

TO: Mayor Savage and Members of Halifax Regional Council

Original Signed by 

SUBMITTED BY: _____
Jacques Dubé, Chief Administrative Officer

DATE: February 16, 2018

SUBJECT: Case 21284: Discharge of Covenant - 90 Sunnybrae Avenue, Halifax

ORIGIN

Application by Michael and Rose Rogers to discharge a restrictive covenant from the title records for 90 Sunnybrae Avenue, Halifax.

LEGISLATIVE AUTHORITY

Halifax Regional Municipality Charter (HRM Charter), subsection 11(1)
``The powers of the Municipality are exercised by the Council.``

HRM Charter, subsection 61(3), ``The property vested in the Municipality, absolutely or in trust, is under the exclusive management and control of the Council, unless an Act of the Legislature provides otherwise.``

RECOMMENDATION

It is recommended that Halifax Regional Council:

1. Approve the discharge of a restrictive covenant in favour of the Municipality from the title of the property at 90 Sunnybrae Avenue, Halifax, as shown in Attachment A; and
2. Authorize the Mayor and Clerk to execute the relevant discharge documents on behalf of the Municipality.

BACKGROUND

Michael and Rose Rogers are the current owners of 90 Sunnybrae Avenue, Halifax. Title records for that property include a restrictive covenant between the previous owners and the former City of Halifax. Mr. and Mrs. Rogers have applied to discharge the covenant which would allow the longstanding use of the two-family dwelling on the property to continue.

Subject Site	90 Sunnybrae Avenue, Halifax (PID 00237867)
Regional Plan Designation	Urban Settlement (US)
Community Plan Area	Halifax (Mainland)
Community Plan Designation (Map 1)	Residential Environments, Halifax Municipal Planning Strategy (Map 1)
Zoning (Map 2)	R-2 (Two-Family Dwelling) Zone, Halifax Mainland Land Use By-law (LUB) (Map 2)
Size of Site	634 square metres (6,820 square feet)
Street Frontage	Approximately 19 metres (62 feet) on Sunnybrae Ave.
Current Land Use(s)	A two-family dwelling
Surrounding Use(s)	The surrounding area is comprised mainly of low-density residential buildings (single family, duplex, semi-detached, small-scale apartment buildings) as well as some institutional uses

Proposal Details

On July 11, 1974, at the request of the previous property owners, Halifax City Council rezoned the property from R-1 to R-2 to allow the addition of a basement apartment to a single unit dwelling. As a condition of that rezoning, a covenant containing additional restrictions was registered on the subject property (Attachment A). The covenant contained the following stipulations:

- the second unit must be a basement apartment and not any other type of R-2 use;
- the basement apartment can only be occupied by the original owners or their immediate family; and,
- if the use of the basement apartment is discontinued or if the property is no longer held by the original owners, then the property would be rezoned back to R-1 and the basement apartment would not be a non-conforming use.

As of June 2017, the property is no longer held by the owners named in the covenant. The current owner proposes to retain the longstanding basement apartment but compliance with the covenant is not possible. Accordingly, they have requested the covenant be removed from the title. This requires a resolution of Council and the execution of the appropriate discharge documents. If Council agrees to discharge the covenant, the applicant will be responsible for the filing of legal documentation with the Land Registration Office.

Original Rezoning and Covenant

Restrictive covenants are sometimes used between private property owners to restrict the use an owner may make of his or her land. They are not normally used by the Municipality as Council has been granted powers under the HRM Charter to regulate the use of land through land use by-laws. In this case, the document appears to have been approved in 1974 with the intent of establishing restrictions beyond typical zoning requirements including limitations based on the identity of the owners and their familial relationship with the occupants. Land use regulations based on this type of criteria were not common when this covenant was approved and it is not clear whether those conditions were enforceable at that time.

COMMUNITY ENGAGEMENT

The community engagement process is consistent with the intent of the HRM Community Engagement Strategy. A public information meeting or a public hearing is not required, nor is it the practice to hold such meetings for the discharge of a covenant. The decision to discharge a covenant is made by resolution of Community Council.

DISCUSSION

MPS Compliance

Staff reviewed the proposal relative to all relevant policies and advise that discharge of the covenant consistent with the intent of the MPS.

Covenant Enforceability

Planning legislation has changed significantly in the 43 years since the covenant was approved. It is now generally accepted that municipal land use regulation can not be enacted or enforced based on ownership or familial relationships. Legal precedent supporting this conclusion exists across Canada and retention of the covenant increases the risk of a legal challenge on that basis.

Land Use / Zoning

The subject property has been used for approximately 43 years as a two-unit dwelling without any apparent negative impact on the surrounding neighbourhood. While the predominant zoning in the area is R-1, there are multiple R-2 and R-2P zoned properties in the immediate area (Attachment B).

Discharge of the existing covenant would bring R-2 zoning regulations to bear on the property in the same manner as any other R-2 zoned land. Application of R-2 regulations in the absence of the covenant reflects the current use and does not materially change the development capacity on the property. Therefore, the risk of material impacts resulting from the discharge is minimal and the mandatory rezoning to R1 as outlined in the covenant is not required to maintain integrity of the neighbourhood.

Conclusion

Staff recommend that Council approve the proposed covenant discharge based on the following:

- the proposal is consistent with the intent of the MPS;
- R2 zoning is appropriate for the site;
- land use restrictions based on ownership and familial relationship are unsuitable in a modern planning context; and
- the building has been used as two units for approximately 43 years without any apparent negative impact on the surrounding neighbourhood.

Therefore, staff recommend that the Halifax Regional Council discharge the existing covenant via resolution.

FINANCIAL IMPLICATIONS

There are no budget implications. The applicant will be responsible for all costs, expenses, liabilities and obligations incurred in order to formally discharge the covenant.

RISK CONSIDERATION

There are no significant risks associated with the recommendations contained within this report. This application may be considered under the terms of the existing covenant and the *HRM Charter*. Community

Council has the discretion to make decisions that are consistent with their legislative authority. Information concerning risks and other implications of discharging the existing covenant are contained within the Discussion section of this report.

ENVIRONMENTAL IMPLICATIONS

No environmental implications are identified.

ALTERNATIVES

Halifax Regional Council may choose not to discharge the existing covenant and direct staff to initiate the process to rezone the subject property to the R-1 Zone. If Council were to select this option, it is likely that land use compliance issues would result given that the property is not occupied by members of the immediate family of those inhabiting the property in 1974. A decision of Council to refuse to discharge a covenant is not appealable to the N.S. Utility & Review Board.

This alternative is not recommended noting there are material questions as to the enforceability of the covenant.

ATTACHMENTS

Map 1: Generalized Future Land Use
Map 2: Zoning and Location

Attachment A: Existing Covenant
Attachment B: R-2 (Two Family Dwelling) Zone Requirements – Halifax Mainland LUB

A copy of this report can be obtained online at halifax.ca or by contacting the Office of the Municipal Clerk at 902.490.4210.

Report Prepared by: Paul Sampson, Planner II, 902.490.6259

Original Signed

Report Approved by:

Steven Higgins, Acting Manager, Current Planning, 902.490.4382

Original Signed

Report Approved by:

Kelly Denty, Acting Director, Planning and Development, 902.490.4800



Map 1 - Generalized Future Land Use

HALIFAX

90 Sunnybrae Avenue,
Halifax

 Subject Property

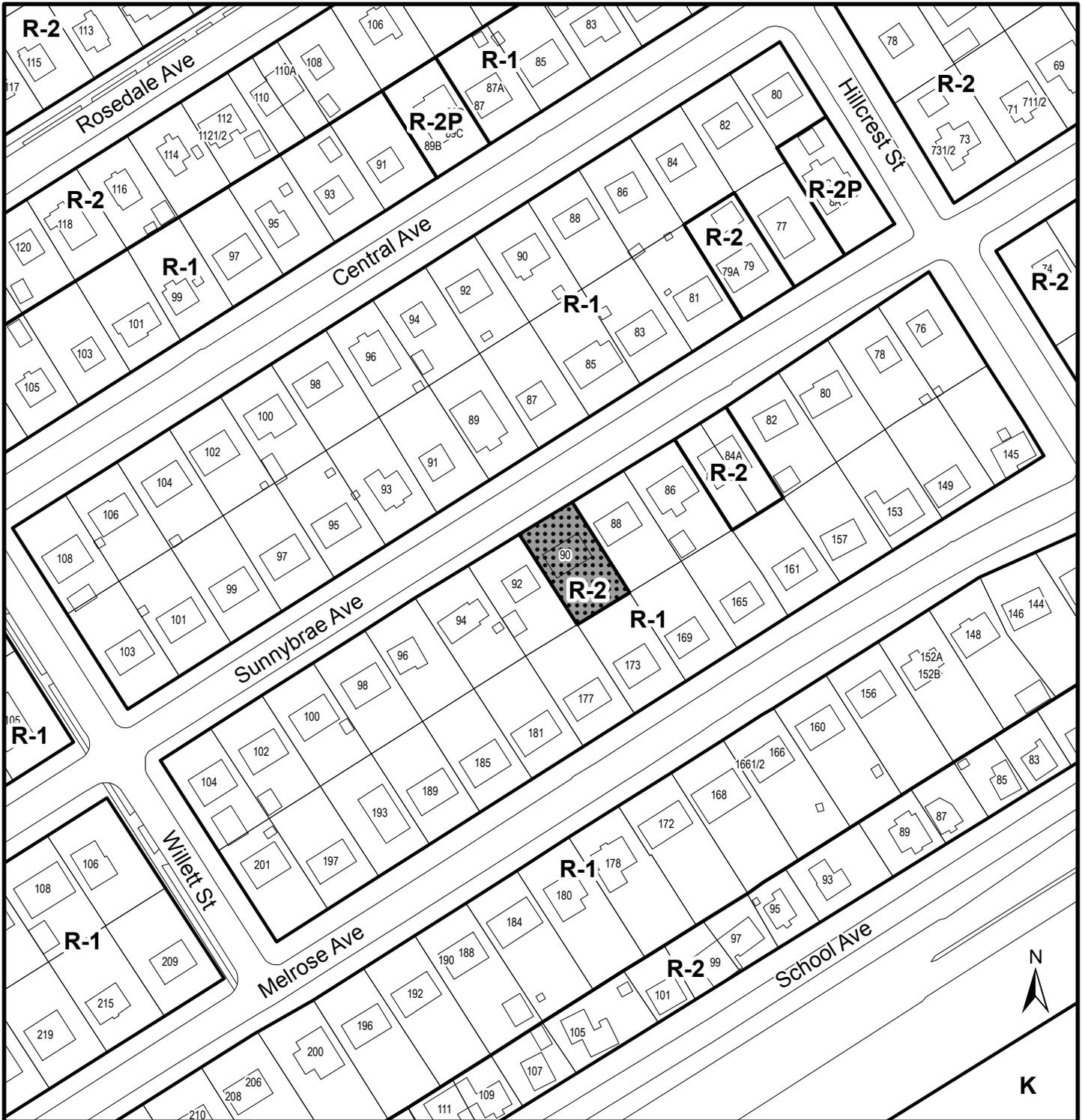
Designation
RES Residential Environments



This map is an unofficial reproduction of a portion of the Generalized Future Land Use Map for the plan area indicated.

The accuracy of any representation on this plan is not guaranteed.

Halifax Mainland
Land Use By-Law Area



Map 2 - Zoning and Location

90 Sunnybrae Avenue,
Halifax

HALIFAX

 Subject Property

Zone

- R-1 Single Family Dwelling
- R-2 Two Family Dwelling
- R-2P General Residential
- K Schedule K



This map is an unofficial reproduction of a portion of the Zoning Map for the plan area indicated.

The accuracy of any representation on this plan is not guaranteed.

Attachment A: Existing Covenant

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THIS AGREEMENT made and entered into this 28th day of November 1975.

BETWEEN:

THOMAS RICHARD GRANDY
and GLADYS WINNIFRED GRANDY, his wife,
both of Halifax, in the County of
Halifax, Nova Scotia, hereinafter called
the "Owners"

of the One Part

- and -

CITY OF HALIFAX, a body corporate,
hereinafter called the "City"

of the Other Part

APPROVED
AS TO FORM

City Solicitor

WHEREAS the Owners represent that they,
as joint tenants, hold in fee simple those lands and premises
known as Civic Number 90 Sunnybrae Avenue in the City of
Halifax and more particularly described in Schedule A hereto,
hereinafter called the "Property",

AND WHEREAS the Property is presently zoned R-1
under authority of the Zoning By-law of the Municipality of
the County of Halifax, being Zoning By-law Number 24, as
amended by the City of Halifax;

AND WHEREAS a basement apartment is not
permitted in an R-1 zone;

AND WHEREAS a basement apartment is permitted
in an R-2 zone;

AND WHEREAS the Owners have requested that the
City re-zone the Property to R-2;

AND WHEREAS on July 3, 1974, the Council of
the City held a public hearing with respect to the foregoing
request;

AND WHEREAS on July 11, 1974, the Council of
the City re-zoned the Property as requested, subject to "a
Caveat being filed in the Registry of Deeds to the effect that
once the applicant's immediate family discontinues the R-2
use or the property is purchased, it shall revert back to the
R-1 use";

NOW THEREFORE THIS INDENTURE WITNESSETH that
in consideration of the sum of One Dollar (\$1.00) paid by the
Owners to the City, the receipt whereof is hereby acknowledged,
and in consideration of the agreement by the City to re-zone the
Property to R-2, the Owners covenant and agree with the City
as follows:

1. That the only R-2 use of the Property will be a basement apartment and not any other R-2 use;

2. That the said basement apartment shall only be used by the Owners and their immediate family and not by any other person or persons;

3. That if the use of the said basement apartment by the Owners and their immediate family is discontinued at any time, the Property shall be re-zoned to R-1 and the basement apartment will not be a non-conforming use;

4. That if the Property shall cease to be held in fee simple by the Owners or either of them, the Property shall be re-zoned to R-1 and the basement apartment will not be a non-conforming use;

5. That if the use of the said basement apartment by the Owners and their immediate family is discontinued at any time, or if the Property shall cease to be held in fee simple by the Owners or either of them, the Owners shall immediately so notify the City in writing;

6. That the Owners shall be jointly and severally liable to comply with the terms of this Agreement;

THIS AGREEMENT and everything herein contained shall ensure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators, successors, and assigns, respectively.

IN WITNESS WHEREOF the said Thomas Richard Grandy and Gladys Winnifred Grandy have hereunto set their hands and seals, and the City of Halifax has caused this Indenture to be executed by the hands of its Mayor and City Clerk and its Corporate Seal to be affixed hereunto, the day and year first above written.

SIGNED, SEALED AND DELIVERED)
in the presence of)

[Redacted] - as to T. R. Grandy.
[Redacted] - as to Gladys Winnifred Grandy.

[Redacted Signature]
Thomas Richard Grandy

[Redacted Signature]
Gladys Winnifred Grandy

CITY OF HALIFAX

[Redacted Signature]
Mayor

[Redacted Signature]
City Clerk



DESCRIPTION
CHECKED

SCHEDULE "A"

All that certain lot, piece ^{of} parcel of land situate, lying and being on the South side ^A Sunnybrae Avenue, at Fairview in the County of Halifax, being Lot 551 according to the Plan Showing Brookdale and Sunnybrae Subdivisions, dated November 15, 1954 and revised June 28, 1955 and October 13, 1955. The said Plan having been signed by G. M. Hilchie, C.E., P.L.S. and filed in the Registry of Deeds at Halifax, said Lot 551 being more particularly described as follows: -

BEGINNING on the Southern boundary line of Sunnybrae Avenue at the Northwest angle of Lot 552 as shown on said plan;

THENCE Westwardly along the Southern boundary line of Sunnybrae Avenue sixty-two (62) feet to the Northeast angle of lot 550, which said Lot 550 is shown on a revision of said plan dated July 20, 1956;

THENCE Southwardly along the Eastern side line of said Lot 550 one hundred and ten (110) feet to the Northwest angle of Lot 566;

THENCE Eastwardly along the Northern boundary of Lot 566 sixty-two (62) feet to the Southwest angle of Lot 552;

THENCE Northwardly along the Western sideline of Lot 552, one hundred and ten (110) feet to the place of beginning:

PROVINCE OF NOVA SCOTIA)
COUNTY OF HALIFAX)

On this 2nd day of November A.D., 1974⁵,

before me, the subscriber, personally came and appeared

Colleen Clarke

a subscribing witness to the foregoing Indenture, who, having been by me duly sworn, made oath and said that Thomas Richard Grandy and Gladys Winnifred Grandy, his wife, caused the same to be executed and their hands and seals thereunto affixed in his presence.

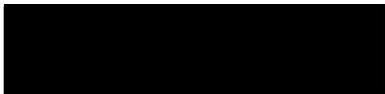


A Commissioner of the Supreme Court of Nova Scotia

GORDON D. HERB

PROVINCE OF NOVA SCOTIA)
COUNTY OF HALIFAX)

On this *2nd* day of *December* A.D.,
1975, before me, the subscriber, personally came and appeared
H. Rene Levesque
a subscribing witness to the foregoing Indenture, who, having
been by me duly sworn, made oath and said that the City of
Halifax, one of the parties thereto, caused the same to be
executed and its Corporate Seal to be thereunto affixed by the
hands of Edmund L. Morris, its Mayor, and R. H. Stoddard, its
City Clerk, its duly authorized officers, in *h^{is}* presence.



A Commissioner of the Supreme
Court of Nova Scotia

BARRY S. ALLEN

Province of Nova Scotia
County of Halifax

I hereby certify that the within instrument
was recorded in the Registry of Deeds Office
at Halifax, in the County of Halifax, N.S.
at *2:12* o'clock *P.* M., on
the *3rd* day of *December*
A. D. 19 *75* in Book Number *2963*
at Pages *863-867 1/1*

Registrar of Deeds for the Registration District
of the County of Halifax

Attachment B
R-2 (Two Family Dwelling) Zone Requirements – Halifax Mainland Land Use By-law

R-2 ZONE
TWO-FAMILY DWELLING ZONE

- 24(1) The following uses shall be permitted in any R-2 Zone:
- (a) all R-1 Zone uses;
 - (b) a semi-detached dwelling;
 - (c) a duplex dwelling;
 - (ca) a building containing not more than 3 apartments on the 3-unit Dwelling Site identified on ZM-26, subject to the requirements of Section 28C. (RC-Jun 10/14;E-Jul 26/14)**
 - (d) (Deleted)
 - (e) (Deleted)
 - (f) in the "**Fairview Area**", conversions of existing buildings used for institutional purposes to a maximum of 4 units, provided that the height and floor area of the building are not increased.
 - (g) uses accessory to any of the foregoing uses.
- 24(2) No person shall, in any R-2 Zone, carry out, or cause or permit to be carried out, any development for any purpose other than one or more of the uses set out in subsection (1)
- 24(3) No person shall, in any R-2 Zone, use or permit to be used any land or building in whole or in part for any purpose other than one or more of the uses set out in subsection (1)
- 24(4) (Deleted)

R-1 USES IN R-2 ZONE

- 25 Buildings erected, altered or used for R-1 uses in an R-2 Zone shall comply with the requirements of an R-1 Zone.
- 25A (Deleted)

REQUIREMENTS

- 26 Buildings erected, altered or used for R-2 uses in an R-2 Zone shall comply with the following requirements:
- (a) Lot frontage minimum 50 feet except when a lot faces on the outer side of a curve in the street, in which case the minimum frontage may be reduced to 30 feet
 - (b) Lot area minimum 5,000 square feet
 - (ba) Notwithstanding clause (b), the minimum lot area for lots abutting an inland watercourse in the "**Mainland South Area**", shall be 6,000 square feet;

- (c) Lot coverage maximum 35 percent
- (ca) The maximum height shall be 35 feet
- (d) Floor coverage of 900 square feet living space, minimum
- (e) Every building shall be at least 12 feet from any other building and at least 8 feet from the rear and both side lines of the lot on which it is situated and at least 20 feet from any street line in front of such building;

ACCESSORY BUILDINGS

- (f) Notwithstanding the provisions of clause (e), a carport or a detached or attached non-commercial garage may be located not less than 4 feet from the rear and both side lines of the lot on which it is situated and shall be located 8 feet from any other building;
- (g) Notwithstanding the provisions of clause (f), any accessory building shall not require any side or rear yard nor any setback from any other building if such building is located entirely within the rear yard of the lot on which such building is located; provided, however, that such accessory building shall not be closer than 15 feet to any street line.

BUILDINGS ON CORNER LOTS

- (h) Where a building is situated on a corner lot, it shall be at least 10 feet from the flanking street line abutting such lot;

SEMI-DETACHED DWELLINGS

- (i) Notwithstanding the provisions of other requirements:
 - (1) For each unit of a semi-detached dwelling, the minimum lot frontage shall be 25 feet, the minimum lot area shall be 2,500 square feet, and the maximum lot coverage shall be not greater than 35 percent.
 - (2) Every semi-detached dwelling shall be at least 12 feet from any other building and at least 8 ft. from the rear and side lines of the lot on which it is situated and at least 20 ft. from any street line in front of such dwelling.
 - (3) Where a semi-detached dwelling is situated on a corner lot, such dwelling and accessory buildings or uses shall be at least 10 feet from the flanking street line abutting such lot.
 - (4) Notwithstanding subsection (2) where a lot containing a semi-detached dwelling is to be or has been subdivided so that each unit is on its own lot, there shall be no setback required from the common lot boundary.

DAY NURSERY

- (j) (Deleted)
- (k) (Deleted)

BOARDERS AND LODGERS

- 27 The keeping of not more than three boarders or lodgers in an R-2 Zone shall be permitted, but no window display or sign of any kind in respect to the use permitted by this section shall be allowed.

SIGNS

- 28 The exterior of any building in an R-2 Zone shall not be used for the purpose of advertising or erecting or maintaining any billboard or sign except the following:
- (a) one sign board not exceeding 6 square feet in size pertaining to the sale or rent of the building or lot;
 - (b) one non-illuminated no-trespassing, safety, or caution sign not exceeding one square foot in size;
 - (c) one non-illuminated sign not exceeding one square foot in area, indicating the name and the occupation, profession or trade of the occupant of the building;
 - (d) one bulletin board for a church.
 - (e) A sign not exceeding two square feet in size for a **day care facility. (RC-Mar 3/09;E-Mar 21/09)**

DAY NURSERY - ADDITIONAL CHILDREN PROVISION

28A (Deleted)

28B (Deleted)

28C Notwithstanding Section 26, any building permitted by clause 24(1)(ca) shall comply with the following requirements:

- (a) Lot frontage minimum of 45 feet;**
- (b) Lot area minimum of 4,500 square feet;**
- (c) Lot coverage maximum of 35 percent;**
- (d) The maximum height shall be 30 feet;**
- (e) The maximum number of storeys shall be 2;**
- (f) The minimum front yard setback shall be 15 feet;**
- (g) The minimum side yard setback shall be 10 feet; and**
- (h) The minimum rear yard setback shall be 20 feet.**
(RC-Jun 10/14;E-Jul 26/14)