



P.O. Box 1749  
Halifax, Nova Scotia  
B3J 3A5 Canada

**Item No. 8.1.1**  
**North West Community Council**  
**September 10, 2018**  
**October 1, 2018**

**TO:** Chair and Members of North West Community Council

Original Signed

**SUBMITTED BY:** \_\_\_\_\_  
Steven Higgins, Manager, Current Planning

**DATE:** August 17, 2017

**SUBJECT:** **Case 21429: Appeal of Variance Approval - PID No. 40304198, St. Margaret's Bay Road, Head of St. Margaret's Bay**

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**ORIGIN**

Appeal of the Development Officer's decision to approve a variance.

**LEGISLATIVE AUTHORITY**

*Halifax Regional Municipality (HRM) Charter; Part VIII, Planning and Development:*

- s. 250, a development officer may grant variances in specified land use by-law or development agreement requirements but under 250(3) a variance may not be granted if:
  - (a) the variance violates the intent of the development agreement or land use by-law;
  - (b) the difficulty experienced is general to properties in the area;
  - (c) the difficulty experienced results from an intentional disregard for the requirements of the development agreement or land use by-law.
- s. 251, regarding variance requirements for notice, appeals and associated timeframes
- s. 252, regarding requirements for appeal decisions and provisions for variance notice cost recovery

**RECOMMENDATION**

In accordance with Administrative Order One, the following motion must be placed on the floor:

**That the appeal be allowed.**

Community Council approval of the above motion will result in refusal of the variance.

Community Council denial of the above motion will result in approval of the variance.

Staff recommend that North West Community Council deny the appeal.

## **BACKGROUND**

A variance request has been submitted to relax the minimum front yard setback to enable construction of a single unit dwelling on an undeveloped waterfront property (PID 40304198) on St Margaret's Bay Road in Head of St Margaret's Bay (Map 2 and Attachment 1).

The lot does not meet current standards for lot size. However, the Planning Districts 1 & 3 Land Use By-Law (LUB) allows development permits to be issued for lots not meeting the current standard if they existed prior to the effective date of the LUB. The subject lot meets this requirement and is eligible for consideration of a development permit.

The By-law also allows for reduction of required watercourse buffers on existing undersized lots to provide a practical building envelope while maintaining the other setbacks and yards required by the applicable zone in the LUB. The Development Officer has applied the watercourse buffer reduction to the greatest degree possible. However, a practical building envelope cannot be achieved without further relaxation of the watercourse setback or reduction of the standard 20-foot front yard requirement. The applicant has requested consideration of a reduction to that minimum front yard requirement.

### **Site Details:**

#### **Zoning**

The property is zoned MU-2 (Mixed Use) of the Planning Districts 1 & 3 Land Use By-Law. The requirement of the LUB and the related variance request is as identified below:

	<b>Zone Requirement</b>	<b>Variance Requested</b>
<b>Minimum Front Yard</b>	20 feet	8 feet

For the reasons detailed in the Discussion section of this report, the Development Officer approved the requested variance (Attachment 3). As per the requirements outlined in the Halifax Regional Municipal Charter, all assessed property owners within the 100m notification area (Map 1) were notified of this decision and their right to appeal. Three appeals were received (Attachment 4) and the matter is now before North West Community Council for decision.

#### **Process for Hearing an Appeal**

Administrative Order Number One, the *Procedures of the Council Administrative Order* requires that Council, in hearing any appeal, must place a motion to "allow the appeal" on the floor, even if such motion is in opposition to the recommendation contained in the staff report. As such, the Recommendation section of the report contains the required wording of the appeal motion as well as a staff recommendation.

For the reasons outlined in this report, staff recommend that Community Council deny the appeal and uphold the decision of the Development Officer to approve the variance.

## **DISCUSSION**

### **Development Officer's Assessment of Variance Request:**

In hearing a variance appeal, Council may make any decision that the Development Officer could have made, meaning their decision is limited to the criteria provided in the *Halifax Regional Municipality Charter*. As such, the *HRM Charter* sets out the following criteria by which the Development Officer may not grant variances to requirements of the Land Use By-law:

"250(3) A variance may not be granted if:

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

In order to be approved, any proposed variance must not conflict with any of the criteria. The Development Officer's assessment of the proposal relative to each criterion is as follows:

**1. Does the proposed variance violate the intent of the land use by-law?**

When adopted in 2006, the Regional Plan proscribed a greater watercourse setback (buffer) than previously required. However, it was recognized some existing lots could be rendered undevelopable by these enhanced requirements. Further to the content of the Regional Plan, the LUB contains clauses specifically intended to allow relaxations to standard watercourse buffers if those requirements are prohibitive to development of existing lots. Section 4.19(3) of the LUB states:

*"...where the configuration of any existing lot...is such that no main building could be located on the lot, the buffer distance shall be reduced in a manner which would provide the greatest possible separation from a watercourse having regard to other yard requirements."*

When applied to the subject lot, the required 20 m (66ft) watercourse buffer encompasses the entire property. Under these circumstances, application of Section 4.19(3) is compliant with the LUB. The Development Officer has determined that a relaxation from the standard requirement is acceptable and the applicant is proposing a setback of approximately 12 feet.

Notwithstanding the application of Section 4.19(3) to the watercourse setback (rear yard), a standard 20-foot front yard remains practically prohibitive to the location of a main building on the property. As a result, reduction of the front yard through the variance process is proposed in conjunction with the application of Section 4.19(3). The variance request proposes to reduce the minimum front yard from 20 feet to 8 feet. This is intended to strike a balance between reduction in the watercourse buffer and minimum front yard to allow the creation of a modest but developable building envelope.

Staff feel the intent of the land use bylaw is clear with respect to accommodation of existing lots as noted above. It is the Development Officer's opinion that the request is reasonable under the circumstances and does not violate the intent of the Land Use By-law.

**2. Is the difficulty experienced general to properties in the area?**

Application of standard bylaw requirements in this specific instance results in difficulty that is not general to properties in the area. The subject lot has a relatively unusual configuration and, at 4,395 square feet is significantly smaller than most of the surrounding properties. Map 1 shows the subject property and the lots within the notification area for the proposed variance. Lot sizes, configuration and proximity to water vary significantly in the area. Most of properties are not subject to the same difficulties as the subject lot.

Under these circumstances, it was felt that the difficulty experienced is not general to properties in the area.

**3. Is the difficulty experienced the result of an intentional disregard for the requirements of the land use by-law?**

In reviewing a proposal for intentional disregard for the requirements of the Land Use By-law, there must be evidence that the applicant had knowledge of the requirements of the By-law relative to their proposal and then took deliberate action which was contrary to those requirements.

The applicant has requested the variance in good faith prior to commencing any work on the property. Intentional disregard of Bylaw requirements was not a consideration in this variance request.

**Appellant's Appeal:**

While the criteria of the *HRM Charter*, limits Council to making any decision that the Development Officer could have made, the appellants have raised certain points in their letters of appeal (Attachment C) for Council's consideration. These points are summarized and staff's comments on each are provided in the following table:

<b>Appellant's Appeal Comments</b>	<b>Staff Response</b>
<i>Concern regarding safety of ingress and egress to the property, and noise.</i>	Approval of the access has been obtained from NSTIR. Noise is not a consideration of the variance criteria.
<i>Concerns regarding the slope of the property, distance above sea level and excavation and setbacks suggest there is no land to build upon. Also, the excavation will compromise the roadbed.</i>	The variance request is for a reduced front yard setback. The owner is aware of the unique challenges associated with construction on this lot. Public infrastructure such as the road bed will be protected through regulation.
<i>The lot is classified as under-sized and a combination of setbacks and slope suggests that there is no land to build on.</i>	The applicant has provided plans demonstrating the ability to provide a sufficient developable area with the benefit of appropriate consideration of reduced setbacks / buffers.
<i>Concern relative to property valuation and regard for precedence for further development along the St Margaret's Bay Road.</i>	Effect of development on property valuation is not part of the variance criteria. Individual assessments of each variance request are based on the criteria outlined in the <i>Halifax Regional Municipal Charter</i> .
<i>Property does not qualify as an "Existing Undersized Lot".</i>	The property history was researched with the aid of staff from the Land Registry Office. Although both lots were owned by Mr. Boutilier on the effective date of the Land Use By-law, they were and remain as separate parcels. PID 40304198 (at coast) was purchased by Boutilier in 1979 and sold in 2015. PID 40805590 (Hillside Drive) was purchased by Boutilier in 1964 and sold in 1998.
<i>Detailed information regarding the 3.8m Canadian Geodetic Vertical Datum is required to ensure that no portion of the structure is within the 3.8m vertical set-back</i>	The 3.8m vertical setback is a mandatory requirement that will need to be met regardless of other variances. A plan from a Surveyor or an Engineer will be required at the time of construction permit application to confirm this requirement is met.
<i>Concern regarding water treatment and placement of the septic system.</i>	Municipal Staff does not review well and septic provisions or requirements. These are regulated by NS Environment. Provincial septic approval is required at the time of a construction permit application regardless of the presence of any variances to siting requirements.
<i>Comment that NSTIR and NSE should be informed of the development.</i>	Staff received approval for the proposed driveway on November 8, 2017 from NSTIR. Municipal staff do not review well, septic provisions or environmental concerns. These are reviewed by NS Environment.
<i>Accommodation afforded to this lot via the "existing undersized lot" provision is not appropriate.</i>	The LUB objectively defines how existing lots are defined and accommodated. There is no capacity for the Development Officer to consider additional subjective element such as "appropriateness" when applying the bylaw.

**Conclusion:**

Staff have reviewed all the relevant information in this variance proposal. Resulting from that review, the variance request was approved as it was determined that the proposal does not conflict with the statutory criteria provided by the *Charter*. The matter is now before Council to hear the appeal and render a decision.

**FINANCIAL IMPLICATIONS**

There are no financial implications related to this variance.

**RISK CONSIDERATION**

There are no significant risks associated with the recommendation contained within this report.

**COMMUNITY ENGAGEMENT**

Community Engagement, as described by the Community Engagement Strategy, is not applicable to this process. The procedure for public notification is mandated by the *HRM Charter*. Where a variance approval is appealed, a hearing is held by Council to provide the opportunity for the applicant, appellants and anyone who can demonstrate that they are specifically affected by the matter, to speak.

**ENVIRONMENTAL IMPLICATIONS**

There are no environmental implications.

**ALTERNATIVES**

As noted throughout this report, Administrative Order One requires that Community Council consideration of this item must be in the context of a motion to allow the appeal. Council's options are limited to denial or approval of that appeal motion.

- 1) Denial of the appeal motion would result in the approval of the variance. This would uphold the Development Officer's decision and this is staff's recommended alternative;
- 2) Approval of the appeal motion would result in the refusal of the variance. This would overturn the Development Officer's decision.

**ATTACHMENTS**

Map 1:	Notification Area
Map 2:	Site Plan
Attachment 1:	Building Elevations (North and East)
Attachment 2:	Building Elevations (3D View)
Attachment 3:	Variance Approval Notice
Attachment 4:	Letters of Appeal

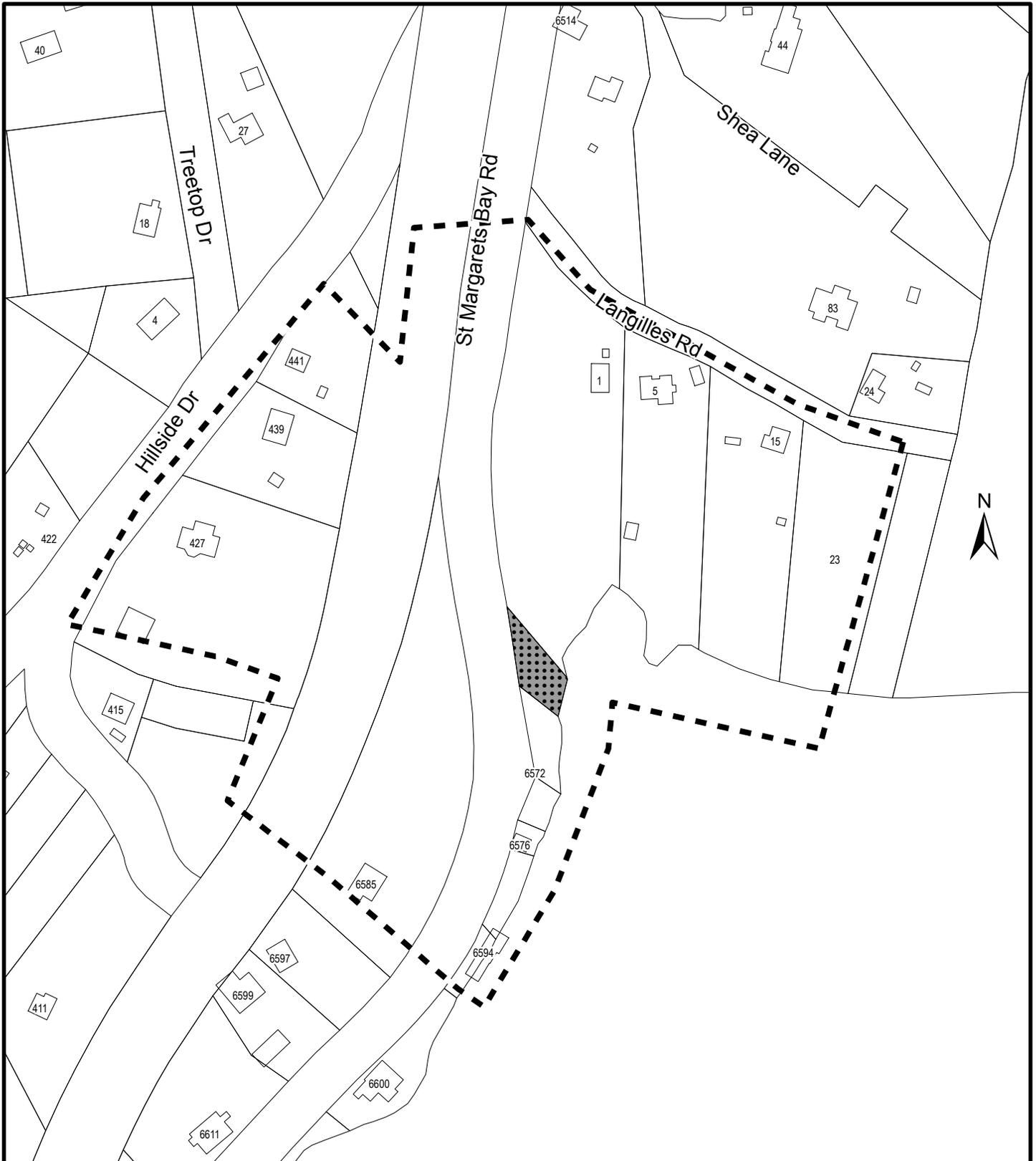
A copy of this report can be obtained online at [halifax.ca](http://halifax.ca) or by contacting the Office of the Municipal Clerk at 902.490.4210.

Report Prepared by: Connie Sexton, Planner I, 902.490.1208  
Sean Audas, Development Officer, 902.490.4402

Original Signed

Report Approved by: Erin MacIntyre, Manager, Land Development and Subdivision, 902.490.1210

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**Map 1 - Notification Area**

St. Margarets Bay Road,  
Head of St. Margarets Bay



Subject Property



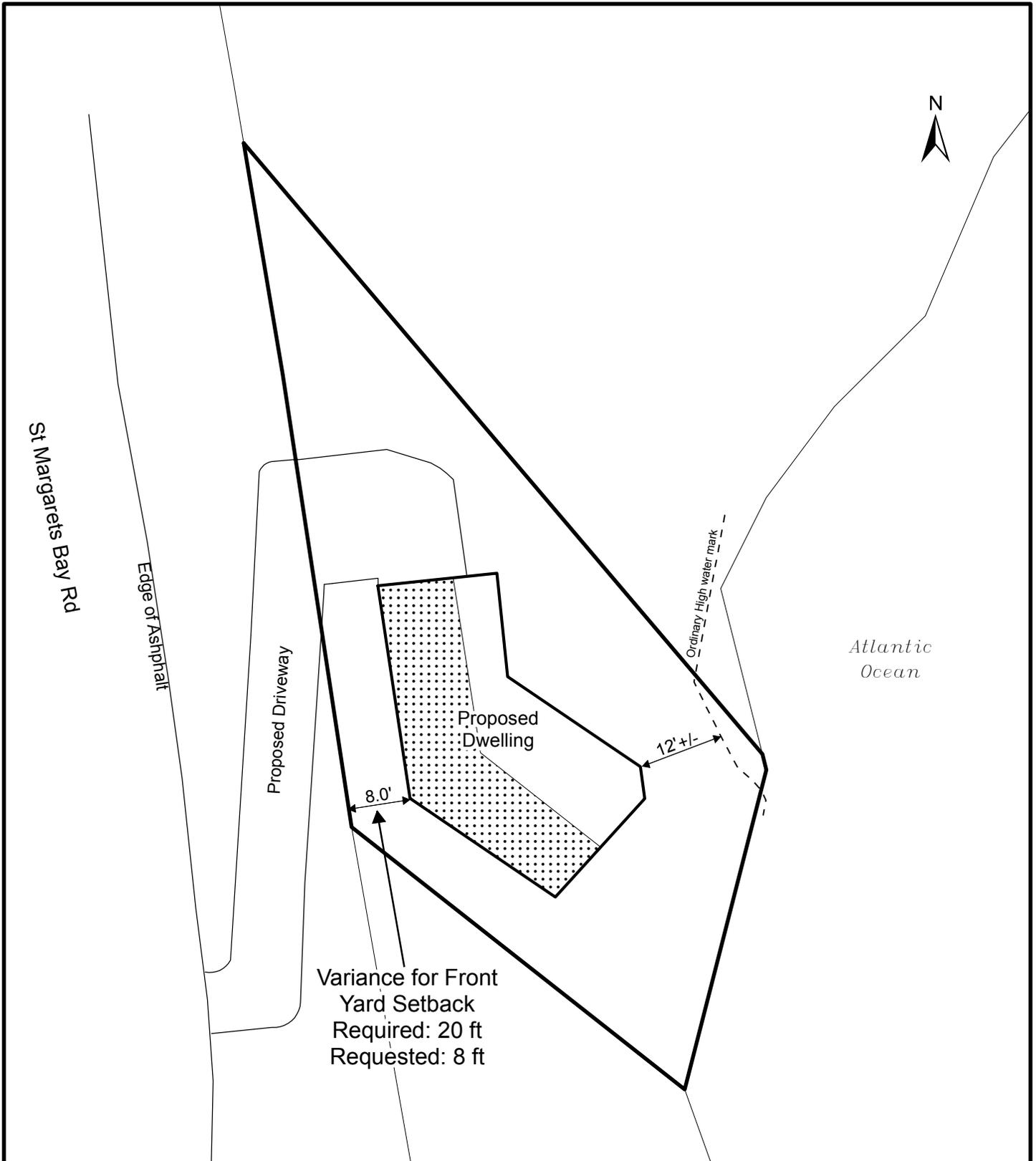
Notification Area

**HALIFAX**



Planning District 1 & 3  
(St Margarets Bay) Plan Area

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



**Map 2 - Site Plan**

St. Margarets Bay Road,  
Head of St. Margarets Bay

Planning District 1 & 3  
(St Margarets Bay) Plan Area



Subject Property



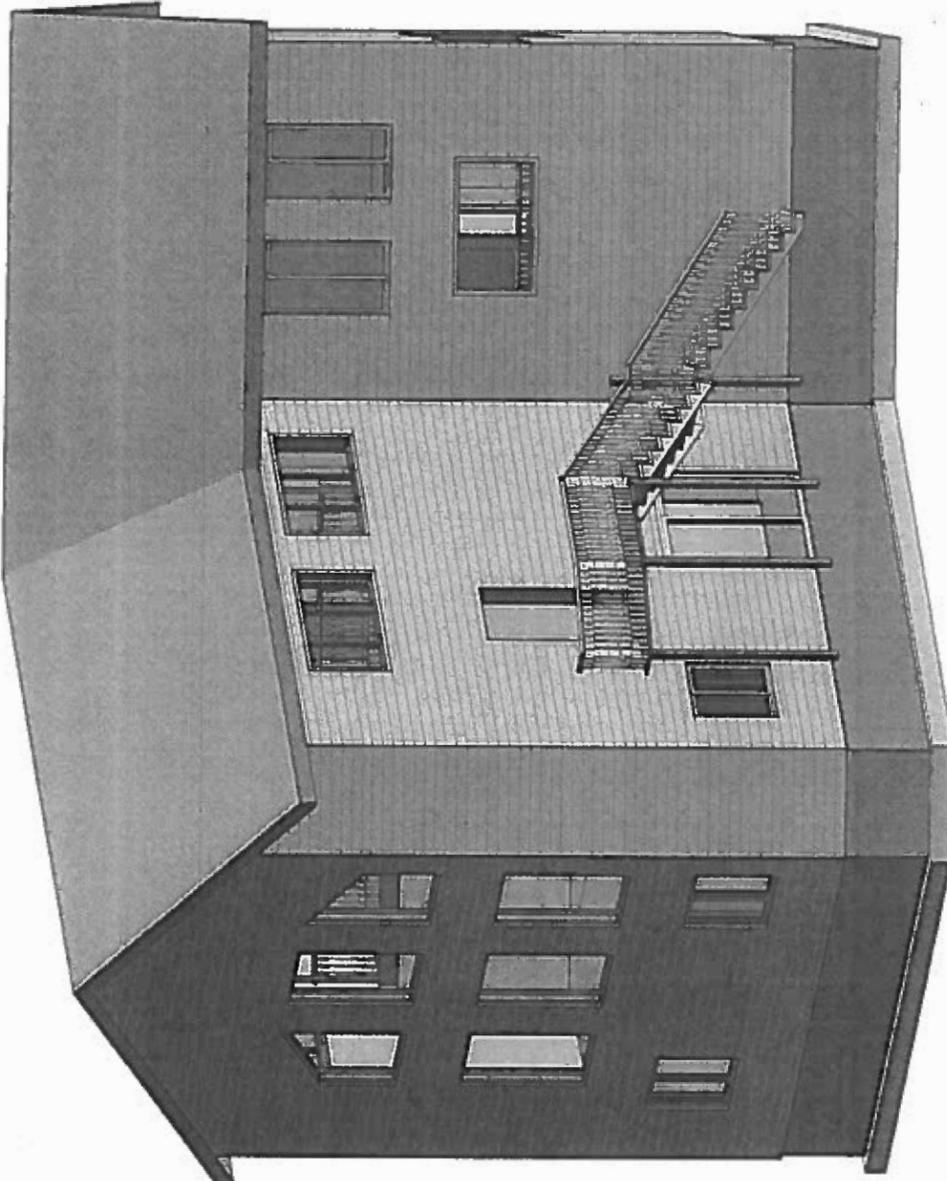
Area of Proposed Variance

**HALIFAX**

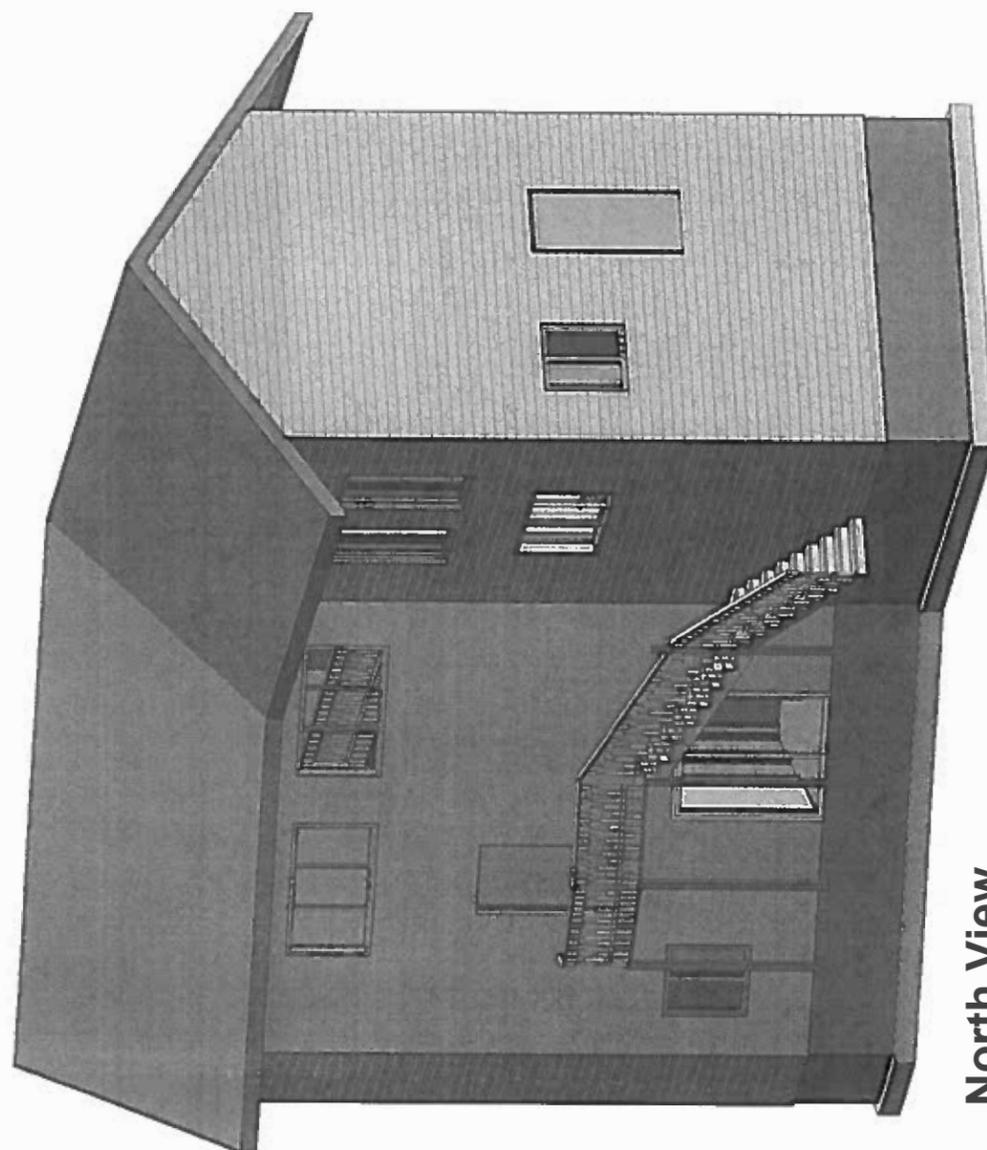


The accuracy of any representation  
on this plan is not guaranteed.

**Attachment 1 - Building Elevations  
(North and East)**



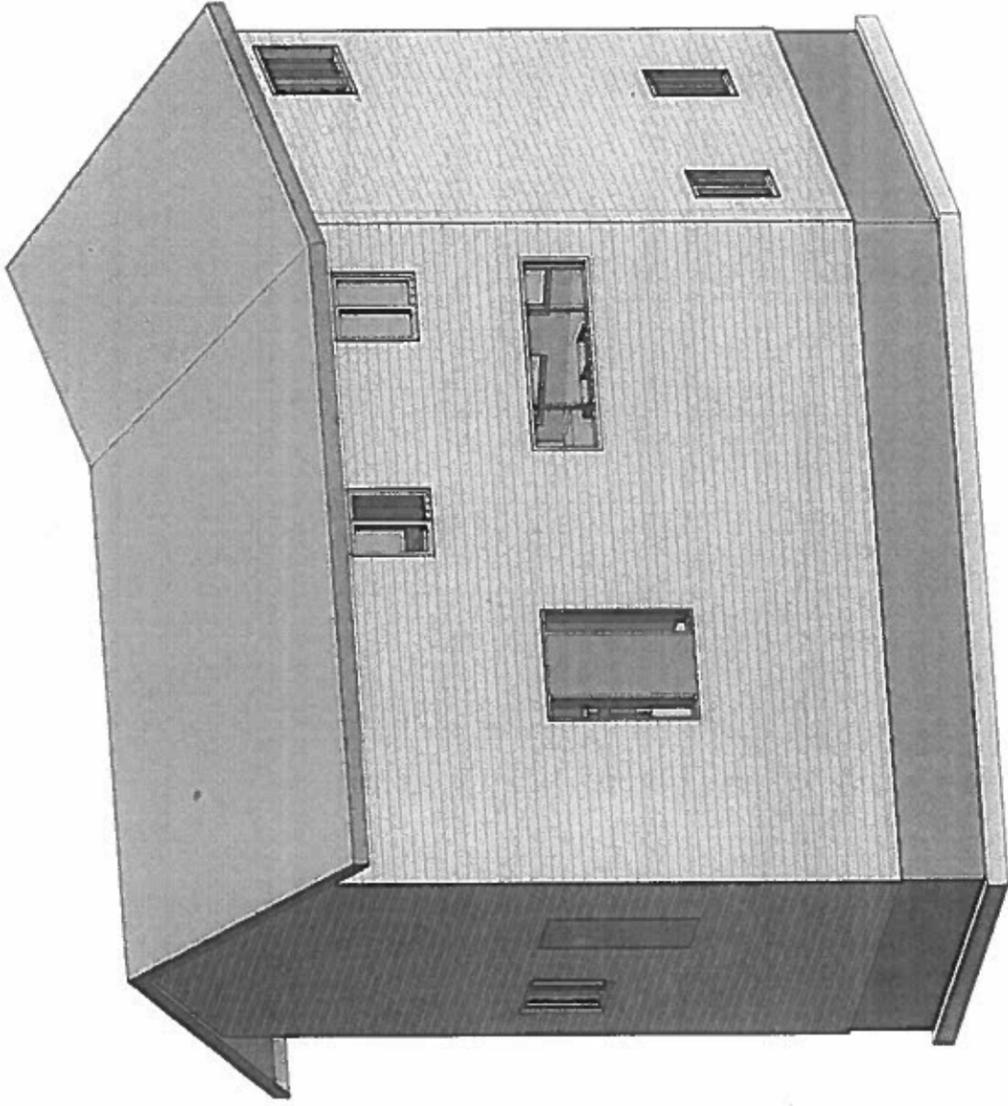
**East View**



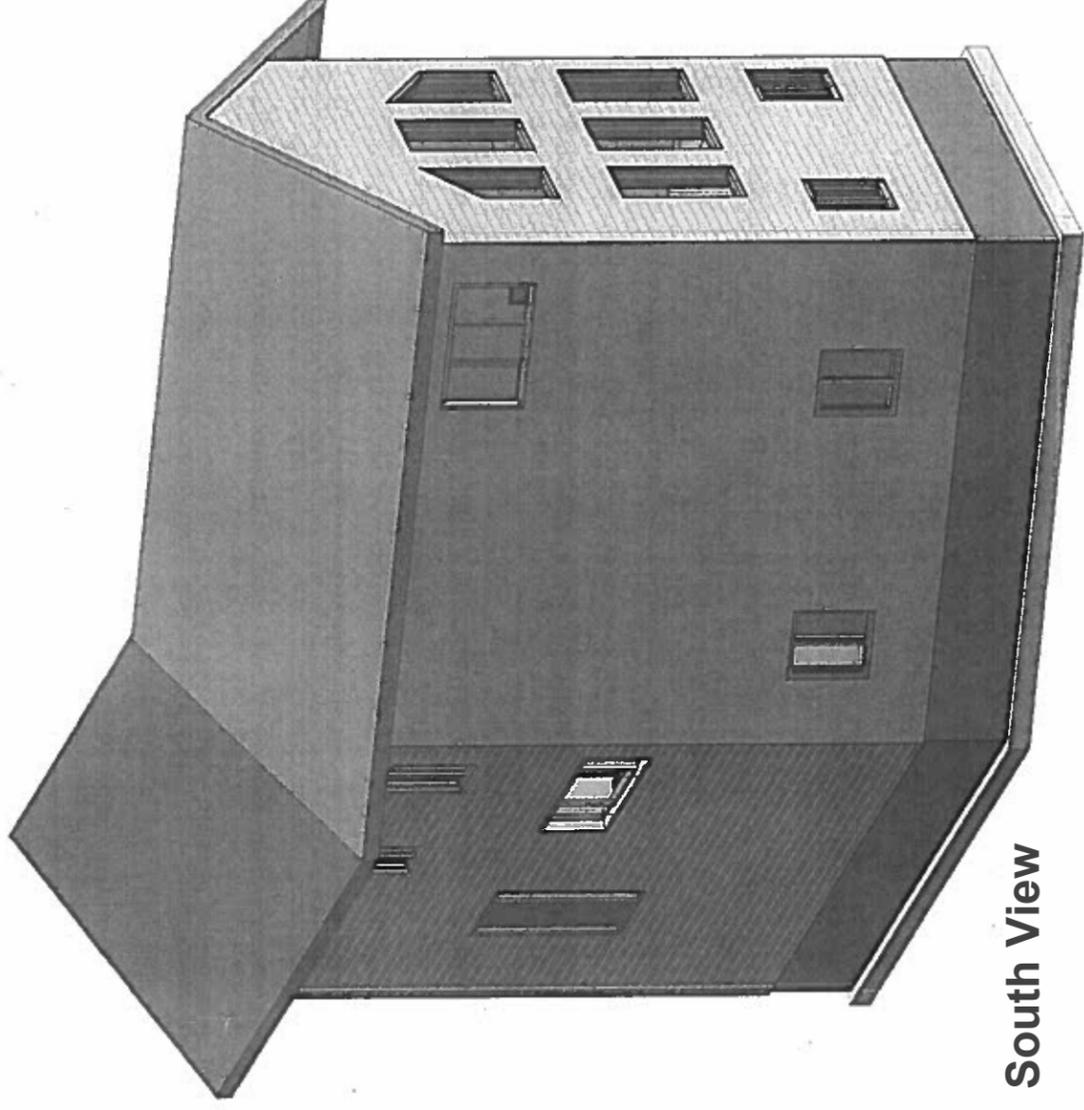
**North View**

Drawn: <b>J.Davis</b>	Scale:
Date: <b>01/25/18</b>	
Project:	
<b>BOUTILIERS POINT</b>	
City:	Province: <b>N.S.</b>
Title:	
<b>3D VIEWS</b>	
DWG No: <b>A10</b>	

**Attachment 2 - Building Elevations  
(West and South)**

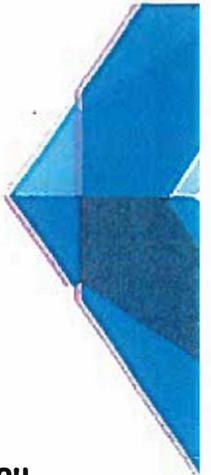


**West View**



**South View**

Drawn: <b>J. Davis</b>	Scale:
Date: <b>01/25/18</b>	Project:
Title: <b>BOUTILIERS City: POINT Province: N.S.</b>	
3D VIEWS	
D7/G No: <b>A11</b>	



January 9, 2018

Dear Sir or Madam:

**RE: Variance Application # 21429 at (PID#40304198) St. Margaret's Bay Road**

As you have been identified as a property owner within 100 metres of the above noted address you are being notified of the following variance as per requirements of the Halifax Regional Municipal Charter, Section 251.

This will advise you that as the Development Officer for the Halifax Regional Municipality I have approved a request for a variance from the requirements of Planning Districts 1 & 3 (St. Margaret's Bay) as follows:

**Location:** (PID#40304198) St. Margaret's Bay Road  
**Project Proposal:** Vary front yard set back to place a dwelling on a vacant existing property

LUB Regulation	Requirements	Proposal
Front Yard setback	20 ft	8 ft

Pursuant to Section 251 of the Halifax Regional Municipal Charter, assessed property owners within 100 metres of the above noted address are notified of this variance. If you wish to appeal, please do so in writing, on or before January 26, 2018.

and address your appeal to:

**Municipal Clerk**  
**Halifax Regional Municipality**  
P.O. Box 1749, Halifax, N.S. B3J 3A5  
clerks@halifax.ca

Please note, this does not preclude further construction on this property provided the proposed construction does not require a variance. If you have any questions or require clarification of any of the above, please call Connie Sexton, Planner 1 at 902-490-1208.

Yours truly,

Originally Signed

Sean Audas, Principal Planner / Development Officer  
Halifax Regional Municipality

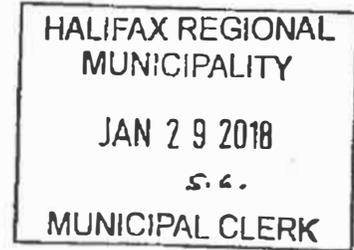
cc. Kevin Arjoon, Municipal Clerk  
Councillor Matt Whitman

## Attachment 4 - Letters of Appeal

**Stewart, April**

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**From:** Faye Lee  
**Sent:** January-26-18 11:46 PM  
**To:** Office, Clerks; Audas, Sean  
**Cc:** |  
**Subject:** Appeal re Variance Application #21429



Dear Mr. Audas,

As owners of the property at 1 Langille's Road, directly adjoining PID . , Saint Margaret's Bay Road, we wish to state our objection to the Variance that it is proposed to be granted in order to permit construction of a dwelling with its indicated water treatment plant that would otherwise be ineligible for a Development Permit.

Our adjacent lot lies along Saint Margaret's Bay Road, and is already subjected to the noise of squealing vehicles and other traffic at what is a series of quite dangerous bends along our relatively narrow trunk road, especially in the evening hours. To what extent has this been taken into account and how were any such measurements made?

Are we correct in our understanding that, without the proposed a Variance, the lack of setback from the trunk road would not permit a dwelling of any proportions on a lot of the given proportions, precisely because of related safety and noise issues as well as its proximity to the waters of Saint Margaret's Bay?

Has the significance to our adjacent property of the proposed water treatment plant been fully considered and, if so, how and by whom or by what municipal body?

As adjoining neighbours, these are just a few of the questions that spring to mind when faced with this proposed Variance. Until they are addressed satisfactorily and we can be assured that there would be no detriment to as well as to our continued quiet enjoyment of our adjoining property, we regret that we must object to this proposed Variance.

Yours truly,

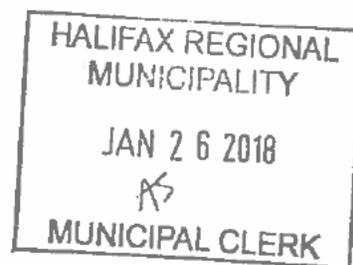
E. P. Fay Lee  
Christina D. Lee

Sent from my iPad

**Stewart, April**

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**From:** Bernie  
**Sent:** January-26-18 12:36 PM  
**To:** Office, Clerks  
**Subject:** variance appeal.docx  
**Attachments:** variance appeal.docx



To whom it may concern,

Attached is our written appeal to variance application #21429.

Sincerely Bernie Power & Valerie Wentzell

Dear Mr. Audas

This is our notice of appeal to the proposed variance application # 21429 at (PID# \_\_\_\_\_) and our questioning of the granting of a development permit to the property owners. The letter of notice of the variance application was a shock to us. Not only the fact they are asking to lessen the setback requirements but that someone would want to build a residence on this property. We were also surprised that the powers that be would knowingly approve the building of anything other than a boat or storage shed. The history of ownership and use of this land up until the most recent years suggested that it was only intended for water access privileges, where the owners fished, kept a small powerboat and swam. This is typical of many properties along Highway 3 where the road is running close to the water's edge. The property was combined with a larger parcel of land owned by Edgar Boutilier on Islandview Drive and had a natural subdividing line made by the St. Margaret's Bay Rd ( Highway #3). Originally when Mr. Boutilier was selling his property it was the combined two pieces, divided naturally by the highway. However, after being on the market for an extended period of time, he decided to separate the two parcels and sell them separately.

Our appeal to this variance and the approval of a development permit is as follows:

- The variance violates the intent of the related land use by law
  - o An 8 ft. set back would place the driveway/parking so that vehicles would most likely create dangerous conditions. Looking at the diagrams provided with the application, vehicles entering or leaving will most likely have to back in or out and possibly be doing this on a section of the shoulder of a secondary highway. The location is in a 70 KM /hr speed zone and in between two turns in the highway (note: I have spoken to the DOT and requested that someone who is responsible for approving driveways in the area contact me, but have not heard back to date)
  - o The slope of the property, the distance above sea level, allowances for excavation and setbacks for a building put into the equation suggest there is no land to build on.
  - o The lot is classified as undersized and with the above combined issues appears to be a violation of intent of the by law.
  - o The property was purchased I believe for \$36,000. The closest water front property in the area was recently listed for approximately \$300,000. It would have fallen under all the bylaws for setbacks, coverages, etc. It doesn't seem fair and could also set a precedent on the development of the many undersized lots along the shore. The bay area has many lots where the secondary highway runs close to the water's edge. This also could have a negative effect on waterfront lots that do not require variances of any kind.

Further questions that I would appreciate answers to or direction on where to get the answers:

- My understanding of the bylaws would suggest the owners would have to request other variances in requesting the development permit that was given.
- Did the individual/s involved with the approval process visit the actual site and walk the grounds? Is this required?
- Is it possible to find out what is proposed for sewage disposal on this site?
- Is it possible to get a copy of the development permit?
- What is the statute of limitations to appeal the development proposal?
- Does your department contact and consult with other departments where there could be environmental concerns (i.e. department of oceans, Natural resources) and if so which ones?

Looking forward to your responses.

Sincerely

Bernie Power & Valerie Wentzell

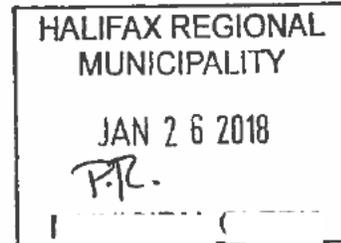
Email contact:

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**John Whyte and Dana MacKenzie**

! Langille's Road  
Head of St. Margaret's Bay, Nova Scotia  
B3Z1Y3

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|  
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**Halifax Regional Municipality**  
P.O. Box 1749,  
Halifax, N.S  
B3J 3A5

January 26<sup>h</sup>, 2018

Dear Mr. Audas:

RE: Appeal re Variance Application # 21429 at (PID # ) St. Margaret's Bay Road –  
First Submission

Please accept this letter as confirmation of our desire to appeal the variance relating to PID #  
We reserve the right to provide further particulars of the appeal as more information is made available  
to us.

**PART I: THE LEGAL FRAMEWORK**

The Development Officer's decision to grant the variance is situated in a legal framework that includes multiple statutory and regulatory instruments: the land use by-law (re zoning and setbacks), the Municipal Planning Strategy for Planning Districts 1 and 3, the Regional Plan, and provincial environmental and road safety regulation and engineering specifications. The Development Officer's decision to grant the variance is most specifically proscribed by s.250 of the *Halifax Regional Municipality, Charter S.N.S. 2008*, c.39 (Part VIII: Planning and Development), which provides that a development officer **may grant variances in specified land use by law or development agreement requirements, but under 250(3) a variance may not be granted if:**

- (a) The variance violates the intent of the development agreement or land use bylaw;
- (b) The difficulty experienced is general to the properties in the area; or
- (c) The difficulty experienced results from an intentional disregard for the requirements of the development agreement or land use by-law [**emphasis added**]

As an interpretive restriction, the use of the bolded terms set out above is significant. The ability to grant a variance, with the use of the term "may" in s.250 generally, indicates that the Development Officer's ability to grant variances is discretionary. Clauses (a)-(c) in s.250(3) are then identified as "no-

go zones” for the exercise of the discretion; significantly, they are not a list of items to be “disproven” by the applicant for the variance, or a checklist that, if they are not triggered, compels the granting of the Variance by the Development Officer. A review of several Staff reports filed on appeals of this nature, reveals that s.250(3) appears to have frequently been treated with an interpretive “checklist” approach to clauses (a) to (c) (i.e. “if they are not violated then the application for a Variance should be granted”). The Appellants submit this approach is flawed and fails to take into account the plain meaning of s.250(3), and the purpose of the provision and the statute in which it is situate.

Recent direction on interpreting municipal legislation within the context of a planning appeal is available from the Nova Scotia Court of Appeal in *Halifax (Regional Municipality) v. 3230813 Nova Scotia Ltd.*, 2017 NSCA 72 (CanLII). Writing for the court at paragraph 58, Bryson J.A. recognizes the requirement to read municipal legislation, including subordinate legislation, in a “broad and purposive way” and “that the words of an Act...be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intention of Parliament.” An interpretation of s.250(3) that treats clauses (a) (c) as a checklist to be overcome with a default towards granting an application without reference to the broader statutory and planning instruments in play, ignores the plain meaning of s.250(3), the words used in the section, the syntax which was used to express them, and the entire regime established for set-backs and lot requirements.

Instead, while recognizing that clauses (a) to (c) are the “absolute deal breakers” for an application to vary, adequate attention must still be paid to the legal requirements for lot size, set backs, highway and environmental safety, and the municipality’s intention (as evidenced in its suite of planning documents) for the area in which the area is situate. The governing legislation also contemplates that Development Officer’s discretion is fully reviewable by this Council and, with the greatest respect to the Development Officer asked to grant the Variance, there is no legal requirement for deference on the part of Council. It is respectfully submitted that this appeal process will act to provide information to the Development Office and the Council that may not have been available to it when the Variance was applied for and subsequently granted at Stage 1 (i.e., pre-Appeal).

Notwithstanding that the analysis cannot focus on clauses (a) to (c) alone, the application does run afoul of s.250(3)(a)-(c). Additionally, it should be noted that Bryson J.A.’s analysis in *Halifax (Regional Municipality) v. 3230813 Nova Scotia Ltd.*, supra, at para 64-67, elaborates on s.250(3)(b), revealing that a prohibition against a variance where the difficulty is “...general to the area” means that where other properties in the area are subject to the same difficulty (e.g. set backs, etc.), the variance cannot be granted. In this present case, the set backs and lot size requirements are common across numerous properties in the area, placing the application squarely within the prohibition set out in s.250(3)(b).

Additionally, when gleaning “intent” for the purpose of s.250(3)(a), the following excerpts from the Municipal Planning Strategy, Planning Districts 1 and 3 (St. Margaret’s Bay) are relevant:

- Plan Area Profile, p. 3: “the “Bay” as it is called by local residents, has been the dominant influence on the Plan Area.”
- Plan Area Profile, p.3 “Of major concern to residents of the Plan Area is the environment. As a result, the cornerstone of the Strategy for Planning Districts 1 and 3 is specific policy for its protection”
- Environmental Concerns, pages 6-11, and the highlighted intent to avoid issues respecting on-site sewage disposal systems and the risk increased density would create to the

environment, stating at page 7, "Given the concern for the protection of the environment, the application and enforcement of existing regulations concerning on-site treatment systems and lot sizes is of utmost importance." [emphasis added]

The Appellants further arguments are set out below, under "Facts and Analysis."

**PART II: FACTS AND ANALYSIS**

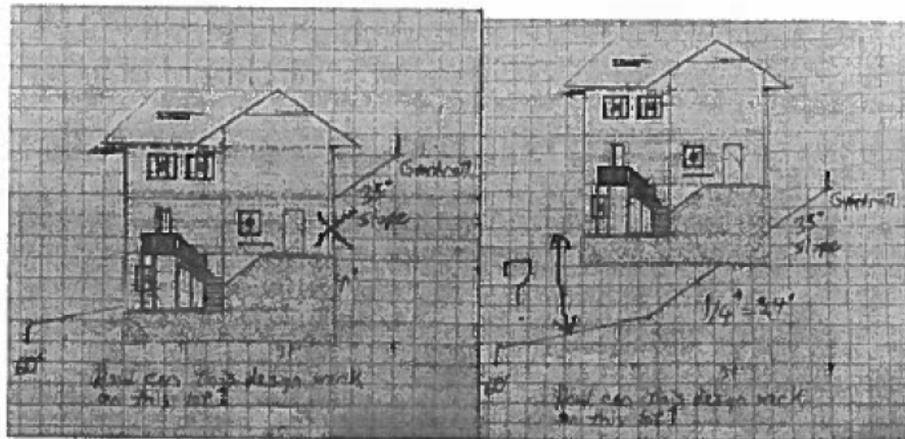
It appears there is a gap regarding some of the information that may have been provided in the permitting application process re lot PID # . Moreover, the variance, as granted, does not appear to be appropriate for this lot. We are hereby also requesting a copy of the file and background information relating to the granting of the building permit. Please advise if a formal FOIPOP request is required to obtain those documents.

We are neighbours of this property and are familiar with its history and physical features. Our appeal specifically raises the following items (and others once we have been provided with further particulars and the file relating to its granting):

The following grounds are noted at this stage:

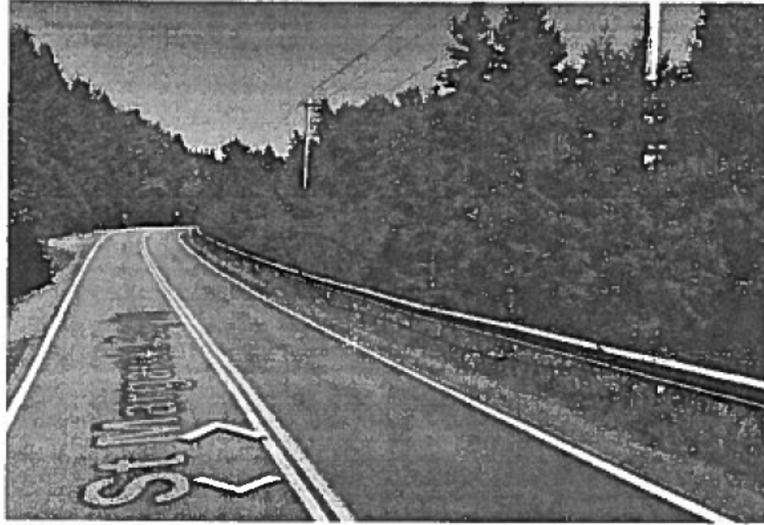
1. The property is not subject to the "EXISTING UNDERSIZED LOTS" accommodation given that PID # was not held in separate ownership from adjoining parcels on the effective date of the by-law, as required. Water lot, PID # , and the house lot, PID # were both held by Edgar Boutilier at the time of the effective date of the by-law. Please reference deeds 40826 and 17631. As with many similar lots in the St. Margaret's Bay area, the water lot would have been used for recreational water access and was never intended as a separate building site. This point is further underlined by the extremely low tax assessment of \$20,000 and selling price of \$33,000 in 2015 and \$36,000 in 2017. These values represent a fraction of the typical value of ocean front lots deemed appropriate for development.
2. There are important issues related to PID # that appear not to have been communicated to the planning staff in the permit application process, such as:
  - a) Major portions of the proposed house location do not meet the 3.8 metre elevation above Canadian Geodetic Vertical Datum (CGVD 28) requirement for a lot abutting the ocean. Given rising sea levels and the controversial nature of this small oceanfront lot, careful adherence to by-law 4.19A (4) should prevail:
    - (4) Every application for a development permit for a building or structure to be erected pursuant to this section, shall be accompanied by plans drawn to an appropriate scale showing the required elevations, contours and lot grading information to determine that the proposed building or structure will meet the requirements of this section.

- b) Given the generous accommodations being proposed (a 10ft setback from the ocean when the requirement for this particular lot is 90ft, and permission to be within 8ft of a highway when 20ft is the minimum), an onus should be placed on the applicant to clearly show the topography of the site via a 3d contour plot with 1m resolution in order to bring into relief the areas that violate the 3.8 metre Datum. Also, additional buffer beyond the 3.8m 'no-development area' should be provided to allow for the impact of excavation on this steep grade so as to ensure no excavation impacts the 3.8m zone. It is important to note that neither the Development Officer nor the Council has jurisdiction to allow construction of a dwelling that is on a lot abutting the coast of the Atlantic Ocean within a 3.8 metre elevation above Canadian Geodetic Vertical Datum. The effect of the variance granted here violates that absolute prohibition. It is also worth noting that the Department of Natural Resources now recommends the new CGVD2013 standard which adds an extra 65cm over the old Datum. This higher standard would render even more of the structure footprint to be in an unsafe zone for construction.
- c) The building structure proposed, as per drawings provided in the variance application, indicate a foundation designed for a slope of approximately 10-15 degrees. However, the lot has a building site slope of 35-40 degrees. The lot (in vertical height) drops approximately 30 ft over its short 60 ft depth, starting immediately at the roadway guardrail. As an engineer, it is my conclusion that the structure as proposed is not designed to suit the building site and will result in significant disruptive excavation that will likely compromise the roadbed, and also result in significant in-fill that will "harden" the ocean frontage. Transportation and Infrastructure Renewal, as well as the Department of Environment, should be informed.



- d) The minimal front yard setback will not be appropriate in the context of vehicles departing from beside the proposed dwelling. The proposed building site is set between sharp turns in a 70km highway zone providing minimal warning and

response time for traffic needing to react to vehicles blocked from view and emerging from beside the proposed construction.



- e) As a living structure, there are also concerns regarding placement and efficacy of a septic system given existing environmental regulation. The septic regulations are not subject to accommodation on an undersized lot. 30m distance is required from any water-tight portion of the septic system and the watercourse. Additionally, non-water-tight elements of the septic system must be 15m from a watercourse. There does not appear to be any means to accommodate these requirements on the lot.
3. The accommodations afforded to this lot via the “existing undersized lots” provision are not appropriate, for example:
- At 4400 sq ft the lot is merely 1/5<sup>th</sup> of the regulation standard for the area.
  - While the 20ft front yard setback is this focus of this variance, what goes unnoted is the extreme ocean setback variance of 80ft in the proposed development, placing the dwelling a mere 10ft from the ocean rather than the standard of 90ft. The standard ocean setback is set at 66ft and is intended to be an undisturbed environmental defense against erosion and water run off directly into the ocean. Given the extreme 35-40 degree slope of the small lot, the by-law requires the normal 66’ buffer to be increased to 90ft, rendering the entire lot ineligible for development. Building on this site inside what is normally the standard buffer flies directly in the face of the well reasoned environmental intent of the by-law buffer and may endanger the local waters for swimming and fishing. The delicate tidal zone of the cove teems with minnows and mackerel and must be considered.

By way of further context, applicable sections of the by-law include the following:

#### 4.5 EXISTING UNDERSIZED LOTS

(a) Except within the Tantallon Crossroads Coastal Village Designation as shown in Schedule L, and (RC-Jul 22/14;E-Oct 4/14) notwithstanding anything else in this By-law, a vacant lot held in separate ownership from adjoining parcels on the effective date of this By-law, having less than the minimum frontage, depth or area required by this By-law, may be used for any purpose permitted in the zone in which the lot is located and a building may be erected on the lot, provided that all other applicable provisions in this By-law are satisfied.

#### 4.19 WATERCOURSE SETBACKS AND BUFFERS (RC-Jun 25/14;E-Oct 18/14)

(1) (a) No development permit shall be issued for any development within 20m of the ordinary highwater mark of any watercourse.

(b) Where the average positive slopes within the 20m buffer are greater than 20%, the buffer shall be increased by 1 metre for each additional 2% of slope, to a maximum of 60m.

(c) Within the required buffer pursuant to clauses (a) and (b), no excavation, infilling, tree, stump and other vegetation removal or any alteration of any kind shall be permitted in relation to a development.

(d) Within the required buffer pursuant to clauses (a) and (b), activity shall be limited to the placement of one accessory structure or one attached deck not exceeding a footprint of 20 m<sup>2</sup> or a combination of an accessory structure and attached deck not exceeding 20 m<sup>2</sup>, fences, boardwalks, walkways and trails not exceeding 3 metres in width, wharfs, boat ramps, marine dependent uses, fisheries uses, conservation uses, parks on public lands, historic sites and monuments, and public road crossings, driveway crossings and wastewater, storm and water infrastructure, and water control structures.

(e) Notwithstanding clause (a), the required buffer shall be 30.5m of the rim of any watercourse within the MR-2 (Mixed Resource 2) Zone north of Highway 103; 30.5m of the rim of Wright Lake; or 30.5m of the rim of Coon Lake within the MU-1 (Mixed Use 1) Zone. No excavation, infilling, tree, stump and other vegetation removal or any alteration of any kind shall be permitted within this buffer. Activity shall be limited to the placement of board walks, walkways and trails, conservation uses and buildings and structures for conservation related uses, wilderness campsites or non-motorized water related recreation uses.

(f) Notwithstanding clause (a), the required buffer for construction and demolition operations shall be as specified under the applicable CD Zone.

(g) Within the buffer required pursuant to clause (f), no excavation, infilling, tree, stump and other vegetation removal or any alteration of any kind shall be permitted in relation to a development.

(h) Notwithstanding clause (a), within the Tantallon Crossroads Coastal Village Designation, the required buffer shall be 30 m (98.5 ft) from the ordinary high water mark of the East River shown on Schedule Q. (RC-Jun 23/15;E-Jul 14/15)

(i) Within the required buffer pursuant to clause (h), no excavation, infilling, tree, stump and other vegetation removal or any alteration of any kind shall be permitted in relation to a development. (RC-Jun 23/15;E-Jul 14/15)

(j) Within the required buffer pursuant to clause (h), activity shall be limited to the placement of one accessory structure or one attached deck not exceeding a footprint of 20 square metres or a combination of an accessory structure and attached deck not exceeding 20 square metres, fences, boardwalks, walkways and trails not exceeding 3 metres in width, wharfs, boat ramps, marine dependent uses, fisheries uses, conservation uses, parks on public lands, historic sites and monuments, and public road crossings, driveway crossings and wastewater, storm and water infrastructure, and water control structures. (RC-Jun 23/15;E-Jul 14/15)

(k) Notwithstanding clause (h), where the configuration of any lot created prior to the effective date of the Tantallon Crossroads Coastal Village Designation, is such that no main building could be located on the Lot:

(i) the minimum riparian buffer requirements set forth in the Regional Municipal Planning Strategy shall apply; and

(ii) for greater certainty, Subsection 4.19(3) shall apply.

(RC-Jun 23/15;E-Jul 14/15)

(2) Notwithstanding subsection (1), where an existing residential main building is located within the required buffer, accessory structures, subject to meeting other requirements of this by-law, shall be permitted provided they are located no closer to the watercourse than the existing main building.

(3) Where the configuration of any existing lot, including lots approved as a result of completed tentative and final subdivisions applications on file prior to August 26, 2006, is such that no main building could be located on the lot, the buffer distance shall be reduced in a manner which would provide the greatest possible separation from a watercourse having regard to other-yard requirements.

(4) Notwithstanding subsection (1), nothing in this by-law shall prohibit the removal of windblown, diseased or dead trees, deemed to be hazardous or unsafe.

(5) Notwithstanding subsection (1), the selective removal of vegetation to maintain the overall health of the buffer may be authorized by the Development Officer where a management plan is submitted by a qualified arborist, landscape architect, forester or forestry technician.

(6) Every application for a development permit for a building or structure to be erected pursuant to this section, shall be accompanied by plans drawn to an appropriate scale showing the required buffers, existing vegetation limits and contours and other information including professional opinions, as the Development Officer may require, to determine that the proposed building or structure will meet the requirements of this section.

With the greatest of respect, the approach taken by the Staff in this case seems to be biased towards accommodating an applicant's design rather than taking into account the intent and parameters of the regulatory framework. Based on this approach one would have to question at what size does a lot become too small in the planning authority's eyes to support development?

4. Applying the "EXISTING UNDERSIZED LOTS" accommodation to extreme, micro-sized lots such as this creates a precedent allowing extensive water front development that will have a detrimental impact to the St Margaret's Bay environment and violates the strict requirements placed on new lots. A quick survey of the Queensland to Indian Harbour area of St Margaret's Bay suggests that there could be as many as 50-100 of these micro-sized lots that could be developed in a similar fashion causing detrimental impact to the waters of the bay, a result that flies squarely in the face of the guidance provided in the MPS for the area. It is no answer to say that no precedent is set because each lot and application is considered on its own merits and facts. Reasonable certainty and non-arbitrariness are foundational legal principles to any regulatory system.
5. Such other grounds as may appear as more information is obtained by the Appellants.

As noted above, we have requested details of the permit application and intend to vigorously pursue a halt to the proposed structure. To expedite the process, please email the permit documents to

**[REDACTED]**. Please also share details on the process to appeal the granting of a building permit.

Yours Truly,

John Whyte

Dana MacKenzie

cc.

Councillors Matt Whitman, Tim Outhit, Steve Streach, Lisa Blackburn, Steve Craig  
St. Margaret's Bay Stewardship Association  
Department of the Environment  
Transportation and Infrastructure Renewal