

October 13, 2021

Island Regulatory & Appeals Commission  
5<sup>th</sup> Floor, Suite 501  
134 Kent Street  
Charlottetown, PE C1A 7L1

Attention: Philip J. Rafuse

Dear Mr. Rafuse:

Re: Deborah Dennis v City of Charlottetown – LA21019  
Notice of Appeal – August 30, 2021

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This letter is in response to your correspondence requesting the City of Charlottetown's (the "City") Record and Reply to the Notice of Appeal filed by Geoff Gibson, counsel, on behalf of his client, Deborah Dennis (the "Appellant") with the Island Regulatory and Appeals Commission (the "Commission") on August 30, 2021. The City's Record was provided on or about October 6, 2021. Please accept this correspondence as the City's Reply to the Notice of Appeal.

The Appellant has appealed a decision of Council dated August 9, 2021, whereby Council rejected the Appellant's Variance Application needed in order to permit a subdivision of PID #349035 into two lots to accommodate the construction of two new single-detached dwellings on PID #349035 on Viceroy Avenue (the "Application"). The Application consisted of the following requests for:

- One Minor Variance to reduce the minimum front yard setback requirement from 19.7ft to 18ft; and
- One Major Variance to reduce the minimum rear yard setback requirement from 24.6ft. to 15.2ft.

It is the City's position that, pursuant to section 28(1.1) of the *Planning Act*, RSPEI 1988, c P-8 (the "Act"), an appeal of Council's decision to deny the Application is not an appealable decision to the Commission. Section 28(1.1) is specific as to the types of decisions which are

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appealable to the Commission and thus within the Commission's jurisdiction. The City submits that a variance of any kind is not a type of decision listed under section 28(1.1) of the Act and as a result, the Commission does not have jurisdiction to hear this appeal.

Should the Commission determine that the appeal is within the Commission's jurisdiction, the City submits the following in response to each of the four grounds of appeal submitted by the Appellant.

**1. The City failed to exercise its decision-making discretion in a fair, reasonable and transparent manner.**

The City submits that the decision to deny the Application was in fact made in a fair, reasonable and transparent manner; - and requests that the Appellant provide further and better particulars as to her specific allegations in this regard. In the current absence of particulars, the City submits the following.

The City is bound by the processes and procedures as set out in applicable legislation, which in this case, consists of the processes and procedures set out in the Act and the City's Zoning and Development Bylaw (the "Bylaw"). The Act and Bylaw requirements for applications to the Planning & Heritage Department (the "Department") are designed in a way to promote a fair, reasonable and transparent decision making process. Therefore, compliance with the requirements of the Act and the Bylaw, in the City's view, demonstrates that Council's decision was made in a fair, reasonable and transparent manner.

In order to facilitate an intended subdivision application, the Appellant applied to the Department for a minor variance and a major variance. The requested variances are governed by sections 3.8 and 3.9 of the Bylaw, respectively. Section 3.9.3 of the Bylaw states that before an application for a *major* variance can be considered for approval, written notice to surrounding property owners must be provided outlining the details of the application and the avenue for submitting comments. This letter was mailed - **Tab 9** - and comments were received. Furthermore, in advance of the Planning Board Meeting, the Department's Report was made available online and in advance of Council, the Planning Board Minutes were available online or by contacting the Department. The Appellant was actually or ought reasonably have been aware of these processes and procedures.

A Planning Board Meeting was held on August 3, 2021. The Appellant was permitted to speak on numerous occasions to address questions by Planning Board members and to speak to

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the Application generally. Furthermore, as you can see in the email correspondences, found at **Tab 17**, the Department staff was in continuous communication with the Applicant and kept her apprised of all procedural steps to be taken.

**2. The City failed to provide reasons for its decision, contrary to the principles of natural justice and procedural fairness.**

Firstly, the City requests particulars be provided as to the specific principles of natural justice and procedural fairness were not complied with; and, specifically how the City is alleged not to have been in compliance with these principles.

Secondly, in the current absence of such particulars, the City submits the following:

The City states generally that its procedures and decision making process complied with the Act, Bylaw and the common law principles of natural justice and fairness.

The discussion at the Council Meeting on August 9, 2021 [**Tab 13**] when the decision to deny the variances was determined was brief, but Council had followed the recommendation of Planning Board and thus implicitly adopted the reasons of Planning Board. Planning Board is a functioning body of Council and lay persons who are mandated to provide Council with recommendations. Planning Board is given its authority by Council and the applicable legislation, regulations and bylaws. Four of the ten elected City Councilors sit on Planning Board. The City's Record indicates that the Department reports and minutes of the Planning Board Meetings were all made available to Councilors for review on line and in paper copy in advance of their August 9, 2021 meeting.

Planning Board, at the August 3, 2021 Meeting, discussed the Application in detail. In summary, the recommendation to deny was for a number of reasons, including, but not limited to: the Appellant's as-of-right build opportunity, the concerns from numerous residents, the encroachment on the properties to the south of the lot that would occur as a result of a major variance request for the rear yard setback and the possible exacerbation of the traffic issues with the neighbouring elementary school. These reasons were clearly articulated by Planning Board and in an 8-1 vote to deny the Application, were undoubtedly the reasons adopted by Council.

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3. The City failed to apply sound planning principles by: (a) not properly considering the report of the Planning and Heritage Department; and (b) not complying with the principles and objectives of the City of Charlottetown's Official Plan (the "OP")

Firstly, the City requests particulars be provided as to the specific principles and objectives of the OP which the Appellant contends were not complied with and how so.

Secondly, in the current absence of such particulars, the City submits the following:

**(a) The Planning Report**

The City submits that Council's decision to deny the Application was an appropriate exercise of Council's discretion and ultimate decision making authority based on all of the background information provided to them, including, but not limited to, the Department Report, the Planning Board recommendation, the Bylaw (and the OP). Council contends it exercised that discretion in accordance with sound planning principles.

Councilors are elected officials that make decisions to vote a certain way in Council meetings based on all of the background information before them. This information includes the Department Report and recommendation, - but also - the Planning Board recommendation, the Bylaw, the application itself, the voices of the neighbouring residents and any other applicable information. In the process of considering the Application, Councilors would have read and considered the Department Report but at law Council is not obliged to follow the recommendation of the Department regardless of all other information before Council. This point was previously considered by the Commission in *Doiron v City of Charlottetown*, LA10-06 Docket LA10005, where the Commission, in denying Mr. Doiron's appeal held the following:

[39] City Council is not bound by recommendations of their planning department. In fact I believe that they have a public duty to not blindly follow submitted recommendations and to judge the validity of those recommendations. The Council is free to decide in the alternative but they should expect no less of their decision making process than they expect of the basis upon which a staff recommendation is made. In rejecting a recommendation they should demonstrate sound planning reasons for doing so, and if they wish to have the decisions sustained on appeal then it should be clear in the City's decision making process

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that other factors were considered that support the final decision and give weight to the decision. As it is a planning matter, the final decision should be rooted in planning principles.

The Commission has further held in past decisions that it will not lightly substitute its opinion for the elected Council's unless Council manifestly failed to adhere to sound planning principles [see: *L & A MacEachern Holdings Ltd. v City of Charlottetown*, Order LA08-04]. In this case, the City submits that Council's decision to deny the Application was made in accordance with sound planning principles even though Council's decision was not the recommendation of the Department.

Furthermore, the Department Report, found at **Tab 10** of the City's Record, is not black and white: the report outlines each aspect of the Application and in the end, identifies a number of positives and a number of shortcomings respecting the Application. In the end, the Department did recommend approval to Planning Board based on its weighting of the positive aspects of the Application over the shortcomings (see the chart at p. 10 of the Report). Planning Board identified and agreed moreso with the shortcomings of the Application, and as a result, recommended to Council for denial. Council had both the staff and Board recommendations and reports before it and sided with the Planning Board.

The reasons supporting denial, as noted in the response to ground 2 above, were each considered by the Department at some point throughout their Report, which in the City's view, establishes that Council's decision, based on a recommendation of Planning Board was made in accordance with due process and sound planning principles. The Department, Board and Council each have differing roles in the planning process prescribed by the Act and Bylaw. City Councilors, as elected representatives of their constituents also have an obligation to consider the perspectives and input from their constituents.


Case law and the Commission have recognized that elected municipal councilors should be accorded a certain latitude / deference due to the unique nature of their job (see: *Nanaimo (City) v Rascal Trucking Ltd*, 2000 SCC 13).

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4. Such further and other grounds as may be apparent upon review of the record and the Commission may permit.

The City reserves their right to make additional submissions on any further grounds for appeal and as to any of the particulars requested herein which are subsequently submitted by the Appellant to the Commission in advance of the hearing.

Yours very truly,

*for*   
David W. Hooley, Q.C.  
DWH/mm

cc. Alex Forbes, Manager of Planning  
Geoff Gibson, Counsel for the Appellant