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Halifax, Nova Scotia
B3J 3A5 Canada

Peninsula Community Council
May 10, 2010

TO: Chair and Members of Peninsula Community Council

SUBMITTED BY: Andrew Faulkner
Andrew Faulkner, Development Officer

DATE: April 28, 2010

SUBJECT: Appeal of the Development Officer's decision to approve an application for a Variance - 6088 Oakland Rd, Halifax

ORIGIN

This report deals with an appeal of the Development Officer's decision to approve a variance from the gross floor area (GFA) requirements of the Halifax Peninsula Land Use By-law to permit the construction of a new single unit dwelling.

RECOMMENDATION

It is recommended that Council uphold the Development Officer's decision to approve the variance

BACKGROUND

The proposal is to construct a single unit dwelling on a 7776 square foot lot at 6088 Oakland Rd. The zone is R-1 (Single Family Zone) in the South End Secondary Plan of the Halifax Peninsula Land Use By-Law.

The owner has proposed a dwelling with a Gross Floor Area (GFA) of 5233 square feet, the maximum permitted GFA for a 7776 square foot lot is 3888 square feet.

Previously a one and a half storey dwelling was located on the property. The present owner received a Demolition Permit to remove the dwelling December 8, 2009.

A construction permit for a single unit dwelling was issued December 22, 2009. This application proposed the majority of the basement level with a ceiling height of less than 1.95 m and was therefore excluded from GFA calculation. In this configuration the dwelling met the GFA and all other zone requirements.

The owner applied for a variance to the GFA requirements which was approved by the Development Officer March 25, 2010. The application proposed a full ceiling height (ie. more than 1.95m) for the entire basement.

All property owners within 100 feet were notified of the approved variance and two appeals were filed prior to the expiration of the appeal period (Attachment 1).

DISCUSSION

The *HRM Charter* sets out guidelines under which the Development Officer may consider variances to Land Use Bylaw requirements. Those guidelines are as follows:

“A variance may not be granted where the:

- (a) variance violates the intent of the land use bylaw;*
- (b) difficulty experienced is general to the properties in the area;*
- (c) difficulty experienced results from an intentional disregard for the requirements of the land use bylaw.”*

In order to be approved, the proposed variance must not conflict with any of the above statutory guidelines. An assessment of the proposal relative to these stipulations is set out below.

Does the proposed variance violate the intent of the land use bylaw ?

The intent of the Gross Floor Area (GFA) is twofold: 1) to prevent large additions with multiple bedrooms, (“quasi-rooming houses”) and 2) to prohibit large houses that are out of scale with the neighbourhood.

Staff believe the design of this home would make it difficult to convert to a rooming house therefore that is not a consideration in this application.

In regards to building mass, the proposal is for three developed levels totalling 5233 square feet. Although it would be the largest building in the immediate neighbourhood from a square footage standpoint, its appearance is not out of scale with other houses.

The front and right facades have the appearance of a two storey house. The left facade features a car port (which is not included in GFA calculations) leading into the grade level basement. The rear facade is at grade and features a walkout (Attachment 2).

Houses in the immediate neighbourhood range from 1.5 storeys to 3.5 storeys (including the basement).

To permit the variance would be consistent with the intent of the land use bylaw.

Is the difficulty experienced general to the properties in the area ?

Properties in the area range in size from 4500 to 12000 square feet. The majority of houses in the neighbourhood exceed the floor area ratio (FAR) requirement.

The floor area ratio is dependant on lot size, when comparing other homes on lots of similar size the proposal is consistent.

As the majority of the existing homes already exceed the FAR requirements, their replacement would not be subject to the current requirements and would not require a variance, therefore the difficulty experienced is not general to similar properties in the area.

Is the difficulty the result of intentional disregard for the requirements of the land use bylaw?

The applicant had begun construction of the dwelling with a construction permit prior to the application for variance. The owner’s design changed during construction and a portion of the basement ceiling was raised. Subsequently the owner applied for a variance, however work did not stop and on April 14, 2010 a stop work order for items related to the violation of GFA requirements was issued. A site inspection by staff determined that the basement ceiling height was now more than 1.95 m for the entire basement level. In consideration of other criteria in the HRM Charter intentional disregard is not a consideration in approving this variance.

BUDGET IMPLICATIONS

None.

FINANCIAL MANAGEMENT POLICIES / BUSINESS PLAN

This report complies with the Municipality's Multi-Year Financial Strategy, the approved Operating, Capital and Reserve budgets, policies and procedures regarding withdrawals from the utilization of Capital and Operating reserves, as well as any relevant legislation.

ALTERNATIVES

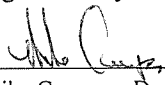
1. Council could uphold the decision of the Development Officer to approve the variance. This is staff's recommended alternative.
2. Council could overturn the decision of the Development Officer and refuse the variance.

ATTACHMENTS

1. 2 Appeals
2. Building Facades

A copy of this report can be obtained online at <http://www.halifax.ca/commcoun/cc.html> then choose the appropriate Community Council and meeting date, or by contacting the Office of the Municipal Clerk at 490-4210, or Fax 490-4208.

Report Prepared by :


Mike Cowper - Development Technician (490-7455)

Report Approved by:


Andrew Faulkner - Development Officer (490-4402)

DATE: April 28, 2010

SUBJECT: Development Officer's decision to approve a variance from the gross floor area (GFA) requirements of the Halifax Peninsula Land Use By-law to permit the construction of a new single unit dwelling.

Attachment 1

April 12, 2010

Municipal Clerk
c/o Mr. Andrew Faulkner, Development Officer
Halifax Regional Municipality
PO Box 1749
Halifax, NS
B3J 3A5

Dear Sirs:

Re: Variance 15975 – 6088 Oakland Road, Halifax

I am writing to object to the granting of this variance, which seeks to build a house that is approximately 35% larger than the allowable square footage for a property built on this lot size.

According to HRM's planning department, a building permit was initially granted on the basis of plans submitted in November 2009 that indicated that the height of the basement for this house would, in general, not exceed 6'4".

The variance application is based on the basement being full height throughout, with the result that the basement will now count as part of the living space for the house.

HRM's Planning Department approved the variance, subject to objection from affected neighbours, on March 25, 2010. At this point, the framing of the house was complete, along with most of the sheathing and roof trusses.

On receipt of your letter to me of March 25, I made a visit to the house. While I am no expert in construction practices, it is quite clear to me that the basement was always intended to be living space. I measured the height of the basement, between the top of the footings and the ceiling strapping that is already in place, to be 8'6", which I understand is a standard ceiling height.

The proposed variance was therefore not some form of "construction accident". At the time that the foundation was poured it was the intention of the builder, who I understand is an experienced developer, to make the basement full height, notwithstanding the plans that had been submitted to the contrary.

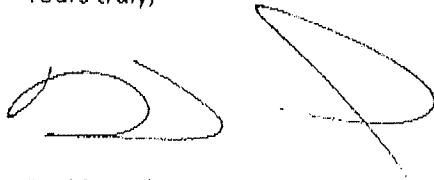
I can only view the conduct of the builder here as a carefully planned attempt, by someone who knew the operation of the system, to circumvent the building size rules established by HRM.

The builder appeared to realize that obtaining a variance later would be easier than obtaining it before construction commenced, and the granting of the variance by HRM's Planning Department seems to confirm this.

The antics of this builder display a calculated attempt to circumvent the rules, and I do not believe should be rewarded by the retroactive granting of a variance.

I object to the granting of this variance and request that HRM order the homeowner to take such steps as are necessary to permanently conform to the original permit.

Yours truly,

A handwritten signature in black ink, consisting of a stylized, cursive 'D' followed by a series of loops and a final flourish.

David Harris

Cc: Councilor Sue Uteck

WARREN K. ZIMMER

BARRISTER & SOLICITOR

TELEPHONE (902) 429-7787
FACSIMILE (902) 429-7788CHAMPLAIN BUILDING, 2ND FLOOR
5162 DUKE STREET
HALIFAX, NOVA SCOTIACORRESPONDENCE
P. O. BOX 786
HALIFAX, NOVA SCOTIA B3J 2V2

April 12, 2010

Municipal Clerk
c/o Andrew Faulkner, Development Officer
Halifax Regional Municipality
Community Development - Western Region
6960 Mumford Road - West End Mall
PO Box 1749
Halifax NS B3J 3A5

By Fax: 490-4645

Dear Sir/Madam:

RE: Variance #15975 - 6088 Oakland Road, Halifax**NOTICE OF APPEAL**

I am the solicitor for Pamela Zimmer, _____, Halifax, Nova Scotia, who, on or about March 30, 2010, received a Notice of Variance #15975 from Andrew Faulkner, Development Officer, HRM.

I have been instructed by Pamela Zimmer to file this Notice of Appeal on her behalf.

I have been advised that at the time the builder obtained his or her Development Permit the plans showed that the basement was to be constructed at a height less than 1.95 meters (6'4") presumably so that the basement floor area would not be included in the calculation of the gross floor area. Mr. Cowper has advised that the square footage as calculated at the time the Permit was issued was 3,820 sq. ft.

The owner/builder has requested a variance to increase the gross floor area to 5,233 sq. ft. This is to be accomplished by allowing the owner/builder to construct the basement ceiling at a height in excess of 1.95 meters, thereby bringing the basement area into the calculation.

The construction at 6088 Oakland Road has gone on for a number of months prior to the application for the variance. The foundation was poured and the building framed, in the

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basement area, to a height of approximately 8 feet, 6 inches. This is from the floor (not yet poured) to the strapping. The support beams measure 8 feet, 6 inches, approximately.

It would appear that the owner/builder, from the time of the initial construction, had always planned to construct the basement ceiling height at approximately 8 feet, 6 inches, or somewhere around that number. Certainly in excess of the 6 feet, 4 inches as laid out on the original plans. It may very well be that there was a second set of plans from which the actual construction took place given that materials would have been required, and ordered, to construct the ceiling at its present height. I suspect that the carpenters would have been following drawings that laid out the ceiling at this new height.

It would appear that there was a clear plan in place to construct this residence knowing full well that it did not comply with the Permit and would exceed the floor area ratio without a variance. The owner/builder has banked on being able to obtain the variance to continue construction regardless of the original Permit.

The Halifax Regional Municipality Land Use Bylaw Halifax Peninsula defines a "basement" for the purpose of the Bylaw. Generally it is that storey which is partly underground, but having no more than half of its clear floor to ceiling height below the average grade of the land outside the building in which such basement is located, such grade being taken from the foundation walls.

In the case of the construction at 6088 Oakland Road, the ground level of the house which is referred to as the basement, in my respectful opinion, does not meet the definition of basement in the Bylaw.

The building under construction, on the south side and east side, is built to grade. Neither of these walls has any portion "underground". Unless this storey meets the definition of "basement" in the Bylaw, the variance cannot be considered as it involves more than simply building the basement ceiling at a height greater than 6 feet, 4 inches. The variance would effectively allow for the construction of a three storey residence with 5,233 useable square feet and such would not otherwise be permitted. This is not a variance of a ceiling height in a basement, but rather an attempt to build a full three storey house from the outset.

It is submitted that even if the ground floor level does qualify as a basement as defined in the Bylaw, the variation does not meet the requirements of Section 235(3) of the *Municipal Government Act*.

Section 235(3) of the *Act* reads:

(3) A variance may not be granted where the

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- (a) variance violates the intent of the development agreement or land use bylaw;
- (b) difficulty experienced is general to the properties in the area; or
- (c) difficulty experienced results from an intentional disregard for the requirements of the development agreement or land use bylaw.

In order to be approved, the proposed variance must not conflict with any of the above statutory criteria and in the present case, it is submitted, the proposed variance does conflict with the statutory criteria.

Firstly, the storey designated as a "basement" by the owner/builder does not meet the statutory definition in the Bylaw and therefor cannot be varied as requested by the owner/builder because the variance relates to a "basement" that does not exist.

Secondly, the difficulty that the owner/builder has at the present time is general to the properties in the area. Quite simply the owner/builder could have constructed a residential building exactly in accordance with the Development Permit they received, that is, a 3,820 sq. ft. residence with a basement of a height that was no more than 6 feet, 4 inches. The building, as applied for, could easily have been constructed. The difficulty now encountered is that the owner/builder seeks to increase the gross floor area by way of a variance. This is exactly the same problem that would be encountered by any other owner/builder in the neighborhood who sought to over-build.

Lastly, the difficulty experienced, if such actually exists, results from the intentional disregard of the requirements of the Land Use Bylaw on the part of the owner/builder. The plans, as filed, clearly demonstrated an intent to build a residence with a basement height of 6 feet, 4 inches, and the Permit was granted on that basis. The decision was made to build at a "basement height" of 8 feet, 6 inches in disregard for the original plans. A view of the south side of the house clearly demonstrates the intent to build a three storey house on that lot.

The owner/builder would have been aware of the requirement to obtain a variance long before the shovel was in the ground. Building materials were ordered to construct at a height of 8 feet, 6 inches and the owner/builder proceeded on that basis.

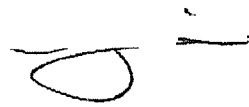
Any difficulty which arises at the present time was engineered by the owner/builder, presumably with the expectation that the variance would be granted and they could maximize the return on their investment by increasing the gross floor area by approximately 1,400 sq. ft.

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Purposeful behaviour that defeats the Bylaw should not be rewarded with the variance as it will simply encourage others to follow in the same footsteps. This will be to the detriment of all the neighboring residences.

Yours truly,

Warren K. Zimmer

A handwritten signature in black ink, appearing to be 'W. Zimmer', written over a horizontal line.

WKZ/ald

DATE: April 28, 2010

SUBJECT: Development Officer's decision to approve a variance from the gross floor area (GFA) requirements of the Halifax Peninsula Land Use By-law to permit the construction of a new single unit dwelling.

Attachment 2

Roof 6/12 slope (see roof plan)

Roof 6/12 slope (see roof plan)



Oakland Road

Car port
6/4

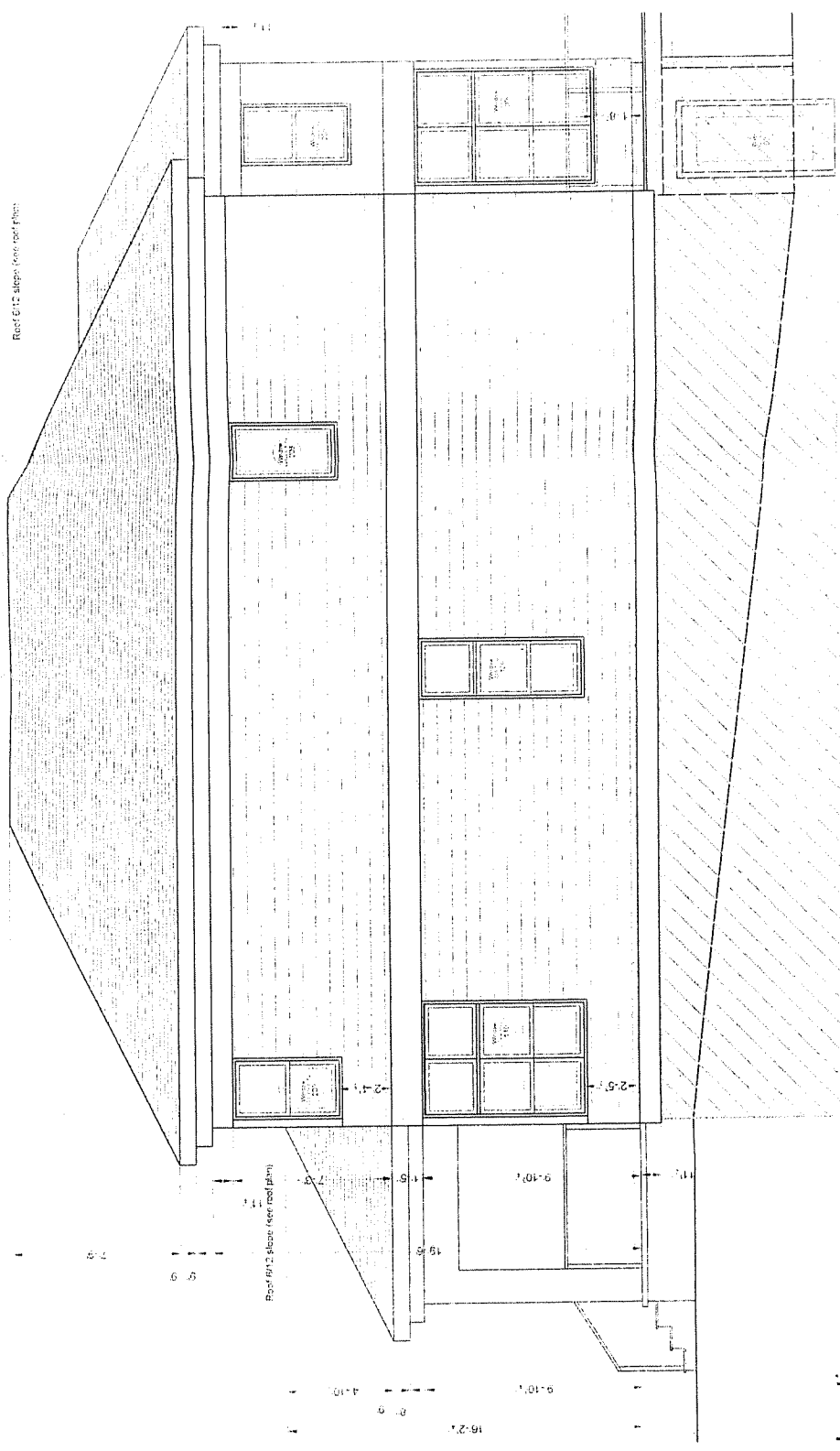
Front Elevation

Right Elevation

WITH 10'

Roof 6:12 slope (see roof plan)

Roof 6:12 slope (see roof plan)



levation

New door

Architectural drawing showing the right elevation of a building with various dimensions and annotations.

REVISIONS WILL BE...

Rear Elevation

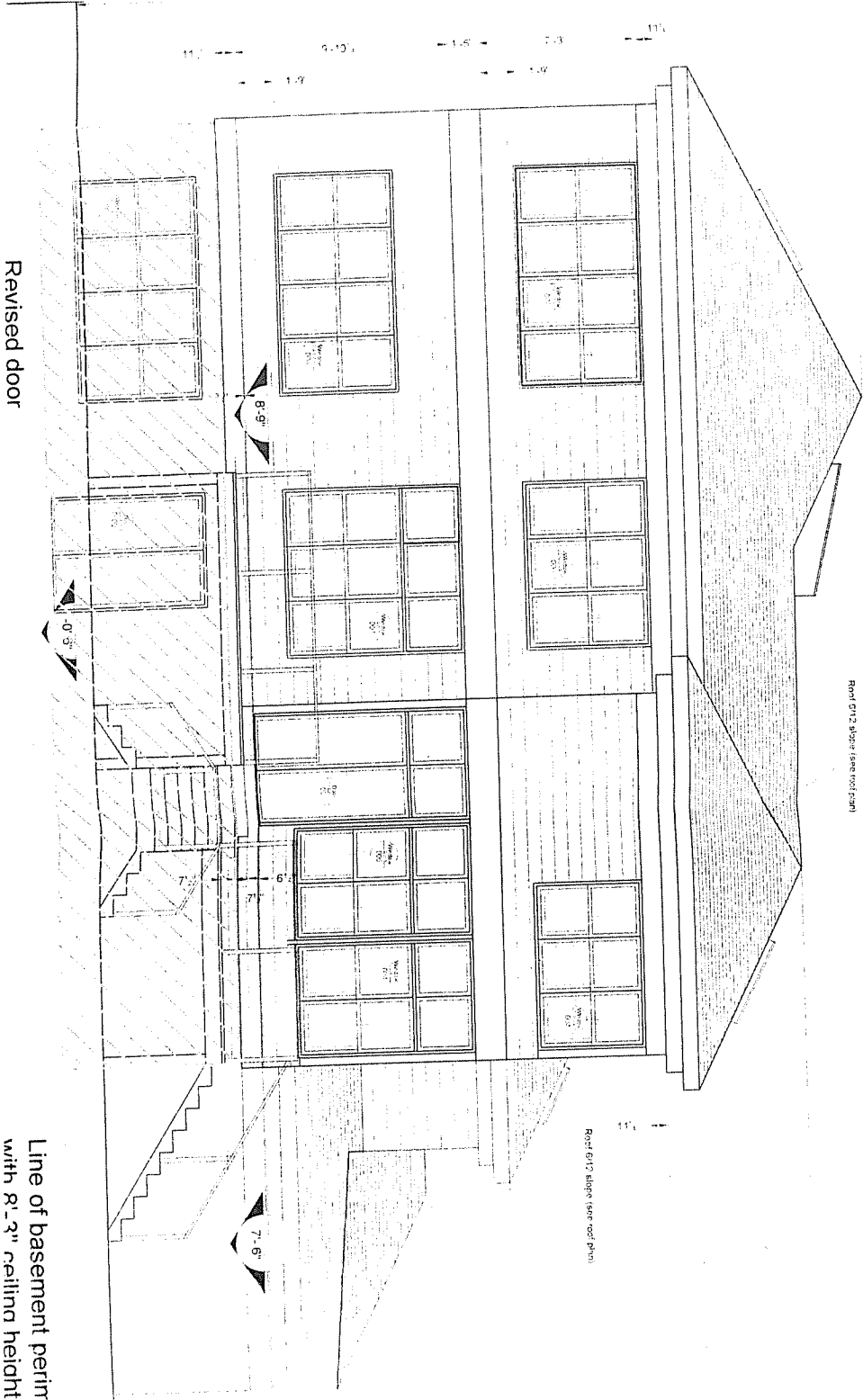
Application for additional space in basement level

Line of basement perimeter with 8'-3" ceiling height

Rear 611'2" slope (see roof plan)

Rear 612'2" slope (see roof plan)

Rear 611'2" slope (see roof plan)



Revised door

Line of basement perimeter with 8'-3" ceiling height