

United States Supreme Court Rejects Taking Claim and Upholds Lot Merger Regulation
By Edward J Sullivan ©

Murr v. Wisconsin, U.S. Supreme Court No. 15-214 (June 23, 2017) was the review of a trial court grant of summary judgment to Defendant in a “regulatory takings” case. Plaintiffs had separately acquired two adjacent parcels from family members or entities connected with those members, neither of which could be developed for residential use separately under the local zoning regulations, and built a cabin on one of them. The zoning regulations did allow for residential development of undersized lots in certain circumstances, but had also required (before Plaintiffs acquired the lots), that adjacent parcels under the same ownership were considered “merged” so that only one house could be placed on them. Plaintiffs claimed a regulatory taking under the merger requirement.

The federal Wild and Scenic Rivers Act designated the St. Croix River for federal protection and Wisconsin developed a program to protect the area that included Plaintiffs’ property. Plaintiffs’ application for a hardship variance for an additional dwelling was denied and that denial was affirmed on appeal. The trial court granted Defendant’s summary judgment motion on the taking claim, finding Plaintiffs had other options for the use of the vacant lot in conjunction with the existing cabin, which could be moved or replaced and that they had not been deprived of all economic value of their property. The state court of appeals affirmed, using a “parcel as a whole rule” that analyzed the taking claim with reference to both parcels under common ownership. That court noted the merger provision existed before Plaintiffs acquired either property, so that they were on notice of that limitation so that it was unreasonable to expect otherwise and observing the difference in value of the merged parcel and the two parcels separately was less than 10%. The state Supreme Court denied discretionary review and the U. S. Supreme granted certiorari

Justice Kennedy’s majority opinion noted that regulatory takings may occur when all economic value is deprived or under the three-factor test of *Penn Central Transp. Co.. v. New York City*, 438 U.S. 104, 124 (1978), i.e. economic impact of the regulation, interference with distinct investment backed expectations and the character of the regulation. Terming the use of the *Penn Central* analysis as involving a “complex series of factors” and noting that even deprivation of all viable economic use was not always dispositive in a taking claim, Justice Kennedy concluded that the “central dynamic” of the court’s regulatory takings jurisprudence was the “flexibility” to reconcile property rights with a public agency’s power to adjust rights for the public good.

The majority noted previous cases used a “parcel as a whole” rule to evaluate certain takings claims involving multiple property interests, such as in *Penn Central*, where Plaintiff attempted to segregate “air rights” to build to a greater height within the zoning envelope. The Court did not consider this potential interest separately but looked to the effect of the regulation on the entire property, where the “denominator” of full value would often reduce its impact, and thus its constitutional significance. The majority also stated that it was the purpose of the Takings Clause that was important, i.e., preventing the government from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

The analysis begins with the nature of the property under consideration. The majority refused to define property for constitutional purposes as always coextensive with state law, which could allow that interest to be altered to defeat an otherwise legitimate Takings claim, choosing three new “factors” to determine the denominator, the parcel as a whole, viz. the treatment of the land under state law (a landowner must recognize reasonable expectations that legitimate restrictions may be imposed), the

physical characteristics of the land (i.e., human, topographic and environmental limits on its use), and the effect of regulations on other lands held by the same owner.

In doing so, the majority rejected the formalist responses of both parties. The state would have found its regulations dispositive, while Plaintiffs sought to make Lot lines (which themselves may be changed under state law) as dispositive. The majority focused instead on the reasonableness of the land use regulations and determined that merger provisions were of long standing and legitimate land use tools that may be used, in conjunction with other similar land use tools, to reduce substandard lots in separate ownerships over time. Reliance on lot lines, which may take different forms and significance across the country, was thus not useful. Applying the new factors, the majority accepted the merger provisions as a reasonable exercise of state policy under the first factor. The shape of the parcels, their rough terrain and significantly undevelopable portions added to the rationality of the merger provisions under the second factor. Finally under the third factor, the lack of separate residential use on one of the two parcels is offset by the use of the property as an integrated whole, with additional open space and privacy and additional flexibility locating improvements. The market value differential in the value of the parcels separately and as merged also contributed to the rationality of the regulations.

To conclude, the majority found no denial of all viable economic use, as the parcel as a whole may be still used for residential purposes. Nor do the merger requirements fail the *Penn Central* factors, as the loss in value is less than 10%, Plaintiffs could have expected these rules under the circumstances, and the regulation was part of an intergovernmental effort to preserve the river and surrounding land. The majority concluded:

Like the ultimate question whether a regulation has gone too far, the question of the proper parcel in regulatory takings cases cannot be solved by any simple test. * * * Courts must instead define the parcel in a manner that reflects reasonable expectations about the property. * * * Treating the lot in question as a single parcel is legitimate for purposes of this taking inquiry, and this supports the conclusion that no regulatory taking occurred here

Recently appointed Justice Gorsuch did not participate in the decision. The Chief Justice, joined by Justices Thomas and Alito filed the principal dissent, but he added that the outcome in the case did not trouble him; however the majority's analysis (devised for the purposes of this case) was troubling. The dissent suggested the majority's tests for defining property move away from the somewhat familiar association with state law creations and definitions to the new factors found and threatens to conflate that definition with the standards used to evaluate a regulatory taking.

The dissent found three questions presented by the Takings Clause: the nature of the affected private property, whether that property had been taken for public use and whether just compensation were due. That Clause does not define the term "property," and the Court has long looked to state law in determining whether an interest were property. Similarly, the Court has had trouble in determining when a regulation goes "too far." Discussions in regulatory takings cases are rarely about property and in the absence of a total deprivation are more likely to focus in the broadly-drawn *Penn Central* factors for takings, occurring at the second stage of analysis as to whether a taking has occurred, rather than over the nature of property.

In evaluating the parcel as a whole in this case, the majority uses a multi-factor approach, whereas the dissent would use property boundaries under state law as the traditional point of departure. Impacts of the adjacent parcel may be considered, but not at the first stage in defining the

property under consideration. The factors used by the majority to define property were rather meant to be used as the *ad hoc, factual inquiries* the court has previously associated with the takings analysis in the second step, rather than the determination of property or the parcel as a whole. By presenting the same analysis twice, with the use of factors related to public goods promoted by the regulation (which is also a factor in the second step determination of whether a Taking has occurred) the outcome is doubly weighed in favor of upholding the regulation even before the “too far” analysis begins. The dissent would remand the case to the trial court to determine whether each Lot were independent property interests and, if so, to proceed with the traditional *Penn Central* takings analysis.

The Chief Justice concluded::

Instead, the majority’s approach will lead to the definitions of the “parcel” that have far more to do with the reasonableness of applying the challenged regulation to a particular landowner. The result is clear double counting to tip the scales in favor of the government.

The dissent would remand the matter to the trial court to determine whether each Lot constituted “property” and, if so, to conduct a *Penn Central* analysis. Thus, the dissent would limit the definition of property to the first stage and have the discretionary review at the second stage of takings analysis, where reasonableness and other factors may be considered, a result it suggested would lead to more effective judicial review.

Justice Thomas called for a review of regulatory takings from the standpoint of originalism.

It may be, as the principal dissent suggests, that this case would have the same result under either approach, but it does appear to be important to define the property at the commencement of the analysis by using state law definitions and understandings, then to undertake the taking analysis, most likely under *Penn Central*, along with parcel as a whole considerations, and then move to any issue of just compensation. But perhaps that’s too simple. The introduction of new “factors” at the initial stage, factors without precedent in case law, complicates the analysis and does appear to give the public agency the advantage. The outcome may be correct – Plaintiffs may well not have suffered a constitutionally significant impact in their property value; they may well have no significant investment-backed expectations impaired; and they may have to bow to the public good in limiting development on their property. But all of that might be achieved under a *Penn Central* analysis without the need for another contrived set of factors.

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