

U.S. Supreme Court Decides Wisconsin Takings Case

Jeffrey A. Mandell, Partner, Stafford Rosenbaum LLP



The U.S. Supreme Court decided a major regulatory takings case last week, ending a Wisconsin land-use battle that lasted more than a dozen years. See *Murr v. Wisconsin*, No. 15-214 (U.S. June 23, 2017). It is not common for a case to jump from an unpublished, non-precedential opinion in a state intermediate court of appeals to the nation's highest court. Even less often does a local case provide an opportunity to resolve a long-standing doctrinal puzzle that has stymied courts and litigants for decades. *Murr v. Wisconsin* was notable, and the Supreme Court's decision is both interesting and instructive.

(Full disclosure: Stafford Rosenbaum submitted an amicus brief on behalf of the Wisconsin Counties Association, the Wisconsin Towns Association, and the League of Wisconsin Municipalities, urging the Supreme Court not to reach the constitutional issue at the heart of the case. The views in this article are my own; they go beyond the arguments expressed in the amicus brief and do not necessarily reflect the opinions of my clients.)

The Facts of the *Murr* Case

The essential facts are these: The Murrs who litigated this case were the second generation to own the property in question. Their parents purchased two lots along the Lower St. Croix River, in northwestern Wisconsin, more than 50 years ago. They built a small cabin on one lot and transferred ownership to

their family business. A couple of years later, they purchased the adjacent lot, which they kept in their own names and never built on. In the 1990s, the parents transferred the land to their children, bringing the two adjacent lots into common ownership for the first time.

This mattered a great deal because, in the intervening years, the federal, state, and local governments all adopted laws to protect the river's scenic beauty. The regulations limited development to those lots with at least one acre of land, excluding the river's floodplain and the slope of the bluffs that tower above the river. Neither of the Murrs' lots, though approximately 1.25 acres each, had enough buildable space to meet the development requirements on its own. The regulations addressed this fairly common issue through two complementary provisions. The first grandfathered in any property owners who had purchased their land prior to the regulations; they could still build, even if their lots lacked one acre of buildable space. The second merged adjacent lots without sufficient buildable space if those lots came under common ownership.

Here, when the two adjacent lots passed to the second generation, they came under common ownership and therefore merged as a matter of law. When the Murrs later sought a zoning variance to sell the empty lot and use the proceeds to improve the cabin on the other lot, the County said no. The Murrs alleged

that the state and county regulations amounted to an uncompensated taking of their property in violation of the U.S. Constitution. The Murrs' takings claim was rejected by the trial court, the state appellate court, and ultimately the U.S. Supreme Court.

The Applicable Legal Framework

The Constitution provides that private property cannot "be taken for public use, without just compensation." U.S. Const., amend. V. The framers and early courts were focused on physical appropriations of property for public use (to build a road, for example). But for almost a century courts have recognized that regulations restricting an owner's use of property can amount to a compensable taking. How and when regulations impose enough of a burden to require compensation has been a vexing question. In response, the Supreme Court has provided two tests. Where a regulation deprives the owner of all economically beneficial use of the property, that is a taking. See *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992). Even where a regulation is less invasive, it can still require compensation, based on a balancing of several factors, including the economic impact of the regulation, the character of the regulation, and the extent to which the regulation interferes with reasonable investment-backed expectations for the property. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

Under either test, however, there is a predicate question: How do courts define the relevant property against which to measure the effects of the regulation at issue? The Murrs complained that the merger provision deprived them of the right to use or sell the vacant lot adjacent to their cabin. When a court considers that alleged deprivation, does it measure the loss against only the vacant lot (in which case it could be seen as a near-total taking) or against the Murrs' combined riverside properties (in which case it appears to be a smaller loss)? As legal commentators have long discussed, in many cases "the answer to this question may be outcome determinative." *Murr*, slip op. at 9.

The prospect that the *Murr* case would answer this longstanding question drew significant interest. The case presented the Court with multiple options:

- The Murrs argued that the right answer begins and (largely) ends with the lot lines on the property rolls. They conceded that evidence of how the property is actually used might be sufficient to overcome the lot lines in certain instances.
- The State of Wisconsin argued that the answer is found in the application of state law, including but not limited to the lot lines and, importantly in this case, also including the merger provision.
- St. Croix County, for its part, argued that multiple factors are relevant, beginning with state property law, but also including the physical characteristics of the property and the economic impact the regulation has on the property.

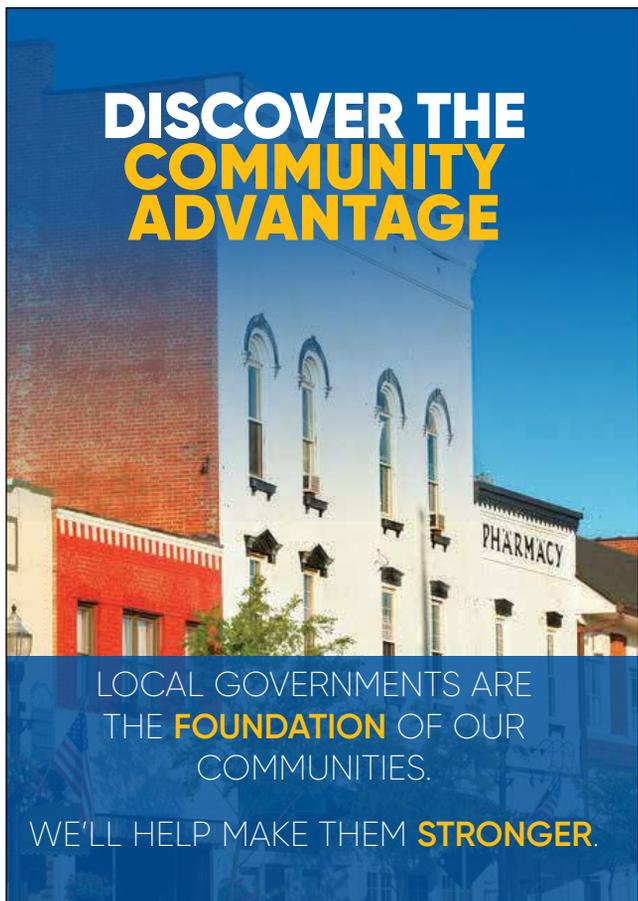
- Finally, the federal government, appearing as an amicus curiae (friend of the court), offered an alternative multi-factor balancing test, placing no special weight on state law and instead looking to achieve fairness and justice.

The Murrs obviously argued that their proposed test would favor their taking claim. All of the various governmental entities argued that there was no taking in this case.

The Majority Opinion

The Court fully adopted St. Croix County's approach, holding that "the question of the proper parcel in regulatory takings cases cannot be solved by any simple test," such that "courts must consider a number of factors." *Id.* at 11, 20. "These include the treatment of the land under state and local law; the physical characteristics of the land; and

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the prospective value of the regulated land.” *Id.* at 11. In doing so, the Court incorporated the factors both the Murrs and the State had offered as bright-line tests, explaining that “courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law,” but also insisted that those factors were, on their own, insufficient. *Id.* at 12-15.

Notably, the Court also gave a full-throated endorsement to the merger provision that the Murrs challenged, calling it “a legitimate exercise of government power.” *Id.* The Court rooted its approval in both tradition and efficacy. After noting that merger provisions “originated nearly a century ago” and are now widely used, the Court praised those provisions as a way of “balancing the legitimate goals of regulation with the reasonable expectations of landowners.” *Id.* at 15-16. The St. Croix County zoning provisions at issue “represent a classic way of doing this: by implementing a merger provision, which combines contiguous substandard lots under common ownership, alongside a grandfather clause, which preserves adjacent substandard lots that are in separate ownership.” *Id.* While one criticism of balancing tests is that they lack certainty, here the Court clearly mapped one way in which zoning ordinances can strike a judicially sanctioned balance between limiting development and protecting existing property rights.

The Dissenting Opinions

Chief Justice Roberts wrote the primary dissent, joined by Justices Thomas and Alito. (Justice Gorsuch did not participate in the case, which was argued before he joined the Court.) The Roberts dissent adopted the State of Wisconsin’s approach. Chief Justice Roberts did not argue the Murrs should win their suit, but he eschewed the multi-factor test adopted by the majority.

Chief Justice Roberts identified two primary rationales for his position. First, because “[t]he question of who owns what is pretty important,” it follows that “[t]he rules must provide a readily ascertainable definition of the land to which a particular bundle of rights attaches that does not vary depending upon the purpose at issue.” Slip op. at 6 (Roberts, C.J., dissenting). On this basis, the dissent decried “[t]he majority’s new, malleable definition of private property” for the takings inquiry. *Id.* at 2.

Second, Chief Justice Roberts asserted that the majority’s balancing test improperly advantages the government in every takings dispute. Because one factor relevant to defining the property is “the reasonableness of the regulation as applied to the claimant[,] ... the government’s regulatory interests will come into play not once, but twice – first when identifying the relevant parcel, and again when determining whether the regulation has placed too great a public burden on that property.” *Id.* at 9-10. (This is true only for regulations assessed under *Penn Central*; any per se taking under *Lucas* will not be subject to the second analysis.)

Ultimately, the Roberts dissent argued, the majority decision “knocks the definition of ‘private property’ loose from its foundation on stable state law rules and throws it into the maelstrom of multiple factors that come into play at the second step of the takings analysis. The result: The majority’s new framework compromises the Takings Clause as a barrier between individuals and the press of the public interest.” *Id.* at 12.

Justice Thomas also wrote his own separate dissent. He affirmed his agreement with Chief Justice Roberts’s application of the Court’s regulatory takings precedent, but he reiterated his belief that the Court should reexamine the past century’s regulatory takings

jurisprudence to see if it can be rooted in the original meaning of the Constitution.

Takeaways

The balancing test adopted in *Murr* will not make takings litigation any simpler or more predictable. It amplifies the subjectivity – and thus the variability – of the takings analysis. In different courts, that may redound to the benefit of the government or to the benefit of the property owner. However, the *Murr* decision is a clear victory for municipal governments, environmentalists, and other proponents of regulation inasmuch as the Court rejected efforts to rewrite the takings analysis in ways that would more frequently require compensation to property owners. The decision also provides a modest degree of clarity by expressly endorsing merger provisions for adjacent, substandard lots that share an owner. That alone marks *Murr* as a big win for municipal governments in Wisconsin and across the country that utilize this common tool.

About the author:

Jeffrey A. Mandell is a partner at Stafford Rosenbaum LLP, where his practice focuses on litigation and appeals in commercial and municipal matters. He is co-chair of the firm’s Appellate Practice Group and serves on the editorial board of the American Bar Association’s Appellate Practice Journal. He received his J.D. with high honors in 2006 from the University of Chicago Law School, after which he served as a law clerk to the Honorable A. Raymond Randolph on the U.S. Court of Appeals for the District of Columbia Circuit. He is admitted to practice in Wisconsin, Illinois, and Washington, D.C. Jeff can be reached at jmandell@staffordlaw.com