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One Parcel Plus One Parcel Equals A "Parcel As A Whole" Murr v. Wisconsin's Fluid Calculations for Regulatory Takings

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Murr v. Wisconsin's Fluid Calculations for Regulatory Takings

By Shelby D. Green

The Court's most recent major property law case, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017), tackles one of the thorny, recurring issues in regulatory takings jurisprudence: what is the proper "denominator" to use in determining whether a government regulation has so greatly diminished the economic value of a parcel of land that it effects a taking? More specifically, *Murr* looked at what constitutes the "parcel as a whole" when a landowner holds title to two contiguous lots. Should a court assess the economic impact on the value of each lot separately or the impact on the value of the two lots together? In answering that question, the Court added another multi-factored test to the already complex web of regulatory takings law.

Development of Regulatory Takings Jurisprudence

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Supreme Court upheld the application of New York City's landmarks preservation law, spoiling the owner's plans to construct an office tower atop the elegant Beaux Art Grand Central Terminal. The owner asserted that because 100% of its right to build atop the terminal (its air rights) was barred by the ordinance, there was a taking of property requiring compensation. But the Supreme Court conceived the burdens from the ordinance differently, looking at the whole parcel, including the existing building. The Court explained:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the *parcel as a whole*—here, the city tax block designated as the "landmark site."

Id. at 130–31 (emphasis added). In fact, the land underneath the Penn Central operations comprised six lots, although the site for the proposed tower rested on only one legally defined lot.

Takings jurisprudence derives from the Fifth Amendment (private property shall not "be taken for public use, without just compensation"). Since 1922, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the clause has been read to apply not only to the government's direct appropriation of property or its functional equivalent (like permanent flooding) but also to the burdensome effects of land use regulations. The Court allowed that "property may be regulated to a certain extent," but pronounced that "if regulation goes too far it will be recognized as a taking." Id. at 415. In elucidating that point, Justice Oliver Wendell Holmes offered little more than his characteristic poetry:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone.

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Id. at 413. The Court went on to reverse a lower court ruling on a statute that forbade the mining of coal in such a way as to cause the subsidence of structures used for human habitation.

In *Penn Central,* the Court articulated the now-prevailing test for regulatory takings, one that had been developing in the years after *Pennsylvania Coal*. Though in the guise of a mathematical equation, there was no "set formula," the test lacked certainty in the calculation and result and offered little guidance for staying clear of Justice Holmes's line. Instead, the three-part calculus embraces multiple variables and fluid measures. Id. Under the *Penn Central* ad hoc test, when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking may be found based on several factors, including (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. 438 U.S. at 124.

Years later, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court recognized that some regulations may overwhelm all of the fruits of ownership. In the "extraordinary circumstance when no productive or economically beneficial use of land is permitted," there is a categorical taking. Id. at 1017, 1019. This exception to the *Penn Central* ad hoc test is made only when the burden of the regulation is complete. This means that if "the diminution in value is 95% instead of 100%," the categorical takings claim fails and the takings analysis focuses on the three *Penn Central* factors. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002).

The Court took the opportunity to extend its regulatory takings jurisprudence in *Murr*. More than a century after the advent of regulatory takings jurisprudence, the Court admitted that it still has not crafted definitive

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rules to guide this area of takings law. 137 S. Ct. at 1942. The Court did not undertake to square up the entire analysis in *Murr*, but only to give some direction for one part of the test—the "parcel as a whole" component. Whether the additions portend greater ease of analysis is not certain.

The Lands of the Murrs and the Regulatory Limits

Under the *Penn Central* analysis of the economic impact of a regulation, the ultimate question is what portion of the property's value the challenged action depresses; the greater the portion, the more likely it may be found to be a taking. In *Penn Central,* the property owner contended that 100% of its air rights were taken. But a majority of the Court found that air rights were not the proper denominator; instead, the Court considered air rights to be only part of the "parcel as a whole." 438 U.S. at 131. *Murr* presented the denominator question in the context of a landowner who holds contiguous lots.

The Murrs' parents acquired Lot F in 1960 (later transferring ownership to a family plumbing business) and the adjacent Lot E, which they held in their own names, in 1963. They built a three-bedroom cabin on Lot F and used Lot E for parking, volleyball, and general recreation. The topography of the lots is rough and rugged with a steep bluff that cuts through the middle of each; the only level land suitable for development is that above the bluff and next to the water below it. Id. at 1940. Although each lot is approximately 1.25 acres, because of the geography, less than one acre of each lot is suitable for development and, even when combined, the buildable area of the lots is only 0.98 acres. Id.

The parents transferred title to the two lots to their children on different dates: Lot F in 1994 and Lot E in 1995. The lots were within an area long-admired for its "picturesque grandeur," the St. Croix River scenic area. Id. at 1939–40. The beauty of the area was preserved under the Wild and Scenic Rivers Act, 16 U.S.C § 1274(a)(6), (9), which required the states of Wisconsin and Minnesota to develop "a management and development program" for the river area. 41 Fed. Reg. 26,237. Accordingly, Wisconsin enacted the amendments to its administrative code that created the conundrum for the Murrs. First, legal lots were required to have at least one acre of land suitable for development. Wis. Admin. Code §§ NR 118.04(4), 118.03(27), 118.06(1)(a)(2)(a), 118.06(1)(b). A grandfather clause, however, relaxed this restriction for substandard lots that were "in separate ownership from abutting lands" on January 1, 1976, the effective date of the regulation, and permitted the use of qualifying lots as separate building sites. Wis. Admin. Code § NR 118.08(4)(a)(1). Nevertheless, adjacent lots that came under common ownership were merged and could not be "sold or developed as separate lots" if they did not meet the size requirement ("the merger provision"). Wis. Admin. Code § NR 118.08(4)(a)(2). The county zoning ordinance contained identical restrictions. St. Croix County, Wis., Ord. § 17.36I.4.a. As is typical, the rules provided for variances in case of "unnecessary hardship." Wis. Admin. Code § NR 118.09(4)(b); St. Croix County Ord. § 17.09.232.

A decade after the transfer from their parents, the Murrs sought to relocate the cabin to a different portion of Lot F and to sell Lot E to obtain the funds for their plan. Much to their frustration, the transfer of the lots from their parents triggered the merger provision, which barred separate sale or development. The Murrs could sell or build only on the single larger lot, but not on Lot E separately. *Murr*, 137 S. Ct. at 1941. Their request for a variance to sell Lot E was denied; the county suggested alternative uses—preserving the existing cabin on Lot F, or tearing down the cabin and building a new one on Lot E, on Lot F, or across both lots. Id. at 1941.

Finding none of the alternatives acceptable, the Murrs brought a regulatory takings claim in state court. In the challenge, they maintained that the value of Lot E, if sold as an unbuildable lot, was $40,000 but was approximately $400,000 if sold without any restrictions; and that the value of Lots E and F, if sold together and with restrictions, was $698,300 but was $771,000 if sold separately without restrictions. Id. at 1941. The trial court found the Murrs had the options for the use and enjoyment of their property as suggested by the county when it denied the variance. It also found that the Murrs had not been deprived of all economic value in their property. And, viewing the two lots as a single parcel, the court determined that the decrease in market value was less than 10%, not a significant economic impact.

The Wisconsin Court of Appeals affirmed, declining to analyze the effect of the regulation on Lot E alone. Instead, it ruled that the takings analysis "properly focused" on the regulations' effect on the Murrs' property as a whole—Lots E and F together. Id. This was so because the Murrs could not reasonably have expected to use the lots separately because they were charged with knowledge of the regulations when they acquired the property. Any expectation to use the lots differently became unreasonable when they chose to acquire Lot E in 1995, after having acquired Lot F in 1994, triggering the merger provisions. Id. at 1942. The court of appeals agreed with the trial court that the economic impact from the regulation was minimal—only a 10% decline in value. The Wisconsin Supreme Court declined review and the matter came before the Supreme Court on petition for certiorari. The Court agreed with the state.

Parcel as a Whole

The Murrs did not contend that the Wisconsin rules deprived them of all the value of their land so as to make out a *Lucas* categorical taking (the lots could still be used as they always had been). Instead, they contended that because Lot E could not be alienated or developed as a separate parcel, there was a taking, subject to the *Penn Central* ad hoc test. Their claim was about the parcel as a whole component—the "denominator question." If the correct denominator was Lot E, then there was either a 90% or 100% loss, very likely a taking requiring compensation; but if it was Lots E and F as one parcel, then there was only a 10% loss, unlikely a sufficient effect on value to establish a taking.

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From the first regulatory takings case, the Court's treatment of the "parcel as a whole" concept has been fitful—some cases adopting it, if only *sub silentio*, others casting doubt on it, and yet others squarely adopting it and in novel contexts. Arguably, in *Pennsylvania Coal*, 260 U.S. at 393, the Court treated just that part affected by the statute—the "support estate," that is, the right to remove the strata of coal and earth that undergird the surface or instead to leave those layers intact to support the surface and prevent subsidence, as the denominator. But, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), the Court viewed the support estate as an inextricable part of the mineral estate or surface estate, stating that it could not be used profitably by one who does not also possess either the mineral estate or the surface estate. Id. at 498. Because the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated, the interests should be considered as one parcel. Id.

In *Lucas*, Justice Scalia found that although the proper factors for determining the denominator were unclear, the position taken by the state court in *Penn Central* (that is, to consider all of Penn Central's property in the area) was "extreme . . . and unsupportable." 505 U.S. at 1016 n.7. He suggested examining state property law as to "how the owner's reasonable expectations have been shaped by the State's law of property, *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest." Id.

Then, in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), the Court explained that "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." Id. at 644.

Why logically does one parcel plus one parcel equal "a parcel as a whole" and not two parcels for purposes of the regulatory takings analysis?

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), a plurality of the Court granted that some cases endorse the parcel-as-a-whole rule but confessed that "we have at times expressed discomfort" with it. Id. at 631. There, the landowner claimed his upland parcel was distinct from the regulated wetlands portions, so he should be permitted to assert a deprivation limited to the latter; but the point was not pressed in state courts, nor raised in the petition to the Court, and as such, the framed total deprivation argument failed. Id. at 632.

In *Tahoe-Sierra Pres. Council*, 535 U.S. at 302, the Court ruled that a moratorium that precluded all development for three years was not a total taking inasmuch as, when the moratorium ended, the landowners could once again enjoy all the attributes of a fee simple absolute title. The Court stated that it is the effect on the parcel as a whole, that is, the whole fee simple, in relation to the entire life of the property, that is relevant. Id. at 331–32. "An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. . . . Both dimensions must be considered if the interest is to be viewed in its entirety." Id. at 332.

Multi-Factor Test: Gaps, Leaps, and Offsets

Why logically does one parcel plus one parcel equal "a parcel as a whole" and not two parcels for purposes of the regulatory takings analysis? In *Murr,* rather than applying the term "lot" or "parcel" literally, looking to the geographical or legal demarcations of the land to determine the relevant denominator, the Court adopted a "takings-specific" meaning, one that is found under a multi-factor test. The stated aim is to 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. 137 S. Ct. at 1945. The starting factor is the treatment of the land under state and local law. On this point the Court stated that an acquirer of land must acknowledge "legitimate restrictions affecting his or her subsequent use and disposition of the property," but it cautioned that those limits that are triggered only after a change in ownership may present a different case. Id. at 1945.

A second factor focuses on the physical characteristics of the land, including the relationship of any distinguishable tracts, its topography, and the surrounding human and ecological environment, to determine, among other things, whether the property is in an area that is subject to, or likely to become subject to, environmental or other regulation. Id. at 1945–46. In this regard, an acquirer might expect prospective regulations to protect and preserve the land, rather than the state simply addressing degradations under nuisance law.

The third factor instructs courts to assess the positive effects of the regulation, not only on the land directly affected by the regulation, but on adjacent, remaining land. Although a use restriction may decrease the market value of the property, that effect may be tempered if the regulated land adds value to the remaining property, such as by protecting views and allowing the expansion of a structure—benefits that counsel in favor of treatment of multiple parcels as a single one. Id. at 1946.

All of those factors resolved against the Murrs. The state limits on sale and development of substandard lots were in place at the time the Murrs acquired ownership. It was their "voluntary conduct" in bringing the lots into common ownership after the regulations were enacted that subjected them to those limits—the valid merger provision under state law informed the expectations and forecast the treatment of the two lots as a single property. Id. at 1948. It does not seem to matter that the grandfather provisions in the regulations preserved the legal definitions of the parcels and would have allowed the separate sale and development of Lot E by the parents. These rights did not extend to their transferees.

The Court noted that the lots were contiguous and situated in an area of remarkable natural beauty; their physical configuration and topography made building on them as separate lots challenging to say the least. Id. at 1940. It is unclear whether the Court would have reached a different conclusion on this fact had it considered other land use tools for protecting the character of the land, such as limits on the type, size, and location of structures on the lots, or that the original lot lines might have been driven by the same rugged topography.

The Court went on to find that "[t]he value added by the lots' combination shows their complementarity and supports their treatment as one parcel." Id. at 1949. Accepting that the regulation diminished the value of Lot E, that diminution was offset by the increase in value to the two lots as combined: the combined lots were valued at $698,300, far greater than the total value of the separate regulated lots (Lot F with its cabin at $373,000, according to the state's appraiser, and Lot E as an undevelopable plot at $40,000, according to

the Murrs' appraiser). On this point, the Court clearly affirmed the long-held notion that effects of land use regulations are both positive and negative. Because the Murrs had used Lot E to serve Lot F, Lot E having no separate purposes, their merger, which produced an increase in total value, might seem unobjectionable, except that by doing so, the Murrs are largely foreclosed from putting Lot E to different purposes and denied the opportunity to realize its separate economic value.

Outcome-Determinative

Treating the two lots as one seemed outcome-determinative; it reduced the regulatory impact from 100% of one lot to 10% of two lots, meaning not likely severe enough to require compensation and rendering the other elements of the takings test largely irrelevant. But the multi-factor test adopted was less outcome-determinative than would have been the bright-line rules offered by both sides in the case. Rejecting a fixed meaning, the Court stated that it must define "parcel" in a manner that reflects reasonable expectations about the property. Id. at 1950.

The state of Wisconsin urged that the definition of the relevant parcel should be tied to state law, considering the two lots as a single whole as a result of their merger under the challenged regulations. But this position would tend too much to the state and create the risk that a state might "define the relevant parcel in a way that permits it to escape its responsibility to justify regulation in light of legitimate property expectations." Id. at 1946.

In contrast, the Murrs insisted that the boundary lot lines should determine the relevant parcel. This proposition ignored that lot lines were creatures of state law, which can be overridden by the state in reasonable exercise of its powers. The assertion also tended too far to one side, ignoring the well-settled reliance on merger provisions as a common means of achieving legitimate ends, such as preserving open space while allowing orderly development, their harshness often ameliorated through variances. Id. at 1947. See, e.g., *Ness v. County of Crow Wing*, No. A06-1690, 2007 Minn. App. Unpub. LEXIS 1202 (Minn. Ct. App. Dec. 18, 2007) (upholding merger provisions for valid land use purposes).

Radical Inventions?

Although the dissent criticized the majority for incorporating new layers in the analysis that serve only to increase opacity, the dissent in turn did not acknowledge that a number of lower federal courts already had colored the analysis by introducing flexible variables toward a more nuanced determination of the relevant parcel. See *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) ("[o]ur precedent displays a flexible approach, designed to account for factual nuances"). For those courts, the intuitive starting point was whether the parcels are contiguous property and held by the same owner at the time the taking occurred. In *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir.), cert. denied, 528 U.S. 951 (1999), contiguous parcels, although one submerged and another above ground, were treated as a whole. But, in *Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1381, aff'd on rehearing, 231 F.3d 1354 (Fed. Cir. 2000), because 50 acres of a larger 261-acre parcel were situated across the road and physically remote, they were treated as separate.

Contiguity alone is insufficient because the courts also consider other practical and economic conditions linking the parcels, such as time of purchase and common financing. See *Ciampitti v. United States*, 22 Cl. Ct. 310, 321 (1991) (owner treated the lots as a single parcel for purposes of purchase and financing, which were inextricably linked). Parcels included in the same development plan or held by the owner as a single economic unit also may be treated as one. In *Lost Tree Village Corp. v. United States*, 707 F.3d 1286, 1294 (Fed. Cir. 2013), aff'd, 787 F.3d 1111 (Fed. Cir. 2015), cert. denied, 137 S. Ct. 2325 (2017), the relevant parcel did not include a nearby developed lot because the landowner did not treat them as part of the same "economic unit." See also *Palm Beach Isles Assocs.*, 208 F.3d at 1381 (development of one parcel was physically and temporally remote from, and legally unconnected to, the other; combining the two simply because at one time they were under common ownership cannot be justified); *Loveladies Harbor, Inc.*, 28 F.3d at 1181 (contiguous land developed and sold before enactment of regulation treated as separate parcel). But see *Norman v. United States*, 429 F.3d 1081, 1091 (Fed. Cir. 2005) (the landowners "regarded the 2280-acre parcel as a single economic unit"); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1346 (Fed. Cir. 2004), cert. denied, 543 U.S. 1188, (2005) (contiguous leases were part of "one unified mining plan").

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in defining the relevant parcel, finding that contiguous parcels under common ownership may be treated as one. See *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451 (Mass. 2006) (contiguous lots with same uses and zoning); *K & K Const., Inc. v. Dep't of Natural Resources*, 575 N.W.2d 531 (Mich. 1998), cert. denied, 525 U.S. 819 (1998) (three contiguous parcels under common ownership); *Bevan v. Brandon Twp.*, 475 N.W.2d 37, amended, 439 Mich. 1202 (1991), cert. denied, 502 U.S. 1060 (1992) (contiguous lots under common ownership); *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996) (separately-zoned parts of 10.4 contiguous acres constituted the denominator).

At the same time, noncontiguous parcels are more likely to be treated as separate property by state courts. In *East Cape May Assoc. v. New Jersey*, 777 A.2d 1015 (N.J. Super. App. Div. 2001), the court applied a set of ten nonexclusive factual questions and concluded that noncontiguous, separately purchased, and separately zoned and developed tracts were separate parcels.

Just as in the federal courts, state courts have treated otherwise separate parcels held by their owners as part of the same economic unit or development plan as one for purposes of determining the denominator. *Giovanella*, 857 N.E.2d at 460–61 (contiguous parcels, purchased at the same time and intended for same development); *K & K Const.*, 575 N.W.2d at 581 (parcels connected through a proposed development scheme and permit applications); *Chapman v. Conservation Comm'n*, 987 N.E.2d 619 (Mass. App. Ct. 2013)(subdivision consisting of 140 lots was the relevant parcel, not just the two lots burdened); *Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 737 S.E.2d 601, 615–18 (S.C. 2013) (including all 256 acres of the golf course property and not just the discrete portion subject to the development for residential use); *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 673 N.E.2d 61 (Mass. App. Ct. 1996) (lots purchased within same subdivision on same date).

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A Shape-Shifting Thing

Perhaps the only thing that is clear from *Murr* is that the regulatory takings doctrine is a shape-shifting thing—evolving and flexing, finding form in the context to which it is applied, and the inventions introduced there are not certain to make the lines more definite and results more admired.

Property is said to be a legal construct, with significance in terms of rights and limits on those rights and protections against intrusions on those rights. Before *Murr,* fairly settled conventions determined the thing to which the laws of property applied—legal descriptions as manifested on the ground—and this remains so for most purposes. But now, will a state or local government be able to preempt or circumvent takings challenges, simply by how it, even from a post hoc perspective, characterizes or defines the physical dimensions of property? The "takings-specific" meaning of property, to be applied first to determine whether there is property and second to determine whether there has been a taking, as the dissent in *Murr* maintained, will almost always portend this result. The multi-factor test adopted in *Murr* and being used in the lower courts for defining the parcel seems only to describe what a state has done but does not otherwise constrain what it can do. In other words, just because two lots can nominally be regarded as one parcel for purposes of the state's land use policies does not mean the decision to merge them should be beyond the Court's scrutiny as a taking or that they should be regarded as one for purposes of regulatory takings analysis.

In evaluating the parcel-as-a-whole concept, it seems important to bear in mind what the concept originally aimed to do—prevent an owner from identifying a single thread in his bundle of ownership rights and claim a taking. As Chief Justice Roberts asserts in his dissent, there is no risk of single-thread selection by giving regard to the boundary lines between parcels already drawn by the states. 137 S. Ct. at 1953. As it is now defined, not only does the "parcel as a whole" concept *not* reveal or assess the severity of the economic impact from regulation, but also it may operate to mask it. ■