***Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36**

The Supreme Court of Canada ("SCC") clarified the law of "constructive taking" in *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 ("*Annapolis v. Halifax*"). Annapolis Group Inc. ("Annapolis") started buying lands in the Halifax area in the 1950s and over time, it acquired 965 acres of land which it intended to develop and sell. In 2006, the Halifax Regional Municipality ("Halifax") adopted a 25-year Regional Municipality Planning Strategy for land development which included the Annapolis lands. The planning strategy indicates some of those lands would be zoned for a public park with the rest designated for "serviced development", such as residential neighbourhoods. For serviced development to occur, Halifax needed to adopt a resolution authorizing a "secondary planning process" and make an amendment to the land use by-law. Annapolis made several attempts to seek approval for the development of its lands, starting in 2007, with no success. In 2016, Halifax ultimately adopted a resolution refusing to initiate the secondary planning process.

Annapolis commenced a lawsuit against Halifax in the Supreme Court of Nova Scotia which claimed, among other things, that Halifax had essentially expropriated private property for a public park, which amounted to a "constructive taking". In 2019, Halifax asked the court for summary judgment to dismiss the constructive taking claim from the lawsuit. In response, Annapolis argued that its claim of constructive taking raised issues that required a trial. The judge agreed but Halifax appealed that decision to the Nova Scotia Court of Appeal and based on the Supreme Court of Canada's 2006 ruling in *Canadian Pacific Railway Co. v. Vancouver (City)*, the Court of Appeal concluded that Annapolis had no reasonable chance of success. Annapolis then appealed to the Supreme Court of Canada and the SCC allowed Annapolis's claim of constructive taking to proceed to trial.

As the SCC explained in *Annapolis v. Halifax*, a "taking" is a forcible acquisition by a public authority of privately owned property for public purposes. A taking may take the form of a formal expropriation under applicable legislation (for example, for Alberta municipalities under s. 14 under the *Municipal Government Act* (Alberta), or for BC municipalities under s. 31 of the *Community Charter* (BC))". A taking may also take the form of a constructive taking (also known as a *de facto* or regulatory taking in situations where a public authority effectively expropriates an interest in land through regulation. The Supreme Court confirmed that a constructive taking occurs if: 1) the public authority has acquired a beneficial interest in the property or flowing from the property; and 2) proposed regulatory measures would remove all reasonable uses of the private property.

Under the first part of the two-part test established by the SCC in *Annapolis v. Halifax*, a public authority acquires a beneficial interest when it acquires an advantage, such as when private property is enjoyed as a public resource. Annapolis contended this was the case as Halifax had acquired a beneficial interest in Annapolis' lands by exercising dominion over them so as to effectively create a public park at Annapolis' expense. In deciding that Annapolis should be able to adduce evidence of this, the SCC also clarified that acquisition of a beneficial interest does not require the public authority to acquire physical control of the property. As noted by the SCC, "it is well-established in our law that zoning which effectively preserves private land as a public resource may constitute a "beneficial interest" flowing to the state, as contemplated

in CPR, where it has the effect of removing all reasonable uses of that land." (at para. 58) Under the second part of the two-part test whereby it must be proved that proposed regulatory measures would remove all reasonable uses of the private property, the SCC indicated that "the line between a valid regulation and a constructive taking is crossed where the effect of the regulatory activity deprives a claimant of the use and enjoyment of its property in a substantial and unreasonable way, or effectively confiscates the property ((K. Horsman and G. Morley, eds., *Government Liability: Law and Practice*, at § 5:2). Put simply, "in order for a Crown measure to effect a constructive taking of property, private rights in the property must be virtually abolished, leaving the plaintiff with 'no reasonable use' of the property" (Horsman and Morley, at § 5:13 (emphasis added))." (at para. 19) Conversely, the SCC noted that Canadian Courts have dismissed claims for compensation where the regulation left the owner some reasonable use for the property. (at para. 20) That was the case in the SCC's 2006 ruling in *Canadian Pacific Railway Co. v. Vancouver (City)* where the court concluded that CPR could still use its land to operate a railway or lease the land for use in conformity with the by-law.

In considering whether proposed regulatory measures would remove all reasonable uses of the private property, the SCC confirmed that evidence of Halifax's intentions was also relevant. At para. 8, the majority opinion stated that "[f]urther, the Court of Appeal erred by holding that Halifax's intention is irrelevant to applying the second part of that analysis. …Annapolis is entitled to adduce evidence at trial to show that, by holding Annapolis' land out as a public park, Halifax has acquired a beneficial interest therein; and that, because Halifax is unlikely to ever lift zoning restrictions constraining the development of Annapolis' land, Annapolis has lost all reasonable uses of its property. Further, and in support of the latter proposition, Annapolis may adduce evidence of Halifax's intention in not doing so."

As the SCC confirmed, under the common law, a taking of property by the state creates a presumptive right of compensation to the property owner; however, this right can be displaced by clear statutory language showing an intention not to compensate. (at para. 21) Quoting from Lord Atkinson in *Attorney-General v. De Keyser's Royal Hotel, [1920] A.C. 508 (H.L.)*, the SCC noted that "[t]he recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation" (p. 542).

No exception exists for municipalities in Alberta and British Columbia to the general rule that a property owner must be compensated for the taking of property, either through a formal expropriation process or a constructive taking. In either case, the compensation due to the owner is generally the fair market value of the property taken, plus disturbance damages and other ancillary compensation applicable to the owner's costs arising from the taking. The lesson for municipalities from *Annapolis v. Halifax* is that such compensation may be payable in circumstances where either a formal expropriation or a constructive taking occurs.