

April 8, 2022

VIA HAND DELIVERY

The Island Regulatory & Appeals Commission
Attention: Philip Rafuse
National Bank Tower, Suite 501
134 Kent Street
Charlottetown, PEI
C1A 7L1

Dear Mr. Rafuse:

Re: **Sheila Scott v City of Charlottetown – Appeal LA22-03**

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 Sheila Scott (the "Appellant") filed with the Island Regulatory and Appeals Commission (the "Commission") on February 1, 2022 (the "Appeal"). The City's Record was provided on April 30, 2022. Please accept this correspondence as the City's Reply to the Notice of Appeal.

The Appellant has appealed a decision of the City dated January 7, 2022 approving a request by the Applicant Developer, Prebilt Structures Ltd. (the "Applicant"), for issuance of an Occupancy Permit as it related to the development at 11-13 Essex Crescent (PID 1127984) (the "Property") of a Semi-Detached Residential dwelling (the "Permit") [Tab 10].

The Appellant has appealed the Permit for one primary reason being the water run-off from the Property onto her property and the properties of her neighbour. In support of the Appeal, the Appellant obtained the services of David R. J. Morris, P. Eng, PEILS, CLS, of Morris Geomatics and Engineering Ltd. [Tab 11].

The Property

For clarity, we have attached hereto an aerial map of Essex Crescent and Royalty Road to assist in better understanding the properties that we are addressing. We have reproduced a portion of this map herein:

David W. Hooley, Q.C. | Senior Counsel

Direct 902 629 3903 Main 902 628 1033 Fax 902 566 2639 Email dhooley@coxandpalmer.com

Dominion Building 97 Queen Street Suite 600 Charlottetown PEI C1A 4A9

Practicing as Professional Corporation

*20009937/00338/929687/v3

April 8, 2022



The Blue X marks the Appellant’s property – 118 Royalty Road (the “Appellant’s Property”), the Red X marks the Property – 11-13 Essex Crescent and the Black X marks the property directly abutting the Appellant’s Property – 23-25 Essex (the “Abutting Property”).

At Tab 13 of the City’s Record, there are various communications from the Appellant to the City regarding storm water runoff. Some of this correspondence can be found at pgs. 79-87, 90, 97, 107, 187, 199. This correspondence is in relation to the Appellant’s Property and the Abutting Property, neither of which are the subject of this appeal. The picture is slightly dated as the Abutting Property currently has a building on it, but it is not at the occupancy stage and has not been issued an occupancy permit.

The City has never received a complaint about the Property and only became aware of any issue with the Property when the Notice of Appeal was filed by the Appellant. It appears that it is the Abutting Property that the Appellant has issues with. However, it is the Property that

April 8, 2022

is under appeal so the following comments are intended to address the Property and not the Abutting Property.

The Permit

The Permit was issued on January 7, 2022 in accordance with section 3.7 of the City's *Zoning & Development Bylaw* (the "Bylaw"). The City included three conditions that need to be satisfied by the Applicant. If the conditions are not satisfied, the City can revoke the Permit and the Applicant can be penalized under section 3.18 of the Bylaw. The conditions of the Permit are as follows:

1. The Final Drainage Plan and landscaping requirement shall be completed by no later than June 15, 2022.
2. The development deposit shall not be released until the Final Drainage Plan and landscaping requirements are completed.
3. Rough grading and appropriate siltation measures shall be installed to mitigate surface water runoff and erosion until final grading is complete.

The conditions, as is clearly shown, are intended to remedy the complaints that the Appellant takes issue with. The Applicant commenced construction in the fall of 2021 and did not substantially complete construction until January, 2022. In Prince Edward Island, fall and winter are wet seasons and some water runoff during construction is unavoidable. Hence, the City's requirement for satisfaction of the conditions of the Permit.

Section 6.4.3 of the Bylaw provides that surface drainage on a lot will be approved in two stages:

- 6.4.3 For any Development, the surface drainage on the Lot shall be approved in two stages:
 - a. Approval of the proposed Surface Drainage Plan at the time of the approval of the Building and/or Development Permit; and
 - b. Approval of the Final Grading Plan, which shall be submitted after the site grading portion of the Development has been completed

April 8, 2022

and which shall be a condition of the approval of an Occupancy Permit, when applicable.

In this matter, the proposed surface drainage plan was received by the City on May 14, 2021 [Tab 3, pg. 4] in accordance with section 6.4.3(a) of the Bylaw. The Permit was then issued on January 7, 2022, a condition of which was completion of the Final Drainage Plan and landscaping on or before June 15, 2022, in accordance with section 6.4.3(b).

Section 6.4.4 of the Bylaw then provides as follows:

6.4.4 The Development Officer may waive the requirements for a Final Grading Plan as a condition of the final Occupancy Permit during winter months, provided the property has been rough Graded and appropriate siltation measures are in place to mitigate surface water run off or erosion during this period.

The intent behind this provision is to account for the weather in Prince Edward Island and the difficulties that developers/homeowners would face in seeking an occupancy permit during the winter months when the final grading has not been completed. In this matter, the Development Officer permitted the final grading to take place in the Spring (condition #1) provided rough grading and appropriate siltation measures were implemented (condition #3) to mitigate water runoff. Rough grading on the Property was completed and, as shown on the preliminary surface drainage plan, a dry well was installed. In addition to the dry well installation, a water pump was installed which, during periods of heavy rain, pumps water out of the dry well onto Essex Crescent, which is a public road.

As such, the City anticipates that when the weather permits, in the coming weeks, the Applicant to satisfy the conditions of the Permit – i.e. complete final grading, landscaping and adherence to the Final Drainage Plan – the water runoff from the Property will be resolved.

However, as stated, there is no water runoff onto the Appellant's Property from the Property, rather, *the Appellant's concern appears to be related to the Abutting Property, which is not the subject of this appeal.* Further, the City is of the view that the water runoff onto the Appellant's Property cannot be entirely attributed to the Abutting Property. The Appellant's Property is the lowest graded property in her neighbourhood. Before the Applicant commenced development of his subdivision, the Appellant's Property and her neighbours drained directly onto the Essex Crescent properties. Since development, water runoff onto the

April 8, 2022

Essex Crescent properties has slowed and as development continues, and eventually comes to an end, the City anticipates that water runoff will be properly managed and directed to the appropriate drainage systems.

The Report

The Appellants filed a Report with the Commission dated January 27, 2022, authored by David Morris, P. Eng, PELS, CLS, to address the surface water drainage on the Property (the "Report"). Similar to the issues outlined by the Appellant, the Report addresses the Appellant's Property and the properties on Essex Crescent that immediately abut her property. These properties are not the subject of this appeal.

The City intends to address the Report at the hearing of this matter. However, the City would like to reference a point made by Mr. Morris on page 2 of the Report. Mr. Morris states the City refused/failed to provide him with certain documents related to the development on Essex Crescent, including engineered drawings. To clarify, legally, the City has no authority to publicly disclose developer drawings or engineered drawings, such as surveys, site plans and surface drainage plans. These plans are not owned by the City – they are owned by their author – and can only be released directly by the author, through a FOIPP request - where permission from the author is required or through an appeal to the Commission where the City produces a record of their file.

Relief Sought by the Appellant

In her Notice of Appeal, the Appellant list the four pieces of relief she is seeking [Tab 11, pg. 42]. They are as follows:

1. The storm water from Essex Crescent development be appropriately managed through engineered design drawings and construction to ensure that all waters from the development are directed to a storm water system within a public right of way.
2. The City of Charlottetown take appropriate measures during to ensure that precipitation that falls during the winter months will not back up and flood our basement, through temporary measures such as a swale or ditch.

3. The City of Charlottetown put in place a bylaw, policy or manual to manage storm water and in particular storm water from new development.
4. The City of Charlottetown reinstate the provisions of the bylaw (September 2018), regarding the grading of lots, and certification associated with the stage of development.

The Commission is created by statute, meaning that the Commission's power and authority are defined by statute. As a result, the Commission does not have inherent jurisdiction over matters and must exercise only that authority and those powers conferred upon the Commission by the legislature¹.

The Commission's authority to hear and decide appeals of municipal decisions respecting land use is granted by the *Planning Act*, R.S.P.E.I. 1988, c P-8 (the "Act"). The City submits that while the Commission has the authority to hear and decide this matter, pursuant to subsections 28(1.1) (a)(i.l) and (8), much of the relief sought by the Appellant goes beyond the scope of the kind of Order the Commission would ordinarily issue. Generally speaking, the Commission may allow the appeal with or without conditions; or, dismiss the appeal. This case may lend itself to mediation which may in turn facilitate a more flexible outcome that is mutually amenable to the parties.

With respect to item (1), the City submits that the preliminary drainage plan [Tab 3], prepared by Derek A. French Professional Services Inc. was received by the City on May 14, 2021. The preliminary drainage plan shows the direction of drainage onto Essex Crescent and additionally, a dry well in the back left of the Property. The Final Drainage Plan (and landscaping) will be completed and submitted to the City on or before June 15, 2022. The Final Drainage Plan will be prepared by an engineer to ensure that all drainage from the Property is directed to the appropriate place.

With respect to item (2), condition #3 of the Permit, made pursuant to section 6.4.4 of the Bylaw, requires the Applicant to install rough grading and siltation measures to mitigate water runoff until such time as final drainage and landscaping can be completed. Rough grading, to the extent it could happen given the weather, has been done on the property and a dry well, along with a water pump connected to the drywell, was installed at the back of the property.

¹ 629857 NB Inc. et al. v City of Charlottetown, Order LA09-11, paras 14-15. (Appendix "A")

April 8, 2022

With respect to item (3), the City has a process for submission of grading plans as set out in 3.7 and 6.4 of the Bylaw. The City is guided by the Bylaw processes and adheres to it when processing applications involving storm water management and drainage. The City is always open to making improvements to its policies and bylaws where experience indicates changes are needed but making policy and bylaw changes are, respectfully, not ordinarily appropriate matters for an Order from the Commission in disposing of an individual appeal.

With respect to item (4), the City also requests further and better particulars of this claim for relief and reserves the right to respond to those particulars within a reasonable time. Exactly what provision were in the 2018 iteration of section 6.4 which the Appellant is referring to? The Bylaw, along with all other City bylaws, is an evolving document that is constantly subject to amendments to respond to experience and changes in processes, procedures, rules, regulations and advancements in the development/construction industry. The Bylaw amendments in 2018 were no different.

To reiterate, the City is of the view that the Commission does not have the authority, pursuant to the Commission's statutory authority, to order the City make amendments to their policies or bylaws².

In closing, the City anticipates that when the final grading and landscaping is completed on or before June 15th, the Appellant's concerns respecting storm water runoff will have been adequately addressed. The City suggest the appeal be placed in abeyance until we can determine if the Appellant's concerns have been adequately addressed by measures already in place.

Yours very truly,


for David W. Hooley, Q.C.

DWH/mm

² The exception to this is when a particular bylaw amendment is under appeal. In that case, the Commission has the authority to uphold or deny a City amendment.

April 8, 2022

CC. Alex Forbes, Manager of Planning & Heritage Department
Scott Adams, Manager of Public Works Department
Duncan Shaw, Applicant
Sheila Scott, Appellant