

Supreme Court on Regulatory Takings: Look to Reasonable Expectations

Late last week, the Supreme Court decided an important case in regulatory takings law, *Murr v. Wisconsin*. *Murr* sets out a new test for defining the private property at issue in regulatory takings cases.

Regulatory takings and the denominator problem. A regulatory taking may occur when the government regulates private property, rather than physically appropriating it such as by eminent domain. Deciding whether regulation amounts to a taking begins with delineating the affected property, the so-called “denominator problem.” A statute or regulation might severely burden a small part of a parcel but have only a minor impact on the whole parcel. Three decades ago, in *Penn Central Transportation Co. v. New York City*, the Supreme Court declined to focus on only the burdened part of a parcel, looking instead at the “parcel as a whole.” *Murr* presented a variation on that issue.

The *Murr* case. *Murr* involved two adjacent substandard lots on the scenic *St. Croix River*. Lot E is undeveloped; Lot F has a cabin. To protect the river, state and local law bars construction on single substandard lots in the area. There is an exception, however, for lots that have been separately owned since before 1976. When they both came under the Murrs’ ownership, Lots E and F lost the benefit of that exception; they “merged,” and must be built on or sold together. The Murrs challenged the merger of the lots as a regulatory taking that deprived them of the opportunity to develop or sell Lot E by itself.

The Wisconsin courts found no taking because Lots E and F, together, are appraised at more than 90% of their separate values. In the U.S. Supreme Court, the *Murrs* argued that *Penn Central’s* “parcel as a whole” rule meant that the burden on the lots must be assessed lot-by-lot. By contrast, the state of *Wisconsin* argued that state law, which considers merged lots to be one lot, should set the denominator. *St. Croix County* presented a more pragmatic position: that the merger did not impair the Murrs’ reasonable expectations about their use of their property.

The majority: the Murrs lose. The Supreme Court affirmed the judgment for the County by a vote of 5-3 in an opinion by Justice Kennedy. (Justice Gorsuch took no part in the case.) The majority decided that “no single consideration can supply the exclusive test for determining the denominator.” Instead, courts trying to determine the private property in regulatory takings claims are to inquire how “reasonable expectations about property ownership would lead a landowner” to expect a court to define her property. The majority then provided a nonexclusive list of factors: “the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land.”

In *Murr*, all three factors favored defining the affected property as the merged lots. State and local law treated Lots E and F as a single parcel, the lots’ “rough terrain and narrow shape” and location on a highly regulated riverfront should have led the Murrs to expect limitations on their use of the land, and the merged lots were almost as valuable as they would be as separate buildable lots. Thus, the Wisconsin court had been correct to treat the merged lots as the denominator for the takings analysis and in finding no taking.

The dissent: the Murrs probably lose, but not yet. The majority rejected the state of Wisconsin’s position, since it would leave property owners’ federal constitutional claims at the mercy of state law. The main dissent (Chief Justice Roberts, joined by Justices Thomas and Alito) largely adopted that position. The dissenters would have remanded the case to the Wisconsin courts to reexamine whether the merged lots were the proper denominator under Wisconsin property law and, if not, redo the takings analysis.

Takeaways. The Court’s decision seems to re-affirm state and local governments’ power to treat contiguous lots under common ownership as a single property for the purpose of land use regulation, particularly when doing so serves a clear public purpose such as environmental management, or when doing otherwise would give landowners a windfall. However, as with many Supreme Court decisions, the majority’s flexible test will have to be further developed by lower courts.

Finally, it is worth noting that, if a similar case arises under the Takings Clause in Article 10 of the Massachusetts Declaration of Rights, the state courts seem likely to follow the Supreme Court’s lead. The Supreme Judicial Court affirmed in 2010 in *Blair v. Department of Conservation and Recreation* that Article 10 affords the same protections against regulatory takings as the federal Takings Clause.