08 was posted for a period of fifteen days, beginning 2/28/08 and remained so posted for fifteen days at the two posting places as designated by Charter.

Mary Ann Meola
Clerk

CERTIFICATE

I, Mary Ann Meola Clerk of Council of the City of Middleburg Heights, Ohio, do hereby certify that the foregoing is a true and accurate copy of Ord. 2008-19 passed on the 26th day of February 20 08 by said Council.

Mary Ann Meola
Clerk of Council