

U.S. Supreme Court Hands Down Controversial Decision in Property Rights Case

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The complicated area of regulatory takings law, which pits private property interests against the power of government to adjust rights for the public good, has become more complicated following the U.S. Supreme Court's June 23, 2017 ruling in *Murr v. Wisconsin*.

An important issue to be determined when analyzing whether a regulation constitutes a taking of property entitled to just compensation under the Takings Clause of the Fifth Amendment is the identification of the relevant parcel, or proper unit of property, against which the impact of the regulation is to be considered. The Supreme Court addressed this issue in *Murr*.

In 1960, the Murr parents purchased property along the lower St. Croix River in Troy, Wisconsin, Lot F, on which they built a recreational cabin. In 1961 they put title to Lot F in the name of the family plumbing business. In 1963, they purchased adjacent Lot E in their own name. Each of the lots is over an acre in size, however, due to the waterline and steep bluff, each lot has less than one acre of land suitable for development.

In 1976, the State adopted scenic and conservation regulations limiting development in the area. The regulations prohibited the use of lots as separate building sites unless each lot had at least one acre of land suitable for development. The regulations included a grandfather clause for substandard lots on abutting land in separate ownership. The regulations, however, also had a merger provision which provided that adjacent lots in common ownership may not be sold or developed as separate lots, unless each lot had at least one acre of land suitable for development.

In the 1990s, the Murr parents conveyed the lots to their children, the petitioners. Years later, desiring to relocate the cabin on Lot F and to sell Lot E to fund the project, the petitioners sought variances from the regulations. The variances were denied, with the State courts affirming. The petitioners then commenced a separate action alleging that the regulations resulted in a taking of Lot E, because the lot could neither be sold nor developed as a separate lot. The Wisconsin courts concluded that Lots E and F should be considered together based on the merger provision of the regulations, and ruled that the regulations did not effect a taking of the lots as combined. The U.S. Supreme Court agreed with this conclusion, but not with the reasoning of the Wisconsin courts as to the identification of the relevant parcel.

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In the 5-3 majority opinion, the Supreme Court announced a complex standard for the identification of the relevant parcel in regulatory taking cases based on consideration of objective rules and customs and reasonable expectations about the property. This includes the following factors: 1) how State and local law affect the land (specifically, how the land is bounded or divided); 2) the physical characteristics of the land; and 3) the prospective value of the regulated land, including the effect of the burdened land on the value of other adjacent or non-adjacent holdings of the owner.

Applying the foregoing standards, the majority identified the relevant parcel as the two lots together as a whole. With respect to State and local law, the two lots had merged pursuant to valid State regulations, and the petitioners' parents had voluntarily created common ownership of the two substandard lots when they transferred ownership to their children. With respect to physical characteristics, the riverfront location and rugged terrain are appropriate subjects for the regulations. With respect to prospective value, Lot E adds value to Lot F by providing increased privacy, recreational space and optimal location of any improvements.

After determining the relevant parcel pursuant to its newly announced test, which is the significance of the *Murr* decision, the Court then analyzed the impact of the regulations on the two lots as a whole and concluded that the regulations did not effect a taking. The Court reached its conclusion under both the *Lucas* test of whether the regulations denied all economically beneficial use of the land, and the *Penn Central ad hoc* multi-factor analysis which considers the economic impact of the regulation on the claimant, the extent to which the regulation interferes with distinct investment-backed expectations, and the character of the governmental action.

The dissent in *Murr* would simply have limited the test of identifying the relevant parcel to State law, which defines property rights, which in this case was the merger provision of the regulations. The dissent otherwise agreed with the majority that there was no taking of the property by the regulations.

Regulatory takings law now has an additional layer of complicated analysis involving the preliminary determination of the relevant parcel against which the issue of whether the regulation constitutes a taking is to be considered.

The author of this Alert, **John J. Reilly**, is Chair of the firm's **Condemnation & Eminent Domain Practice Group**.