Land Use Sterilization and Constructive Taking: SCC Clarifies the Rules – *Annapolis Group v. Halifax*

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When does a municipality's planning decisions amount to a de facto expropriation of land, and when is the owner entitled to compensation? These issues were considered by the Supreme Court of Canada in its October 21, 2022, decision in *Annapolis Group Inc. v. Halifax Regional Municipality*.

Beginning in the 1950s, Annapolis assembled 965 acres of land with the intent of development and resale. In 2006, Halifax approved a planning strategy intended to guide land development in the region over the next 25 years. Part of the Annapolis land was identified for possible inclusion in a future regional park. Some of the land was designated 'urban settlement' in which prescribed development would be permitted, and other parts were designated 'urban reserve,' intended to be held for future development beyond the 25-year life of the regional plan. Any serviced development of the land required Halifax's council to adopt a resolution authorizing a secondary planning process and an amendment to the zoning bylaw.

Despite several attempts on the part of the Annapolis to develop the land, Halifax refused to initiate the secondary planning process. In 2016, Annapolis then sued, claiming that Halifax's planning decisions deprived it of all reasonable or economic uses of its land, amounting to a constructive expropriation. Annapolis presented evidence that Halifax was treating the land as a public park, encouraging members of the public to hike, cycle, canoe, camp, and swim there.

Halifax applied to have the lawsuit bounced on the basis that its refusal to amend the planning strategy and zoning bylaws could not result in constructive taking. In a five–four split, the Supreme Court agreed with the motion judge, who found that there were sufficient facts and law to support a potential claim at trial.

Justices Côté and Brown, writing for the majority, set out the following ground rules:

- Expropriation through regulation should be referred to as 'constructive taking.' A 'taking' occurs where there is a forcible acquisition of privately owned property by the Crown for public purposes.
- The basic tenet of expropriation law is that, "At common law, taking of property by the state must be authorized by law, and triggers a presumptive right to compensation which can be displaced only by clear statutory language showing a contrary intention — that is, an intention not to compensate."

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- The test for establishing constructive taking set out in the 2006 decision of the Court in *Canadian Pacific Railway Co*. *Vancouver* should be viewed in the context of earlier decisions of the Court. A constructive taking occurs where: (1) an advantage accrues to the regulating authority, which could include use of the property as a public resource; and (2) the regulation at issue removes all reasonable uses of the affected property.
- In determining whether all reasonable uses of the property have been removed, the courts are entitled to consider the intent of the regulating body (in this case, the municipality). Proof of the intention of the authority to take constructively may support a finding that the landowner has lost all reasonable uses of their land. But the absence of evidence of the state's intention does not rule out a successful claim.
- When considering whether a regulation constitutes taking, the court can consider:
    - The nature of the government action (i.e., whether it targets a specific owner or more generally advances an important public policy objective), notice to the owner of the restrictions at the time the property was acquired, and whether the government measures restrict the uses of the property in a manner consistent with the owner's reasonable expectations;
    - The nature of the land and its historical or current uses. Where, for example, the land is undeveloped, the prohibition of all potential reasonable uses may amount to a constructive taking. That said, a mere reduction in land value due to land use regulation, on its own, would not suffice; and
    - The substance of the alleged advantage. The case law reveals that an advantage may take various forms. For example, permanent or indefinite denial of access to the property or the government's permanent or indefinite occupation of the property would constitute a taking. Likewise, regulations that leave a rights holder with only notional use of the land, deprived of all economic value, would satisfy the test. It could also include confining the uses of private land to public purposes, such as conservation, recreation, or institutional uses, such as parks, schools, or municipal buildings.

Until the *Annapolis* decision, the courts applied the *Canadian Pacific* case as requiring proof that the expropriating authority had actually acquired a beneficial interest in the land in order for there to be a constructive taking. Further, the intent of the expropriating authority was considered irrelevant. In *Annapolis*, the majority said that some courts had applied *Canadian Pacific* incorrectly and that the term 'beneficial interest' should be viewed more broadly as being an 'advantage' flowing from the property. It is not necessary for the owner to show that government has effected an actual acquisition of an interest in the property to support a claim for compensation. It is enough for the aggrieved owner to show that the state has derived an advantage from the private property through regulation.

The majority held that if Annapolis could prove that Halifax was unlikely to ever grant secondary planning approval, it would be material to establishing its claim. It was wrong to say that the conduct of Halifax was a mere refusal to up-zone. When Annapolis acquired the land in 1950, it could have developed it. Halifax did not start to regulate its use until 1982. While Annapolis claimed that the land had been transformed into a public park, Halifax could defeat the claim by showing that there is at least a single reasonable use of the property as zoned. However, leasing the land as a public park should not be looked at as a possible use since the evidence was that it was already being used for that purpose.

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The full effect of this decision remains to be seen. Annapolis is still bringing the case to trial. Arguably, the Court has broadened the circumstances in which a claim for constructive taking may be made out. Municipalities, planning authorities, and governments should proceed with caution when regulating in a way that can be characterized as sterilizing vested land use rights. The principles could be applied outside of the area of land use regulation and zoning. Take, for example, legislation that imposes a moratorium on the exercise of natural resource extraction or harvesting rights. It also remains open for the legislature to legislate away rights to compensation within the limits of its authority.

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