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DOWNZONING – PANACEA OR A DIRTY WORD?

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Joe Scafe, Jordan Adam and Timothy Luk

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I. INTRODUCTION

Within the suite of authorities granted to local governments by the province, land use regulation is perhaps the most important. And central to land use regulation is zoning authority. As demands have increased on the lands within British Columbia, it is natural for communities to consider how to increase the capacity of the lands within their jurisdiction. However, situations still arise in which councils and boards may conclude that limiting land use is in the best interest of the community, which may include reducing the intensity or density of land use or removing previously permitted uses of land by amending the applicable zoning. This process is commonly referred to as downzoning.

Land use regulation permits downzoning as a valid exercise of legislative authority. Section 458 of the *Local Government Act* provides that compensation is not payable to any person for any reduction in the value of that person's interest in land or for any loss or damage resulting from the adoption of an official community plan or a zoning bylaw. Notably, the exemption from liability does not apply when a zoning bylaw restricts the use of land to a public use.

Despite this statutory protection, downzoning has garnered a checkered reputation for its potential to result in complaints and litigation. While this paper should not be understood as advocating for, or against, downzoning, knowing the limitations and risks associated with downzoning will help local governments understand and use this tool effectively and lawfully.

This paper is divided into two parts: first, a review of when a local government is prohibited from downzoning, and second, a review of the major risks that arise when downzoning. These risks include legal claims based on improper purpose, bad faith, improper procedures, unfair processes, unjust enrichment, and constructive taking. In most legal claims, the claimant is a property owner seeking to have the decision to downzone overturned, but in some cases the property owner is seeking compensation for the loss of value in their property.

II. WHEN IS A LOCAL GOVERNMENT PREVENTED FROM DOWNZONING?

A. Phased Development Agreements

When land is subject to a phased development agreement, or a "PDA", that specifies a permitted use, that use cannot be prohibited by a subsequent downzoning. Division 12 of Part 14 of the *Local Government Act* authorizes a local government to enter into a phased development agreement with an owner of land. The local government must hold a public hearing before adopting a bylaw that authorizes a PDA. A PDA effectively freezes the provisions of the zoning and subdivision bylaws that apply to the land for the term of the agreement.

Since a PDA will prevent a local government from prohibiting a land use authorized by the PDA, local governments should carefully consider the proposed development and term of the proposed PDA. PDAs have maximum terms of 10 years unless they are approved by the Inspector of Municipalities, in which case the term may extend up to 20 years. Importantly, a PDA does not necessarily run with the land, meaning a new owner is not able to benefit from a PDA signed by the previous owner unless the previous owner assigns the PDA. PDAs cannot be assigned by the original signatory unless the local government consents or the agreement specifically identifies the person or class of persons to whom the owner may assign it.

B. Non-Conforming Use Protection

Section 529 of the *Local Government Act* holds that if, at the time a zoning bylaw is adopted, land or a building or structure that the bylaw applies to is being "lawfully used" and such use doesn't conform to the new bylaw, the existing use may be legally continued as a non-conforming use. Subsection 529(4) clarifies that a building or structure that is "lawfully under construction" at the time of adoption of a land use bylaw is considered to be existing at that time and to be in use for its intended purpose.

Consequently, a downzoning bylaw cannot prevent the construction of a building or structure that complies with the old zoning if the downzoning bylaw is adopted after the building or structure is lawfully under construction. This means that the timing of adopting a downzoning bylaw is important – if an owner establishes a non-conforming use prior to the bylaw being adopted, the downzoning bylaw will not have the desired effect.

As such, a key question for local governments considering adopting a downzoning amendment is whether a building or other structure is considered to be lawfully under construction. Unsurprisingly, this question has been thoroughly considered by the courts, who have held that where a landowner, through significant physical alterations to a site, has established a "commitment to use", a zoning change cannot be enforced against that land owner. The owner must prove more than a "mere intention" to use the land for a particular purpose; they must demonstrate an irrevocable commitment to use the land in a certain way.[1]

The case of *G.S.R. Capital Group Inc. v. White Rock (City)*, [2022] B.C.J. No. 180 [*GSR*], clarifies whether being in possession of a development permit constitutes a "commitment to use" and analyzes what is considered "lawfully under construction", what a "commitment to use" looks like, and whether a commitment to use is sufficient to garner non-conforming use protection.

In *GSR*, the plaintiff developer owned property in a designated development permit area in White Rock. In 2018, the City issued the developer a development permit permitting construction of a 12-storey residential building. Following the civic election, the new council did not view the GSR's project favourably and decided to downzone the lands. Concurrently, the City notified GSR that it intended to withhold a building permit for the project pursuant to

[1] *Onni Wyndansea Holdings Ltd. v. Ucluelet (District)*, 2022 BCSC 1869 at para 99 [*Onni*]

section 463 of the *Local Government Act*, which allows local governments to withhold building permits if the "development proposed in the application" for a building permit conflicts with a zoning bylaw that is under preparation. In accordance with section 463, GSR had seven days to submit its building permit application or have it withheld.

GSR was ultimately unable to submit its building permit application prior to expiry of the seven-day period and the City withheld the building permit. GSR challenged the City's decision to withhold by arguing that section 463 only applies to "proposed developments", and that since it had received a development permit for the project, the development was no longer merely "proposed" and thus section 463 did not apply. Additionally, GSR argued that the language of section 501(3) of the *Local Government Act*, which provides that a "land use permit is binding on the local government as well as the holder of the permit" prohibits a local government from downzoning lands subject to a development permit. The Court held that from a grammatical, contextual and purposive standpoint, it was not unreasonable to describe the project as a "proposed development". The Court also rejected the developer's argument that the purpose of a development permit is to give developers assurance that changes to an official community plan or zoning bylaw will not affect a developer's ability to proceed with the proposed project.

GSR also argued that it was bound to proceed with the development contemplated by the development permit and that this obligation, along with the substantial financial resources GSR expended to obtain the development permit, demonstrated GSR's "unequivocal commitment" to the project. These factors, argued GSR, showed it had made a "commitment to use", and thus the project should be considered "lawfully under construction" and protected from the rezoning as a non-conforming use. Ultimately, the Court was unconvinced by GSR's argument, holding that when determining whether a building or structure constitutes a lawful non-conforming use, courts have invariably required construction to have been commenced, at least in the sense of substantial physical alteration of a site in preparation for erection of a building.[2] In this case, GSR had not physically altered the lands, and receipt of a development permit alone was not enough to establish a non-conforming use.

C. Withholding Building Permits for Bylaws Under Preparation

In the event that a developer submits a development proposal that is viewed unfavourably by council for lands that are already zoned to permit the proposed project, a local government must act quickly to downzone the property. If an application for a building permit is received within seven days of a council or board's direction to staff to prepare the downzoning bylaw, the building permit application must be processed in the ordinary course.

[2]GSR at para 48.

If the application is not received within the seven day period, section 463 of the *Local Government Act* authorizes the council or board to direct that a building permit be withheld for a 30-day period and a subsequent 60-day period - ample time to adopt the downzoning bylaw. Although the City of White Rock gave the developer notice that it had begun preparing the downzoning bylaw in *GSR*, there is no legislative or common law requirement to put the developer on notice that they have seven days in which to apply for their building permit.

III. RISKS OF DOWNZONING

Since downzoning reduces the permitted uses of land and can have a significant effect on its value, developers and land owners have understandably taken a dim view of the practice. Considering the large sums developers spend on acquiring land and the initial stages of development planning, developers have a strong incentive to litigate – even when the chance of success may be low. With that in mind, we turn to discussing the risks and potential liability associated with downzoning and how they may be minimized or avoided.

A. Procedural Issues, Vagueness, and Uncertainty

A local government's failure to follow the statutorily prescribed procedure will generally render its action unreasonable, and any resulting bylaw will be void. As a result, parties seeking to overturn a downzoning bylaw will look to attack any procedural defects. As such, when adopting a downzoning bylaw, local governments should be aware of the following procedural requirements that are engaged:

- Bylaws require three readings before adoption with a clear day between third reading and adoption (*Community Charter*, s. 135);
- Zoning bylaws require either a public hearing after first reading or notice prior to first reading that the local government will be proceeding without a hearing (*Local Government Act*, ss. 464, 467, 518, 546, 610, and 612);
- When holding a public hearing related to the downzoning bylaw, a local government must ensure that it follows public hearing procedures, including affording all persons who believe that their interest in property is affected by the proposed bylaw a reasonable opportunity to be heard or to present written submissions respecting matters contained in the bylaw that is the subject of the hearing (*Local Government Act* s. 465), and public hearing notice procedures (*Local Government Act* s. 466).

Local governments also have their own rules of procedure for council meetings, including stipulations regarding the manner by which resolutions may be passed and may be adopted, however, failure by a council or board to follow its own procedure requirements is not fatal

unless the failure also offends a statutory requirement.[3] Despite this, local governments should still make every effort to follow their own procedural requirements to avoid the possibility that the failure to do so could be used as grounds for attacking a bylaw, even if such an attack is destined to fail.

Another basis on which to attack a bylaw is to argue that it is vague and uncertain. The idea is fairly simple: for a bylaw to be enforceable, it must be clear and understandable. If a bylaw is too vague or uncertain to be understood, or it is contradictory and impossible to comply with, a court can declare it void and unenforceable.

Legally, a bylaw is vague if a reasonably intelligent person would not be able to determine the meaning of the bylaw and govern their actions accordingly. The bar for proving a bylaw is vague is relatively high, as the courts have held that a bylaw is not necessarily void for vagueness or uncertainty because its terms are susceptible to more than one interpretation, and bylaws are to be interpreted benevolently and supported if possible.[4]

Despite this high bar, care should be taken when drafting downzoning bylaws to ensure they are clear and consistent. As downzoning bylaws are amendments to the main zoning bylaw, local governments should take care to ensure that the language used in the amendment is consistent with the main bylaw and that defined terms are properly used, and should consider whether new terms in the amendment should be defined. The amendment should not contain any contradictory provisions or provisions that are impossible to comply with.

B. Bad Faith, Unreasonableness, and Improper Purpose

Downzoning bylaws have historically been challenged on the basis of being unreasonable, or being adopted in bad faith or for an improper purpose. All three bases were canvassed in the next case.

In *Onni Wyndansea Holdings Ltd. v. Ucluelet (District)*, [2022] B.C.J. No. 2054, the previous owner of the subject lands and the District entered into development agreements, registered as section 219 covenants, that established the conditions for the development and provided that if the zoning bylaw amendments and OCP amendment necessary to permit the proposed development were adopted, the developer would grant the District amenities, including land dedications and community amenity contributions.

[3] *Hidber, Koopman, and Munroe v. Regional District of Bulkley-Nechako*, 2006 BCSC 789

[4] *Kelowna Mountain Development Services Ltd. v. Central Okanagan (Regional District),* 2014 BCCA 369 at para 94

The official community plan and zoning amendment bylaws were adopted and the property was subdivided. As part of the subdivision approval, the developer installed the necessary water, sewer and road infrastructure, dedicated a roadway and paid approximately $2.5 million in cash contributions to the District. After the development stalled, the District adopted a policy that provided that where a development has not proceeded in accordance with a master development agreement within 5 years of execution, has stalled for 5 years or longer, or if the original owner had not fulfilled its obligations in the agreed upon time frame, the District could downzone the property to its pre-agreement zoning.

When the original developer experienced financial difficulties, it sold the development to Onni. Onni proposed to develop the lands for residential and short-term rental use. Onni was also kept apprised of the District's proposed official community plan amendment that identified several of the strata lots in the development as parks and open space. After back and forth between the developer and the District, the mayor put forward a motion that staff prepare a bylaw to return the lands zoning that permitted only single-family dwellings on large lots.

The developer submitted applications for 29 building permits after first reading of the proposed rezoning bylaws and advised that if the District withheld the permits it would challenge the decision and possibly pursue damages for unjust enrichment. Council adopted a resolution withholding the permits in accordance with section 463 of the *Local Government Act* and subsequently adopted the downzoning bylaw. The developer commenced litigation, arguing that the bylaws were adopted for an improper purpose, in bad faith and were unreasonable.

On the ground of improper purpose, the developer alleged that the District intended to rezone the lands to control development of the lands and nearby lands owned by the developer and to extract amenities in addition to those granted by the original developer. The Court noted that it is an improper purpose to downzone to depress the value of lands the local government wishes to acquire (see: *Hauff v. Vancouver (City) (1981)*, 28 B.C.L.R. 276, 1981 CanLII 437), but that a reduction in value that is incidental and not the primary purpose of a bylaw is not evidence of an improper purpose (see: *Hall v. Maple Ridge (District)*, [1993] B.C.J. No. 1006).

The Court rejected the developer's argument. The Court held that at the time the downzoning bylaws were adopted, the development plan from 2005 was over 15 years old, and that the record did not disclose an attempt to extract further amenities from the developer. Instead, the Court ruled that the critical concern of council was that the proposed subdivision was not in the best interests of the community – a valid purpose.

The developer also argued that the bylaw was unreasonable. A bylaw will be held to be unreasonable where it is manifestly unjust or if it results in oppressive or gratuitous interference with the rights of those affected by it without reasonable justification, not where it merely goes further than is prudent, necessary or convenient in the opinion of the court (see: *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.)). The developer alleged that it was unreasonable for council to adopt the downzoning bylaw without considering that amenities had already been

provided. The Court held that council's purpose in adopting the bylaw was to stop the development from proceeding in accordance with a plan approved in 2005 by a previous council. It was immaterial that amenities had previously been provided – that did not detract from council determining that the development was not in the best interests of the community. The Court held that the bylaw was not unreasonable.

Bad faith includes unreasonable conduct and conduct based on improper motives or undertaken for an improper or ulterior purpose. The court quoted from *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee*, 10 B.C.L.R. (3d) 121, 1995 CanLII 4585:

> [153] The words bad faith have been used in municipal and administrative case law to cover a wide range of conduct in the exercise of legislatively delegated authority. Bad faith has been held to include dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that is illegal, and renders the consequential act void. And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact.
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> ...
>
> [178] Moreover, all members of the Islands Trust Committees are now elected, either directly or indirectly. In my view courts should be slow to find bad faith in the conduct of democratically elected representatives acting under legislative authority, unless there is no other rational conclusion.
>
> [emphasis added]

The Court also quoted from *CMHC v. North Vancouver (District)*, 2000 BCCA 142, in proclaiming that courts should "confine themselves to rectifying clear excesses of authority rather than using the terms such as 'improper purpose' and 'bad faith' to substitute the court's view of what is right for the view of the elected representatives".

The developer argued that the District acted in bad faith when it approved the subdivision and accepted the road dedication, the installation of services and the cash contributions and subsequently adopted a rezoning bylaw to prohibit the same project. The Court held that it was satisfied that council's purpose was to prohibit a development viewed favourably 15 years ago by a previous council which the current council no longer desired. The Court was satisfied that this was a valid purpose and did not constitute the council acting in bad faith.

On the basis of *Onni Wyndansea Holdings Ltd.*, a downzoning bylaw will withstand challenge on the bases of bad faith, improper purpose and unreasonableness where the bylaw is adopted to control land use in the best interests of the community and without an ulterior motive. An incidental reduction in the value of the land affected by the bylaw is not evidence of bad faith or an improper purpose. In addition, it is not unreasonable for a council or board to ignore or give little consideration to amenities already received when considering whether to downzone land in the best interests of the community. That said, such amenities may found the basis of an unjust enrichment claim by the developer, as discussed below.

C. Unjust Enrichment

Another factor that local governments should account for when considering downzoning is a potential unjust enrichment claim by the developer. Unjust enrichment is a legal concept that is known as an "equitable remedy", meaning it is something that can be used to address situations of unfairness that cannot be addressed via other legal means. It is a flexible remedy used to address situations where, for no legal reason, a party received a benefit at the expense of another party.

A party seeking to show unjust enrichment can do so by proving the following:

- The defendant has received a benefit;
- The plaintiff has suffered a corresponding loss; and
- That there is juristic reason for the defendant's retention of the benefit.

Unjust enrichment claims arise in downzoning situations when a local government receives a benefit, such as an amenity contribution, from a landowner in exchange for rezoning. If the local government subsequently downzones the lands, the owner is left with lands that are not zoned for the project it intended to construct and is short the amenity contribution.

This is exactly what happened in *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75. In that case, Pacific National Investments ("PNI"), owned 22 acres of former Crown land in the City of Victoria's inner harbour. The City and PNI entered into an agreement which provided, among other things, that if the City rezoned the land to permit the proposed development the developer would build roads, parkland, walkways, a new seawall, and other works and improvements valued at approximately $1,080,000.

After successfully developing a portion of the lands, PNI applied for building permits to develop two water adjacent lots and construct a marina, restaurants, shops, other commercial uses, and two stories of residential condominiums on the harbour. Members of the community were opposed to PNI's proposed development of the water lots, and it ultimately became an election issue. Following the election, the new council downzoned the water lots to permit only one-storey commercial buildings, thereby eliminating the two stories of residential

condominiums that PNI planned on developing. PNI then sued the City for breach of an implied term that the City would not downzone the lands. The claim was rejected by the Supreme Court of Canada because the alleged implied term, being a fetter on council's legislative authority to rezone the lands, was unlawful. However, the matter was remitted to trial on the matter of whether the City had been unjustly enriched. The Court ultimately found that the City was unjustly enriched by applying the three part test outlined above:

- The City received $1,080,000.00 worth of parkland, roads, walkways a new seawall.

- PNI suffered a corresponding deprivation of $1,080,000.00. PNI was required to spend funds to provide the amenities and had to dedicate part of the lands it had purchased as park. No other person or entity contributed to the enrichment.

- The City had no juristic, or legal, reason for receiving and retaining the benefit provided by PNI. While PNI provided the amenities to the City via various agreements, which would normally constitute a juristic reason for the enrichment and deprivation, the City had no authority to enter into the agreements because they were an unlawful fetter of council's legislative discretion.

The City argued that PNI had provided the works and improvements as a donation, or sweetener, in exchange for the original rezoning of the lands. While the Court acknowledged that it is common practice for owners to provide amenities as part of the rezoning process, it held that PNI agreed to provide the amenities in exchange for the zoning and both PNI and the City believed that the City was bound by such an agreement. When it turned out that the agreement was not valid and the City could downzone the lands, PNI was left without the benefit of the zoning that it believed it was receiving in exchange for providing the amenities.

Ultimately, the Court found that the City did not provide a juristic or legal reason for why it received the $1,080,000 worth of improvements, nor could it convince the Court that finding that the City was unjustly enriched would be bad public policy, with the Court specifically noting the following:

> Third, I am not persuaded that it would be good public policy to have municipalities making development commitments, then not only have them turn around and attack those commitments as illegal and beyond their own powers, but allow them to scoop a financial windfall at the expense of those who contracted with them in good faith. This is precisely the sort of unfairness that the doctrine of unjust enrichment is intended to address.[5]

[5] *Pacific National Investments Ltd. v. Victoria* (City), 2004 SCC 75 (CanLII), [2004] 3 S.C.R. 575 at para 57

Pacific National Investments is a unique case because of the City's implied agreement to rezone the lands and keep the zoning in place long enough to allow PNI to complete the project as they envisioned it. Removing the City's implied agreement to maintain the zoning, the exchange between PNI and the City should look very familiar to local governments because PNI, based on a mutual understanding that providing certain amenities would enhance their chances of obtaining the desired zoning, offered additional amenities to the City, and the City accepted them. If the City had followed the same process and downzoned the lands absent the City's implied undertaking in their agreement with PNI, would the Court have found the City was unjustly enriched? More broadly, are local governments that downzone after receiving amenities as part of the rezoning process susceptible to claims for unjust enrichment?

Unfortunately, we have not received an answer to this question from the courts, but local governments can likely argue that owners are aware of the possibility of downzoning when they agree to provide the amenities during the rezoning process. Because of *Pacific National Investments*, owners should know that the provision of amenities at rezoning does not protect their lands from downzoning and that they are providing the amenities at their own risk. Additionally, developers may protect themselves by entering into phased development agreements that protect their lands from downzoning. On this basis, a local government may be able to answer a claim of unjust enrichment from an owner by arguing that the owner provided the amenities purely as a donation and that they were not consideration for the local government's agreement to keep the zoning in place.

D. Constructive Takings – When Downzoning Becomes Expropriation

As we have already discussed in this paper, local governments have been granted land use regulatory authority by the province, and this forms a central pillar of their statutory authority. While it is possible that a local government may inappropriately use that authority, leading to claims of, among others, abuse of process and unjust enrichment, these are all situations where the action by the local government is *improper* in some manner. The question remains whether a local government could owe compensation to someone subsequent to a legitimate and proper exercise of its zoning authority. In British Columbia, the *Local Government Act* has a partial answer to that question in section 458, which limits compensation for changes in permitted land use. Section 458 reads as follows:

> 458(1) Compensation is not payable to any person for any reduction in the value of that person's interest in land, or for any loss or damages that result from any of the following:
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> (a) the adoption of an official community plan;
>
> (b) the adoption of a bylaw under
>
> (i) Division 5 [Zoning Bylaws],
>
> (ii) Division 12 [Phased Development Agreements], or

> (iii) Division 13 [Other Land Use Regulation Powers];
>
> (c) the issue of a land use permit;
>
> (d) the termination of a land use contract under section 547 [termination of all remaining land use contracts in 2024];
>
> (e) the adoption of a bylaw under section 548 [process for early termination of land use contract].
>
> (2) Subsection (1) does not apply in relation to a bylaw referred to in paragraph (b) of that subsection that restricts the use of land to a public use.

An important exclusion to the limitation on compensation set out in section 458 is in subsection (2), where the Act excludes restrictions on use limits to a public use. This exclusion is likely intended to operate in conjunction with the common-law rule of constructive taking, also referred to as *de facto* taking.

Constructive taking was established to compensate property owners where the state had effectively expropriated/taken land without technically taking ownership of the land from the owner. The test for constructive taking is set out by the Supreme Court of Canada in *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5 ("*Canadian Pacific Railway*") at paragraph 30:

> For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property

In *Canadian Pacific Railway*, the City adopted an official development plan, which is similar to an official community plan but unique to the *Vancouver Charter,* which effectively froze the development potential for a transportation corridor that was owned by CPR and which CPR had plans to develop. Amongst the claims advanced by CPR was constructive taking, as they argued the City had effectively taken the land by prohibiting any future use other than transportation, which they argued benefitted the City.

The Supreme Court ruled in favour of the City, finding that the two-part common law test for constructive taking had not been fulfilled. First, the City had not acquired a beneficial interest in the lands. The Court recognized that the acquisition of a beneficial interest does not need to rise to the level of forced transfer of property, but it still required an actual beneficial interest in the land or flowing directly from it. In this case, the Supreme Court ruled that the City had gained nothing more than an assurance that the land would develop in accordance with the City's vision. Second, CPR had not lost all reasonable economic use of its land. CPR's use of the corridor as a railway could continue, which was the purpose for which it had been given the land by the Province in the first place.

The Supreme Court of Canada revisited the common law concept of constructive taking in *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 ("*Annapolis*"). In *Annapolis*, the land developer, Annapolis Group, had over decades acquired large portions of land which were eventually designated for public green space and as potential future residential development. The catalyst for the claim was Halifax's decision to refuse to permit development on Annapolis Group's land. In response, Annapolis Group brought a claim for constructive taking. Annapolis Group alleged that Halifax's refusal to permit development was an effort to render their land permanent parkland, citing evidence of the public hiking, camping and otherwise using the land as parkland. They also alleged that Halifax encouraged this use and financially supported organizations that encouraged the public to use the land as such.

Unlike the *Canadian Pacific Railway* case, this decision by the Supreme Court was in relation to a summary judgment application which Halifax had brought against the claim of constructive taking. At the Court of Appeal, the Court ruled that no beneficial interest had been acquired, and therefore no constructive taking had occurred. The Supreme Court disagreed with the Nova Scotia Court of Appeal that the test for summary judgment had been made out, as they felt the evidence could support a claim of constructive taking.

In coming to this conclusion, the Supreme Court began by noting that at common law, taking of property by the state must be authorized by law and triggers a presumptive right to compensation. Only clear statutory language can override that right to compensation. In section 458 of the *Local Government Act*, the BC legislature has immunized local governments from claims generally, but left open the door to compensation when land is rezoned to public use.[6] Next, the Supreme Court reviewed the test as set out in *Canadian Pacific Railway* and restated it as follows:

> (1) a beneficial interest — understood as an advantage — in respect of private property accrues to the state, which may arise where the use of such property is regulated in a manner that permits its enjoyment as a public resource; and (2) the impugned regulatory measure removes all reasonable uses of the private property at issue.

The Supreme Court stressed that this rephrasing was not a departure from precedent, but rather a clarification of the common law rule that was stated in *Canadian Pacific Railway*.

Central to the Supreme Court's clarification is that an advantage derived for the state would satisfy as a beneficial interest. The Nova Scotia Court of Appeal had ruled that in order to satisfy the first part of this test, the state must acquire the land in question. The Supreme Court noted that this is not necessary, and in fact would compress *de facto* taking and *de jure* taking into a single form of taking, making any difference between constructive and explicit taking meaningless. The Supreme Court acknowledged that an "advantage" is broader than a beneficial interest but they rejected the conclusion that it could open any floodgates because

[6] Section 569(1) of the *Vancouver Charter* immunizes the City against claims of taking or injurious affection resulting from downzoning, including rezoning to public use.

the second part of the test would still require that no other reasonable use of the land could be available. How future courts will interpret this revised/clarified language will be important in the application of this common law rule. It should be noted that while the Supreme Court provided some guidance in *Annapolis*, their judgment was ultimately that the test for summary judgment had not been made out and that the matter should proceed to trial.

As for the second part of the test, the Supreme Court concluded that despite the fact that Halifax had essentially refused to upzone, the context of that decision meant that any reasonable use of the land had been removed. They noted that when the lands were first being obtained by Annapolis Group, there were no regulations on its development imposed by Halifax, and so it could not be said that the land owner had not lost some previously available use of their land. This is a distinguishing fact from *Canadian Pacific Railway*, where CPR was given the land as a transportation corridor. As such, barring evidence at trial that even one possible use could be made of the property, the second part of the test could be satisfied.

For now, what can be understood from *Annapolis* is that when a local government is choosing to downzone a property, careful consideration must be given to what possible uses remain for that property that are not public in nature and whether it could be inferred from the context that the local government is effectively neutralizing all possible economic uses of the land in favour of a public use. Even a local government's indirect action may give the impression of an advantage, so the history of the site and the community's engagement may be relevant factors. While both parts of the test remain important, given the potential for a broader interpretation of "advantage", local governments may take some comfort that they will not be undertaking a constructive taking by ensuring that there remains at least one reasonable private/economic use of the property that is clearly available and not merely speculative.

IV. CONCLUSION

Although facing increasing pressure from the public and the provincial and federal governments to increase density, local governments may still find themselves confronted with a development that is not in the best interests of their community. In those situations, a local government may wish to consider downzoning the lands. We hope that this paper will aid local governments in determining whether downzoning is an option, weighing the risks of doing so, and using this extraordinary power lawfully and effectively.

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