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Local Government Discretion to Downzone

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Roadmap

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The Authority to Downzone


“Downzoning means amending the zoning by-law to place land in a category that permits less development.”

The Authority to Downzone

A Wide Discretion

Zoning Bylaws

Division 5, Part 14 of the *Local Government Act,* RSBC 2015, c. 1 ("*LGA*") relates to the adoption of zoning bylaws.

No Promises

Local governments are unfettered in their authority to exercise their zoning power, and it follows that the indication in a zoning bylaw of a particular zoning applying to a property cannot be taken as a representation that the particular zoning will remain so in future.

Limit on Compensation

Section 458, *LGA*

- Compensation not payable for any reduction in the value of land or for any loss or damages that result from the lawful adoption of a zoning bylaw, an OCP, a phased development agreement, etc.
- Does not apply to downzoning for public use.

Re Wall & Redekop Corp. Ltd. and City of Vancouver, 1974 CanLII 1188 (BC CA), at 159:

> **The fact that rezoning during the course of development results in diminution in value of the property to the landowner, does not establish bad faith. It is a result that is contemplated by the legislation**. As was said by Robertson, C.J.O., in *Toronto v. Presswood*, [1944] 1 D.L.R. 569 at p. 585, [1944] O.R. 145:
>
> > **It is of the very essence of the exercise of the power to regulate and control the location, erection and use of buildings for designated purposes, and to prohibit the erection or use of buildings for all or any of these purposes within defined areas, that there will be interference with vested rights**. An owner who, before the passing of such a by-law as is contemplated by the statute, had a right to erect a factory on his land, or to use as a factory a building already erected on his land but theretofore used for other purposes, can no longer exercise this right after the passing of the by-law. **In many cases the market value of his property will be affected, and it may be that his intentions in acquiring or in holding the land will be defeated. This interference with vested rights is inseparable from the exercise of these powers of regulation, control and prohibition**. *Toronto v. Bd. of Trustees of R.C. Separate Schools*, [1925] 3 D.L.R. 880, [1926] A.C. 81.

Limits on Downzoning

Limits on Downzoning

- **Phased Development Agreements**
- **Lawful Non-Conforming Uses**
- **In-process Subdivision Applications**
- **In-process Building Permit Applications**

Phased Development Agreements

01

Basics

- Private agreement between local government and owner
- Public hearing required
- Freezes subdivision and zoning bylaws

02

Term Length

- 10 years without Inspector of Municipalities approval
- 20 years with Inspector approval

03

Section 516(5), *LGA*

- If bylaw amended while the agreement is in effect, the changes do not apply without developer agreement in writing

04

Key provisions

- Timing and phasing
- Right of assignment
- Registration of covenants

05

Added features

- Amenities
- Parkland dedication

06

Remedies for breach

- Developer security
- Early termination

Lawful Non-Conforming Uses

01

Section 528, *LGA*

Applies to land or a building or other structure which is lawfully used

02

Time of bylaw adoption

The protection arises at the moment a zoning bylaw is adopted or amended

03

Commitment to Use

The burden is on the owner to demonstrate unequivocal commitment to use

04

Permits not sufficient

Issuance of a development permit is insufficient to establish use

05

“Under construction”

Substantial physical alteration of a site in preparation for the erection of a structure

06

6-month Discontinuance

Section 528(2), *LGA*: if non-conforming use is discontinued for a continuous period of 6 months, the protection ends

In-process Subdivision Applications

For any subdivision application made prior to the adoption of a new zoning bylaw, Section 511 of the *LGA* suspends the effect of the new bylaw on the subject property for a grace period one year from the date of adoption of the new bylaw.

Developers have alleged frustration of applications during the grace period through the imposition, in bad faith, of impossible or unlawful conditions.

In-process Building Permit Applications

Section 463, *LGA* authorizes a municipality to withhold a building permit for a 30-day period where it identifies a conflict between a proposed development and an OCP or a zoning bylaw under preparation, but only where preparation of the bylaw begins at least 7 days before the building permit application is made.

Right to Compensation?

Index Investments Inc. v. Paradise (Town), 2023 NLSC 112

A Helpful Case Study on Constructive Takings

Index Investments Inc. v. Paradise (Town)

- Investment company owned properties rezoned “conservation”, and it sought to quash the rezoning or to be compensated for a constructive taking.

- The Supreme Court of Newfoundland and Labrador found that the Town of Paradise had properly exercised its statutory authority and, further, the owner had failed to meet the two-part test for establishing a constructive taking.

Index Investments Inc. v. Paradise (Town)

[262] The Applicants do not allege, as was the case in *Annapolis* that the Town is promoting the use of the Conservation Properties as a public park or encouraging trespass on the Conservation Properties. The allegation is merely that the presence of land zoned as Conservation within the Town's territory amounts to an advantage. In essence, the Applicants contend that the downzoning itself is sufficient to meet the standard.

[263] I find that the circumstances of this case are analogous to that of *Mariner* and *CPR*.

[264] In *Mariner*, the landowners submitted that their property had been effectively pressed into public service and that this sufficient to constitute the requisite acquisition. Cromwell J.A. concluded at paragraph 105:

> Returning to the respondents' submissions in this case, in my opinion, the freezing of development and strict regulation of the designated lands did not, of itself, confer any interest in land on the Province or any other instrumentality of government. I am reinforced in this opinion by many cases dealing with zoning and other forms of land use regulation. … One of the bases of these decisions is that the restriction of development generally does not result in the acquisition of an interest in land by the regulating authority. [emphasis added]

Index Investments Inc. v. Paradise (Town)

[265] While *Mariner* predates the *CPR* test, this statement remains relevant. Downzoning, in and of itself, does not amount to an acquisition of a benefit by the public authority.

[266] In *CPR*, the plaintiff railway company argued that by passing the impugned by law, the City of Vancouver had acquired a public park. The Supreme Court did not agree. Rather, it found that Vancouver had gained nothing more than some assurance the land would be used or developed in accordance with its vision without even precluding the historical or current use of the land. This was not the sort of benefit that could be construed as a taking (*CPR* at paragraph 33).

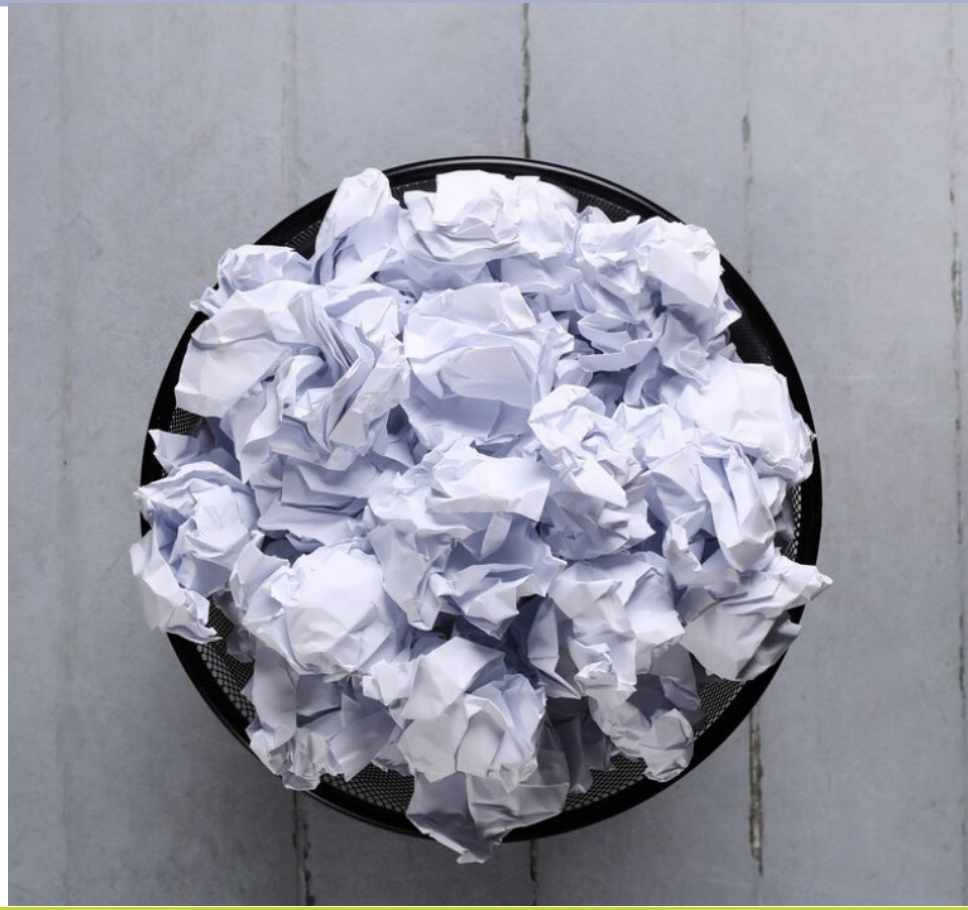
[267] In my view, in reading together the cases of *Annapolis*, *Mariner* and *CPR*, creating a park through regulation, rather than directly expropriating property, will meet the constructive taking standard. However, simply downzoning or preventing development, without more, will not amount to a compensable taking.

Challenges to Downzoning

Challenges to Downzoning

Owners have sought to quash downzoning bylaws by reason of the bylaws being:

- unreasonable,
- passed for an improper purpose, or
- passed in bad faith



Onni Wyndansea Holdings Ltd. v. Ucluelet (District), 2023 BCCA 342

Fresh Guidance from the Court of Appeal

Onni Wyndansea Holdings Ltd. v. Ucluelet (District)

Timeline of events:

- 2005: the District amended its zoning bylaw to permit a comprehensive resort on undeveloped land on the outskirts of Ucluelet that was previously within a rural zone. The development plan included the creation of a subdivision, construction of a hotel and golf course, and dedication of land to the public.

- 2008: the subdivision of a parcel of the land was approved and work began by a previous owner to install services.

- 2012: That prior owner encountered financial difficulties and the services were then decommissioned.

- 2021: the new owner, Onni, sought to reactivate the services and to proceed with the development in the subdivision. By this time, Onni had indicated its intention to depart from the comprehensive 2005 golf course plan for the surrounding land. When Onni submitted building permit applications for the strata lots within the subdivision, the District council adopted bylaws downzoning the lands to revert to rural zoning even more restrictive than the rural zoning in place prior to 2005. This prevented Onni from proceeding with its plan to develop strata lots within the subdivision in accordance with its building permit applications.

Onni Wyndansea Holdings Ltd. v. Ucluelet (District)

Bad faith and improper purpose:

- Onni alleged that the Mayor for the District had stated that the District "did not like the deal it had struck with the previous owner at the time of the original rezoning" and that the District could have required more land from the previous owner as part of that rezoning. Onni also alleged that in adopting the zoning amendments, Council wanted to control development on the lands owned by Onni and to stop it from developing or selling lots within the subdivision until the District secured more amenities from Onni.

- The Court disagreed and found that the judge had drawn factual inferences about the Council's motives that were reasonably available to her on the evidence before her. The Court upheld the factual findings that Council's decision to act quickly to forestall development did not demonstrate bad faith and that the Council did not, nor could have, taken steps to prevent the sale of the strata lots in an attempt to extract more amenities. Rather, Council was concerned that Onni's plans for the subdivision were not in accordance with its views of what was best for the community and had become divorced from the original comprehensive development plan for the lands. Those motives were not in bad faith nor for an improper purpose.

Onni Wyndansea Holdings Ltd. v. Ucluelet (District)

Unreasonableness:

- Onni also argued there were three reasons why Council's decision to adopt the downzoning was unreasonable:
    - it constituted an unjustified reversal of a longstanding practice of the District to allow the isolated development of the subdivision;
    - the Council's deliberations reflected an incoherent chain of reasoning; and
    - the Council failed to consider the significant impact of the amending bylaws on Onni and the third party who purchased a strata lot in the subdivision in 2008.

Onni Wyndansea Holdings Ltd. v. Ucluelet (District)

- With respect to prior “longstanding practice”, the Court found, on the facts, that there was no longstanding practice of the District to allow the isolated development of the subdivision. The original upzoning of the property was for the entire comprehensive development, not just the portion of the subdivision. The District had never relieved Onni of the commitments made by the previous owner and it did not endorse Onni’s shift to developing the subdivision in isolation while abandoning the comprehensive development plan.

- In relation to the allegation of “incoherent chain of reasoning”, Onni alleged that Council had ignored prior facts relevant to its decision. The Court disagreed and found that any facts Council did not explicitly refer to in arriving at its downzoning decision did not detract from its concerns that Onni and the prior owner had left a number of commitments unfulfilled and Onni had signified its intention to abandon the comprehensive 2005 plan.

- As to the allegation that Council had failed to consider the significant economic impact on Onni and a strata lot purchaser, the Court found that the District had provided notice to any affected landowners and heard submissions from them in advance of voting on the downzoning. The Court upheld the long-standing principle that a land use decision is one made by balancing the interests of private owners against the broader public interest in finding the District was not beholden to avoiding economic harm to Onni and the strata lot purchaser.

Onni Wyndansea Holdings Ltd. v. Ucluelet (District)

Commitment to use:

- Finally, Onni argued that the installation of services to the subdivision was a “commitment to use” that would satisfy establishment of a lawful non-conforming use under s. 528 of the Local Government Act, meaning that the downzoning could not impede Onni’s continued development of the subdivision. The Court disagreed, finding that the original owner’s installation of the services was in respect of the comprehensive 2005 golf resort plan, and Onni could not rely on those services as being a commitment to the use of only the subdivision in isolation from the comprehensive 2005 golf resort plan.

- Further, the Court noted that no work had been done on the strata lots which distinguished this case from Sunshine Coast (District of) v. Bailey, 1995 CanLII 570 (BC SC), where a lawful non-conforming use was found to exist where a majority of planned cottages had been constructed at the time the downzoning was enacted.

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Thank you

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