

Your Property At Risk: U.S. Supreme Court Decision Confirms Importance of Understanding Zoning During Real Estate Acquisitions

Article

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The Fifth Amendment of the United States Constitution requires federal, state and local governments to pay “just compensation” any time they “take” private property for public use. On June 23, 2017, in a close 5-3 decision, the U.S. Supreme Court held that a Wisconsin zoning ordinance that combined two adjacent lots with common owners into a single lot did not result in a regulatory taking by the county government. As a result of the decision in *Murr v. Wisconsin*, what were previously two distinct parcels of real property are now a single indivisible lot.

The Murr Property and Alleged Taking

The two lots are located along the picturesque St. Croix River in the town of Troy, Wisconsin. The Murr siblings’ parents purchased the first lot in 1960 in the name of the family plumbing company. The Murr parents then purchased the second adjacent lot in 1963 in their personal names and built a family cabin on the first lot. The Murr parents held title to the two parcels under two different names until 1994 and 1995 when the lots were conveyed to the Murr adult children.

As a result of the passage of the Wild and Scenic Rivers Act in the late 1960s, the State of Wisconsin was required to develop rules governing the development of the land around the St. Croix River. In the 1970s, St. Croix County adopted zoning ordinances that paralleled the state rules, including limitations on the minimum developable area of lots along the St. Croix River.

Under the new zoning ordinances, neither of the parcels meet the new minimum developable area requirements and both are therefore undevelopable. The new zoning ordinance contains a grandfather clause that allowed substandard lots to be developed so long as they were not under common ownership. Further, the zoning ordinance contained a merger provision that merged adjacent substandard lots under common ownership so that the lots could not be sold or developed as separate lots. Thus, under the zoning laws enacted in the 1970s, the Murr lots could be separately sold and developed until they came under

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common ownership in 1995.

In 2011, the Murr siblings sought to move the family cabin on one of the lots and fund that move with the sale of the adjacent lot. The zoning ordinances prohibited the sale of the adjacent lot separate from the lot on which the cabin existed and the Murr siblings brought suit alleging that the zoning ordinances rose to a taking of the adjacent lot by the government without just compensation, a violation of the Fifth Amendment of the U.S. Constitution.

The New Zoning Ordinances Did Not Constitute a Taking

After working its way through the Wisconsin state courts, the Murr siblings appealed to the U.S. Supreme Court. The Supreme Court noted the established right of state and local governments to adjust the rights of property owners for the public benefit; and further noted the Court's longstanding precedent that every loss of a property right caused by regulation does not arise to a taking under the Fifth Amendment.

The Court's analysis began by explaining the spectrum used by the Court to determine whether a governmental action constitutes a taking. The Supreme Court noted that at one end of the spectrum lie the cases in which the government takes actual possession of property or passes regulations that renders property economically worthless. In these situations, precedent has established that a "total taking" has occurred and the property owner is entitled to just compensation. The Court then looked at the various factors used to determine (i) whether a governmental action results in a taking, but not a total taking and (ii) when governmental actions do not represent a taking at all, which represents the other end of the spectrum.

In the *Murr* case, those factors included (i) a purchaser's reasonable expectation of future use of property at the time of acquisition; (ii) the physical characteristics of a piece of property and whether it may be reasonably foreseeable that such property will become subject to increased regulation in the future; (iii) the economic effect of the regulation on the property, taking into account the loss of value but also considering the economic benefits that may result in an adjacent parcel not being developable.

After considering the factors above, the Court determined that the regulation was a reasonable use of the government's powers as zoning ordinances allowing for the orderly development of real estate have long been recognized as a legitimate government interest. The Court also found the process of bringing non-conforming lots into compliance gradually to be reasonable. Further, the fact that the Murr siblings could have avoided the merger of the lots by not bringing the two lots under common ownership weighed in favor of finding the zoning ordinances to be reasonable. The physical characteristics of the lots and the fact that it would be reasonable to expect that each lot would have limited economic use on its own also weighed in favor of finding that the merger of the

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lots was not unreasonable. Finally, the Court found that because each lot separately was worth much less than if sold as a single lot, the merger of the lots was a reasonable use of the government's power.

The Takeaway: Do Your Homework to Preserve the Value of Your Property

The *Murr* case failed to provide a bright-line rule to determine when a regulatory taking has occurred. The case highlights the need for property owners to investigate and understand the zoning of real estate before purchasing it or otherwise transferring ownership. As the population continues to increase, land use and the regulation of land use will continue to play a major role in the use of real estate. The fact that a parcel was previously used for a particular purpose does not mean it will always be able to be used for that purpose. Zoning laws can change, thus permitting a use that previously was not allowed. Further, there are a variety of tools and other mechanisms available to governments and property owners to change the allowed uses of a piece of property.

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