

February 1, 2022

VIA EMAIL

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

Attention: Philip J. Rafuse

Dear Mr. Rafuse:

**Re: Edward & Joan Delage v Town of Three Rivers – LA220001
Notice of Appeal – January 2, 2022**

This letter is in response to your correspondence requesting the Town of Three River's (the "Town") Record and Reply to the Notice of Appeal filed by the Appellants, Edward and Joan Delage (the "Appellants") on January 2, 2022. The Town's Record was provided on or about January 25, 2022. Please accept this correspondence as the Town's Reply to the Notice of Appeal.

The Appellants have appealed a decision of the Town's Council dated December 13, 2022, whereby Council rejected the Appellants' Application for a Major Variance needed in order to permit a single family dwelling to remain on the property as is (the "Application"). In particular, Council's decision was as follows:

BE IT RESOLVED THAT Town of Three Rivers Council deny the application for a major variance of 70% to reduce the flankage requirement from 50 feet to 15 feet. This recommendation is based on section 15.1 of the Community of Lower Montague Zoning and Subdivision Control (Development) Bylaw which reads:

- 15.1(3) No variance shall be granted where the difficulty experienced is the result of intentional or negligent conduct of the applicant in relation to the property.

Melanie McKenna | Lawyer

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Placing the dwelling on the property without applying for a development permit to ensure proper setbacks are followed would be considered negligent conduct.

It is also recommended that the applicant have the property surveyed to confirm buffer zones adjacent to the wetland area on the property are met, to ensure that if the dwelling is moved to meet flankage setbacks it will meet the buffer zone requirements.

The Appellants have submitted the Notice of Appeal form and include the following as their grounds of appeal: “we did not ask to be submitted into December 13 meeting. We were not prepared”; and “we feel that we should be able to receive same judgment as neighbor. Within 1 mile, they approved a property that was 11’ from within setbacks, we are 17’ so we are farther in our property than them’. At this time, the Town requests further particulars from the Appellants and reserves the right to respond to those particulars.

Nevertheless, the Town’s position is that the Commission should uphold Council’s decision rejecting the Application for the following reasons in response to the grounds of appeal

- 1. The Application should not have been put before Council on December 13th as the Appellants were not prepared.**

At the time the Application was submitted to the Town in June, 2021, the Appellants had already moved the single family dwelling on the property. As a result, the Appellants were, and continue to be, in violation of section 4.1(1)(b) of the Lower Montague Zoning & Subdivision Control (Development) Bylaw (the “Zoning Bylaw”).

The Appellants submitted an application for a development permit to the Town on or about June 24, 2021 [Tab 1]. At that time, the Town identified that the dwelling did not meet the requirements for lot area, minimum frontage and flankage side yard for a property in the Residential (R1) Zone, as set out in section 8.4 of the Zoning Bylaw. As a result, a major variance, pursuant to section 15.2 of the Zoning Bylaw, was necessary as it related to flankage side yard. This was communicated to the Appellants and their agent, Sharon Ogawa.

In accordance with section 15.2(1)(b) of the Zoning Bylaw, on or about August 9, 2021, the adjoining property owners were notified of the variance request via mail [Tab 17, pg. 106]. On or about September 7, 2021, the assigned Development Technician, Patrick Donahoe, of the Town’s Planning Department authored a report to the Planning Board [Tab 7] outlining the

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details of the Application in light of the Zoning Bylaw requirements. On September 7, 2021, the Planning Board moved to recommend to Council to reject the Application [Tab 9]. Finally, on December 13, 2021, the Application went before Council and moved to approve the recommendation of the Planning Board and reject the Application.

The Appellants argue that it was inappropriate for the Town to put the Application before Council in December, 2021 as they were not prepared. The Town submits that the Appellants had approximately seven months between the time the Application was submitted until it was before Council to formally withdraw their application. They never indicated an intention to withdraw their application and never withdrew their application.

The Town has an obligation to its residents to process applications expeditiously, in accordance with the principles of natural justice. In order to properly process the Application, the Town required additional information from the Appellants, including, initially, a septic permit and confirmation of approved building lot, and later on, a delineation report. As soon as those were provided, the Town processed the Application. Furthermore, as clearly shown in the Record, the Appellants and their agent were pressing the Town to finalize the Application quickly – examples of this correspondence can be found at Tab 17, pgs. 94, 122, 125, 162, 168, 180, 182-184, 190 and 199.

The Town's obligations further extend to all residents within the Town, and not just the Appellants in this case, to ensure that bylaws are properly administered and enforced. The Appellants were in violation of the Zoning Bylaw and to remedy the violation, a decision of Council was required. Following receipt of the delineation report, on November 17, 2021, the Town reminded the Appellants of Planning Board's recommendation to Council and suggested an alternative route for compliance [Tab 17, pg. 242]. The Town followed up on November 26, 2021 [Tab 17, pg. 246]. Given that no reply was received and no formal withdrawal occurred, the Town, in accordance with their obligation to the Appellants, to residents, and the Appellants very clear desire to have the Application processed expeditiously, proceeded with the Application before Council on December 13, 2022. It was not until December 16, 2021, three days after Council's decision to reject, that the Appellants expressed a desire to not proceed with the Application.

The Town submits that they complied with their obligations to process the Application, correctly and expeditiously, and it is not up to the Town to withdraw applications at their own behest.

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2. The Application should have been approved in light of Council's decision on another home with the municipal boundaries of the Town.

First, the Town submits that Council's decision on another property within the Town is immaterial to the Town's decision herein.

Second, in the absence of particulars, the Town provides the following response to the Appellants comments regarding 'setbacks'.

The Appellants property is in a Residential (R1) Zone, which is covered in section 8 of the Zoning Bylaw. Section 8.4 outlines the building requirements for a Residential (R1) Zone property, which includes 50ft. (15 m) as the minimum flankage yard for development. At the time of the Application, the dwelling was situated on the property with only 15 ft. flankage side yard. As a result, the Appellants needed approval of a major variance from Council – a 70% variance to be specific.

The Planning Department makes recommendations to Planning Board and then to Council based on a full review of the particulars of an application, alongside the applicable Zoning Bylaw provisions and good planning principles – not based on approvals or rejections of applications made by other property owners within the Town. Pursuant to section 15.1(3), Council may not approve a minor or major variance when the issues are as a result of the conduct of the applicants:

- (3) No variance shall be granted where the difficulty experienced is the result of intentional or negligent conduct of the applicant in relation to the property.

In this matter, the Appellants had moved the dwelling onto the property without a permit from the Town and without a permit from the Province, as required under the *Building Codes Act*, RSPEI 1988, c B-5.1. It was at the time the application for a development permit was made that the Appellants learned that they were in further violation of section 8.4 of the Bylaw (already in violation of section 4.1(1)(b)). It is the Town's view that the challenges herein are as a result of the intentional and/or negligent conduct of the Appellants and as a result, in accordance with the provisions of the Zoning Bylaw, sound planning principles and the particulars of the Application, the Application was rejected.

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Yours very truly,


Melanie McKenna

MM/th

cc. Edward & Joan Delage, Appellants
Jill Walsh, CAO for the Town of Three Rivers