

A ZONING AMENDMENT FOR ENVIRONMENTAL PROTECTION MAY RESULT IN DISGUISED EXPROPRIATION

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The adoption of a municipal zoning by-law that changes a property's zoning to "conservation" may result in disguised expropriation and force the municipality to compensate the landowner, according to a Quebec Court of Appeal ruling recently upheld by the Supreme Court of Canada's dismissal of the application for leave to appeal.

The case pitted the City of Mascouche, on the North Shore of Montreal, against the owner of a wooded lot estimated at more than \$4 million in value. The owner had acquired it in 1976 for the sum of one dollar (\$1), as an investment. In 2006, the City adopted a zoning by-law which zoned the land "conservation", prohibiting all construction and limiting the permitted uses to silviculture, maple syrup production and certain recreational uses.

After learning of this zoning change in spring 2008, the owner initiated talks with the City with a view to having the City either change the zoning or purchase the lot. These discussions took place over several years, during which different scenarios were considered. The City even publicly expressed its willingness to purchase the land between 2014 and 2016. In doing so, the City fostered a reasonable hope on the owner's part that it would rezone or expropriate the lot. The talks ended on February 8, 2016, when the City informed the owner that it did not intend to purchase the land. These ongoing exchanges and the City's public statements led the Court of Appeal to confirm that the cause of action could not have crystallized prior to that date; prescription for the action therefore began to run on that date, almost 10 years after the adoption of the by-law that changed the zoning.

The Court of Appeal's decision is a good reminder of several important principles regarding disguised expropriation, which stem from article 952 of the *Civil Code of Québec*:

952. No owner may be compelled to transfer his ownership except by expropriation according to law for public utility and in return for a just and prior indemnity.

First, disguised expropriation may result from either (1) a restrictive by-law (usually zoning) or (2) a combination of such a by-law and the physical appropriation of an immovable by the public body alleged to have

expropriated it. Moreover, it is the by-law's actual effect on the owner that is decisive. The fact that the by-law is legally valid does not preclude a finding of disguised expropriation.

With respect to the residual uses resulting from the zoning amendment, the Court of Appeal confirmed that while the zoning as amended did not deprive the owner of all uses, the remaining uses were sufficiently limited to conclude that she was now deprived of any "reasonable" use of her land. The Court of Appeal further pointed out that section 113 (12.1) of the *Act respecting land use planning and development*, while allowing a municipality "to regulate or restrict the planting or felling of trees to ensure protection of the forest cover and promote sustainable development of private forest", does not allow the municipality to prohibit any land use.

The Court of Appeal also had to address the issue of land valuation. The Court noted that the land must be valued according to the zoning it had under the by-laws in force prior to the one that led to the disguised expropriation. That said, due to the particular circumstances of the case, the Court of Appeal determined that the value of the compensation should be calculated as at February 8, 2016, the date the City informed the owner that it would not purchase the land. In the Court's view, this is the fairest solution for the expropriated owner and the most consistent with the principle that compensation must take into account the owner's loss as a whole. As the Court of Appeal did not have the evidence required to rule on the value of the land, the case was referred back to the Superior Court, which will rule on this aspect.

At first glance, this decision could be seen as a legal barrier to municipalities wishing to adopt measures to protect the environment within their boundaries. However, the Court of Appeal expressly recognizes the important role of municipalities in protecting the environment, particularly through their zoning powers, and notes that measures designed to do so may validly have the effect of imposing an additional burden on property owners. The Court nevertheless set a limit to the municipalities' leeway: this burden, if it meets the criteria of disguised expropriation, will entitle the owner to compensation under article 952 of the *Civil Code of Québec*.

The decision also highlights the importance of clear communication between land owners and municipal representatives in the context of a zoning change and municipal use of private land, for example, for recreational purposes.

by [Martin Thiboutot](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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