



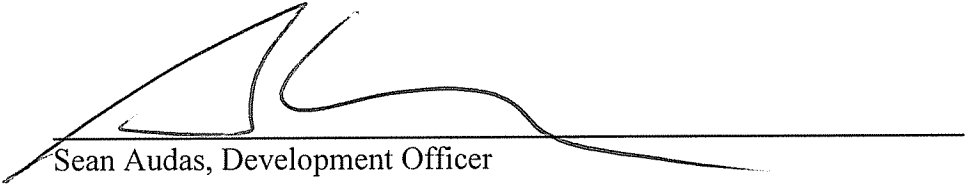
PO Box 1749
Halifax, Nova Scotia
B3J 3A5 Canada

Harbour East Community Council
May 1, 2008

Item 8.1.1

TO: Chair and Members of Harbour East Community Council

SUBMITTED BY:



Sean Audas, Development Officer

DATE: April 18, 2008

SUBJECT: Appeal of the Development Officer's decision to refuse a Variance at 84,
86, 88A & 88B Shore Road, Dartmouth

SUPPLEMENTARY INFORMATION REPORT

ORIGIN

This report deals with the appeal of the Development Officer's decision to refuse a variance for lot coverage and side yard setbacks at 84, 86, 88A & 88B Shore Road, Dartmouth.

As a follow up from the April 3, 2008 Variance appeal hearing, Community Council requested clarification on legal consequences if the Variance was not granted and the likelihood of proceeding with charges if the Variance is granted.

BACKGROUND

As directed, following the April 3, 2009 Harbour East Community Council, Community Development and Legal Services discussed possible consequences of granting or not granting the Variance request. This report is intended to provide Community Council with an overview of possible scenarios.

Also, some concern was raised by the applicant regarding the omission of attachments contained in the appeal letter. This has been clarified with Legal Services and a complete copy of the letter of appeal including attachments (Attachment 1) is contained in this report.

DISCUSSION

A number of questions were raised during the April 3, 2008 meeting of Harbour East Community Council. This report will outline the three areas of concern raised by Harbour East Community Council during the Variance hearing. What will happen if the Variance is not granted? What will happen if the Variance is granted? If the Variance is granted what remedies remain?

Variance is not granted

If the Variance is not granted by Harbour East Community Council, HRM could proceed with both a prosecution and an injunction to remedy the land use by-law violations. Under the administrative provisions of the Land Use By-law for Downtown Dartmouth, no persons shall erect, alter, repair or maintain any building or locate or carry on any industry, business, trade or calling or use any land or building within any zone without complying with the provisions of the by-law.

A person who violates the Land Use By-law for Downtown Dartmouth would be guilty of an offence and is subject to the enforcement provisions contained in the Municipal Government Act (MGA). Under the MGA that person would be liable, upon summary conviction, to a penalty of not less than one hundred dollars and not more than ten thousand dollars and in default of payment, to imprisonment for a term of not more than two months.

Every day during which the offence continues is a separate offence. In addition to the fine, a judge may order the person to comply with the by-law within the time specified in the order. Any person who fails to comply with such an order would be guilty of an offence. Breaches of the Land Use By-law for Downtown Dartmouth are strict liability offences.

The prosecutor would have to prove the prohibited act beyond a reasonable doubt. In this case, the violation with respect to side yard set back or lot coverage. Once the offence is proven, the accused may be able to escape liability if they are able to establish a defence of due diligence on the balance of probabilities. A due diligence defence would be successful where the accused was able to produce evidence which established that he or she "took reasonable care or acted under a reasonable mistake of fact". For the purposes of the defence, this may include reliance upon a professional or expert.

The owner of the property would be subject to prosecution in relation to breaches of the Land

Use By-Law for Downtown Dartmouth. A developer or builder could be deemed a “person” in breach of the by-law. It may be however, that the developer or builder would claim that they were simply acting as an agent of the owner and that it was in fact the owner who is responsible for any breach. Whether a developer or builder would be prosecuted in a particular circumstance would be a determination to be made by HRM’s Municipal Prosecutor following a full investigation into the matter.

It should be noted that no proceedings can be initiated more than six months after the time the offence was committed. If a building was erected by a builder more than six months ago, the limitation period would be expired. An owner, however, would be committing a continuing breach of the by-law by maintaining the building.

Section 265(1) of the MGA also deals with breaches of approved site plans. A municipality may, upon the breach of an approved site plan, if thirty days notice in writing has been provided to the owner, enter the land and perform any of the terms contained in the site plan. All reasonable expenses whether arising out of the entry on the land or from the performance of the terms of the site plan are a first lien on the land that is the subject of the site plan.

The property owner upon receipt of the thirty day notice may be able to apply to the Court for a temporary injunction preventing the destruction of the property until all facts have been placed before a judge. It is also possible for the Municipality to make an application to the Supreme Court of Nova Scotia for a number of remedies including an order directing the removal or destruction of any structure or part of a structure that contravenes a land-use by-law, or site plan. The order may provide that if it is not complied within a specified time. The Municipality may enter upon the land and premises with necessary workers and equipment and to remove and destroy the structure, or a portion of the structure at the expense of the owner.

Under section 184 of the MGA, if a building is erected, being erected or being used in contravention of a by-law of the municipality or a breach of a by-law is anticipated or is of a continuing nature the municipality may apply to a judge of the Supreme Court of Nova Scotia for an injunction or other order and the judge may make any order that the justice of the case requires.

If the variance is not granted, the Development Officer would have to proceed with an investigation and prepare a package for review by Legal Services in an effort to determine if charges or application for injunctive relief would proceed.

Variance is granted

If the Variance is granted, the building would be in compliance with the Land Use By-Law requirements and the Building Official could proceed with final building inspections and grant occupancy permits for each unit. Also, if the Variance is granted the owners could proceed with

subdividing the townhouse units for individual ownership.

If the Variance is granted what remedies remain

If the variance is granted the Development Officer would have to proceed with an investigation of and prepare a package for review by Legal Services in an effort to determine if charges would proceed. As indicated previously, issues with respect to limitation periods and available defences would have to be reviewed.

The Municipality does not have the authority to regulate, prosecute, or adjudicate private disputes between individuals. A person who is seeking damages with respect a nuisance, or injury to their person or property caused by an adjacent property owner must pursue their remedy in the civil courts.

With respect to the irregularities in the survey plans submitted with regards to this application and previous Variance applications, all plans will be sent to the professional association for review.

BUDGET IMPLICATIONS

There are no implications on the Capital Budget associated with this report

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.

ATTACHMENTS

1. Appeal Letter

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 and Approved by : Sean Audas, Development Officer, 490-4462



Jack A. Innes
Dir 902 444 8445
jack.innes@mcinnescooper.com

1300-1969 Upper Water Street
Purdy's Wharf Tower II
Post Office Box 730
Halifax, Nova Scotia
Canada B3J 2V1
Rec 902 425 6500 Fax 902 425 6350

Our File: TU-1198
March 18, 2008

By Courier

Halifax Regional Municipality
Planning & Development Services
Attention: Sean Audas, Senior Planning Advisor
2nd Floor, Alderney Gate
DARTMOUTH, NS B2Y 2N5

Dear Mr. Audas:

Application for Variance – 1481-84, 86, 88A and 88B Shore Road, Dartmouth, Nova Scotia

Please accept this letter as a Notice of Appeal of your refusal to grant a variance from the requirements of the *Downtown Dartmouth Zone*, HRM Land Use By-law, the requested variances being as follows:

1. 47.1% lot coverage for proposed Lot WR-1CH;
2. 3.0 feet side yard setback.

The grounds for this appeal are as follows:

Variance #1 – Lot WR-1CH

The townhouse lot which is the subject of this appeal is one of four townhouses contained within a single structure having a total footprint of 2,867 square feet which, in relation to the total area of Lot WR-1 (8,671 sq. ft.) represents a coverage of 33.06%. Three of the four townhouses meet the coverage requirement.

At the time the permit was issued for the construction of these units, there was a misunderstanding as to the impact of certain provisions of the HRM Subdivision By-law and it was determined that the proposed dwellings and subdivided lot configuration were in compliance with the HRM Subdivision By-law. Following construction and at the time application was made for final approval of the subdivision of lots, it was determined by HRM staff that the lot configuration which in effect provided adequate area to meet coverage requirements for all four townhouse units, was contrary to Section 33 of the HRM Land Use By-law and the application for subdivision approval was rejected.

Subsequent to rejection of the application, the Appellant negotiated the acquisition of additional lands and the subdivision was redesigned so as to comply with the HRM

(ODMA\PCDOCS\MCLIB\1161783\1)

Subdivision By-law; however, pursuant to the revised subdivision plan, the townhouse constructed on Lot WR-1CH exceeds the permitted coverage of 35%.

Summary

The structure containing the townhouse under appeal was approved for construction based upon a survey plan which met the townhouse coverage requirements. The entire structure in relation to the unsubdivided lot upon which it is built meets the townhouse coverage requirements. From a visual perspective, there is no adverse affect on neighbouring properties. The variance applied for recognizes the reality of coverage for one townhouse unit which was adversely affected by the change in the subdivision plan.

Variance #2 – Side Yard Setback

In March, 2007, Council granted a Variance (#13614) permitting a right side yard of 3.3 feet. The requested Variance resulted from a Location Certificate prepared on behalf of the lot owner and submitted to Council as part of the Application (see attachment #1).

In the course of preparing documentation for Variation #1 above, HRM staff requested a Location Certificate with one additional measurement other than at the corners of the building (see attachment #2). In compliance with that request, the owner's surveyor completed the measurement at the location requested and the distance shown on the resulting Location Certificate was 3.0 feet (see attachment #3). As a result of this outcome, HRM staff requested that the Application for Variance #1 for lot coverage include an additional request for a variance of the side yard from 3.3 to 3.0 feet.

On behalf of the owner, it must be stated that no change has been made to the building since the original Variance was granted in March, 2007. Had HRM staff requested the additional measurement in 2007 as they did in 2008, there is no doubt that the requested variance at that time would have been 3.0 feet.

It is the owner's submission that the request of HRM staff to provide an additional measurement in 2008 having accepted a plan with corner measurements only in 2007 is inconsistent, the result of which is to make it appear as though the owner had done something contrary to the previously approved variance. As noted, however, neither the foundation nor the lot line in question have been changed since Variance 13614 was approved.

Summary

This Application arises from an inconsistent process adopted by HRM's planning staff for the production of Location Certificates delineating side yard setbacks. In effect, the subject matter of the measurement has not changed since 2007 but rather the methodology for obtaining the measurements has.

The Appellant believes that fairness requires Council to approve this Application.

Respectfully submitted for Adams McA'Nulty Vaneast Developments Limited,

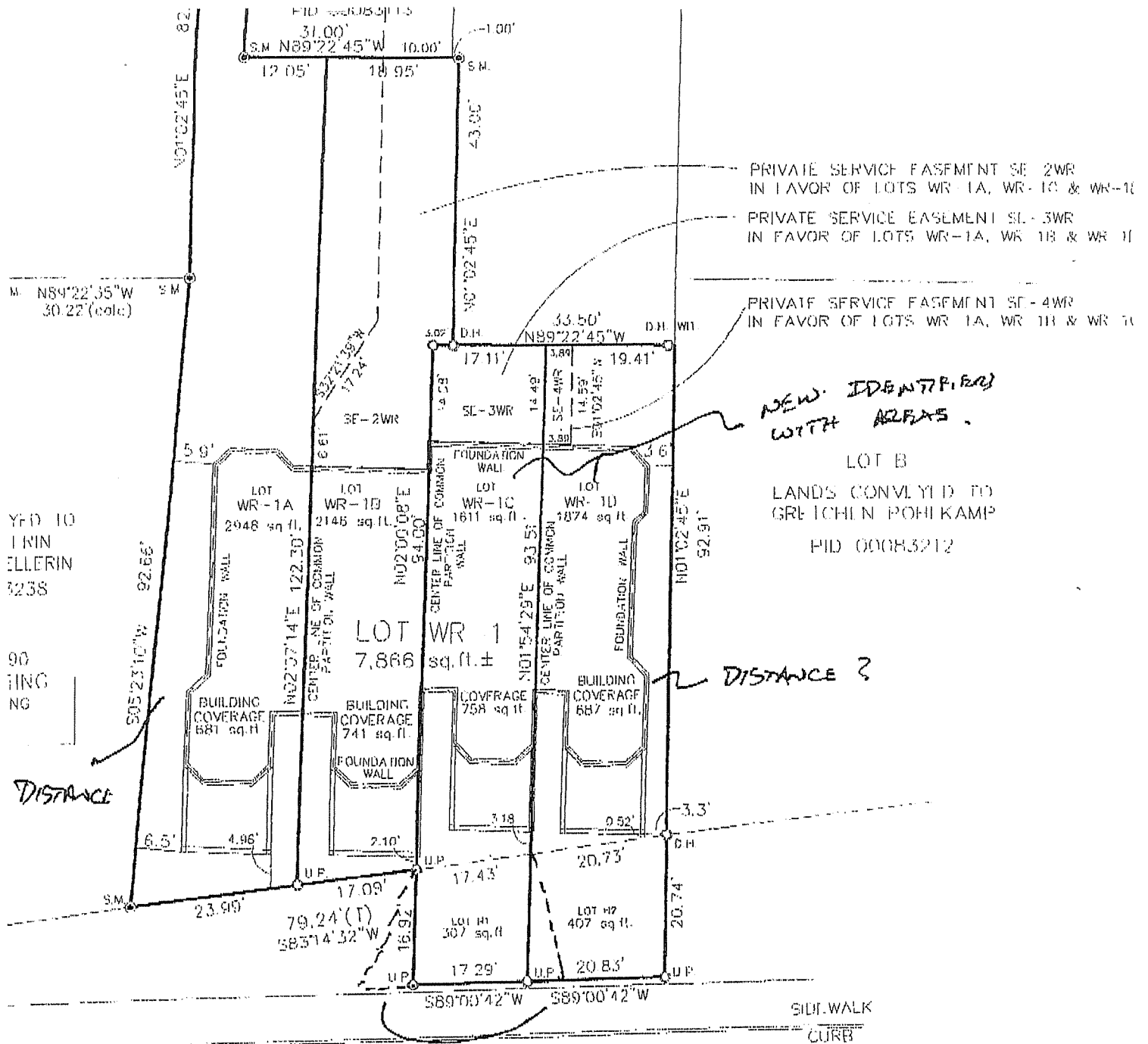
MCINNES COOPER

A handwritten signature in black ink, appearing to read "Jack A. Innes". The signature is written in a cursive style with a large, looping initial "J".

Jack A. Innes, Q.C.

JAI/sl
Encls.

ATTACHMENT #2



SHORE ROAD

(WIDTH VARIES)

WOULD
 THIS AREA
 GET TO
 35%
 LOT COVERAGE

PRIVATE SERVICE EASEMENT SE-2WR
 IN FAVOR OF LOTS WR-1A, WR-1C & WR-1E
 PRIVATE SERVICE EASEMENT SE-3WR
 IN FAVOR OF LOTS WR-1A, WR-1B & WR-1E
 PRIVATE SERVICE EASEMENT SE-4WR
 IN FAVOR OF LOTS WR-1A, WR-1B & WR-1E

NEW IDENTIFIED
 WITH AREAS

LOT B
 LANDS CONVEYED TO
 GREICHIN POHI KAMP
 PID 00083212

DISTANCE ?

DISTANCE

YFD TO
 TRIN
 ELLERIN
 3238

90
 FT
 DISTANCE

SIDE WALK
 CURB

MISSION 154

PID 00083105

LANDS CONVEYED TO TAMMY L HAMPSON
PID 00083113
N89°22'45"W
31.00'

STEEVES
PID 00083121

PRIVATE SERVICE IN FAVOR OF L 740 sq.ft. (GRANTED OF

PRIVATE SERVICE IN FAVOR OF L 245 sq.ft. (GRANTED OF

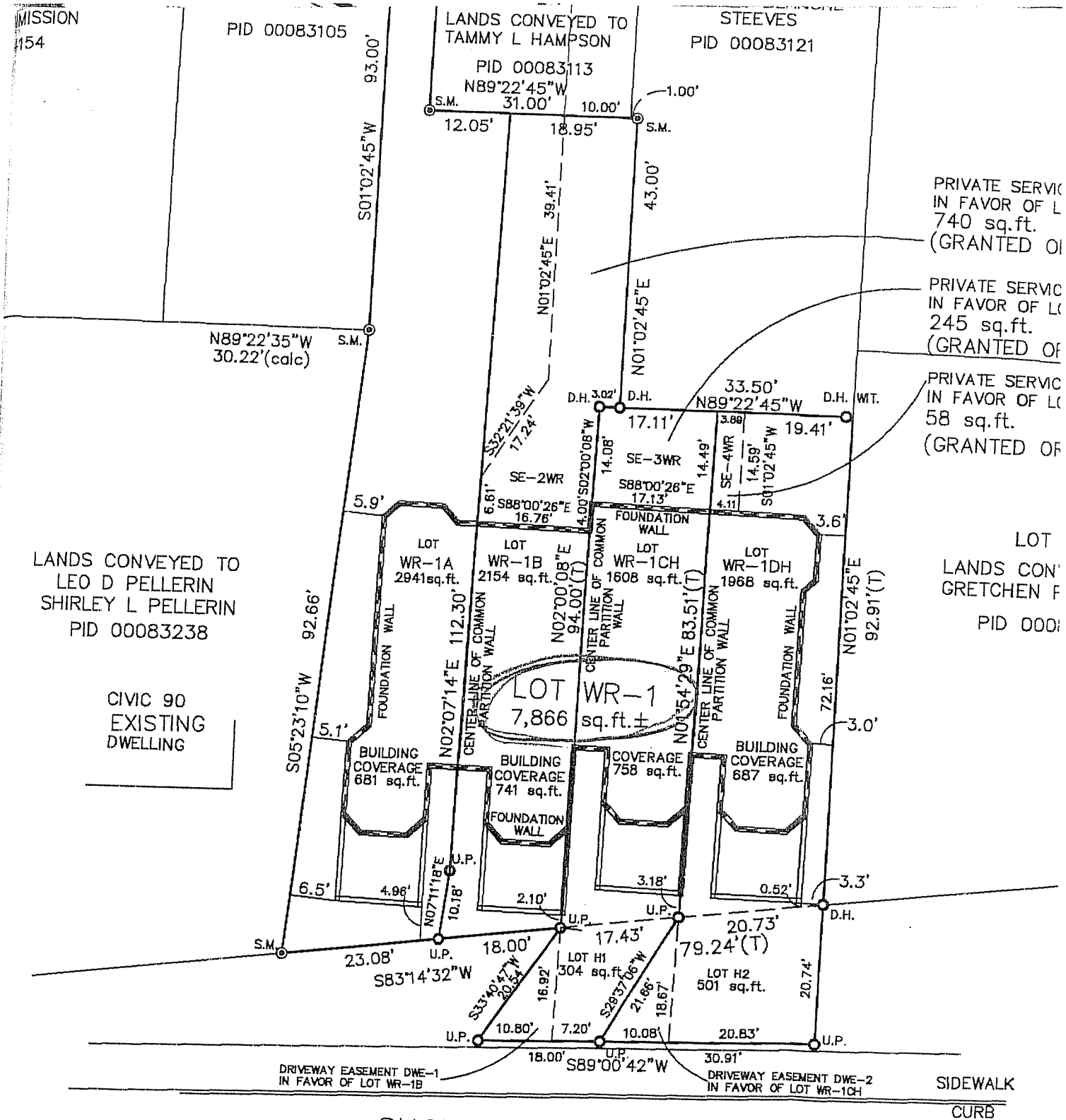
PRIVATE SERVICE IN FAVOR OF L 58 sq.ft. (GRANTED OF

LANDS CONVEYED TO LEO D PELLERIN SHIRLEY L PELLERIN
PID 00083238

LOT LANDS CON GRETCHEN F
PID 000

CIVIC 90 EXISTING DWELLING

LOT WR-1
7,866 sq.ft.±



SHORE ROAD
(WIDTH VARIES)

ATTACHMENT #3




PO Box 1749
Halifax, Nova Scotia
B3J 3A5 Canada

Item 8.1.1

Harbour East Community Council
April 3, 2008

TO: Chair and Members of Harbour East Community Council

SUBMITTED BY:


Sean Audas, Development Officer

DATE: March 27, 2008

SUBJECT: Appeal of the Development Officer's decision to refuse a Variance at 84,
86, 88A & 88B Shore Road, Dartmouth

ORIGIN

This report deals with the appeal of the Development Officer's decision to refuse a variance for lot coverage and side yard setbacks at 84, 86, 88A & 88B Shore Road, Dartmouth.

RECOMMENDATION

It is recommended that Council uphold the Development Officer's decision to refuse the variance for the side yard and lot coverage requirements.

BACKGROUND

Zoning:

The property is zoned Downtown Neighbourhood (DN) Zone under the Land Use By-Law for Downtown Dartmouth.

Permitted Use:

A permit was issued to construct a four unit townhouse building on August 22, 2005. This permit was issued subject to the approved site plan. Site plan approval was granted in accordance with the provisions of the Municipal Government Act.

Approved Variance:

This property has an history of Variance requests. The first Variance was granted in 2005 which reduced the required side yard setbacks. This Variance was approved by the Development Officer and not appealed. A second Variance request was denied by the Development Officer. This Variance request was appealed by the developer. At the appeal hearing on March 1, 2007, Harbour East Community Council approved a further reduction to the minimum required side yard setback of 10 feet for end units. The approved Variance by Harbour East Community Council was:

Approved right side yard:	3' 3"
Approved left side yard:	5' 0"

Subdivision Request:

The owner is requesting that each of the townhouse units be subdivided on their own respective lots. As a result each lot must meet the lot coverage requirements. The current lot configuration is restrictive because two of the proposed lots will not meet the 35% lot coverage requirement. If these two lots are consolidated with a small portion of the HRM right-of-way (tentatively approved), only one lot will require a variance. The only lot which does not meet the lot coverage requirements is proposed lot WR-1CH at 47.1%.

Side Yard Requirements:

The submitted survey plan noted all existing side yard setbacks. It was noted that the right side yard setback was less than what had been approved by Harbour East Community Council. The setback is 3.0 feet, at the closest point, which is approximately 3 inches less than what was approved by Harbour East Community Council. Because of this the applicant modified the Variance application. The applicant not only requested a Variance for the lot coverage of lot WR-1CH, but also requested a Variance to reduce the side yard setback to 3 feet. This further reduction requires the approval of Harbour East Community Council as the Development Officer did not approve the previous request.

DISCUSSION

The *Municipal Government Act* sets out criteria in part 235(3) under which the Development Officer may consider variances to Land Use Bylaw requirements. The criteria 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 criteria. An assessment of the proposal relative to these stipulations is set out below.

The Development Officer had been prepared to approve the variance for lot coverage as a stand alone Variance request. The overall lot coverage is 33%. This is two percent under the minimum requirement. The only parcel which would not meet the lot coverage requirements is proposed lot WR-1CH. The lot configuration presents difficulty in meeting all aspects of the Subdivision By-Law, which is a consideration in granting Variances under the Municipal Government Act.

The entire Variance application was refused, however; the right side yard setback being the catalyst for the refusal. The previous Variance request in March 2007 to reduce the side yard setback had also been refused by the Development Officer. This present Variance request was refused because it results in intentional disregard for the requirements of the land use by-law. It is unclear why the building setback is closer than what was approved at the Variance hearing. This should have been brought forward by the surveyor during construction. One of the numbers was omitted from the plan. The 3 foot setback should have been raised at the previous Variance hearing and discussed at that time.

In summary, staff carefully reviewed all the relevant information in this case. As a result of that review, the variance was refused as it was determined to be contrary to the provisions of the Municipal Government Act.

BUDGET IMPLICATIONS

There are no implications on the Capital Budget associated with this report

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

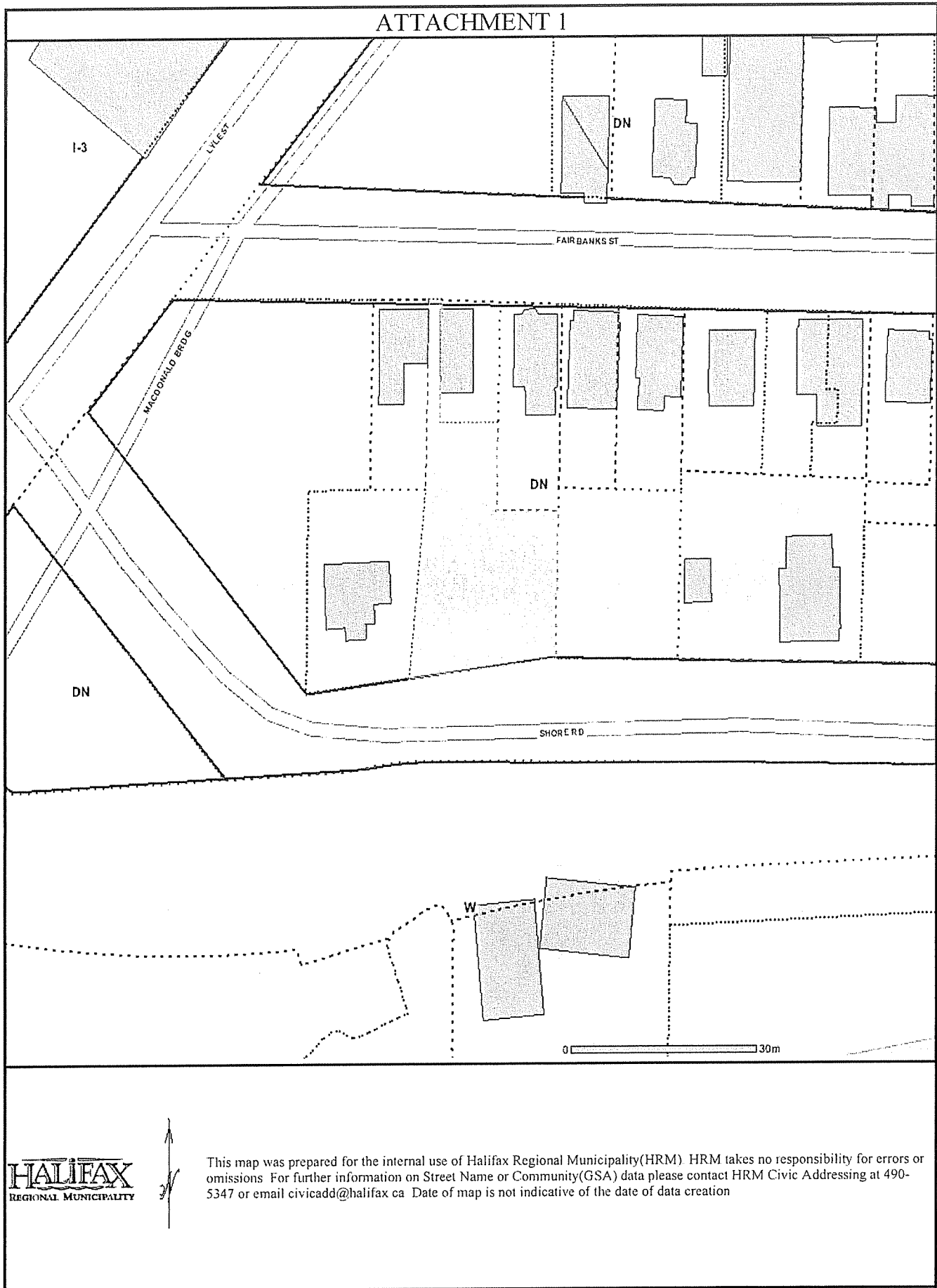
1. Council could uphold the decision of the Development Officer to refuse the variance. This is the recommended alternative.
2. Council could approve the lot coverage variance and refuse the side yard variance. This is a supported alternative.
2. Council could overturn the decision of the Development Officer and allow the variance request for both lot coverage requirements and side yard setbacks.

ATTACHMENTS

1. Location Map
2. Refusal letter
3. Appeal Letter
4. Survey Plan

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 and Approved by : Sean Audas, Development Officer, 490-4462



This map was prepared for the internal use of Halifax Regional Municipality(HRM) HRM takes no responsibility for errors or omissions For further information on Street Name or Community(GSA) data please contact HRM Civic Addressing at 490-5347 or email civicadd@halifax.ca Date of map is not indicative of the date of data creation

PLANNING & DEVELOPMENT SERVICES: EASTERN REGION

March 12, 2008

COPY

Adams McA'Nulty Vaneast Developments Limited
C/O Jack A. Innes
PO Box 652
Dartmouth, NS B2Y 1K9

Dear Mr. Innes:

RE: Application for Variance 14381 - 84, 86, 88A & 88B Shore Road, Dartmouth, Nova Scotia

This will advise that the Development Officer for the Halifax Regional Municipality has refused your request for a variance from the requirements of the Land Use Bylaw for *Downtown Dartmouth* as follows:

Location: 84, 86, 88A & 88B Shore Road, Dartmouth
PID: 00083220
Project Proposal: Reduced lot coverage; Reduced side yard
Required (i.e lot coverage): 35 % lot coverage;
3.3 feet right side yard (as per Variance #13614)
Variance Requested: 47.1 % for proposed lot WR-1CH;
3.0 feet right side yard

Pursuant to Section 236(4) of the **Municipal Government Act** you have the right to appeal the decision of the Development Officer to the Municipal Council. The appeal must be in writing, stating the grounds of the appeal, and be directed to:

Municipal Clerk
c/o Sean Audas, Development Officer
Halifax Regional Municipality
Development Services - Eastern Region
P.O. Box 1749
Halifax, NS B3J 3A5

Your appeal must be filed on or before *March 25, 2007*. *** Please note I have revised the original letter that was faxed to you because it did not provide adequate time to appeal this decision. ***

Sincerely,

A handwritten signature in black ink, appearing to read 'Sean Audas', with a long horizontal flourish extending to the right.

Sean Audas
Development Officer

cc.

J. Horncastle, Municipal Clerk
Councillor Gloria McCluskey, District 5



Jack A. Innes
Dir 902 444.8445
jack.innes@mcinnescooper.com

1300-1969 Upper Water Street
Purdy's Wharf Tower II
Post Office Box 730
Halifax, Nova Scotia
Canada B3J 2V1
Rec 902 425 6500 Fax 902 425 6350

Our File: TU-1198
March 18, 2008

By Courier

Halifax Regional Municipality
Planning & Development Services
Attention: Sean Audas, Senior Planning Advisor
2nd Floor, Alderney Gate
DARTMOUTH, NS B2Y 2N5

Dear Mr. Audas:

Application for Variance – 1481-84, 86, 88A and 88B Shore Road, Dartmouth, Nova Scotia

Please accept this letter as a Notice of Appeal of your refusal to grant a variance from the requirements of the *Downtown Dartmouth Zone*, HRM Land Use By-law, the requested variances being as follows:

1. 47.1% lot coverage for proposed Lot WR-1CH;
2. 3.0 feet side yard setback.

The grounds for this appeal are as follows:

Variance #1 – Lot WR-1CH

The townhouse lot which is the subject of this appeal is one of four townhouses contained within a single structure having a total footprint of 2,867 square feet which, in relation to the total area of Lot WR-1 (8,671 sq. ft.) represents a coverage of 33.06%. Three of the four townhouses meet the coverage requirement.

At the time the permit was issued for the construction of these units, there was a misunderstanding as to the impact of certain provisions of the HRM Subdivision By-law and it was determined that the proposed dwellings and subdivided lot configuration were in compliance with the HRM Subdivision By-law. Following construction and at the time application was made for final approval of the subdivision of lots, it was determined by HRM staff that the lot configuration which in effect provided adequate area to meet coverage requirements for all four townhouse units, was contrary to Section 33 of the HRM Land Use By-law and the application for subdivision approval was rejected.

Subsequent to rejection of the application, the Appellant negotiated the acquisition of additional lands and the subdivision was redesigned so as to comply with the HRM

Subdivision By-law; however, pursuant to the revised subdivision plan, the townhouse constructed on Lot WR-1CH exceeds the permitted coverage of 35%.

Summary

The structure containing the townhouse under appeal was approved for construction based upon a survey plan which met the townhouse coverage requirements. The entire structure in relation to the unsubdivided lot upon which it is built meets the townhouse coverage requirements. From a visual perspective, there is no adverse affect on neighbouring properties. The variance applied for recognizes the reality of coverage for one townhouse unit which was adversely affected by the change in the subdivision plan.

Variance #2 – Side Yard Setback

In March, 2007, Council granted a Variance (#13614) permitting a right side yard of 3.3 feet. The requested Variance resulted from a Location Certificate prepared on behalf of the lot owner and submitted to Council as part of the Application (see attachment #1).

In the course of preparing documentation for Variation #1 above, HRM staff requested a Location Certificate with one additional measurement other than at the corners of the building (see attachment #2). In compliance with that request, the owner's surveyor completed the measurement at the location requested and the distance shown on the resulting Location Certificate was 3.0 feet (see attachment #3). As a result of this outcome, HRM staff requested that the Application for Variance #1 for lot coverage include an additional request for a variance of the side yard from 3.3 to 3.0 feet.

On behalf of the owner, it must be stated that no change has been made to the building since the original Variance was granted in March, 2007. Had HRM staff requested the additional measurement in 2007 as they did in 2008, there is no doubt that the requested variance at that time would have been 3.0 feet.

It is the owner's submission that the request of HRM staff to provide an additional measurement in 2008 having accepted a plan with corner measurements only in 2007 is inconsistent, the result of which is to make it appear as though the owner had done something contrary to the previously approved variance. As noted, however, neither the foundation nor the lot line in question have been changed since Variance 13614 was approved.

Summary

This Application arises from an inconsistent process adopted by HRM's planning staff for the production of Location Certificates delineating side yard setbacks. In effect, the subject matter of the measurement has not changed since 2007 but rather the methodology for obtaining the measurements has.

The Appellant believes that fairness requires Council to approve this Application.

Respectfully submitted for Adams McA'Nulty Vaneast Developments Limited,

MCINNES COOPER

A handwritten signature in black ink, appearing to read "Jack A. Innes". The signature is written in a cursive style with a large, looping initial "J".

Jack A. Innes, Q.C.

JAI/si
Encls.

ATTACHMENT 4

