



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

Item No. 10.2.1
North West Community Council
July 12, 2021

TO: Chair and Members of North West Community Council

SUBMITTED BY: - Original Signed -
Steve Higgins, Director of Current Planning

DATE: June 1, 2021

SUBJECT: Case 23033: Appeal of Variance Refusal – 14 Wardour Street, Bedford

ORIGIN

Appeal of the Development Officer's decision to refuse 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 shall be placed on the floor:

That the appeal be allowed.

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

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

Staff recommend that North West Community Council deny the appeal.

BACKGROUND

A variance request has been submitted for 14 Wardour Street in Bedford, to permit a rear deck that does not meet the right side or rear setback requirements of the Land Use By-law (Map 2 and Attachment A). The deck was built in 2014 and no permit records have been found for its construction. A variance has been requested to allow the deck to remain in place. The deck complies with the requirements of the Land Use By-law with the exception of the minimum rear yard and minimum right side yard.

Site Details:

Zoning

The property zoned RSU (Residential Single Dwelling Unit) Zone for the Bedford Land Use By-Law (LUB). The relevant requirements of the LUB and the related variance request is as identified below:

	Zone Requirement	Variance Requested
Minimum Rear Yard	10 feet	0 feet
Minimum Side Yard	4 feet	2 feet

For the reasons detailed in the Discussion section of this report, the Development Officer refused the requested variance (Attachment B). The applicant has appealed the refusal (Attachment C) and 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 the motion is in opposition to the staff recommendation. The recommendation section of this 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 refuse the request for variances.

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*.

The *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 is as follows:

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

Building setbacks help to ensure that structures maintain adequate separation from adjacent structures, streets and property lines for access, safety, and aesthetics. The rear portion of the deck is on the property line, meaning that there is no separation between the deck and the adjacent property. The lot is rectangular in shape and the capacity exists to construct a deck in compliance with the setback requirements of the By-law.

Authorizing the existing deck would require a 10 foot reduction in the rear and the 2 foot reduction on the side. Under the circumstances, these reductions are considered to be significant alteration to the requirements of the bylaw.

It is the Development Officer's opinion that this deck violates the intent of the Land Use By-Law.

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.

General application of the bylaw does not create a specific difficulty or hardship to this property that is not broadly present in the area. The subject lot was created with the existing dwelling already present including a deck that complied with the regulations. While the lot is smaller than the typical property in the surrounding area, it is not prohibitively small and there are no unique conditions present that would warrant relaxation of the requirements otherwise broadly applicable to 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.

It is clear no permit was obtained before the construction of the deck. Furthermore, HRM records do not contain any indication of inquiries with respect to permit requirements for construction of this deck.

Staff note the deck in question is a relatively substantial structure that appears more complex than a typical residential deck. Given the extent of the construction, it is not unreasonable to expect that a homeowner contemplating a structure of this nature would assume municipal construction permits would be required. Typically, this expectation would generate an application or inquiry to the municipality prior to construction. However, it appears that the property owners were advised by someone other than HRM staff that a permit was not required as the project was replacement of an existing deck. While that advice was incorrect, under the circumstances, it seems the homeowners were duly diligent by inquiring about permits with someone they believed to be expert in these matters.

Under these circumstances, it seems clear that owner may not have realized a permit was required and therefore the disregard of the by-law was in this case was not intentional.

Appellant's Submission:

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:

Appellant's Appeal Comments	Staff Response
<i>The side setback in question abuts the swale on the southwest property line adjacent to the swale in which the driveway to 12 Wardour street resides. Were the deck to have been constructed farther than 2 feet from the property line the location of the basement window well could not have accommodated egress steps to the side of the house.</i>	A survey plan from 2000 of the property shows that there was previously a rear deck that did not encroach into the side yard setback.
<i>The rear setback in question abuts a steep downward slope and the continuation of the driveway, beyond which is the 12 Wardour Street yard and house, estimated to be greater than 100 feet from the rear property line.</i>	There is a separation between the rear of the property and the abutting house. These are standard setback requirements for all RSU zoned property within the Bedford Plan area and the setbacks are based on the distance to a property line not an abutting dwelling. Also, the existing distance of the abutting dwelling is not one of the criteria used in the evaluation.
<i>The decking in question surrounds the swim spa, maintaining a safer alternative for ingress and egress than steps. Because of the existing stone retaining wall, the swim spa cannot be relocated, and a decking surround would not be possible while still upholding a 10ft rear setback.</i>	Obtaining a permit for the decking would have ensured the necessary setbacks were maintained in advance of installation of the swim spa.
<i>In our opinion, the financial burden of removal of the existing decking far exceeds the perceived impact on the neighboring property.</i>	Financial burden is not a criterion that can be considered by the Development Officer in the decision to grant the variance.

Conclusion:

Staff have reviewed all the relevant information in this variance proposal. As a result of that review, the variance request was refused as it was determined that the proposal conflicts 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 request. The HRM cost associated with processing this application can be accommodated with the approved 2021/22 operating budget for Cost Centre C420, Land Development and Subdivision.

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 refusal 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 contact of a motion to allow the appeal. Council's options are limited to denial or approval of that motion.

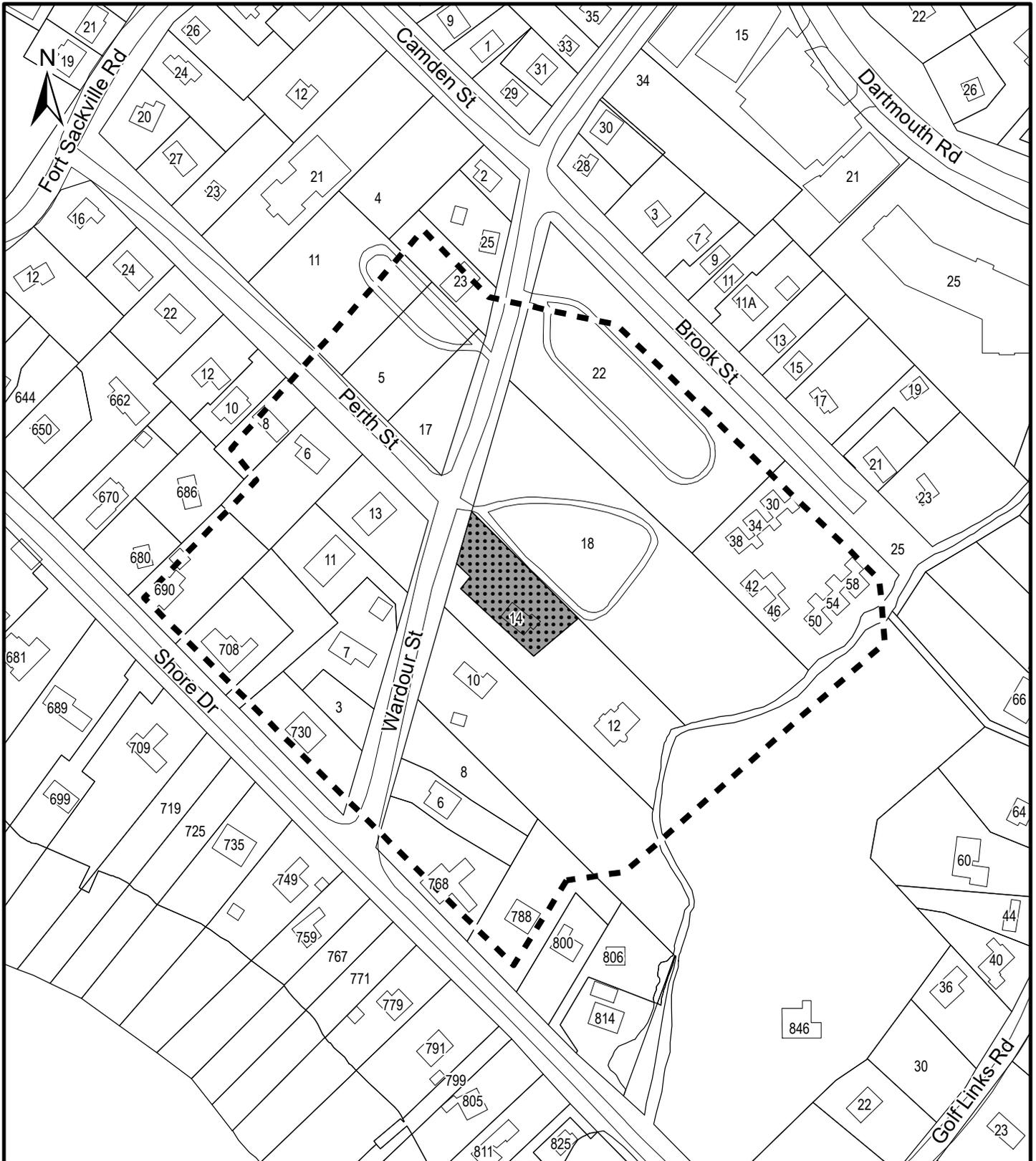
1. Denial of the appeal motion would result in the refusal of the variance. This would uphold the Development Officer's decision and is staff's recommended alternative.
2. Approval of the appeal motion would result in the approval of the variance. This would overturn the decision of the Development Officer.

ATTACHMENTS

Map 1:	Notification Area
Map 2:	Site Plan
Attachment A:	Photos
Attachment B:	Variance Refusal Notice
Attachment C:	Letter of Appeal from Applicant

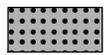
A copy of this report can be obtained online at halifax.ca or by contacting the Office of the Municipal Clerk at 902.490.4210.

Report Prepared by: Sean Audas, Development Officer, 902-476-9553



Map 1 - Notification Area

14 Wardour St
Bedford



Subject Property



Notification Area

HALIFAX



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



Wardour St

Variance Request

Min. Side Yard Setback

Required: 4ft

Proposed: 2ft

Min. Rear Yard Setback

Required: 2ft

Proposed: 0ft

Driveway

Civic # 14
Existing
Dwelling

2 ft

Upper Deck

Existing
Garage

Lower
Deck

0 ft

Map 2 - Site Plan

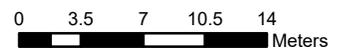
14 Wardour St
Bedford



Subject Property

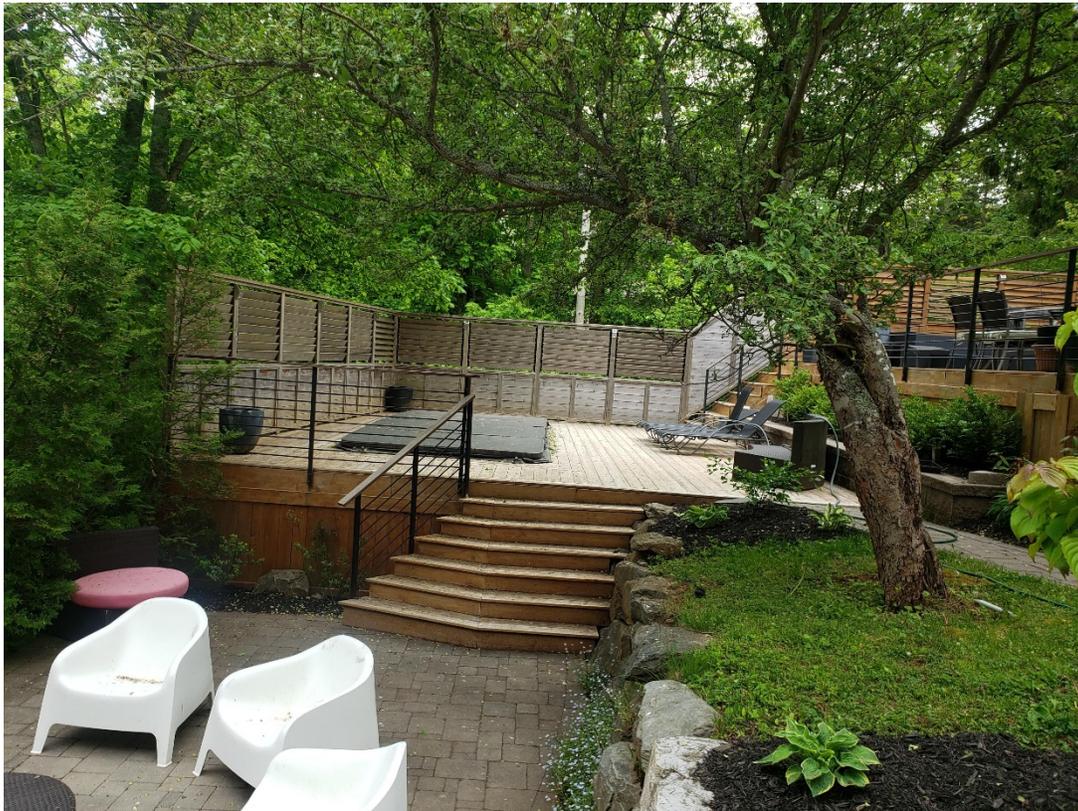
HALIFAX

Bedford
Plan Area



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

Attachment A- Photos



September 2, 2020

Dear Jessica Cesa,

RE: VARIANCE APPLICATION #23033, 14 WARDOUR ST, PID #00415513

This will advise that I have refused your request for a variance from the requirements of the Bedford Land Use Bylaw as follows:

Location: 14 Wardour St, Bedford
Project Proposal: Variance request to reduce the right side yard setback from 4 feet to 2 feet and to reduce the rear yard setback requirement from 10 feet to 0 feet.

LUB Regulation	Requirement	Proposed
Minimum Right Side Setback	4 feet	2 feet
Minimum Rear Yard Setback	10 feet	0 feet

Section 250(3) of the Halifax Regional Municipality Charter states that a variance may not be granted if:

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

It is the opinion of the Development Officer that this variance application does not merit approval because:

- (a) the variance violates the intent of the land use bylaw;

Pursuant to Section 251 of the Halifax Regional Municipality Charter you have the right to appeal the decision of the Development Officer to the Municipal Council. The appeal must be in writing, stating the grounds of the appeal, and be directed to:

**Municipal Clerk
Halifax Regional Municipality
Development Services - Western Region
P.O. Box 1749
Halifax, NS B3J 3A5
clerks@halifax.ca**

Your appeal must be filed on or before **Monday, September 14th**.

If filing an appeal, be advised that your submission and appeal documents will form part of the public record, and will be posted on-line at www.halifax.ca. If you feel that information you consider to be personal is necessary for your appeal, please attach that as a separate document, clearly marked "PERSONAL". It will be provided to the committee and/or council members and staff, and will form part of the public record, but it will not be posted on-line. You will be contacted if there are any concerns.

If you have any questions or require clarification of any of the above, please call Victoria Ascah at 902-719-9609.

Sincerely,

Sean Audas, Principal Planner / Development Officer
Halifax Regional Municipality

cc. Sherryl Murphy- Acting Municipal Clerk
Councillor Tim Outhit

September 10, 2020

Municipal Clerk
Halifax Regional Municipality
Development Services – Western Region
P.O. Box 1749
Halifax, NS B3J 3A5
clerks@halifax.ca

RE: VARIANCE APPLICATION #23033

Dear Sir/Madame,

We are writing to initiate the appeals process with regard to denied Variance Application #23033 at 14 Wardour Street in Bedford.

The application was denied on the grounds that:

- (a) The variance violates the intent of the land use bylaw.

Proposed Side Setback: 2 feet

Proposed Rear Setback: < 1 feet

Background on the Deck in Question:

- The property on which the deck resides (14 Wardour Street) was subdivided approximately 20 years ago, creating a second flag-shaped lot (12 Wardour Street) behind (to the southeast of) the original house, with a driveway along the southwest border of the property. The terrain is such that the property slopes steeply downward behind our house at 14 Wardour Street, leveling off somewhat in the rear (far) portion of the 12 Wardour Street lot.
- At the time we purchased the 14 Wardour Street property in 2012, a large stone retaining wall divided the back yard into two narrow linear swaths across the entire rear width of the property. A wooden deck occupied part of the space. A wooden fence was parallel to the rear property line as well as the southwest side property line. Aside from the decked area, each of the backyard tiers was too narrow to offer reasonably usable space.
- Shortly after we purchased the property, we engaged a well-known landscape architect, who developed a property plan drawing.

- Prior to the landscape plan and construction, we employed a surveyor (SDMM) to ensure that property markers were clearly visible, and no part of the structure projected over the property lines.
- The deck in question was constructed in 2014 in accordance with the specs of the according to property plan, replacing the existing deck and accommodating a 17 x 7 ft swim spa, which was designed into the lower tier of the yard close to the retaining wall. At the time of construction, we were advised that a permit was not required to replace an existing deck, and the swim spa was subject to regulations pertaining to hot tubs/jacuzzi rather than pools.
- The deck and fence/privacy wall in question occupy less than half of the width of the rear property line. In consultation with the then-owner of 12 Wardour Street, we planted a stand of cedars on both sides of the property line, rather than replace the previously existing rear property fence.

Grounds for Appeal

- The side setback in question abuts the swale on the southwest property line adjacent to the swale in which the driveway to 12 Wardour Street resides. Were the deck to have been constructed farther than 2 feet from the property line the location of the basement window well could not have accommodated egress steps to the side of the house.
- The rear setback in question abuts a steep downward slope and the continuation of the driveway, beyond which is the 12 Wardour Street yard and house, estimated to be greater than 100 feet from the rear property line.
- The decking in question surrounds the swim spa, maintaining a safer alternative for ingress and egress than steps. Because of the existing stone retaining wall, the swim spa cannot be relocated, and a decking surround would not be possible while still upholding a 10 ft rear setback.
- In our opinion, the financial burden of removal of the existing decking far exceeds the perceived impact on the neighboring property.

We look forward to presenting this appeal to the Municipal Council. If any further information or documentation is needed we can be reached via phone or email as noted below.

Best Regards,

Jessica Cesa & Erik Mont