



PRINCE EDWARD ISLAND

Regulatory & Appeals Commission

Commission de réglementation et d'appels

ÎLE-DU-PRINCE-ÉDOUARD

**Date Issued:** April 29, 2024

**Docket:** LA23019

**Type:** Planning Act Appeal

INDEXED AS: Geraldine Johnston-Grinton and Paul Grinton v. Town of Three Rivers,  
2024 PEIRAC 4 (CanLII)

Order No: LA24-04

**BETWEEN:**

Geraldine Johnston-Grinton and Paul Grinton

**Appellants**

**AND:**

Town of Three Rivers

**Respondent**

**AND:**

Kreative Acres Corp.

**Developer**

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## ORDER

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Panel Members:

J. Scott MacKenzie, K.C., Chair

M. Douglas Clow, Vice-Chair

Kerri Carpenter, Commissioner

Compared and Certified a True Copy

(Sgd. Jessica Gillis)

General Counsel

Island Regulatory and Appeals Commission

## Contents

<b>Appearances &amp; Witnesses .....</b>	<b>3</b>
<b>1. Introduction.....</b>	<b>4</b>
<b>2. Background.....</b>	<b>4</b>
<b>3. Issues .....</b>	<b>5</b>
<b>4. Disposition .....</b>	<b>5</b>
<b>5. Evidence .....</b>	<b>5</b>
<b>6. Analysis.....</b>	<b>6</b>
<b>7. Conclusion .....</b>	<b>14</b>

## **APPEARANCES & WITNESSES**

- 1. For the Appellants, Geraldine Johnston-Grinton and Paul Grinton:**

**Counsel:**

Shea Callaghan, Key Murray Law

**Witnesses:**

Geraldine Johnston-Grinton

Paul Grinton

Randy K. MacDonald, CEO/Founder, RKM FIRE Safety Consulting

- 2. For the Respondent, Town of Three Rivers:**

**Counsel:**

Melanie McKenna, Cox & Palmer

**Witnesses:**

Lee Kenebel, Planning & Development Officer, Town of Three Rivers

- 3. For the Developer, Kreative Acres Corp:**

**Counsel:**

Nicole McKenna, Carr, Stevenson & MacKay

## 1. INTRODUCTION

1. This is an appeal of the decision of the Town of Three Rivers (the “Town”) to issue a development permit to Kreative Acres Corp., the Developer, to construct a mixed-use development consisting of a 22-unit apartment building with ground floor commercial space, together with a major variance for an additional 4.8ft of building height, on land at PIDs 198069, 196675 & 196642, on School Street in Montague, PEI (the “Development”).
2. The Appellants live across the street from the Development. They have argued that in approving the Development, including the major variance, the Town did not conform with its Official Plan or Development Bylaw, and made various procedural errors in the approval process.

## 2. BACKGROUND

3. On May 12, 2023, the Developer submitted a Development Permit Application (“Application”) to the Town of Three Rivers seeking approval to develop a 22-unit apartment building with commercial space and underground parking. The Application also sought a major variance for additional building height.
4. On May 30, 2023, Lee Kenebel, Planning & Development Officer for the Town, emailed the Developer to say the application had been “registered”. Mr. Kenebel’s email also indicated that the Town’s new official plan and bylaw had recently come into effect<sup>1</sup>, giving the Town a way to deal with the Developer’s variance request.
5. The Town sent a notification letter to nearby property owners on June 1, 2023, advising them that the proposed major variance application would be presented to Planning Board on June 22, 2023, and to Council on July 10, 2023.
6. At the Town’s Planning Board meeting on June 22, 2023, the Planning Board voted unanimously to recommend Council approve the Development. At the regular meeting of Council on July 10, 2023, Council voted to approve the Development, including the major height variance.
7. It was after this time that an error was found in the approval with respect to the PIDs for which the Development was approved. As a result, the Town sent a second notification letter to nearby property owners on July 13, 2023.
8. At the special meeting of Planning Board on July 20, 2023, Planning Board rescinded their initial recommendation and approved a second recommendation to Council to approve the Development, with the corrected PIDs. At a special meeting of Council on July 24, 2023, Council rescinded the initial approval and unanimously approved the Development, including the major height variance, with the corrected PIDs.
9. Following Council’s approval, a development permit was issued to the Developer, on July 24, 2023, approving a 22-unit apartment building with ground floor commercial space, together with a major variance for an additional 4.8ft of building height subject to the following conditions (the “Development Permit”):

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<sup>1</sup> The Three Rivers Development Bylaw was approved and adopted by Council on April 24, 2023, and approved by the Minister of Housing, Land and Communities on May 25, 2023.

Condition 1: The Permit is valid for 12 months from the date of issue.

Condition 2: The methodologies for erosion and sediment control before/during/after the construction process detailed on Drawing C100 shall be implemented upon the commencement of the development and remain in place until completion of the development hereby approved.

Condition 3: This applicant is required to secure any access/entrance permits through the Department of Transportation and Infrastructure.

Condition 4: The approved plans are:

- The completed application form.
- Drawings A001, A002, A030, A100, A101, A102, A200, A300, A301, & C100 dated May 12, 2023.

10. On August 11, 2023, the Appellants filed a Notice of Appeal with the Commission. The appeal was heard on February 7, 2024.

### **3. ISSUES**

11. The appeal raises two main questions for the Commission. First, the Commission must determine whether the Town followed its process and discharged its duty of procedural fairness. Second, the Commission must consider whether the decision made by the Town was one based on sound planning principles.

### **4. DISPOSITION**

12. For the reasons that follow, the appeal is dismissed.

### **5. EVIDENCE**

13. The evidence before the Commission consisted primarily of the Town's record of the decision, a total of approximately 185 pages and comprised of supporting information, including: the Developer's application; correspondence between the Developer and Mr. Kenebel and the Appellants and Mr. Kenebel; the Development Report of Mr. Kenebel; and the verbatim minutes of the Planning Board and Council meetings where this Application was discussed.

14. At the hearing, the Town called one witness: Lee Kenebel, the Planning & Development Officer for the Town. The Town also made written submissions before the hearing.

15. The Appellants both testified at the hearing. They also called Randy K. MacDonald, CEO/Founder of RKM FIRE Safety Consulting, as a witness to speak to whether the Development Permit issued complied with fire safety codes.

16. In addition, prior to the hearing the Appellants made written submissions outlining their position. The submissions were supported by various documents, including minutes from previous Council meetings, photographs of the property taken by the Appellants, information respecting the Appellants' request to access the development application, and

the Appellants' notes from her presentations to Planning Board and Council in respect of this proposed development.

17. The Developer did not give any evidence, nor did he provide written submissions. At the hearing, Counsel for the Developer advised that the Developer supports the position and submissions of the Town on the matters under appeal.

## 6. ANALYSIS

### A. Authority and Guideline

18. The parties agree that the guideline developed by the Commission for exercising its appellate authority under the *Planning Act*<sup>2</sup> is applicable in this case. The guideline involves two main considerations:<sup>3</sup>

- 1) Whether the municipal council followed the proper procedure as required by its bylaw, the Planning Act and the law in general, including the duty of procedural fairness; and
- 2) Whether the decision made by the municipal council has merit based on sound planning principles in the field of land use planning and as enumerated in the Official Plan and Bylaw.

19. The Commission does not lightly interfere with decisions made by a municipal council.<sup>4</sup> The Commission will typically be deferential toward planning decisions by Council that are properly made, and will generally be reluctant to interfere with a decision on the basis that it is not consistent with sound planning principles where that decision is supported by objective and reliable evidence. This evidence must come from planning professionals confirming that the decision is based on the *Planning Act*, the applicable official plan and bylaw, and sound planning principles.<sup>5</sup>

### B. Procedural Issues

20. The Appellant raised several procedural issues with the Town's decision. We have summarized and paraphrased them as follows:
- i. The Application was approved under the incorrect bylaw;
  - ii. The Application was incomplete, did not include the required documentation, and is inconsistent with the approved Development Permit;
  - iii. The Appellant was not provided an appropriate opportunity to view the Application; and

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<sup>2</sup> RSPEI 1988, P-8.

<sup>3</sup> See, for example, Order LA22-07, *Landfest Company Ltd. v. Town of Stratford*, at para 32 [*Landfest*]; and Order LA17-02, *APM Construction Services Inc. v. Community of Brackley*, at para 21.

<sup>4</sup> *Landfest* at para 32.

<sup>5</sup> Order LA18-02, *Queens County Condominium Corporation No. 40 v. City of Charlottetown*, at para 41. [QCC No. 40]

- iv. Council approved the major zoning variance without providing adequate notice to nearby property owners.
21. Each of these procedural issues will be addressed below. In accordance with previous Orders of the Commission, we will also consider the reasons provided by Council in approving this Development.

**i. The Application was approved under the incorrect bylaw.**

22. The Appellants have argued that the Developer's Application was approved under the incorrect bylaw. The Developer submitted his application on May 12, 2023, when the bylaw in force was the 2017 Town of Montague Zoning Bylaw (the "2017 Bylaw"). The new Three Rivers Development Bylaw (#2023-02) (the "2023 Bylaw") only became effective on May 25, 2023.<sup>6</sup> Therefore, the Appellants have argued that the Developer's Application should have been considered in accordance with the provisions of the 2017 Bylaw in force at the time the Application was submitted.
23. The Town's position is that the Application was properly assessed in accordance with the 2023 Bylaw, because the Application was not "registered" until May 30, 2023, after the 2023 Bylaw became effective. The Town further submits that the parties mutually agreed that the Application would be registered and considered after the 2023 Bylaw became effective.
24. At the hearing, Mr. Kenebel testified that when the Town and Developer began having conversations about this Development, the parties were both aware there would soon be a new Official Plan and Development Bylaw ("2023 Planning Documents").<sup>7</sup> He testified that the Application was made within days of the 2023 Planning Documents becoming effective, and was not registered until May 30, 2023, after it was reviewed and assessed by the Town's planning staff. An email from Mr. Kenebel to the Developer on May 30, 2023, states (in part):

Just a quick update to say your application has been registered. On Monday [sic] the new official plan & bylaw came into effect. This gave us a means to deal with the height variance that is within the new bylaw provisions for major variances. Something the Montague bylaw lacked. [...]

25. Mr. Kenebel testified that it is inevitable there will be live case work ongoing when new planning documents are adopted, and a decision has to be made about which plans that live case work will be considered under. In this case, the Developer was satisfied to have the Application assessed and considered under the new 2023 Planning Documents. Mr. Kenebel further testified the Application met the requirements of the 2023 Planning Documents.
26. In this case, the Commission agrees with the position of the Town. The Town's evidence demonstrates that though the Developer submitted his application on May 12, 2023, he was aware the approval of the 2023 Planning Documents was imminent and agreed to his Application being assessed and considered in accordance with those new planning documents. The Developer did not provide any evidence to the contrary. Nor did the

<sup>6</sup> Section 17 of the *Planning Act*, RSPEI 1988, P-8, states: "[Bylaws] shall be subject to the approval of the Minister and shall be effective on the date of approval by the Minister [of Housing, Land and Communities]."

<sup>7</sup> Public Notice was published in the Royal Gazette on June 24, 2023, giving notice that the Minister approved the new Official Plan and Development Bylaw for the Town of Three Rivers, effective May 25, 2023.

Appellants, for that matter. The Application was registered by the Town on May 30, 2023, after the 2023 Planning Documents became effective. The Commission is satisfied that, in this case, the Application was properly considered and approved under the 2023 Planning Documents.

**ii. The Application was incomplete, did not include the required documentation, and is inconsistent with the approved Development Permit.**

27. The Appellants raised several issues with the Developer's Application. First, they pointed out sections of the Application that were not filled in by the Applicant, including a section relating to municipal services (i.e. water and sewer connections). They also submitted that the Application was not accompanied by all required documentation. In particular, the Appellants submitted that the plans attached to the Application did not show the setbacks to proposed structures, as required by subsection 3.2.3.2 of the 2023 Bylaw, and no survey was provided. Finally, the Appellants also submit that the approved Development Permit is not consistent with what was requested on the Application. For example, the Application requested a variance of 5 feet 10½ inches, while the approved Development Permit authorized a height variance of 4 feet 10 inches.
28. To support these grounds of appeal, the Appellants relied on a previous order of the Commission that commented on the issues with incomplete development applications. In Order LA20-03, *PEI Energy Corporation v. Rural Municipality of Eastern Kings*, the Commission held that planning and development must be approached in a professional manner, consistent with a process that provides for development permits to be issued only after all pertinent facts and information have been filed with a Municipal decision-maker. The Commission commented that this allows for an informed decision to be made to approve or reject an application and to ensure what is being proposed complies with the bylaws, the official plan and sound planning principles.
29. In response, the Town submitted:
  - The Town often receives incomplete applications and works with applicants to ensure that all necessary information is provided before the application is considered by Planning Board and Council. Mr. Kenebel's testimony supported this submission.
  - The Developer's Application included all required documentation, including site plans and floor plans, compliant with section 3.2.3 of the 2023 Bylaw, and Town planning staff was easily able to ascertain various measurements, including setbacks, from the plans submitted by the Developer.
  - With respect to the survey, the 2023 Bylaw provides the Town with discretion to require a survey (per s. 3.2.3.5), but regardless, the Town was in possession of a survey for the relevant property that was stamped and certified by a Prince Edward Island Land Surveyor following the March 2022 lot consolidation.
  - In an effort to work collaboratively with applicants, Town planning staff regularly assist applicants with amendments to their applications to ensure compliance with the Official Plan and Development Bylaw. Mr. Kenebel testified that more often than not, permit applications change throughout their processing to ensure they are accurate and comply with the Development Bylaw. In this case, the proposed



development presented to and approved by Council is consistent with the Development Permit issued to the Developer.

30. The Town distinguished Order LA20-03 from the present case by highlighting that in that case, the development permit was issued upon receipt of an incomplete application and an approval process described by the Commission as cursory, at best. Further, the development officer in that case had testified that after reading the application and meeting with the applicant, he was still not sure what the applicant intended to build. Finally, at the hearing before the Commission, the applicant still could not articulate his proposed development.
  31. Based on the above, the Appellants have not persuaded the Commission with respect to these grounds of appeal. The evidence demonstrates that the Town's planning staff worked with the Applicant to ensure that a complete and supported Application was received, assessed and presented to Planning Board and Council. The Commission is satisfied, based on the Record and testimony of Mr. Kenebel, that the Developer's Application was accompanied by the required plans and information as outlined at section 3.2.3.2 of the 2023 Bylaw. Finally, the Commission accepts that permit applications often change throughout the application process. In this case, the final proposed development and height variance that was presented to Planning Board and Council, and ultimately approved by Council, is consistent with the Development Permit issued to the Developer.
  32. The Commission also agrees with the Town that Order LA20-03 can be distinguished. The evidence before the Commission reflects that the Developer's proposed development was described with sufficient clarity, particularly before it was presented to Planning Board and Council, such that it allowed for an informed decision to be made to approve or reject the Application and to ensure what was being proposed complied with the bylaws, the official plan and sound planning principles.
- iii. The Appellant was not provided an appropriate opportunity to view the Application.**
33. The Appellants submitted that they did not have a proper opportunity to view the Developer's Application and supporting documents prior to the approval by Council. Their position is that the planning process is a public one and that residents should have access to all application information. Dr. Johnston-Grinton testified that she attended the Town's office on or around June 23, 2023, to view the Application and supporting documents, but that the detailed plans (for example, floor plans) were not included with the information made available for public viewing. She testified that Mr. Kenebel was not there the day she attended, and that Patrick Donahue, the Town's Development Technician, showed her to a table where the information was located. Dr. Johnston-Grinton also testified that she met with Mr. Kenebel twice.
  34. Testimony from Mr. Kenebel contradicts this. He testified that the Application and supporting documents were available for residents to come and see. He said he could not pinpoint the date Dr. Johnston-Grinton attended the office, but that the plans were there as a printed package on a table outside his office. An email from Mr. Kenebel to Dr. Johnston-Grinton on June 26, 2023, attached "a range of site/elevation and renderings" and noted that "paper copies will remain available at the office for viewing". Mr. Kenebel sent a second email attaching plans to Dr. Johnston-Grinton on July 4, 2023. Further, email correspondence in the Record indicates that Mr. Kenebel responded to some of the

Appellants' concerns via email, and his testimony is consistent that he met with Dr. Johnston-Grinton twice.

35. The Commission agrees with the Appellants that the planning process is a public one and that residents should be afforded a full and fair opportunity to review the complete application, particularly when they are among the residents entitled to specific notice of an application in accordance with the Bylaw. In this case, the evidence discloses that Mr. Kenebel provided at least some of the plans to Dr. Johnston-Grinton via email, and the parties' evidence was consistent that they met twice to discuss the Appellants' concerns. Therefore, despite the discrepancy about what documents were available to Dr. Johnston-Grinton the day she attended the Town's office, the Commission is otherwise satisfied that the Town made good efforts to ensure the Appellants had a fair opportunity to review the Application.
36. As a final note, the Appellants also raised some issues with respect to Town's access to information process pursuant to the Town's Access to Information and Protection of Personal Property Bylaw. Those issues are beyond the jurisdiction of the Commission to comment on in this appeal. However, we will say that the Commission views the public's participation to be an important part of the planning process, particularly where public notice is required by the planning authority's bylaw or other governing documents. In order for residents to fully participate, they must have full and fair access to an application, and the Commission encourages the Town to facilitate that access.

**iv. Council approved the major zoning variance without providing adequate notice to nearby property owners.**

37. The Appellants also argued that proper notice of the major variance was not given to nearby property owners in accordance with section 3.8.2.b of the 2023 Bylaw. They referred to one specific property owner and submitted that their name and address is not listed in the Town's Record as having received a notification letter. The Appellants did not specify whether the issue was with the first notification letter on June 1, 2023, the second notification letter on July 13, 2023, or both.
38. The Town's evidence contradicts this submission. Mr. Kenebel testified that all property owners identified as being within 100 metres of the subject property were sent a letter dated June 1, 2023, and again on July 13, 2023, notifying them about the major variance request, in accordance with section 3.8.2.b of the 2023 Bylaw. He testified to the list(s) of property owners included in the Town's Record. One lists names and addresses, while the other lists PID numbers. Mr. Kenebel testified that the PID number of the specific property owner identified by the Appellants was included on the list of owners identified by PID numbers, and that tells him they were notified.
39. The Appellants did not provide any direct evidence to support their assertion regarding lack of notice to this one specific property owner. The Commission finds there is no evidence of any defect in the notice procedures followed by the Town and dismisses this ground of appeal.

**v. Council's Reasons for approving the Development Permit.**

40. Though the Appellants did not expressly raise this as an issue, the Commission has been consistent in past decisions that a municipal Council must provide reasons for its planning decisions. Reasons assist the public and developers to understand how and why a

decision was made, and also assist the Commission in fulfilling its appellate review responsibilities.<sup>8</sup>

41. Before the Development Permit was issued to the Developer, on July 24, 2023, it was the subject of discussion at both a regular Planning Board and regular Council meeting, and a special Planning Board and special Council meeting (see paragraphs 5 - 8 above).
42. At the June 22, 2023, regular Planning Board meeting, Mr. Kenebel presented his report on the proposed development. Dr. Johnston-Grinton was also present and presented her objections to Planning Board, as did a few other members of the public. After some discussion and questions by Planning Board members with respect to, for example, the sediment control plan, nature of the development in the area, traffic, and sidewalks, Planning Board voted unanimously to recommend to Council to approve the development, including the height variance.
43. Council met on July 10, 2023. The Developer, Dr. Johnston-Grinton and other members of the public presented to Council at this meeting. Mr. Kenebel was also there and answered questions. One Councillor raised questions with respect to traffic and fire safety, given the height of the proposed building. Mr. Kenebel responded to both questions. Ultimately, Council voted 7 to 1 in favour of approving the Development, thereby accepting Planning Board's recommendation.
44. As noted previously, it was after Council's approval that an error was found with respect to the PIDs for which the Development was approved. As a result, a special meeting of Planning Board was held on July 20, 2023, where Planning Board rescinded their initial recommendation and approved a second recommendation to Council to approve the Development, with the corrected PIDs. The unanimous approval was given after some more discussion between members about fire safety and the development's impact on nearby trees.
45. At a special meeting held on July 24, 2023, Council unanimously voted to accept Planning Board's recommendation a second time. At this meeting, both Appellants spoke in objection to the Development.
46. After reviewing the verbatim minutes of the Planning Board and Council meetings wherein this development was discussed, the Commission is satisfied that the minutes include reasons to justify to the public and the Developer why the decision was made to approve this Development, and to assist the Commission in fulfilling its appellate review responsibilities.

**vi. Conclusion regarding procedural grounds of appeal.**

47. In conclusion, on the whole, the Commission is satisfied that the Town discharged its duty of fairness in processing and considering the Developer's Application and request for a major height variance. Therefore, the Commission will show deference to Council's decision to approve the Development Permit.

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<sup>8</sup> Order LA20-04, *Jessie-Frost Wicks et al. v. City of Charlottetown*, at para 33.

### C. Sound Planning Principles

48. Moving on to the second consideration under the Commission's accepted guideline, it is well-settled that the Commission must be satisfied that the final decision made by Council was made in accordance with the Town's Official Plan and Development Bylaw, and has merit based in sound planning principles.
49. The Appellants raised substantive issues with respect to the soundness of the Town's decision to approve the proposed Development and major height variance. Generally, they submit that the development itself, and Council's decision to approve it, is not in accordance with sound planning principles. In particular, they submit that Council failed to consider health and safety concerns in the form of fire safety when approving the Development and height variance.
50. The Appellants submit that pursuant to the Town's Official Plan and 2023 Bylaw, it is a responsibility of Council to ensure that the health and safety of persons living in the Town is considered in the context of planning decisions.<sup>9</sup> Further to this, the Appellants argue that the major height variance approved by Council is inconsistent with the Official Plan and 2023 Bylaw because: (1) the fire rescue equipment of the Montague Volunteer Fire Brigade (the "MVFB") cannot reach the building's highest point; (2) the MVFB was not consulted by the Town in relation to the Development; and (3) therefore, the decision of Council to approve this Development failed to consider the health and safety of persons living in the Town.
51. The Appellants supported their position with evidence from Randy K. MacDonald, CEO/Founder of RKM FIRE Safety Consulting. Mr. MacDonald's experience in fire safety dates back decades. He was the Fire Chief for the City of Charlottetown from 2009 to 2022. Before that, he was the Deputy Fire Chief and a Fire Inspector for the City of Charlottetown. Mr. MacDonald has extensive training in the areas of fire management, fire investigation, fire suppression and fire prevention from various organizations, including the National Fire Protection Association. Mr. MacDonald has no expertise in the field of land use planning and the Commission did not accept him an expert, but permitted Mr. MacDonald to provide opinion evidence restricted matters of fire safety.
52. Mr. MacDonald prepared a written report and testified before the Commission at the hearing. Mr. MacDonald's report provides his opinion on whether the Development Permit approved by the Town complied with the municipal official plan and bylaws, and other applicable legislation and codes, including the National Building Code, National Fire Code, and Life Safety Code.
53. Mr. MacDonald's report concludes that, in accordance with the Life Safety Code 101.3.3.280, the proposed building be considered as a four-storey building. Mr. MacDonald also commented on "operational concerns", advising that consultation with the local fire department (in this case, the MVFB) during the planning process would ensure the fire department has sufficient equipment, training and water supply to combat a fire involving proposed developments. Mr. MacDonald testified that, in this case, he had concerns about the lack of consultation between the Town and MVFB before approval of the Development Permit. He testified that his understanding from reviewing the MVFB's website is that they do not have an aerial device sufficient to service a building of this height. Further, we note that the Appellants' provided an email exchange between Dr.

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<sup>9</sup> Official Plan, section 2.4; 2023 Bylaw, s. 1.2.1.a

Johnston-Grinton and the MVFB, dated October 3, 2023, which states that they “do not have a ladder truck”.

54. With respect to fire suppression, Mr. MacDonald comments that the Town has acknowledged the importance of fire suppression in section 9.3 of its Official Plan. He further concludes that the National Fire Protection Association and 2023 Bylaw have conflicting setback requirements; however, he states that determining how that conflict is to be resolved was outside the scope of his review.
55. In brief, the Town’s position in response is that Mr. Kenebel’s knowledge and experience as a professional land-use planner led him to a sound, well-informed recommendation to Council, and that Council’s decision was made in accordance with sound planning principles. With respect to the issue(s) of fire safety, the Town submits that these are matters appropriately dealt with at the building permit stage rather than the development permit stage.
56. Prior to the meetings of Planning Board and Council, Mr. Kenebel prepared a Development Report for their review. He testified before the Commission as to his conclusions in this report, which recommended approval of the development and height variance with conditions. Mr. Kenebel’s Development Report outlines the Official Plan policies around housing development, and comments that the need for additional higher-density housing in sustainable, serviced areas is a significant factor weighing in support of the Development. Mr. Kenebel testified that this is the right development in the right location, which is a key planning consideration. His report considered the waterfront context of the subject property, the design elements unique to the site itself, and the overall contribution of the development to the Town. For example, he concludes that the addition of commercial retail space is a welcomed feature of the development, supported by the Official Plan, that may bring economic benefits beyond the Town.
57. Mr. Kenebel’s Development Report also considered the relevant provisions of the 2023 Bylaw, including the requirements of the Mixed-Use Zone like setbacks, frontage and the need for a height variance for this particular design. The Development Report specifically addresses how the height variance meets the factors to be considered in a variance request at section 3.6.1 of the 2023 Bylaw. The Report also comments on parking and the requirement that the Development be centrally serviced. Ultimately, Mr. Kenebel concluded that the proposed Development “promotes efficient land use by utilizing existing infrastructure and services” and “maximizes the use of available land, reducing urban sprawl and preserving open space” as advocated within the Official Plan, and that the height variance meets the requirements of the 2023 Bylaw.
58. With respect to the issue of public safety raised by the Appellants, Mr. Kenebel testified that this is a consideration in the planning process, particularly in considering what he termed “the right use in the right area”. He gave the example of a playground near a public road. However, he testified that an official plan and bylaw consider public safety in the context of land use planning, and do not supersede a building permit assessment, which is where matters of fire safety are more appropriately considered.
59. The Town also provided evidence in the form of an email from the Provincial Fire Marshal to the Town’s Development Technician, dated October 15, 2021, advising that his office requires a completed “Code Compliance Certificate” and that compliance inspections either fall with the permit-issuing body or the Building Code section of the Land Division (of the Department of Housing, Land and Communities). The Town submits that in the

Town of Three Rivers, the Building Code section is responsible for the administration and enforcement of the *Building Codes Act*<sup>10</sup> pursuant to an agreement between the Town and the Minister of Housing, Land and Communities per subsection 4(3) of the *Building Codes Act*. Therefore, the Town concludes that the issues raised by the Appellants relating to the fire safety of buildings in the Town are appropriately dealt with at the building permit stage.

60. On a review of the evidence and submissions of the parties, the Commission is satisfied that Council's decision to approve this proposed Development and major variance was based on the Official Plan, 2023 Bylaw, and sound planning principles.
61. First, Mr. Kenebel's Development Report is thorough and comprehensive. It addresses how the Development meets the objectives of the Official Plan and complies with the 2023 Bylaw, including the variance factors at section 3.6.1. Mr. Kenebel has experience and training as a land-use planner and is a member of the Royal Town Planning Institute. The Commission accepts his evidence as credible and knowledgeable about the issues testified to. Importantly, we note that Mr. Kenebel's evidence was the only evidence before the Commission on planning-related matters. The Commission has previously commented that where sound planning principles are at issue, it is incumbent upon an appellant to bring forward objective and reliable evidence from a planning professional or a person with experience in making planning-related decisions, and that more than the subjective concerns are required.<sup>11</sup>
62. With respect to the specific issues of fire safety raised by the Appellants and testified to by Mr. MacDonald, the Commission understands the Appellants' position to be that the Town should not approve the development of a 4-storey building in Montague because the MVFB does not have an aerial device sufficient to service a building of this height. On this point, the Commission accepts the position of the Town and the evidence of Lee Kenebel that matters of building code and fire code compliance are addressed at the building permit stage, and that enforcing the *Building Codes Act* in the Town of Three Rivers is the jurisdiction of the Minister of Housing, Land and Communities.
63. Finally, the Commission notes that the question of fire safety was raised by Councillors and addressed by Mr. Kenebel at both the first Council meeting on July 10, 2023, and the second Planning Board meeting on July 20, 2023. This demonstrates to the Commission that Planning Board members and Council were alive to the issue and satisfied with Mr. Kenebel's assessment that the requirement for the building to be sprinklered falls under the requirements of the building permit approval.
64. To conclude, the Commission is satisfied that the decision made by the Town has merit based on sound planning principles in the field of land use planning and as enumerated in the Town's Official Plan and 2023 Bylaw.

## 7. CONCLUSION

65. The appeal is dismissed. The Commission is satisfied that the Town's decision to approve the Development and major height variance was procedurally fair and was made in accordance with the Official Plan and 2023 Bylaw, and was based on sound planning principles.

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<sup>10</sup> RSPEI 1988, B-5.1.

<sup>11</sup> QCC No. 40, at para 41.

66. The Commission thanks the Appellants, the Town and the Developer for their submissions in this matter.

## IT IS ORDERED THAT

67. The appeal is dismissed.

**DATED** at Charlottetown, Prince Edward Island, April 29, 2024.

## BY THE COMMISSION:

(sgd. J. Scott MacKenzie)

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J. Scott MacKenzie, K.C., Chair

(sgd. M. Douglas Clow)

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M. Douglas Clow, Vice-Chair

(sgd. Kerri Carpenter)

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Kerri Carpenter, Commissioner

## NOTICE

Section 12 of the *Island Regulatory and Appeals Commission Act* reads as follows:

*12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it, or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written Request for Review, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13(1) and 13(2) of the *Act* provide as follows:

*13(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.*

*(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.*

**NOTE:** In accordance with IRAC's *Records Retention and Disposition Schedule*, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.