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## LAW ALERT

### SUPREME COURT CLARIFIES "PARCEL AS A WHOLE" ANALYSIS IN MURR V. WISCONSIN

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Last week the U.S. Supreme Court issued its decision in *Murr v. Wisconsin*, a significant regulatory takings case addressing the so-called "denominator problem." Under the takings clause of the Fifth Amendment, where a government regulation is so onerous as to deny all economically beneficial or productive use of property or otherwise goes 'too far' in regulating private property, a "regulatory taking" has occurred.

Because the test for regulatory takings requires a comparison of the value taken from the property with the value remaining in the property, the preliminary question is how to define the bounds of the property that the government has allegedly taken: the "denominator problem." In *Murr v. Wisconsin*, the court offered a new test for looking at a "parcel as a whole." It explained that "no single consideration can supply the exclusive test for determining the denominator:" courts must use a broad, multi-part analysis in defining the bounds of the subject property.

#### BACKGROUND

The petitioners in *Murr v. Wisconsin*, two sisters and two brothers, acquired two adjacent lots along the Lower St. Croix River in Troy, Wisconsin. The area in which petitioners' property is located is subject to a set of rules limiting development in order to "guarantee the protection of the wild, scenic and recreational qualities of the river for present and future generations." (Wis. Stat. section 30.27(1) (1973).) One of those rules, called a "merger provision," provides that adjacent lots under common ownership may not be "sold or developed as separate lots" if

they do not each have one acre suitable for development.

Petitioners planned to sell one lot to fund improvements on the other lot. However, the lots' common ownership barred their separate sale and development. When petitioners sought variances from the St. Croix County Board of Adjustment to allow separate sale and use of the lots, the Board denied their request. The Wisconsin state courts affirmed that denial because, as explained by the Wisconsin Court of Appeals, the Board reasonably interpreted the local ordinance to have "effectively merged" the adjacent lots, so petitioners "could only sell or build on the single larger lot." The Court of Appeals held that the takings analysis properly focused on the regulations' effect on both of petitioners' adjacent parcels together, rather than on the single parcel that could not be separately sold. A state appraisal found that the lots were worth \$698,300 for the two lots together as one property and \$771,000 as two separate building sites.

The petitioners successfully petitioned the U.S. Supreme Court for review.

#### THE COURT'S DECISION

The Supreme Court framed the issue simply: "What is the proper unit of property against which to assess the effect of the challenged governmental action?" It then acknowledged that the answer to this question may be outcome determinative. If, for example, the affected unit of property is large, so that the regulation only affects a small part of the

parcel or has little impact on its overall value, the regulation is less likely to constitute a taking. If the affected unit of property is small and is significantly devalued by the regulation, it is more likely that a taking has occurred.

Justice Kennedy, writing for the court's majority, held that "courts must consider a number of factors." Among those are: (1) "the treatment of the land under state and local law;" (2) "the physical characteristics of the land;" and (3) "the prospective value of the regulated land under the challenged regulation." The analysis "should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts."

Applying these criteria to the Murrs' adjacent parcels, the court concluded that their adjacent parcels should be evaluated as a single parcel. First, the court observed that this is consistent with the property's treatment under state and local law, which had merged the two lots into one parcel because they were in common ownership.

Second, the court observed that the physical characteristics of the Murrs' property support its treatment as one unified parcel. The parcels are contiguous at their longest edge, and their location along the St. Croix River should have caused the Murrs to anticipate public regulation of the property. Finally, the court noted that the prospective value that the empty lot brings to the lot with the cabin supports considering the two as one parcel for purposes of determining if there is a regulatory taking. The court reasoned that the regulation's effect—prohibiting separate sale or development of the lots—is mitigated by "the benefits of using the property as an integrated whole, allowing increased privacy and recreational space" and that there was less than a 10 percent loss of value.

Based on this analysis, the court concluded that, considering petitioners' property as a whole, the state court "was correct to conclude that petitioners cannot establish a compensable taking in these circumstances."

Chief Justice Roberts filed a dissenting opinion, joined by Justices Thomas and Alito,<sup>1</sup> criticizing the majority's holistic approach to the denominator problem. Without necessarily disagreeing with the majority that no regulatory taking occurred in this case, Chief Justice Roberts argued that private property rights must be protected strictly on each parcel "as state law creates and defines them."

#### IMPLICATIONS FOR CALIFORNIA CITIES AND COUNTIES

Like many other states, California expressly allows local agencies to adopt the type of merger provisions at issue in *Murr v. Wisconsin*. Government Code section 66451.11 provides that "local agencies may...provide for the merger of a parcel or unit with a contiguous parcel or unit held by the same owner if any one of the contiguous parcels or units held by the same owner does not conform to standards for minimum parcel size." Many California cities and counties have adopted subdivision ordinances to that end. Additionally, many communities require that all contiguous property in common ownership, regardless of the number of parcels, be included in any development application and consider the property as a whole, without regard to parcel lines, when reviewing the application.

To some extent, the *Murr v. Wisconsin* case protects those cities and counties from regulatory takings claims premised upon their merger or review provisions. While it is still possible to effect a regulatory taking of commonly owned, "merged" parcels, cities and counties now have a clearer analytical framework for arguing that courts should deem contiguous parcels to be one parcel for a takings analysis.

More broadly, *Murr v. Wisconsin* represents a victory for local land use control and a nod to the government's need to regulate property rights in the name of the public interest.

For more information, please contact Barbara Kautz, Daniel Maroon, or any other attorney at Goldfarb & Lipman at (510) 836-6336.

<sup>1</sup> Justice Gorsuch took no part in considering this case, as it was argued prior to his confirmation to the court.