



P.O. Box 1749
Halifax, Nova Scotia
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Item No. 10.2.1
Harbour East Marine Drive Community Council
July 13, 2022

TO: Chair and Members of Harbour East- Marine Drive Community Council

-Original Signed-

SUBMITTED BY:

Erin MacIntyre, Director, Development Services

DATE: June 27, 2022

SUBJECT: **Case 23398: Appeal of Variance Refusal – 52 Shalimar Crescent, Cole Harbour**

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 Harbour East- Marine Drive Community Council deny the appeal.

BACKGROUND

A variance request has been submitted for 52 Shalimar Crescent in Cole Harbour to allow a deck, which has been constructed without a permit, to remain closer to the right side property boundary than is permitted by the Land Use By-law.

Staff were made aware of a deck being constructed without a permit at 52 Shalimar Crescent on June 6, 2019. The matter was referred to Municipal Compliance for investigation and action, and compliance case #329948 was opened June 6, 2019. Additionally, an order was posted at the property on June 7, 2019, requiring that the owner cease construction until a building permit was obtained. The permit application to construct a deck (Application 175650) was applied for June 10, 2019. Development staff informed the applicant that a location certificate or survey would be required because the deck appeared to cross property lines, based on available mapping. The permit application was not issued, and was held pending review of the requested additional information. On August 23, 2019 a second stop work order was issued as the deck construction had not ceased. The location certificate requested for the review of permit remained outstanding and the permit was formally refused on September 16, 2019. No appeal of the permit refusal was received from the applicant. Compliance case #329948 resulted in the investigating Compliance Officer issuing a notice on January 7, 2021, with a deadline to comply of February 7, 2021.

Staff received the variance application on January 28, 2021, and during the review, a location certificate was requested which was received on January 6, 2022.

For the reasons detailed in the Discussion section of this report, the Development Officer refused the requested variance (Attachment A) on February 18, 2022. The property owner appealed the refusal (Attachment B) and the matter is now before Harbour East- Marine Drive Community Council for decision.

Site Details:

Zoning

The property is zoned R-1 (Single Unit Dwelling) in the Cole Harbour / Westphal 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 Side Yard	8ft	4.3ft

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 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*.

The *Charter* sets out the following criteria by which the Development Officer may not grant a variance 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, privacy, and aesthetics. Section 4.20 of the LUB specifically does not include decks as a structure permitted to encroach into a required setback. The LUB intends for decks to adhere to the side setback requirements in the R-1 zone. The proposed 4.3ft setback is roughly half of the required setback distance and considerably reduces the separation intended to exist between the dwelling and the shared property line. For those reasons, it is the Development Officer's opinion that this proposal 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.

The difficulty experienced is general to properties in the area. Properties in this neighbourhood were created in 1975, through the same plan of subdivision and are generally consistent in size and dwelling location on each lot. The variance application has not highlighted any site constraint or geographical factors that set this property apart from properties in the area. The eight foot side yard requirement is typical for the R-1 zoning of the area and appears to have been met at the subject property prior to the construction of the deck. Because all properties in the area are similarly required to meet the eight foot side yard setback, and because there are no geographic features unduly constraining the property, it is the Development Officer's determination that the difficulty experienced in meeting the setback is 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.

In this case, the applicant continued building the deck even after being informed of the requirement to obtain a permit and completed construction of the deck in violation of two orders from Municipal Building Officials. Subsequent charges related to the unauthorized construction and completion of this deck without a permit are presently before the Court. It is the Development Officer's opinion that the difficulty experienced results from intentional disregard for the LUB requirements.

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>I have not been given any breakdown as to why it was refused. I would like to know and see the criteria/process and how each step of the variance was completed; showing proof that the process was followed properly.</i>	The grounds for the refusal are stated in the refusal letter and were explained in greater detail subsequent to receipt of the appeal letter.
<i>"My neighbour at 41 Shalimar Crescent has been granted a variance for his backyard deck. Satellite images show, the deck with a pool is sitting on the boundary of his premises. I would like to know why he was granted a variance considering it's a much larger and more intrusive structure than my side deck. Why have I been denied a request for a 4.3 ft side yard set back while my neighbour was granted 1 foot from his boundary line? Does his property have different side yard setbacks; and is his in keeping for the zoning for that area?"</i>	Variances are reviewed on a case-by-case basis against the Charter criteria provided in Section 250(3). Because each property and variance request is unique, the basis for the decision on past variances for surrounding properties do not necessarily relate to this request.

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 2022/23 operating budget for Planning and Development.

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

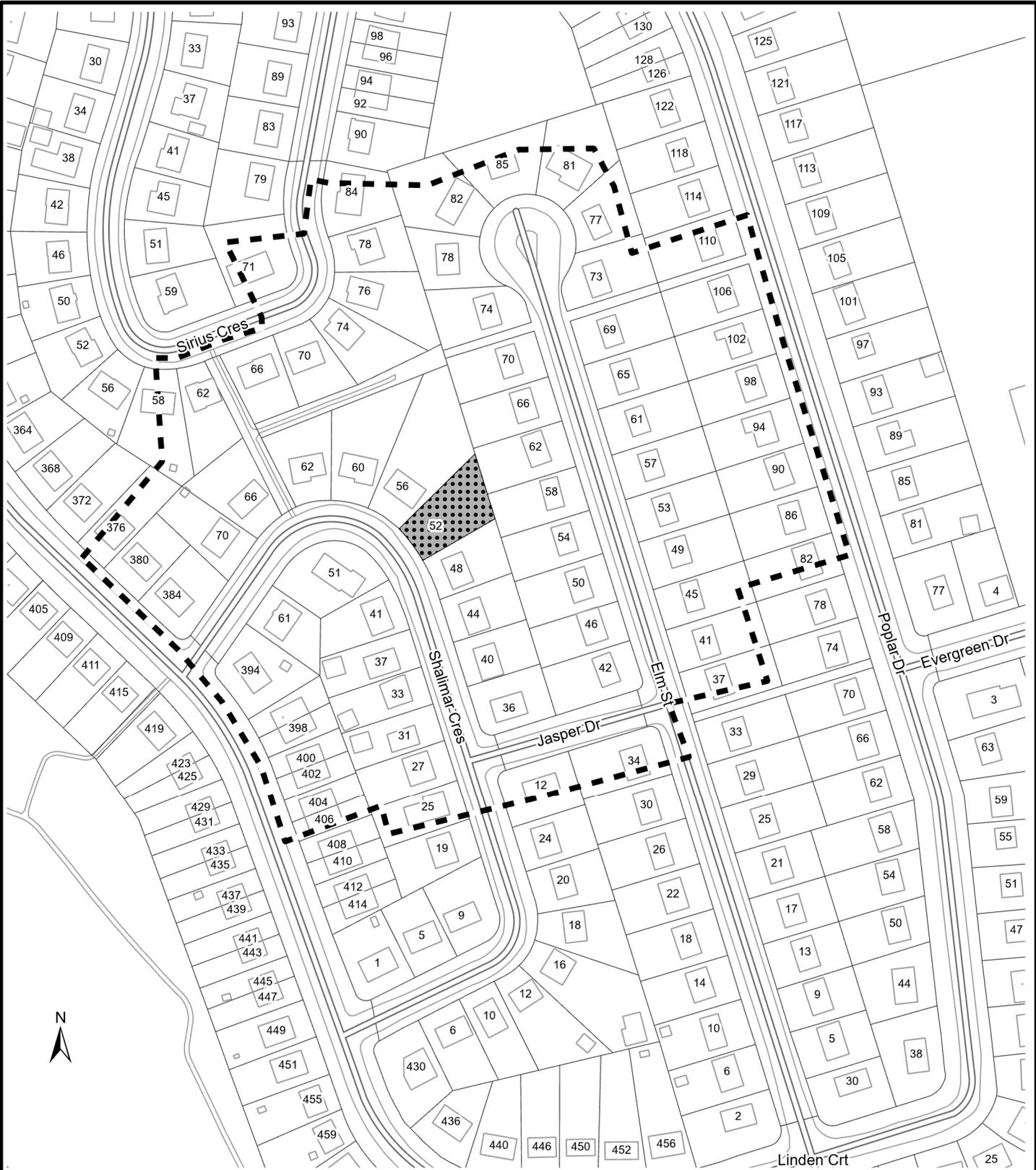
1. Denial of the appeal motion would result in the refusal of the variance. This would uphold the Development Officer's decision and this is staff's recommended alternative.
2. Approval of the appeal motion would result in the approval of the variance. This would overturn the decision of the Development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

ATTACHMENTS

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

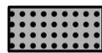
A copy of this report can be obtained online at halifax.ca or by contacting the Office of the Municipal Clerk at 902.490.4210.

Report Prepared by: Telina Debly, Planner 1, 782-640-6120
Trevor Creaser, Development Officer, 902-476-1591

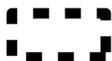


Map 1 - Notification Area

52 Shalimar Cres,
Cole Harbour

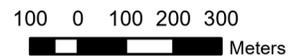


Subject Property

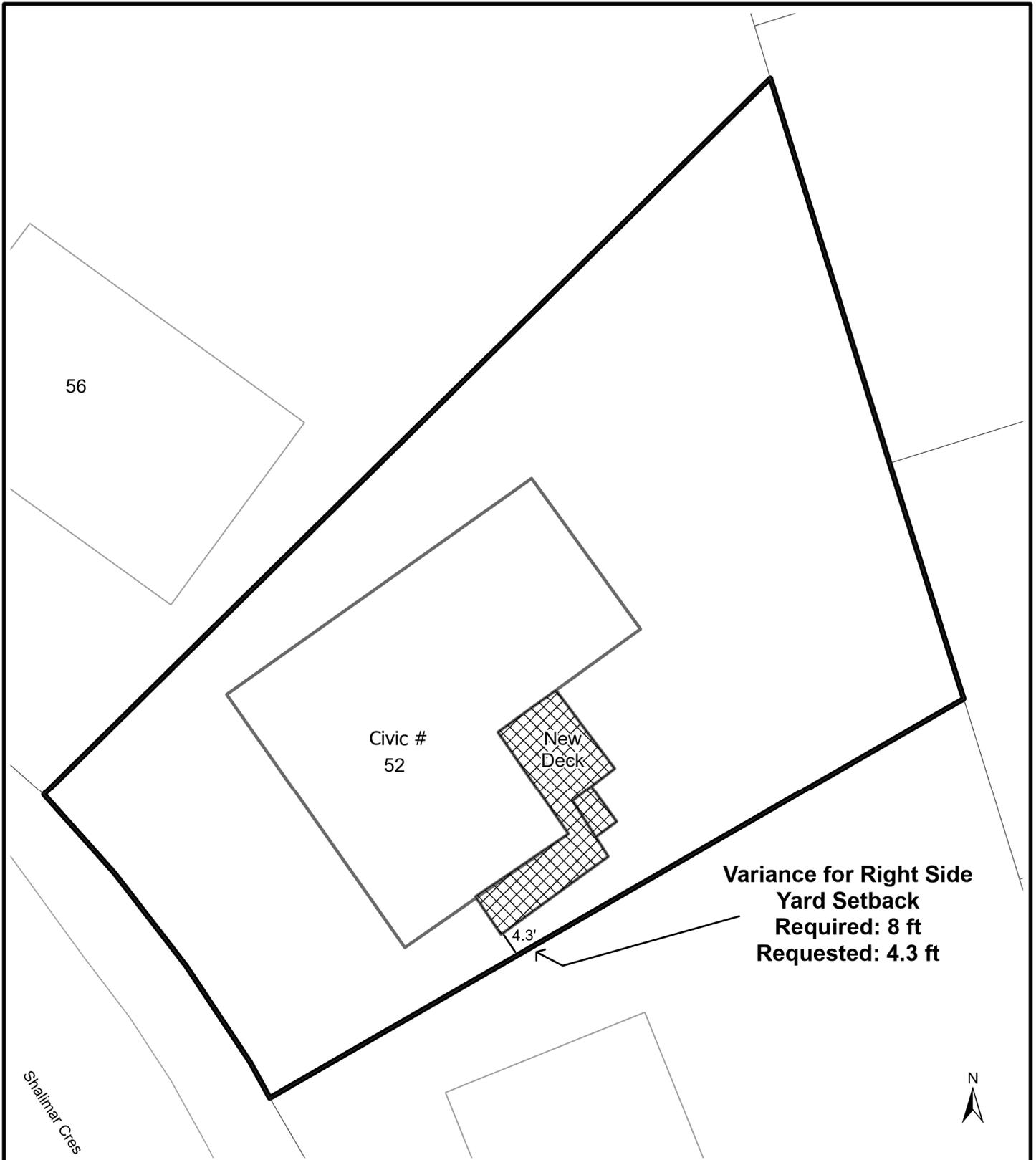


Notification Area

HALIFAX



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



Variance for Right Side
Yard Setback
Required: 8 ft
Requested: 4.3 ft

Map 2 - Site Plan

52 Shalimar Cres,
Cole Harbour

HALIFAX

 Subject Property

5 3 0 5 10
 Feet

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

Attachment A - Variance Refusal Letter

18 February 2022

██████████
52 Shalimar Crescent
Dartmouth, NS. B2W 4L8

██████████
RE: VARIANCE APPLICATION #23398, 52 Shalimar Crescent, Dartmouth, PID 40156051

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

Location: 52 Shalimar Crescent, Dartmouth
Project Proposal: Reduce right yard setback from 8ft to 4.3ft to accommodate recent deck addition

LUB Regulation	Requirement	Proposed
Minimum Right Side Setback	8 feet	4.3 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; and
- (b) the difficulty experienced is general to properties in the area
- (c) the difficulty experienced results from the intentional disregard for the requirements 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 **FEBRUARY 28, 2022**.

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

Attachment A - Variance Refusal Letter

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 Telina Debly, Planner 1 at [REDACTED]

Sincerely,

[REDACTED]

Trevor Creaser, Principal Planner / Development Officer
Halifax Regional Municipality

cc. Municipal Clerk
Councillor Trish Purdy

Attachment B - Letter of Appeal from Applicant [Received as email submission]

[REDACTED]
[REDACTED]
[REDACTED]

Subject: [External Email] Re: Variance Application 23398 - 52 Shalimar Cres

Hello,

Apologies for the delay, I had hoped to respond last week but was extremely busy at work.
I would like to appeal this decision outlined below.

1) I have not been given any breakdown as to why it was refused. I would like to know and see the criteria/process and how each step of the variance was completed; showing proof that the process was followed properly.

I need a better understanding of where my \$1,000 for the variance went? How it was spent?

2) My neighbour at 41 Shalimar crescent has been granted a variance for his backyard deck. Satellite images show, the deck with a pool is sitting on the boundary of his premises.

I would like to know why he was granted an variance considering it's a much larger and more intrusive structure than my side deck.

Why have I been denied a request for a 4.3 ft side yard set back while my neighbour was granted 1 foot from his boundary line?

Does his property have different side yard setbacks; and is his in keeping for the zoning for that area?

Please provide information regarding the inconsistencies around these issues.

3) If your decision is still to refuse the variance I will have no other option than to involve my lawyer. There is enough evidence showing neglect, failing to follow protocols, harassment and cohesion by your department.

I also expect a full refund for \$1,000 for the application; along with \$1,500 fee for the location certificate, as required by you.

I have repeatedly invited you to come and check the deeds and see for yourself, to no avail. This variance application, in my opinion has been very poorly managed and the correspondence from your office, atrocious.

The application has had many hand overs and has not been kept to the proper process.

I look forward to receiving additional information.

Warm regards

[REDACTED]

Sent from my iPhone