

When does taking "advantage" constitute "taking" property? Divided Supreme Court opens the door to compensation for land regulation

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Municipal authorities in Canada generally have the right to regulate land use without compensating the applicable property owner. In fact, land use planning is one of the primary functions of municipal governments. But a recent Supreme Court of Canada decision—*Annapolis Group Inc. v. Halifax Regional Municipality*—has dramatically expanded the circumstances in which compensation for regulation will be required.

What you need to know

- There is a presumption in the common law against confiscation of property (“takings” or “expropriation”) without compensation.
- Land use regulation is not typically considered a taking. However, Canadian courts have long recognized the possibility that governments can take property without overtly acknowledging that they are doing so. This has been traditionally referred to as a “*de facto* taking”.
- Findings of *de facto* takings have been relatively rare in Canada because they not only require a loss by the land owner, but they also require the municipality to acquire a “beneficial interest in the lands or flowing from the lands.”
- The Supreme Court has now significantly diluted this requirement: the majority of the Court has held that a municipality that acquires an “advantage” from the use of the land, rather than an actual proprietary interest, will owe compensation to the affected land owner.

Analysis

Over many years, Annapolis Group acquired 965 acres of undeveloped land in Halifax, with the intention of eventually developing it. In 2006 Halifax designated a portion of the Annapolis Lands for inclusion in a regional park, while dividing the lands’ zoning between “Urban Settlement” and “Urban Reserve”. The former permits immediate development, while the latter identifies lands that could be developed in the future. However, when Annapolis attempted to develop the applicable portion of its lands, Halifax refused to initiate the required secondary planning process. Annapolis sued Halifax, alleging, among other things, a constructive taking. Its argument was that Halifax’s

regulatory regime deprived it of all reasonable or economic uses of its land, which was effectively being used as a public park. In fact, Annapolis alleged that Halifax had erected signage on the land depicting Halifax's city logo, implying that it was a public park.

Halifax moved for partial summary judgment, seeking dismissal of the constructive taking claim. The trial judge refused to grant summary judgment. He held that there were numerous issues that required a trial to determine exactly how Halifax had treated the land, and whether it intended to engage in a "disguised" expropriation. The Nova Scotia Court of Appeal reversed, concluding that Annapolis could not establish that Halifax had obtained a beneficial interest in the lands or flowing from the lands. It held that limiting the use of land, or reducing its value through regulation could not constitute a taking. Rather, it is only a taking if the land is "taken" from Annapolis and acquired by Halifax.

The Supreme Court reversed this decision by a narrow 5-4 ruling. The majority concluded that not every instance of regulating property amounts to a constructive taking. However, it concluded that it would be a taking "where the effect of the regulatory activity deprives a claimant of the use and enjoyment of its property in a substantial and unreasonable way." This reinstated the possibility that sufficiently strict regulation can trigger a right to compensation. The Court justified this on the basis that there is a distinction between "actual" and "constructive" takings, and that "if a constructive taking requires an actual taking, then it is no longer constructive." It confirmed that acquiring a "beneficial interest" in property can merely be acquiring an "advantage" from the use of property, and "need not be an actual acquisition".

The four dissenting justices strongly criticized the majority's decision. In their view, merely acquiring an "advantage" is not sufficient to trigger a right to compensation. They would have held that the regulatory entity is only engaging in a constructive taking if it actually acquires an interest in the property, not simply an advantage flowing from it. The dissent expressed concern that the majority was materially expanding the right to compensation, and making it more difficult for governments to regulate, without risking liability for compensation.

In practical terms, this risk accrues primarily to municipal governments, which have principal responsibility for land regulation. They are also constitutionally unable—unlike provincial or federal governments—to pass legislation confirming that specific regulation shall not be subject to a right to compensation.

The immediate outcome of the case was not to grant Annapolis any compensation, but rather to send it to trial where the question of its rights will ultimately be determined by the Nova Scotia Supreme Court.

While it is too soon to tell with certainty, the Supreme Court has opened the door to a profoundly altered relationship between land developers and the municipal authorities in Canada. Developers frustrated with land use decisions that limit the value of their lands will have a much lower barrier to make a case for compensation. And municipalities, cautious about potential liability, may be inclined to limit their regulatory ambition.

We will be watching for further developments in this area of the law, as developers and regulators consider what might be a "substantial and unreasonable" advantage in their own specific circumstances.

To discuss these issues, please contact the author(s).

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