IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Index Investments Inc. v. Paradise (Town)*, 2024 NLCA 25
Date: July 16, 2024
Docket Number: 202301H0048

BETWEEN:

INDEX INVESTMENTS INC.

FIRST APPELLANT

AND:

DERRICK SPRACKLIN

SECOND APPELLANT

AND:

STANLEY MARSHALL and
ELIZABETH MARSHALL

THIRD APPELLANT

AND:

THE TOWN COUNCIL OF THE TOWN
OF PARADISE

RESPONDENT

Coram: W.H. Goodridge, K.J. O'Brien, and D.M. Boone JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 202001G5525
(2023 NLSC 112)

Appeal Heard:	March 20, 2024
Judgment Rendered:	July 16, 2024
Reasons for Judgment by:	K.J. O'Brien J.A.
Concurred in by:	W.H. Goodridge, D.M. Boone JJ.A.
Counsel for the Appellants:	Michael J. Crosbie, K.C.
Counsel for the Respondent:	Stephen F. Penney

Authorities Cited:

CASES CITED: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Seraj v. Memorial University of Newfoundland*, 2022 NLCA 42; *Russell v. Toronto (City)*, (1998) 37 OMBR 362, 1 MPLR (3d) 270; *Russell v. Toronto (City)*, 2000 CanLII 17036 (ONCA), leave to appeal to SCC refused, 28428 (9 August 2001); *Nova Scotia (Attorney General) v. Mariner Real Estate Ltd.*, 1999 NSCA 98; *Sula v. Duvernay (Cité)*, [1970] CA 234 (QCCA); *Lynch v. Aylmer (City)*, 1989 CarswellQue 1517; *Aubry v. Ville de Trois-Rivieres Ouest*, (1978) 4 MPLR 62 (QCCA); *Lorraine (Ville) v. 2646-8926 Québec Inc.*, 2018 SCC 35, [2018] 2 S.C.R. 577; *Dupras v. City of Mascouche*, 2020 QCCS 2538, rev'd on other grounds, 2022 QCCA 350, leave to appeal to SCC refused, 40161 (29 September 2022); *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36; *Rodenbush v. North Cowichan (District)*, (1977) 3 MPLR 121 (BCSC); *Toronto (City) v. Virgo*, (1896) AC 88 (JCPC); *Cromiller (Re)*, [1959] OJ No 254 (ON H Ct J); *Kerr v. Brock (Township)*, (1968) 2 OR 509 (ON H Ct J); *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Canada Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, [2006] 1 S.C.R. 227; *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Moravian Church v. Newfoundland & Labrador et al*, 2005 NLTD 123.

STATUTES CONSIDERED: *Urban and Rural Planning Act, 2000*, SNL 2000, c. U-8; *Public Inquiries Act, 2006*, SNL 2006, c. P-38.1; *Municipalities Act, 1999*, SNL 1999, c. M-24.

OTHER: *Paradise Municipal Planning Area*, OC 96-173, CNLR 897/96 (*Urban and Rural Planning Act*); *Newfoundland and Labrador T'Railway Provincial Park Proclamation*, OC 97-228, NLR 93/97 (*Provincial Parks Act*).

K.J. O'Brien J.A.:

[1] This is an appeal from a judicial review of a municipal rezoning decision and from a court decision dismissing a claim for constructive taking.

OVERVIEW

[2] The Appellants own adjacent, undeveloped properties in Paradise. The properties were rezoned by the Town of Paradise when it adopted its 2016 Municipal Plan and Development Regulations. Under the previous municipal plan, the Appellants' properties were zoned as Residential Subdivision Area. Under the 2016 Municipal Plan, a significant portion of the properties were rezoned as Conservation and the remaining portion was rezoned as Rural Residential.

[3] The Appellants applied for judicial review of the Town's rezoning decision. In the alternative, the Appellants claimed compensation from the Town for constructive taking.

[4] A judge of the Supreme Court of Newfoundland and Labrador dismissed the application for judicial review because she found that the Appellants had not established that the Town improperly exercised its statutory authority or that the Town's decision was otherwise unreasonable (*Index Investments Inc. v. Paradise (Town)*, 2023 NLSC 112, "Decision").

[5] The judge further found that the Appellants did not establish constructive taking because they did not establish that (i) the Town acquired a beneficial interest in the properties, or (ii) that the rezoning removed all reasonable uses of the properties. As a result, she dismissed the claim for constructive taking.

Issues

[6] Different standards of review apply to appeals of judicial reviews of administrative decisions (such as the judge's review of the Town's rezoning

decision) and appeals of decisions made by judges in the first instance (such as the judge's dismissal of the constructive taking claim). Consequently, in their factum the Appellants organized the issues on appeal in two groups. I will do the same.

[7] On appeal to this Court, the Appellants allege that in the judicial review, the judge erred in her consideration of:

i. The Town's failure to give the Appellants direct notice of the public hearing about the proposed municipal plan;

ii. The Town's assessment of the properties as having "areas of known hazard", which led to those portions of the properties being zoned as Conservation;

iii. The Town's statutory authority to create zones with "no permitted uses", which the Appellants allege that it did in zoning part of the properties as Conservation;

iv. The Town having indirectly and improperly established a park or greenspace for public use by using its zoning authority instead of by purchasing or expropriating the land as it should have; and

v. The Town having zoned the properties so that they have "no reasonable use".

[8] The third and fifth judicial review issues raised by the Appellants are closely related and I will deal with them together.

[9] The Appellants further allege that the judge erred in applying the test for constructive taking by:

i. Failing to consider relevant evidence and considering irrelevant evidence;

ii. Improperly applying the burden of proof;

iii. Failing to properly apply property law principles in considering a public pathway, known as the T'Railway, that runs adjacent to the properties;

iv. Improperly interpreting permitted discretionary uses in the Conservation zone, specifically: "residential accessory buildings", "recreation open space uses (walking trails)", and "telecommunications towers"; and

v. In considering reasonable uses of the Conservation zone portion of the properties, improperly considering uses that depended upon the development of the Rural Residential zone portion of the properties.

Conclusion

[10] For the reasons that follow, I would dismiss the judicial review appeal because the Appellants have not established that the Town's rezoning decision was unreasonable. They have not shown that the Town denied them procedural fairness, or acted beyond its statutory authority or for an unauthorized purpose. I would also dismiss the appeal of the judge's decision on the Appellants' constructive taking claim. The Appellants have not shown that the judge made any error of law or any palpable and overriding error of mixed fact and law in her assessment.

ISSUES RELATED TO THE JUDICIAL REVIEW APPEAL

Standard of review

[11] On an appeal of a judicial review decision, this Court must decide if the reviewing judge chose the correct standard of review and applied it properly. To do this, the Court does not defer to the judge's application of the standard of review, but rather performs a *de novo*, or new, review (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 46-47; and *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, at para. 10).

[12] Here, relying on the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the judge applied a reasonableness standard of review to the Town's decision. This is the correct standard of review. In *Vavilov*, the Supreme Court of Canada established a presumption that when a court reviews the merits of an administrative decision, the standard of review is reasonableness. This presumption is rebutted in a limited number of situations, none of which apply in the present case. The Supreme Court recently reaffirmed the *Vavilov* framework in *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21.

[13] The onus is on the Appellants to establish that the decision is unreasonable.

Applying the reasonableness standard

[14] In conducting a reasonableness review of administrative decisions, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency, and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear upon it (*Vavilov*, at para. 99). To be reasonable, a decision must be based on reasoning that is both rational and logical. Although a reasonableness review is not a "line-by-line treasure hunt for error", the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic (*Vavilov*, at para. 102).

[15] When the decision maker has provided formal reasons, those reasons are the starting point for the analysis (*Vavilov*, at para. 81). However, formal reasons are not always required. For such cases, the Supreme Court of Canada gave the following guidance in *Vavilov*:

> [137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. …

[16] In this case, there are no written reasons for the Town's rezoning decision and so this Court must examine the record to evaluate the Town's reasoning process. The record is the collection of communications, notices, reports, and other documents that relate to the Town's adoption of the 2016 Municipal Plan and Development Regulations (Appellants' Book of Authorities, Vol 1, Tabs 1, 2). The record includes communications made after the adoption, but these are only relevant to the extent that they give insight into the Town's reasons for rezoning at the time it made that decision.

Was the failure to give the Appellants direct notice of the public hearing unreasonable?

[17] The *Urban and Rural Planning Act, 2000*, SNL 2000, c. U-18 (URPA), gives municipalities authority to approve municipal plans and development regulations. Section 28 of URPA requires municipalities to review their municipal plans and development regulations within five years of their coming into force, and to revise them as necessary in accordance with developments that can be foreseen during the next ten years. As part of that review, URPA requires the municipality to provide a consultation opportunity for interested persons and other groups (URPA, section 14). URPA also requires that a public hearing be held to consider objections and representations with respect to a proposed revision of the plan and development regulations (URPA, section 18). A commissioner is appointed to hold the public hearing and that commissioner has the same powers as a commissioner under the *Public Inquiries Act, 2006*, SNL 2006, c. P-38.1 (URPA, section 19). The municipality must give public notice of the proposed plan and development regulations at least 14 days before the public hearing (URPA, section 17).

[18] As part of its review of its plan and development regulations, starting in October 2014, the Town advertised and held public consultation events through mainstream and social media, including holding a public open house, publishing a YouTube video, and issuing public notices. In June 2016, the Town issued a public notice advising the public of the availability of the draft municipal plan on the Town's website (Decision, at para. 66). In 2016 and 2017, the Town approved two sets of revisions to the proposed plan and development regulations following periods of public consultation. Following the revisions, the Town published notices of the revised drafts and invited further public submissions (Decision, at para. 67). Relying on this evidence, the judge found that public consultation played a significant role in the municipal plan review in advance of the drafting and signing into force of the 2016 Municipal Plan and Development Regulations. The judge was also satisfied that the Town had complied with the public notice requirements of section 17 of URPA, and had conducted a public hearing as required.

[19] However, the Appellants submitted that more was required and that they were entitled to *direct* notice about the public hearing. There is no dispute that the Appellants did not attend the public hearing or raise any objections to the proposed plan and regulations prior to their adoption. The judge accepted that the Appellants did not have *actual* notice of the rezoning of their properties. However, she found that they *ought* to have known and that they had ample opportunity to have become aware and to have participated in the process (Decision, at para. 224).

[20] Before this Court, the Appellants submitted that the judge, and presumably also the Town, interpreted the notice requirements of URPA unreasonably. The Appellants submitted that under URPA and the common law, they were entitled to direct notice.

[21] The Appellants rely on section 5(1) of the *Public Inquiries Act, 2006*, which requires a commission of inquiry established under that statute to give people who believe they have an interest in the subject of the public inquiry a right to participate. They suggest that this obligation extended to the public hearing on the proposed municipal plan and required that they, as people with an interest in the subject of the hearing, be given direct notice of it.

[22] A public hearing on a proposed municipal plan held pursuant to URPA is not a commission of inquiry to which section 5(1) of the *Public Inquiries Act, 2006* applies. Section 5(1) applies to commissions of inquiry ordered by the Lieutenant-Governor in Council pursuant to section 3 of that statute. That the commissioner conducting a public hearing under URPA is granted the same powers as a commissioner under the *Public Inquiries Act, 2006* does not cause section 5(1) to apply to public hearings under URPA (see URPA, section 30). It was thus not unreasonable for the Town, and the judge, not to interpret URPA as incorporating the requirements of section 5(1) of the *Public Inquiries Act, 2006*.

[23] The Appellants also rely on a common law principle, which is that before a municipality enacts a bylaw that affects property rights, it must give prior notice and an opportunity to be heard to those affected. The Appellants are effectively relying on a common law principle of procedural fairness.

[24] Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes must be determined with reference to all the circumstances (*Vavilov*, at para. 77; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 21-23; and *Seraj v. Memorial University of Newfoundland*, 2022 NLCA 42, at paras. 64-67).

[25] Here the context is a mandatory statutory review of a municipal plan and development regulations. The proposed plan applied to *all* land within the boundary of the Town (*Paradise Municipal Planning Area*, OC 96-173, CNLR 897/96 (*Urban and Rural Planning Act*)). As the judge noted, this is not a review of a decision that targeted a specific property or development (Decision, at para. 146). The Town advertised and held numerous public consultations. It complied with the notice and

hearing requirements of URPA. In these circumstances, the Appellants have not established that the Town's failure to give them direct notice was unreasonable or that it denied them procedural fairness.

[26] In her assessment of the reasonableness of the Town's decision, the judge also considered that property owners who were similarly affected by Conservation zoning participated in the public hearing, raised their concerns, and were heard (Decision, at paras. 151 and 224). The Appellants submit that in doing so, she wrongfully made negative inferences concerning their failure to make representations to the Town before the proposed plan and regulations were adopted. I cannot agree. That people similarly situated to the Appellants participated in the process is not determinative of whether the procedure was fair, but it is an indicator that members of the public had notice of the public hearing. As such, it was a factor for the judge to consider in assessing procedural fairness, which she did.

Was the Town's assessment of the properties as having "areas of known hazard" unreasonable?

[27] Section 9.29.1 of the 2016 Development Regulations states the purpose of the Conservation zone is to provide a natural buffer around streams, ponds, wetlands and "areas of known hazard".

[28] The Appellants do not challenge the legitimacy of the Conservation zone. Rather, they challenge the Town's decision to designate a portion of their properties as Conservation. This Court must assess the reasonableness of that decision.

What the record reveals about the Town's reasons for zoning part of the properties as Conservation

[29] When the Appellants learned that a portion of the properties had been rezoned as Conservation, they wrote the Town with their concerns and requested a meeting to discuss (Appeal Book, Vol 5, Tab 109). In the correspondence that ensued, the Town explained its decision. That explanation is supported by other documents in the record that predate the adoption of the 2016 Municipal Plan. The record reveals that the Town decided to rezone land that had a slope over 20% as Conservation because the Town deemed it too steep to develop and thus a hazard area. I will review information in the record that elucidates the Town's reasoning process.

[30] In preparing for the municipal plan review, Town staff prepared a slope map of the planning area. "Over 20%" was the steepest category identified on the slope

map. Three areas, including an area that included portions of the properties, were found to have slopes over 20% (Appeal Book, Vol 5, Tabs 111, 122).

[31] The Town commissioned a preliminary geotechnical assessment of one of the three areas ("Golder Report", Appeal Book, Vol 5, Tab 87). Although the Golder Report did not evaluate the Appellants' properties, it identified slope stability risk in the area it examined. The Town considered the other two areas ultimately zoned as Conservation (including the area of the Appellants' properties) to be "very similar" to the examined area (Appeal Book, Vol 5, Tab 111).

[32] A background report prepared for the Town by consulting engineers reported that slopes over 10% are relatively more expensive to build on and require more complicated foundations and utility connections (Appeal Book, Vol 3, Tab 24, at p. 582).

[33] Although the Appellants did not make any objections at the public hearings, others objected to the proposed Conservation zoning in the area studied in the Golder Report. In her final report, the commissioner wrote: "In my opinion, the Conservation zone is in place to safeguard the public by preventing development in hazardous areas such as the steep slopes along Topsail Bluff". She recommended the Conservation zoning remaining as proposed until slope stability in the area had been studied further (Appeal Book, Vol 5, Tab 106, at p. 1213).

[34] Finally, the 2016 Municipal Plan itself reveals the Town's reasoning. Section 6.5, entitled "Hazard Areas", says: "It is important for the Town to ensure the safety of residents by preventing development in areas where it is not desirable, such as on steep or unstable slopes or in floodplains".

[35] In summary, the record reveals that the Town deemed areas with slope greater than 20% to be areas of known hazard because it considered steep slopes to pose a stability risk and be unsuitable for safe development. It thus rezoned land that had a slope greater than 20% as Conservation. Engineering advice supported the decision. Although the record does not reveal exactly why 20% was chosen as the cutoff (as opposed to 15% or 25%, for example), it gives some indication. Twenty percent was the steepest category identified in the slope map and is twice as steep as the minimum slope identified by the engineers as being more complicated to develop.

[36] The onus is on the Appellants to establish that the Town's decision is unreasonable. The Appellants have not sought to show that the 20% cutoff is unreasonable or not rationally connected to a safety risk. They challenge the decision on other grounds. In the court below, the Appellants filed a report of MAE Design

Limited and submitted that it showed that some of their property zoned as Conservation did not have a slope greater than 20% (Appeal Book, Vol 1, Tab 4, at p. 229-234). However, the judge found that the report had not been properly admitted into evidence and she could not rely upon it (Decision, at para. 164). I agree with her conclusion. The Appellants did not seek to admit additional evidence in this Court and thus have not established that the Conservation zone was applied to land with less than 20% slope.

[37] Before this Court, the Appellants argued that the Conservation zone can only be applied to "areas of known hazard", and that the properties are only areas of "suspected hazard". Essentially, the Appellants argued that, notwithstanding the 20% slope, the Town should have done a stability study of their land before considering it an area of "known hazard" and its failure to do so is unreasonable. I cannot agree. On judicial review, this Court does not interpret the Town's development regulations or decide how they should be applied. Instead, this Court assesses whether it has been shown that the Town's interpretation and application were unreasonable. The Appellants have not shown that the Town's reliance on a slope map prepared by Town staff to identify areas with slopes over 20% was unreasonable. Nor have they shown that the Town's interpretation of "known hazard" to include areas with slopes over 20% is unreasonable. I cannot agree that the Town was required to do a stability study of the Appellants' land before rezoning it.

[38] In brief, the Appellants have not established that the Town's assessment of the properties as having "areas of known hazard" is unreasonable. The Town's reasoning is intelligible from the record, and its justification is rational and logical.

Did the Town use its zoning authority for an improper purpose, namely, to create a park or greenspace for public use?

[39] Section 174 of the *Municipalities Act, 1999*, SNL 1999, c. M-24, authorizes a municipality to acquire or establish parks and other recreation facilities within its boundaries. Section 222 of the *Municipalities Act* authorizes a municipality to expropriate land. The Appellants submit that, consequently, the lawful way for the Town to create a park or green space for public benefit is by purchasing or expropriating land, not by using its zoning authority, which the Appellants argue the Town has done in this case.

[40] However, there is nothing in the record that supports the Appellants' assertion that the Town zoned the properties as Conservation to create a park or green space

for public use or benefit. As already discussed, the record reveals that the Town rezoned the properties because it deemed the land too steep to safely develop and thus a hazard area.

[41] The Appellants have cited *Russell v. Toronto (City)*, (1998) 37 OMBR 362, 1 MPLR (3d) 270, a decision of the Ontario Municipal Board (OMB), which was upheld by the Ontario Court of Appeal (*Russell v. Toronto (City)*, 2000 CanLII 17036 (ONCA), leave to appeal to SCC refused, 28428 (9 August 2001)) in support of their position. However, *Russell* is distinguishable from the present case. In *Russell*, a rezoning bylaw was successfully challenged by two property owners. The bylaw, which was enacted to protect ravines from development, would have prevented the applicants from using their land for any purpose other than leaving it for open space (*Russell (CA)*, at para. 5 and *Russell (OMB*), at para. 12). The OMB had a long-standing policy that it would not approve a bylaw that transferred privately owned lands to public purposes, such as open space, unless the municipality could justify such a "drastic result" (*Russell (OMB)*, at paras. 8-9 and *Russell (CA)*, at para. 22). The municipality had not offered any such justification (*Russell (OMB)*, at para. 10).

[42] The OMB briefly addressed situations which would justify such a bylaw: "Where the health and safety of existing or future inhabitants are involved, where there are patent and imminent hazards to the well being of the community" (*Russell (OMB)*, at para. 10 and *Russell (CA)*, at para. 25).

[43] The Appellants have not shown that a policy like that in issue in *Russell* existed in the present case. However, even if this Court were to apply a standard similar to the policy in *Russell*, in this case the Town has justified their decision based on safety concerns.

[44] The Appellants do not accept the Town's justification. Instead, they submit that the Town rezoned their property for the ulterior motive of wanting to protect the "amenity value" of the T'Railway park. The T'Railway is a linear provincial park that runs across Newfoundland over the old railway bed (*Newfoundland and Labrador T'Railway Provincial Park Proclamation*, OC 97-228, NLR 93/97 (*Provincial Parks Act*)). The T'Railway runs adjacent to the properties.

[45] The 2016 Development Regulations protect existing vegetation on 20 metres of either side of the centreline of the T'Railway right-of-way with an Open Space/Buffer (OSB) zone (sections 4.21, 9.28). The Appellants do not contend that this natural state buffer or OSB zone interferes with their property rights. Rather, they submit that the Town zoned a part of their properties as Conservation to increase

the natural state buffer around the T'Railway to more than the already protected 40-metre corridor for the benefit of the public.

[46] However, there is nothing in the record that supports the Appellants' submission. It is speculation. Moreover, it is not particularly logical speculation because if the Town wanted to increase the natural state buffer along the T'Railway, it would reasonably be expected to do so for all the T'Railway within the Town, not just a portion of it. In any event, the Appellants have not shown that the Town improperly used its rezoning authority for the purpose of creating a park or open space for public use.

Did the Town create a zone with "no permitted uses" or "no reasonable uses" without statutory authority to do so?

[47] If the Town made a decision that it did not have lawful authority to make, the decision would be unreasonable and would not survive judicial review.

[48] Section 13(2) of URPA sets out the requirements for a municipal plan. It requires that a plan "divide land into land use classes and the use that may be made in each class" and "include prohibited uses of land" (URPA, section 13(2)(c)).

[49] Section 35 of URPA requires the Town to make development regulations to ensure that land is controlled and used only in accordance with the municipal plan. It states in relevant part:

> **35.** (1) A council or regional authority shall, to ensure that land is controlled and used only in accordance with the appropriate plan or scheme, make development regulations
>
> (a) respecting land use zoning and shall require for that zoning, a map that divides the planning area into land use zones;
>
> (b) indicating permitted, prohibited and discretionary uses of land in each land use zone;

[50] The Appellants submit that the combined effect of these provisions is that the Town must state the permitted, prohibited, and discretionary uses of land in each land use class or zone. They further submit that there is no authority for the Town to create a land use class or zone with no permitted uses or no reasonable use.

[51] The Appellants do not deny that the 2016 Development Regulations list both permitted uses and discretionary uses for the Conservation zone. Nor do they deny the Town's authority to prohibit certain uses of property. The problem, in their view, is that the practical effect of the application of the Conservation zone to their properties is that they cannot make *any* use of their land. They submit that the Town has thus, in effect, created a zone with no permitted uses, which URPA does not authorize them to do.

[52] Before I consider this submission on judicial review, it is helpful to distinguish it from the Appellants' arguments in support of their claim for constructive taking, because the Appellants assert that the Town's zoning decision has deprived them of all reasonable uses of their land in their submissions for both aspects of their appeal.

[53] To succeed on their argument for the judicial review, the Appellants must show that the Town's decision is unreasonable because the Town has acted beyond its statutory authority or for a purpose that is not statutorily authorized (*Nova Scotia (Attorney General) v. Mariner Real Estate Ltd.*, 1999 NSCA 98, at para. 50). If the Appellants do not establish that the Town has acted without statutory authority, they could still establish a claim for constructive taking because such a claim does not require that the Town acted without authority.

[54] The Appellants have cited numerous cases in support of their argument on judicial review, however, all are distinguishable. Several of the cited cases involve the doctrine of disguised expropriation (*Sula v. Duvernay (Cité)*, [1970] CA 234 (QCCA); *Lynch v. Aylmer (City)*, 1989 CarswellQue 1517; *Aubry v. Ville de Trois-Rivieres Ouest*, (1978) 4 MPLR 62 (QCCA); *Lorraine (Ville) v. 2646-8926 Quebec Inc.*, 2018 SCC 35, [2018] 2 S.C.R. 577; *Dupras v. City of Mascouche*, 2020 QCCS 2538, rev'd on other grounds, 2022 QCCA 350, leave to appeal to SCC refused, 40161 (29 September 2022)). The doctrine of disguised expropriation is founded upon article 952 of the Civil Code of Quebec (*Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36, at para. 47). There is no equivalent doctrine in Newfoundland and Labrador. Although the Supreme Court of Canada has recently clarified that disguised expropriation cases may be persuasive authority in assessing constructive taking claims in Canada's common law jurisdictions, the two doctrines are distinct. Constructive taking is considered later in this decision.

[55] In other cases cited by the Appellants, the municipality in question was found to have acted in bad faith or for a purpose that was not statutorily authorized (*Rodenbush v. North Cowichan (District)*, (1977) 3 MPLR 121 (BCSC)), or was found not to have statutory authority to enact the bylaw in question (*Russell*; *Toronto (City) v. Virgo*, [1896] AC 88 (JCPC); *Cromiller (Re)*, [1959] OJ No 254 (ON H Ct

J); *Kerr v. Brock (Township)*, (1968) 2 OR 509 (ON H Ct J)). All these cases are distinguishable from the present case.

[56] In modern Canada, extensive and restrictive land use regulation is the norm (*Mariner*, at para. 42). The principal restrictions on land use arise from public authorities' land use controls, granted to them by planning statutes such as URPA.

[57] There is nothing in the record to suggest that the Town's purpose in adopting the 2016 Municipal Plan was for any reason other than to set out a "comprehensive policy document for the management of growth and development" of the municipality over the 10-year planning period (2016 Municipal Plan, section 1.1). As already discussed, there is nothing in the record that supports the Appellants' assertion that the Town zoned the properties as Conservation to create a park or green space for public use or benefit, or for any other ulterior motive. The record reveals that the Town rezoned all areas with slopes over 20% as Conservation because it deemed the land too steep to safely develop and thus a hazard area.

[58] This decision was within the Town's statutory authority. Section 13 of URPA sets out the requirements and discretionary functions of municipal plans. Of relevance here, municipal plans must indicate the policies to be implemented under the plan (section 13(2)(b)) and may provide for the protection, use and development of environmentally sensitive lands (section 13(3)(f)).

[59] One of the policies implemented under the 2016 Municipal Plan is the policy for "Environmentally Sensitive Areas" (2016 Municipal Plan, section 6.1). It states in relevant part that the Town "will protect environmentally sensitive areas by identifying, maintaining, and enhancing important elements or features of the natural environment including … [p]hysically unstable lands (steep slopes, and/or unstable soil, and areas susceptible to flooding.)". The "Hazard Area" policy includes preventing development in areas where steep topography makes the land unsuitable for development (2016 Municipal Plan, section 6.5.1). Undoubtedly, the Town had statutory authority to create a Conservation zone class of land use.

[60] As for the Appellants' submission that URPA does not authorize the Town to apply Conservation zoning to an area if to do so would result in there being no reasonable uses for the land other than leaving it in an undeveloped state, I cannot agree. Sections 96-98 of URPA contemplate just such a situation.

[61] In brief, section 96 permits a landowner who has been refused permission to develop land because such development would not accord with the municipal plan, to serve a purchase notice on the Town provided that the land has become incapable

of beneficial use. Section 98 creates an exception to the purchase notice scheme if development in the area is prohibited under URPA or some other law for the purpose of protecting a watershed area or for another environmental reason. These sections are not in issue in this case, however, they illustrate that URPA authorizes a municipality to remove all reasonable beneficial uses of an owner's land when applying its municipal plan. Whether the municipality must then compensate the owner is a separate question and one that does not arise in assessing the reasonableness of the Town's rezoning decision on judicial review.

Conclusion on judicial review

[62] The Appellants have not established that the Town's rezoning decision was unreasonable. They have not shown that the Town denied them procedural fairness or acted beyond its statutory authority or for an unauthorized purpose. The Town's reasoning for zoning portions of the Appellants' properties as Conservation is transparent from the record, intelligible, logical, and justified.

ISSUES RELATED TO THE CONSTRUCTIVE TAKING APPEAL

Standard of review

[63] The appeal of the judge's decision to dismiss the Appellants' constructive taking claim is governed by the standard of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[64] For pure questions of law, the standard is correctness. On a question of law, an appellate court can replace the judge's opinion with its own. For questions of fact and of mixed fact and law, the standard is palpable and overriding error. On this standard, the appellate court can only intervene if there is an obvious error in the trial decision that is determinative of the outcome of the case. The fact that an alternative factual finding could be reached based on a different ascription of weight does not mean that a palpable and overriding error has been made. However, if the judge made an extricable error in principle with respect to the characterization of the legal standard in question or its application, that error amounts to an error in law and the applicable standard is correctness (*Housen*, at paras. 8, 10, 26-27, 36-37; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33).

[65] Unlike for the issues on judicial review, for which I performed the analysis anew without deference to the judge's decision, for the issues related to constructive

taking, I do not retry the case (*Housen*, at paras, 3, 7; *H.L. v. Canada (Attorney General*), 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 64).

The legal test for constructive taking

[66] If they were not successful in overturning the Town's rezoning decision on judicial review, the Appellants claimed in the alternative that the Town had, in effect, expropriated their property by rezoning it. This type of claim has been referred to as "*de facto* taking", "regulatory taking", or "constructive expropriation". It is now more properly referred to as "constructive taking" (*Annapolis*, at para. 17).

[67] The judge did not err in identifying the legal test for constructive taking. Nor do the Appellants allege such error. Nevertheless, it is helpful to set out the test here to give context to the errors the Appellants do allege.

[68] To show a constructive taking, the Appellants had to prove that because of the rezoning: (i) the Town acquired a beneficial interest in the property or flowing from it; and (ii) all reasonable uses of the property had been removed (*Canada Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, [2006] 1 S.C.R. 227, at para. 30; *Annapolis*, at para. 25).

Did the judge fail to consider relevant evidence or consider irrelevant evidence?

[69] The Appellants allege errors in the judge's application of the constructive taking test and in her consideration of the evidence. These are questions of mixed law and fact, which are reviewable on the palpable and overriding error standard. This is a high standard. To be successful, the Appellants must identify an obvious error that is determinative of the outcome of the case.

[70] The Appellants have not shown any such error in relation to the judge's application of the test or her consideration of the evidence. Most of the errors they allege are, in effect, their disagreement with the judge's weighing of the evidence. For example, when considering how the rezoning aligned with the Appellants' reasonable expectations of the uses of their property, the judge considered the previous Residential Subdivision Area zoning (at para. 228):

> The only permitted uses within the RSA zoning were "maintenance and operation of existing uses, conservation". As there were no existing uses, the only permitted use was conservation. Pursuant to this zoning, however, the Applicants could submit a

> SDP [Subdivision Development Plan] for approval. The decision of whether or not to approve a SDP was discretionary with the Town.

[71] The judge continued with a careful consideration of the issue. She concluded that there had been some interference in the Appellants' expectations (at para. 227), but that they could not have had a reasonable expectation that they would be able to develop the Conservation portion of their properties without having to clear hurdles, including any issues arising from the sloping of the land (at para. 233).

[72] Before this Court, the Appellants submitted that the judge downplayed the interference with their expectations and failed to consider the superior position they were in prior to the rezoning. The Appellants have not identified any error in the judge's understanding of the Residential Subdivision Area zoning or the process the Appellants would have had to follow to develop their properties under it. Instead, they disagree with her consideration of the issue and her conclusions. Their disagreement is not grounds for appellate intervention.

[73] Likewise, they disagree with the judge's comparison of their situation with that in other cases such as *Mariner* and *Canadian Pacific Railway*. The Appellants have not shown that the judge misunderstood the cases or some aspect of the evidence. Instead, they submit that she should have distinguished those cases and followed others. They do not agree with her findings, but they have not shown that she made an obvious error.

[74] Other errors the Appellants allege are unsupported by the Decision or the record. For example, they submit that the judge did not look at "targeting" realistically when she found that the Town's rezoning decision did not specifically target the Appellants. They allege that she wrongly focused upon whether the record displayed "deliberate intent hostile" towards them (Appellants' Factum, at para. 139). A fair reading of the Decision does not support this allegation. The three times that the judge stated that the Town's actions did not specifically target the Appellants, she referenced the rezoning as occurring as part of the municipal plan review. She made no mention of intent hostile towards the Appellants (Decision, at paras. 123, 146 and 221).

[75] Likewise, the Appellants object to the judge's finding that there was no evidence before her that the Conservation portion of their properties had no economic value (Decision, at para. 273). Yet, they have not identified any evidence that contradicted that finding. Instead, they argue that she should have found that

there was no economic value because of the restrictions of the Conservation zone. They disagree with her not drawing an inference that they wanted her to draw, however, it would have been wrong for the judge to draw an inference for which there was no basis in the evidence.

[76] It is not enough to allege that the judge was unreasonable in her considerations or that she should have made different findings. An appeal is not a retrial and this Court cannot simply substitute its view of matters for that of the judge. Having reviewed all the Appellants' alleged errors in the judge's consideration of the evidence, I am satisfied that none are palpable and overriding errors.

[77] Some of the errors the Appellants raised under this issue relate to the T'Railway. I will address their submissions later in these reasons, when I consider whether the judge failed to properly apply property law principles in considering the T'Railway.

Did the judge improperly apply the burden of proof?

[78] The judge placed the onus on the Appellants to establish on a balance of probabilities that the property had no reasonable uses (Decision, at para. 174). That all reasonable uses of the property have been removed is the second prong of the test for constructive taking.

[79] The Appellants submit that the judge should have considered that the Town had a burden to prove that the Conservation portion of their property *had* reasonable uses.

[80] In *Snell v. Farrell*, [1990] 2 S.C.R. 311, the Supreme Court of Canada stated, at page 321:

> … In a civil case, the two broad principles are:
>
> 1. that the onus is on the party who asserts a proposition, usually the plaintiff;
>
> 2. that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.

[81] The second principle was considered by Green J., as he then was, in *Moravian Church v. Newfoundland & Labrador et al*, 2005 NLTD 123. Justice Green noted that not every situation where the subject matter of an allegation lies "particularly

within the knowledge" of the defendant will necessarily in itself result in the placement of the formal, legal burden of proof on the party with that special knowledge (*Moravian Church*, at para. 42). He continued:

> Nevertheless, where a defendant makes new and discrete assertions often involving alleged improper or opprobrious behaviour on the part of the plaintiff, (such as burning down one's own building, or actually performing alleged defamatory acts, or engaging in improper behaviour justifying dismissal) which one would not expect to be made by fair-minded and reasonable people unless they had some basis for making them, it is not unreasonable to require the defendant in such circumstances to disclose his particular basis of knowledge and to bear the burden of proof in so doing.

[82] The Appellants have not identified any constructive taking cases in which the municipality or public authority was required to prove that the property in question retained reasonable uses. In *Annapolis*, the most recent Supreme Court of Canada case to consider the doctrine in detail, the Court indicated that the burden to establish the test remained with the claimant (*Annapolis*, at paras. 53, 64, 68, 70 and 72).

[83] In all constructive taking cases, claimants are faced with a similar burden to show that all reasonable uses have been removed. There is nothing particular in the Appellants' situation that would make it unfair or impractical to maintain the onus on them as the claimants, such that I would agree that the onus should be reversed in this case.

[84] This is not to say that the Appellants were unable to rely on evidence that originated with the Town to make their case. They were. Moreover, they did rely extensively on the Town's record in advancing their claim.

Did the judge fail to properly apply property law principles or otherwise err in assessing the effect of the T'Railway?

[85] Before this Court, the Appellants have alleged errors involving the T'Railway. Other than noting that the location of the properties was described in the Appellants' application as being "south of the system of trails known locally as the 'Trailway' and near the Topsail River" (Decision, at para. 2), the judge did not specifically mention the T'Railway in the Decision. It is unclear to what extent the Appellants relied on the proximity of the T'Railway to their properties in their argument before the court below because a transcript of that hearing was not filed. Other than the reference identified by the judge, the T'Railway was not mentioned in the originating application they filed in the lower court.

[86] In any event, the Appellants have raised the T'Railway in this Court and I will address their arguments.

[87] The judge found that the Appellants had not proven that the Town had acquired a beneficial interest in their property or flowing from it, as required by the first prong of the constructive taking test. The Appellants had argued that the Town had acquired a benefit in two ways: (1) a right in the nature of a restrictive covenant; and (2) the creation of a natural greenspace or parkland within the Town's jurisdiction (Decision, at para. 243).

[88] With respect to the first argument, the Appellants submitted that because the Conservation zoning restricted them from cutting all the trees on their property, the Town had obtained an interest in the form of a restrictive covenant, *profit à prendre*, or easement. The judge rejected this argument because the Appellants had not adduced evidence to support their assertion that the Town's lands assumed a dominant interest over their lands, which is a legal requirement for easements and covenants over land. She further wrote:

> [250] I accept, as asserted by the Town, that the restrictions in the *2016 Development Regulations* for cutting trees off the Conservation Properties is the same as that for properties within any other zone. It is only if the activity reaches the point of a material change to the Conservation Properties that a permit would be required.
>
> [251] There is no evidence that the Applicants could not obtain a permit to cut vegetation or remove topsoil from the Conservation Properties should one be required. Nor is there evidence as to how the Town would derive a benefit if these activities were prohibited.

[89] The Appellants argue before this Court that the judge erred in law because the T'Railway was the dominant tenement and the Conservation properties were the subservient tenement. Further, they submit that the Town used its zoning authority to restrict them from cutting all the trees on their land because the Town wanted the T'Railway to be a natural trail surrounded by a natural buffer.

[90] I cannot agree that the judge erred as the Appellants allege. In *Annapolis,* the Supreme Court of Canada clarified that a "beneficial interest" as required by the first prong of the constructive taking test is concerned with the effect of a regulatory measure and not with whether the public authority actually acquired an interest. The Supreme Court interpreted "beneficial interest" broadly, as a benefit or advantage accruing to the state. It noted that the focus must be on effects and advantages, and

that substance not form should prevail (*Annapolis*, at paras. 38-45). The judge correctly identified this law (Decision, at paras. 188-190, 206 and 220).

[91] She also applied it without error. Although she was not specifically considering the T'Railway when she found that there was no evidence as to how the Town would derive a benefit from restrictions on cutting, her general statement holds true for the specific. It is likewise for her finding that there was no evidence that the Conservation-zoned portion of the properties enhanced the scenic beauty of a trail or other Town property (Decision, at para. 258). There was no evidence that the land use restrictions on the properties would give a benefit to the Town by enhancing the value of, or otherwise improving, the T'Railway.

[92] Moreover, as I have already stated in paragraphs 45 and 46 above, the Appellants' submission that the Town zoned a portion of the properties as Conservation because it wanted to increase the natural buffer around the T'Railway is speculation. The judge was correct when she stated:

> [259] Although the intention of the Town is not an element of the [test for constructive taking], the assessment of intent can be helpful in distinguishing between mere regulation in the public interest and takings that require compensation. The evidence on the Record is that the Conservation zone was imposed due to sloping concerns with the Conservation Properties.

[93] Simply put, the judge did not err in finding that the Appellants did not establish that the effect of the rezoning was to give the Town an advantage or benefit in the nature of a park or greenspace, or in the nature of an increased natural buffer over any trail or Town property.

Did the judge fail to properly interpret permitted discretionary uses in the Conservation zone, specifically: "residential accessory buildings", "recreation open space uses (walking trails)", and "telecommunications towers"?

[94] The judge found that the Appellants had not proven that the rezoning of a portion of their properties as Conservation resulted in the removal of all reasonable uses, as required by the second prong of the test for constructive taking. In her analysis of this issue, the judge considered the discretionary uses permitted in the Conservation zone by the 2016 Development Regulations. She found that the listed discretionary uses of boathouses, docks and wharves were not reasonable uses for the Appellants' properties because they are not adjacent to waterways (Decision, at para. 315). She continued:

> [316] What is not clear from the sparse evidence before the Court is whether the remaining discretionary uses of residential accessory buildings, recreation open space, or telecommunications are also not reasonable.
>
> [317] Although the Application states that the Properties are not developable "in any manner" and that development has been rendered out of the question, these statements are not supported with an evidentiary foundation.

[95] With respect to the other listed discretionary uses of "residential accessory buildings", "recreation open space uses (walking trails)", and "telecommunications towers", she wrote:

> [323] If development were to occur for the Rural Residential Properties, conceivably the Conservation Properties could have use for residential accessory buildings for the Rural Residential Properties.
>
> [324] Further, open recreation space might prove to be a reasonable use for the Conservation Properties if the Rural Residential Properties were to be developed. It is not clear if "open recreation space (walking trails)" is limited to walking trails or whether walking trails is intended to be an example of a type of open recreation space. If it is broader than trails, then the reasonableness of this use is enhanced. Open recreational space use might include a trail system, playground or ball field. The reasonableness of this use would be heightened if done in conjunction with a single-detached housing development on the Rural Residential Properties.
>
> [325] The final discretionary use is communication towers. I note this is a discretionary use in all of the Town's zones. Although this might not be an attractive option for the Applicants or how they would envision using the portion of the Conservation Properties, it nonetheless is a potential use. The onus was on the Applicants to adduce evidence as to why this would not be a reasonable use. No such evidence was adduced.

[96] The Appellants alleged several errors with respect to these findings. I will explain why I do not agree that the judge erred as they alleged.

[97] First, the Appellants submitted that the judge failed to recognize that whether the properties could be used in these ways was something within the Town's expertise and knowledge. I have already explained that the onus was on the Appellants to establish the removal of all reasonable uses. There was no burden on the Town to prove this element of constructive taking, although the Appellants could have relied on evidence that originated with the Town to meet their burden.

[98] Second, the Appellants alleged that the judge erred in failing to consider that there is no right to use a property for a discretionary use and that, in this case, the potential exercise of the discretion is "quite doubtful" given that the Town generally intends natural vegetation be retained (Appellants' Factum, at para. 161). Related to this argument, the Appellants alleged that the judge failed to consider that a property with a discretionary use that has not been granted has a nominal or zero market value.

[99] Undoubtedly, the judge was aware that these were discretionary uses. Following the direction of *Annapolis*, she recognized that she had to consider not simply that there were discretionary uses under the Conservation zone, but also how those uses might reasonably be applied to the Appellants' property (Decision, at paras. 310-311). The judge noted that here, unlike in some other cases in which constructive taking was found, there was no evidence that the Appellants had applied for a discretionary use and been denied by the Town. That said, she did not view an application as required:

> [319] Although the Applicants need not have applied to develop the Properties prior to bringing this Application, the reasons for denial of a development application would provide cogent evidence for the Court to consider on a constructive expropriation application. I do not have the benefit of that evidence.

[100] The Appellants have not shown that the judge made any error of law in her consideration of this issue and so to be successful on appeal, they must show that she made a palpable and overriding error. They have not.

[101] The Appellants' suggestion that the Town's approval of a discretionary use is "quite doubtful" is speculative. As the judge noted, there was no evidence supporting such a finding. In fact, the last correspondence from the Town contained in the record showed that the Town was still looking to meet with the Appellants to discuss options for development of the properties (Decision, at para. 334). The judge accepted that pursuant to section 3.6 of the 2016 Development Regulations, the Appellants may apply to carry out a residential development within a Conservation zoning area and that the Town has broad discretion to approve or refuse such an application (Decision, at para. 234).

[102] The Appellants' suggestion that the Conservation-zoned property has no value if a discretionary use has not been granted is also unsupported by the evidence. Prior to rezoning, the Appellants had no guaranteed right to develop their land, yet they considered the land to have value.

[103] Moreover, the value of land is affected by factors other than zoning, including its topography. Before the rezoning, the Appellants could have submitted a Subdivision Development Plan to the Town for consideration. As stated by the judge:

> [326] It is noted that the reason the Town rezoned the Conservation Properties was due to slope. Therefore, there may be concern that the Conservation Properties are not conducive to any of the discretionary uses identified. If development is prevented however due to slope, that would have been an obstacle for the Applicants to mount in the prior zoning as well. In other words, if the Applicants are not able to use the Conservation Properties due to slope issues, it is the topography of the land that has caused the problem – not the actions of the Town in rezoning the Properties.

[104] Finally, the Appellants argue that the discretionary uses are public, not private uses. Again, the Appellants point to no evidence to support this assertion. The judge recognized that telecommunications towers might not be an attractive option for the Appellants and her consideration of this use is but one small part of her analysis. I cannot agree that "residential accessory buildings" and "recreation open space uses (walking trails)" are necessarily only public uses and thus cannot be reasonable uses for the Appellants. The judge's findings that these discretionary uses might be reasonable uses for the property may only be interfered with on appeal if the Appellants show that the judge made a palpable and overriding error in her assessment. They have not.

Did the judge improperly consider uses that depended upon the development of the Rural Residential zone portion of the properties?

[105] The Appellants submitted that the judge erred when she considered that if development were to occur for the Rural Residential portion of the properties, conceivably the Conservation portion of the properties could have use for residential accessory buildings. They submitted that this was an error in law because the issue was reasonable use of the Conservation portion of the properties, not the Rural Residential portion. They further alleged error because "this highly speculative assertion" by the judge was "without any supporting evidence or proof by the Town".

[106] I cannot agree. First, the judge was clearly considering whether the Appellants had established that all reasonable uses for the Conservation portion of the properties had been removed. Nothing in the Decision supports a conclusion that she was mistakenly considering the uses of the Rural Residential portion. Second, the judge

did not make a finding that the Conservation properties could be used for residential accessory buildings. She was considering whether the Appellants had discharged their burden of establishing that all reasonable uses, including the listed discretionary uses, had been removed. In doing so, she was entitled to consider the evidence and the lack of evidence. Having made no error in law, her assessment of the evidence and her conclusions are due deference. The Appellants have not established that she made any palpable and overriding error.

Conclusion on appeal of the dismissal of the constructive taking claim

[107] The Appellants have not established that the judge made any error of law or any palpable and overriding error of mixed fact and law in her assessment of their constructive taking claim.

DISPOSITION

[108] For the forgoing reasons, I would dismiss the appeal.

[109] As the Town has been successful, I would further order that it have its costs in this Court on column 3 of the scale of costs against the Appellants and affirm the costs order in the court appealed from.

_____

K.J. O'Brien J.A.

I concur : _____

W.H. Goodridge J.A.

I concur : _____

D.M. Boone J.A.