



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

Item No. 10.2.1
North West Community Council
April 8, 2019

TO: Chair and Members of North West Community Council

Original Signed

SUBMITTED BY: _____
Steven Higgins, Manager, Current Planning

DATE: October 18, 2018

SUBJECT: **Case 21410: Appeal of Variance Approval - 21 Mandaville Drive, Middle Sackville**

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 appeal will result in refusal of the variance.

Community Council denial of the appeal will result in approval of the variance.

Staff recommend that North West Community Council deny the appeal.

BACKGROUND

This variance application and corresponding appeal relate to the construction of an accessory structure and a related variance approval that took place approximately 21 years ago in 1997.

At that time, a variance was approved to reduce the minimum side yard setback from 8-feet to 6-feet to allow the construction of a detached garage at 21 Mandaville Drive in Middle Sackville. That variance was approved by the Development Officer and the approval was not appealed. Subject to the expiry of the appeal period, the garage was constructed at what was believed at the time to be the appropriate location.

In 2017 a survey plan was provided by the abutting property owner indicating that the accessory building had actually been constructed in 1997 on an angle to the property line with an actual setback of 3.9 feet at the front corner and 5.6 feet at the rear corner.

The building location as confirmed by survey does not comply with the approved variance. Under these circumstances, there are only two options available to the building owner to correct the non-compliance:

1. Alter the existing building to comply with the required minimum 6-foot sideyard. This would involve the substantial alteration or demolition of the 21-year-old garage; or
2. Vary the minimum sideyard requirement to comply with the location of the current building. This would require a second variance to relax the minimum sideyard from 6 feet to 3.9 feet

The property owner has chosen option 2 as outlined above and an application was submitted to further reduce the side setback to accommodate the existing accessory building. That application was approved by the Development Officer and subsequently appealed by the abutting property owner. That appeal is the subject of this report.

Site Details:

Zoning

The property is located within the R-1 (Single Family Dwelling) Zone of the Beaver Bank, Hammonds Plains, Upper Sackville Land Use By-Law (LUB). The requirement of the LUB and the related variance request is identified below:

	Zone Requirement	Approved Variance (1997)	Variance Requested
Minimum Side Yard	8 feet (2.43 m)	6 feet (1.82 m)	3.9 feet (1.18 m)

For the reasons detailed in the Discussion section of this report, the Development Officer approved the requested variance (Attachment A). A property owner within the 100m notification area has appealed the approval (Attachment B) 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

General

The current variance process is somewhat unusual in that a previous variance was completed and the structure in question has existed, and was thought to be compliant, for a period of approximately 21 years. The following general context is provided to advise Council how the current application was considered in light of the atypical situation.

In 1997, the Development Officer of the day considered the sideyard variance from 8 feet to 6 feet to be consistent with the requirements of the Planning Act and approval was granted. Since that time, those Planning Act requirements for variances were adopted virtually unchanged in the Municipal Government Act in 1998 when the Planning Act was repealed. These provisions also formed part of the HRM Charter upon its adoption in 2008. As a result, it can be concluded that the criteria for variance approval as set out in provincial legislation has not materially changed since the original variance was approved in 1997. Furthermore, the relevant subject property circumstances are generally the same as what existed in 1997.

Noting that neither the physical conditions nor the public policy provisions for variance consideration have changed since 1997, staff conclude the approval of the previous variance from 8-feet to 6-feet remains valid and is fully compliant with Section 250(3) of the Charter (see below). Under these circumstances, the Development Officer has not conducted a re-assessment of the 1997 decision as part of the current application.

The current application has been assessed solely in the context of whether or not the additional 2.1-foot relaxation for the existing building is compliant with the Charter requirements for variance approval.

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."*

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 as outlined below.

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

In establishing minimum sideyards, the land use bylaw intends to provide separation from adjacent structures, streets and property lines for convenience of access to rear yards, building/property maintenance and aesthetics. Safety, in terms of such things as fire protection is also sometimes seen to be a consideration but those provisions are primarily regulated through application of the building code as opposed to the land use bylaw. The building in question is compliant with the limiting distance requirements of the building code.

Although the garage does not meet the technical requirements of the LUB, the general intent of the bylaw appears to have been maintained in the interim 21 years since the construction of the building. The

additional 2.1-foot encroachment into the required 6-foot sideyard has existed for a prolonged period in a manner that does not appear to be out of context with the suburban / semi-rural streetscape in the area. The additional sideyard encroachment does not compromise access throughout the subject property and minimal but adequate space is retained for building and property maintenance.

It is the Development Officer's opinion that this proposal does not violate the intent of the LUB

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

In evaluating variance requests, staff must determine if general application of the by-law creates a specific difficulty or hardship that is not broadly present in the area. If these circumstances exist, then consideration can be given to the requested variance. If the difficulty is general to properties in the area, then the variance should be refused.

In the majority of variance applications, the difficulty being experienced is a physical one that is related to property conditions. While that type of circumstance is typical, the Development Officer and Council are not limited to only physical conditions when considering if a difficulty is general to the area. In this case, the difficulty is specific and unique to this property in that a 21-year-old construction error has inadvertently led to a non-compliant structure. The only option to deal with the 2.1-foot encroachment other than the proposed variance is the substantial alteration or demolition of the accessory building.

Given the long-standing existence of the building without notable community impacts, the Development Officer considers that the demolition or substantial alteration represents a difficulty that is not generally present 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.

Staff are satisfied that the property owner believed they had complied with the previous variance for a 6-foot sideyard. Upon being notified of the circumstances, the owner responded in a timely manner and made application for a further variance in good faith with the full knowledge of the implications of the application process.

Under these circumstances, staff do not believe the difficulty being experienced was the result of intentional disregard.

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 B) for Council's consideration. These points are summarized and staff's comments on each are provided in the following table:

Appellant's Appeal Comments	Staff Response
<i>Excavation at time of construction caused lateral instability on the neighbour's property with risk of erosion.</i>	Incidental disturbance near common boundaries is not unusual and not regulated by the municipality in situations like the current application. Municipal staff make every effort to prevent unauthorized encroachment during construction but protection of property is a matter of civil law and ultimately the responsibility of both

	<p>property owners. In this case, the building in question was constructed in 1997 and further relaxation of the side yard to accommodate a structure that has been in place for 21 years should not materially impact implementation of any solution to alleged property damages.</p>
<p><i>Erosion along the property boundary has contributed to land devaluation.</i></p>	<p>HRM does not regulate grade alteration in these types of circumstances and impacts of cross boundary erosion are civil matters between abutting land owners. As noted above, the requested additional 2.1-foot relaxation to accommodate the existing building should not impact any related instability or any solution to alleged property damages.</p>
<p><i>The foundation was used and not the roof overhang for the setback.</i></p>	<p>The side yard was calculated correctly – Section 2.78(c) of the bylaw specifies the building wall to be used to determine a setback from a side property line and Section 4.21(b) allows a roof overhang projection of up to 2 feet into any required yard.</p>
<p><i>The placement of the garage has removed any sense of separation between the two properties.</i></p>	<p>For reasons outlined in the Discussion section of this report, the requested additional 2.1-foot relaxation is considered to be adequate in the opinion of the Development Officer.</p>
<p><i>Use of wood stove in garage causes smoke to cross the neighbouring property.</i></p>	<p>Wood burning appliances are common throughout the municipality and its presence is not part of this assessment for the variance. The existing vent is on the roof of the accessory building well beyond the sideyard setback encroachment and is compliant with municipal regulation. The requested additional 2.1-foot relaxation to accommodate the existing building would not impact the lawful operation of the wood burning appliance.</p>
<p><i>The neighbour has incurred expenses due to the need for property boundary delineation as well as a security system.</i></p>	<p>Costs were incurred to generate survey evidence to confirm the location of the common property boundary. Its purpose was to support the appellant’s position that grade alteration had encroached on the property line and that the building constructed in 1997 was not in compliance with the approved variance. This evidence was needed to quantify a previously unclear situation for the primary benefit of the appellant. Those costs are appropriately carried by the property owner receiving the benefit of that evidence. Any recovery of costs from other property owners would be subject to agreement of those owners or based on the outcome of the civil legal process.</p> <p>Costs incurred to provide protection of personal property such as security systems are voluntary and are the sole responsibility of individual property owners.</p> <p>These factors were not accounted for in the Development Officer’s decision regarding the proposed additional 2.1-foot variance.</p>

<p><i>Property Value has dropped significantly and at the present time is unsaleable in today's market due to the excavation, erosion and close proximity of the building/garage.</i></p>	<p>The bylaw explicitly allows accessory buildings in the area where the garage is located and the specific siting based on the previous variance is lawful. The issue presently at hand relates to the 2.1-foot additional relaxation proposed to permit retention of the existing building. The Development Officer is of the opinion that an accessory building located at the approved 6-foot setback would have substantially the same proximity impact as one at the existing location which is 5.6 feet at the rear corner and 3.9 feet at the front corner.</p> <p>As noted above, impacts related to excavation and erosion are matters of civil law and are not regulated by the Municipality.</p>
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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 did 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 of this variance report.

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, all assessed owners within 100 metres of the variance, 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: Site Plan
Map 2: Notification Area

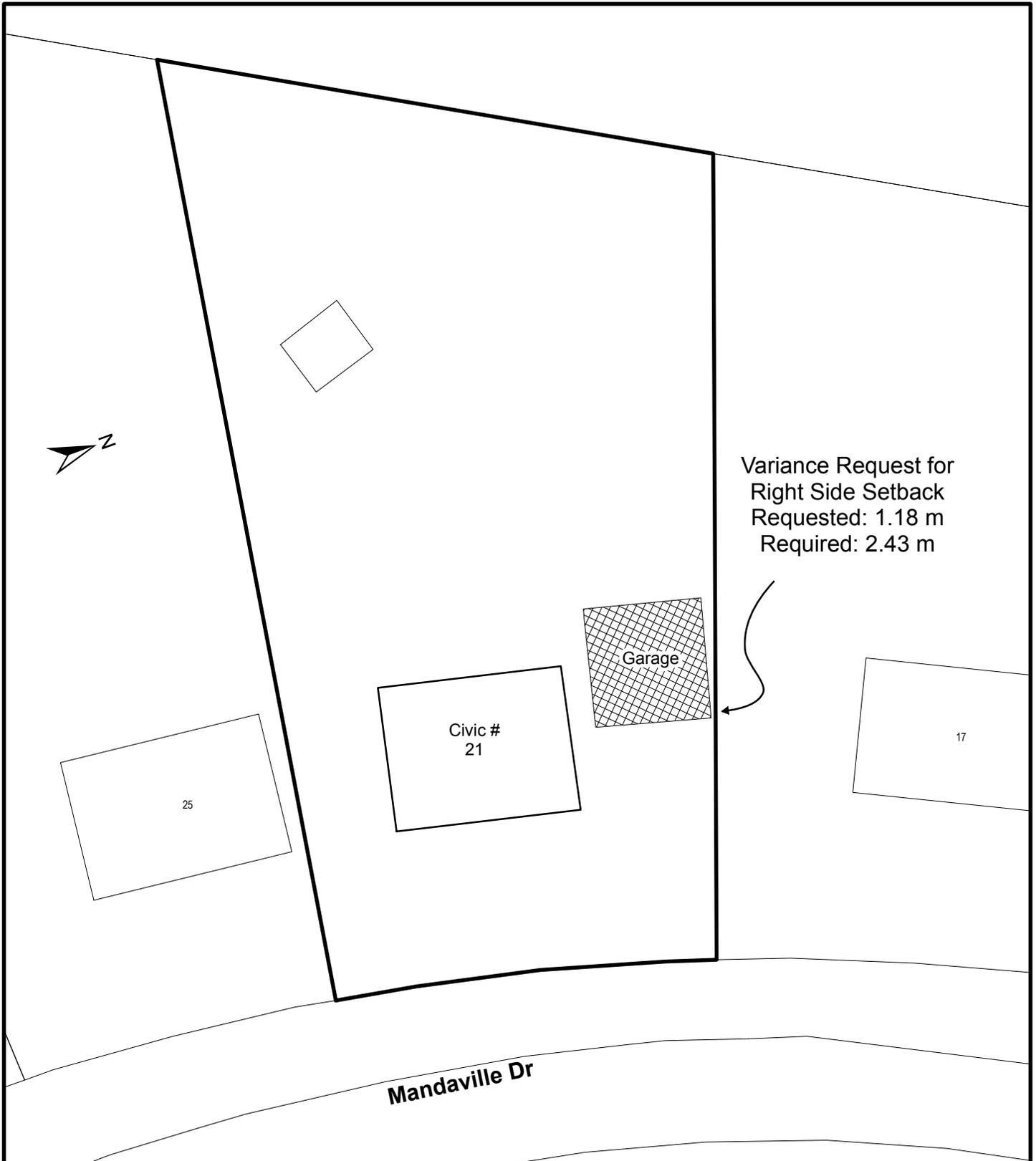
Attachment A: Variance Approval Letter
Attachment B: Letter of Appeal

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: 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



Map 2 - Site Plan

21 Mandaville Drive,
Upper Sackville

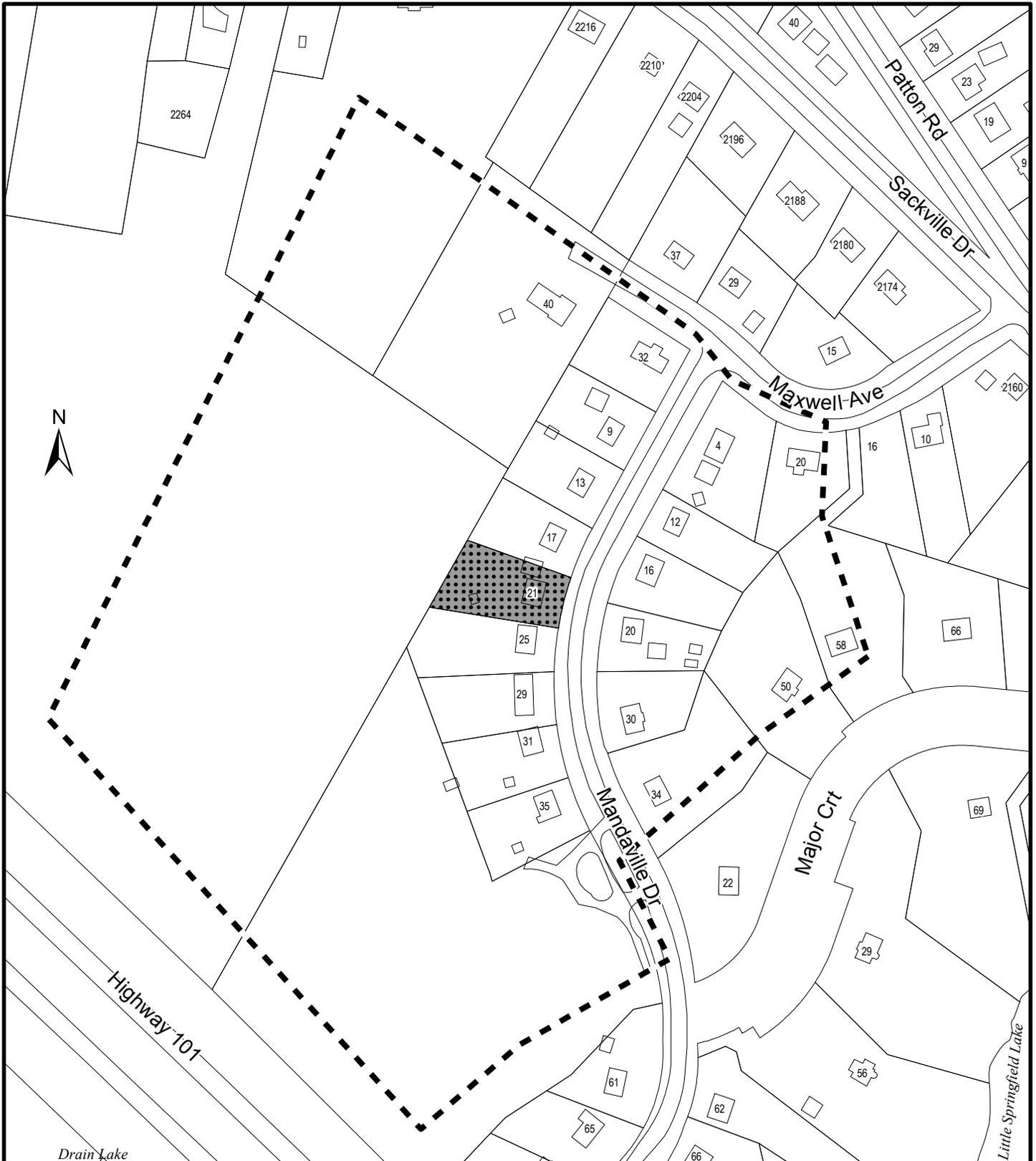
HALIFAX



Subject Property

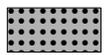


The accuracy of any representation on this plan is not guaranteed.



Map 1 - Notification Area

21 Mandaville Drive,
Upper Sackville

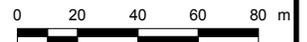


Subject Property

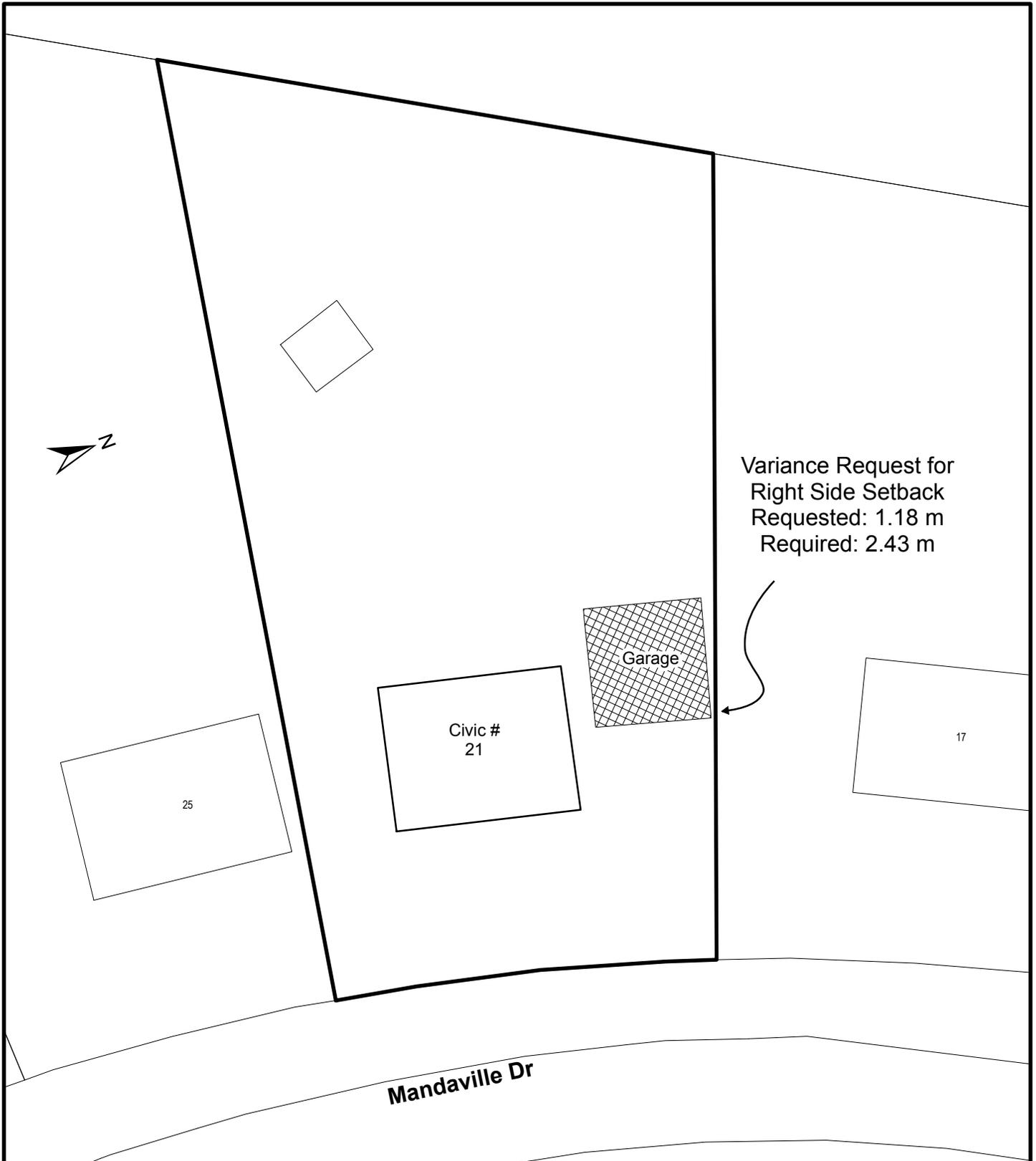


Notification Area

HALIFAX



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



Map 2 - Site Plan

21 Mandaville Drive,
Upper Sackville

HALIFAX



Subject Property



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

Attachment A - Letter of Approval

November 22, 2017

Mr. Arthur Sutcliffe
21 Mandaville Drive
Upper Sackville, NS
B4E 3C7

Dear Mr. Sutcliffe:

RE: Variance Application # 21410 at 21 Mandaville Drive, Upper Sackville, PID # 00478768

This will advise you as the Development Officer for the Halifax Regional Municipality, I approved your request for a variance from the requirements of the Beaver Bank, Hammonds Plains, Upper Sackville Land Use By-law as follows:

Location: Mandaville Drive, Upper Sackville, PID # 00478768
Project Proposal: Vary set-back of existing garage

LUB Regulation	Requirements	Proposal
Side Yard Set Back	2.43 meters	1.18 meters

Pursuant to Section 251 of the Halifax Regional Municipal Charter, assessed property owners within 100 meters of the property have been notified of this variance. Those property owners have the right to appeal and must file their notice, in writing, to the Development Officer on or before **December 11, 2017**

No permits will be issued until the appeal period has expired and any appeals disposed of.

If you have any questions or require additional information, please contact Connie Sexton, Planner 1 at 902-490-1208

Sincerely,

ORIGINAL SIGNED

Sean Audas, Principal Planner / Development Officer
Halifax Regional Municipality

cc. Kevin Arjoon, Municipal Clerk
Councilor Lisa Blackburn

HALIFAX

Halifax Regional Municipality
PO Box 1749, Halifax, Nova Scotia
Canada B3J 3A5

halifax.ca

Stewart, April

From:	Brenda Dean [REDACTED]	HALIFAX REGIONAL MUNICIPALITY DEC 07 2017 <small>S.A.</small> Mandaville Drive., Upper Sackville MUNICIPAL CLERK
Sent:	December-07-17 11:01 AM	
To:	Office, Clerks; Sexton, Connie	
Cc:	Blackburn, Lisa	
Subject:	RE: Appeal for Variance Application #2140 at 21 Mandaville Drive (PID#00478768) (Message 1 of 2)	
Attachments:	Photo 1-Side View Before.jpeg; ATT00001.htm; Photo-2.JPG; ATT00002.htm; Photo-3.JPG; ATT00003.htm; Photo-4.JPG; ATT00004.htm; Photo-5.JPG; ATT00005.htm; Photo-6.JPG; ATT00006.htm; Photo-7.JPG; ATT00007.htm; Photo-8.JPG; ATT00008.htm; Photo-9.JPG; ATT00009.htm	

MESSAGE 1 of 2 (Please Acknowledge Receipt)

I spoke with Councillor Lisa Blackburn regarding the Appeal process. As a result of that discussion, I am forwarding to you additional information which I have, that would not be included in your records, as additional reference material to support your preparation of the Staff Report, and explains why I am opposed to the variance. If any of the attachments, photos and/or diagrams are not clear, please let me know and I will forward a hard copy.

[REDACTED] who is assisting me with this process, will be away for February and March 2018 and not available for a Hearing with the North West Community Council at that time.

The location of the building located at 21 Mandaville Drive has/is causing the following:

1. The excavation at the time of construction of the building/garage at 21 Mandaville Drive included excavation right to and beyond the property line, without prior notification to or permission by myself. My property is at a higher elevation than the adjoining property and building/garage. This excavation removed the lateral stability of my property, with no attempt made to stabilize/retain my property to its then current elevation. This left my property at risk of erosion, which has occurred and currently my land adjacent to the building/garage, to within 6 feet of the property line, is unsafe, unstable and aesthetically damaged/missing. Erosion from the property line to "top of slope" as indicated on Copy of Survey is 10 feet with approx 12 feet remaining to my house. (See attached Survey Section)

2. This erosion along the property boundary has significantly contributed to the land devaluation described in Item 7. The area of erosion is approx 46 feet in length, 6 to 8 feet in width, with elevation erosion of 1 to 3 feet at the boundary line and is located directly adjacent to the building/garage at 21 Mandaville Drive relating to the requested variance. All topsoil in area marked as "Top of Slope" on Survey to the property line has eroded

in the past year. I previously fell through the ground near fence (now indicated on Survey Section Drawing as "Trench" area), luckily not breaking a leg or ankle. Erosion has occurred to the extent that the top of large 18" rocks placed for a raised garden are now at grade level. Soil in the area is clay and it is felt that without the rocks installed for the raised bed that the erosion may have been more extensive. Photos and diagrams indicate the extent of the erosion to date. Any remediation or correction to the land to reestablish the land and property value is at risk for new/additional erosion based on the current location of the building/garage. Note, the survey pin in photos is rebar at ground level and not the wooden stakes which are used to mark the location. (See Photos 1,2,3,4,5,6, Survey Section Drawing, Elevation Diagram)

Recently, a "beautification wall" was constructed at 21 Mandaville; however it does not correct the above noted erosion as it ends at the front corner of the building in question. In fact, an additional safety hazard exists. The wall collapsed as only boards were placed along the property line and unable to withstand the weight of gravel, thus pulling away toward/over my property line. Now, as a result from HRM inspection, and contractor repair, two iron supports for the neighbouring wall, are located on my property. This area is not safe to walk near, as slippage into the trench could result in broken leg/ankle. HRM was to engage the home owner to move the iron posts to the appropriate side of the boundary line, backfill or provide support agreeable to inspector. This has not happened and is outstanding on HRM files. (Photo 7)

3. The requested variance of 1.18 meters is measured from the base of the building/garage and does not include the overhang on the roof of the building. As a result, the roof and any water run off from the roof is approx 18-20 inches from the property line. While gutter and downspouts are installed runoff from both sides of the building roof are directed to the side of the building nearest the property line.

4. The location of the building, combined with the property erosion has removed any sense of separation between the two properties. Large power mast exists on building/garage facing my property, making the separation less, and Nova Scotia Power always walked through my garden to read the meter at 21 Mandaville as it was closer/easier access. The lack of separation between these two properties has significantly contributed to the loss of peace and enjoyment of my property for me, [REDACTED]

5. While the location of the building and the fact that it is at a lower elevation is aesthetically displeasing from my property, it also contributes to health issues. Use of a wood stove located in the building at the lower elevation results in smoke coming across my property instead of higher over the property. It was necessary to call the fire department over the summer due to heavy smoke from the chimney in the building setting off my smoke alarms. It is also impossible for me to air dry laundry on a clothesline during these times. The roofline of the building is lower than my clothesline, windows, doors, and a person standing in the yard. The potential exists for embers from the wood stove chimney to ignite the wood siding on my house. (See Photos 8, 9)

6. I have at my expense, (approx \$5,000) had two property surveys conducted including the survey provided to HRM to prove the building location at 21 Mandaville Drive; and, hired a contractor to partially remove my boundary fence due to damage caused by the excavation and resulting erosion. [REDACTED]



8. The Halifax Regional Municipality Charter, Section 250 (3) Variance indicates conditions under which a variance will NOT be granted:

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

(a) the variance violated the intent of the development agreement or land-use by-law;

(b) the difficulty experienced is general to 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."

I believe all three of the above requirements have been knowingly and purposely violated.

Combine the loss of separation between the properties, loss of peace, use and enjoyment of my property [redacted] [redacted] illustrates my reasons to appeal the decision to grant the requested variance. As long as the building/garage remains in the existing location at 21 Mandaville, the property damage and safety hazards noted above will continue to exist. I am requesting that the approval be reversed and the standard setbacks be respected. Once the building/garage has been moved to compliance then restoration of my property can proceed. [redacted]

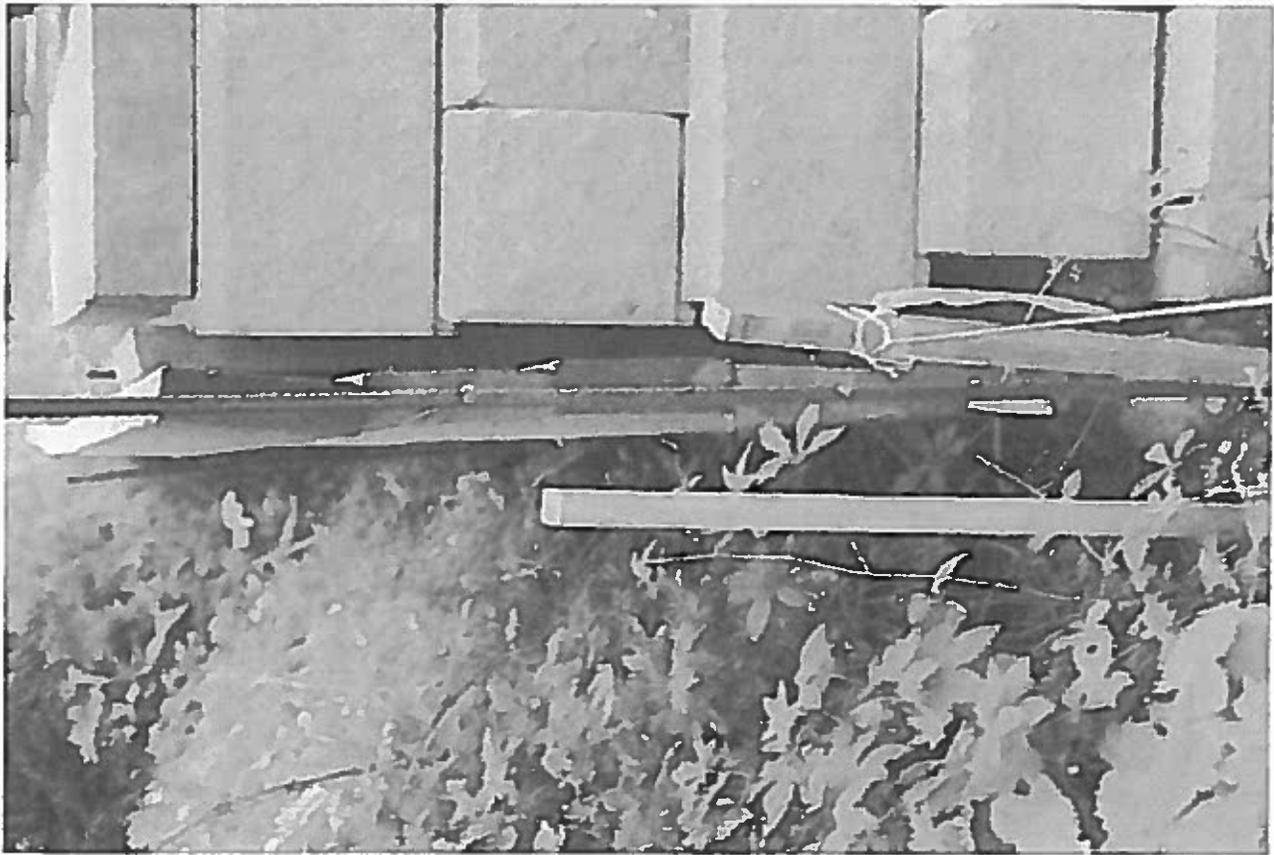
Brenda Dean

[redacted]
Upper Sackville, NS
B4E 3C7

[redacted]

[redacted]









From the workbench of:
Date:

Diagram showing area & scope of land erosion

