Lot Mergers and Takings Claims After *Murr v. Wisconsin*

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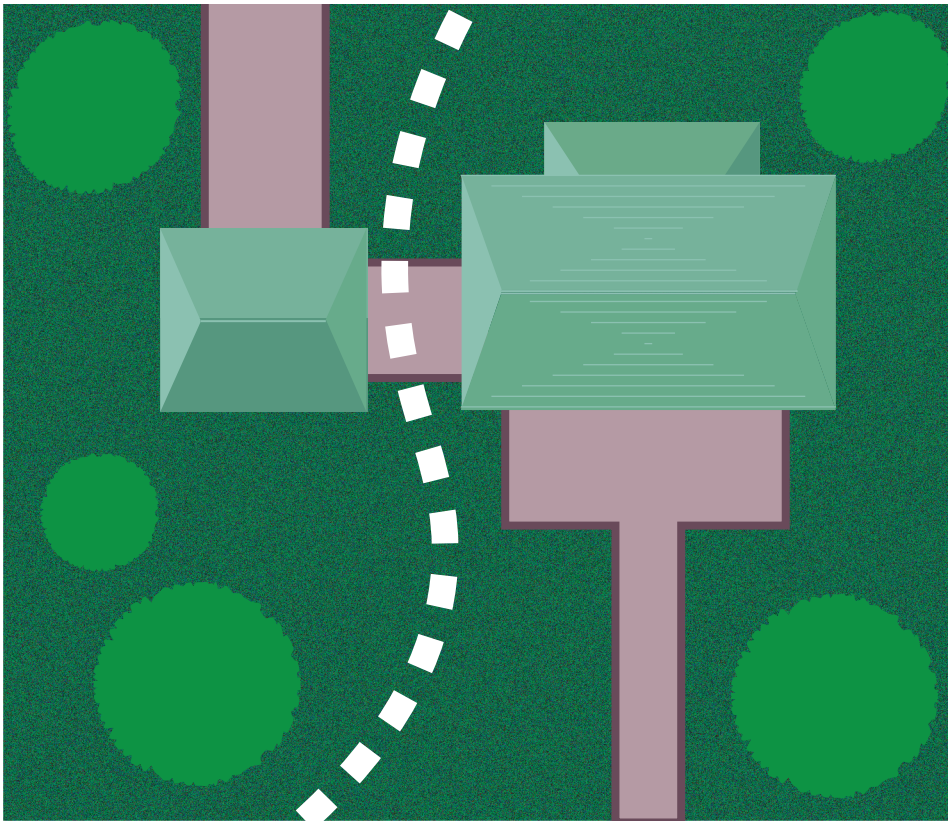

INTRODUCTION

On June 23, 2017, the Supreme Court issued its opinion in *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017). The property at issue included two adjacent lots—Lot E and Lot F—under common ownership along the protected St. Croix River that were subject to merger regulations barring their separate sale or development. After the Murrs were denied a variance to sell Lot E as part of development plan to improve Lot F, they filed their taking suit. In a 5-3 opinion by Justice Kennedy, the Court held that the Court of Appeals of Wisconsin was correct to analyze the two lots as a single unit in finding that there was no regulatory taking.

The Supreme Court announced an objective, three-factor balancing test for identifying the proper unit of property against which to assess the effect of the challenged governmental action. The factors "include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land." The test hinges on "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. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition."

This article examines the *Murr* decision and provides practice and planning tips in the wake of the decision.

I. Three-Factor Balancing Test for Identifying the Proper Unit of Property

A. Factor One - Treatment Under State and Local Law

Under the first factor, "courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law." The Supreme Court emphasized that "reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property."

The Court found the lot merger ordinance at issue to be a legitimate land use restriction, "consistent with the widespread understanding that lot lines are not dominant or controlling in every case," and the merger regulations "indicate[ ] petitioners' property should be treated as one when considering the effects of the restrictions." The Court noted that the property was subject to the merger regulatory burden "only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted." "As a result, the valid merger of the lots under state law informs the reasonable expectation they will be treated as a single property."

B. Factor Two - Physical Characteristics

The physical characteristics of property the Supreme Court identified as relevant to the inquiry include (a) "physical relationship of any distinguishable tracts;" (b) "the parcel's topography;" (c) "the surrounding human and ecological environment;" and (d) whether "the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation." Applying these factors, the Court found that they support the property's treatment as a unified parcel:

> The lots are contiguous along their longest edge. Their rough terrain and narrow shape make it reasonable to expect their range of potential uses might be limited.. . . The land's location along the river is also significant. Petitioners could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land.

C. Factor Three - Value

Under *Murr's* third factor, "courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings." The Court explained that "[t]hough a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy,

expanding recreational space, or preserving surrounding natural beauty." The Court emphasized that "[t]he absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge." For example, "[a] law that limits use of a landowner's small lot in one part of the city by reason of the landowner's nonadjacent holdings elsewhere may decrease the market value of the small lot in an unmitigated fashion." "On the other hand, if the landowner's other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in turn, may counsel in favor of treatment as a single parcel and may reveal the weakness of a regulatory takings challenge to the law."

Applying this factor, the Court found that "the prospective value that Lot E brings to Lot F supports considering the two as one parcel for purposes of determining if there is a regulatory taking." The Court elaborated as follows:

> Petitioners are prohibited from selling Lots E and F separately or from building separate residential structures on each. Yet this restriction is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements.. . .
>
> The special relationship of the lots is further shown by their combined valuation. Were Lot E separately saleable but still subject to the development restriction, petitioners' appraiser would value the property at only $40,000. We express no opinion on the validity of this figure. We also note the number is not particularly helpful for understanding petitioners' retained value in the properties because Lot E, under the regulations, cannot be sold without Lot F. The point that is useful for these purposes is that the combined lots are valued at $698,300, which is far greater than the summed value of the separate regulated lots (Lot F with its cabin at $373,000, according to respondents' appraiser, and Lot E as an undevelopable plot at $40,000, according to petitioners' appraiser). The value added by the lots' combination shows their complementarity and supports their treatment as one parcel.

D. Rejection of "Formalistic Rules"

The Supreme Court favored the multi-factor test for guiding the denominator parcel inquiry over the "formalistic" rules advocated by the parties. The Court affirmed that "[a] central dynamic of the Court's regulatory takings jurisprudence . . . is its flexibility." This flexibility is needed "to reconcile two competing objectives central to regulatory takings doctrine." The first "is the individual's right to retain the interests and exercise the freedoms at the core of private property ownership . . .." The second is "the government's well-established power to 'adjus[t] rights for the public good.'" A proper balancing of these principles requires a careful inquiry informed by the specifics of the case. "In all instances, the analysis must be driven by the purpose of the Takings Clause, which is to prevent 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."

1. Wisconsin's Proposed Rule

Wisconsin attempted to tie the definition of the parcel to state law, but the Court opined that it is necessary to weigh "whether the state enactments at issue accord with other indicia of reasonable expectations about property." The Court explained:

> [D]efining the parcel by reference to state law could defeat a challenge even to a state enactment that alters permitted uses of property in ways inconsistent with reasonable investment-backed expectations. For example, a State might enact a law that consolidates nonadjacent property owned by a single person or entity in different parts of the State and then imposes development limits on the aggregate set. If a court defined the parcel according to the state law requiring consolidation, this improperly would fortify the state law against a takings claim, because the court would look to the retained value in the property as a whole rather than considering whether individual holdings had lost all value.

2. Petitioners' Proposed Rule

Petitioners urged the Court to adopt a presumption that lot lines define the relevant parcel in every instance. "In effect, petitioners ask this Court to credit the aspect of state law that favors their preferred result (lot lines) and ignore that which does not (merger provision)." The Court rejected the proposed presumption as "flawed" and ignoring "the fact that lot lines are themselves creatures of state law, which can be overridden by the State in the reasonable exercise of its power." The Court affirmed its case law, "which recognizes that reasonable land-use regulations do not work a taking."

II. PRACTICE AND PLANNING TIPS FOLLOWING MURR

In the wake of *Murr*, local governments now have a better of understanding of how to go about lot merger and retire development rights while assessing and avoiding takings liability.

A. Lot Inventory

The first step that a local government should consider making is evaluating its inventory of lots to determine which are (a) contiguous and under common ownership and (b) located in an area where specific environmental regulations may be applied.

Murr made it clear that lot contiguity and common ownership are factors that can lead to property being treated as one parcel, instead of separate lots, in evaluating whether there has been a

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taking of the property. This broader approach minimizes potential takings liability and may inform how the local government regulates the lots and makes final decisions on applications for their development.

Murr also determined that a property's location in an area that is subject to environmental or other regulation is one of the factors that a court should consider in weighing whether a landowner could anticipate that his holdings would be treated as one parcel, or as separate lots. In addition to identifying lots that are contiguous and under common ownership, local governments should ascertain whether the lots are also located in an area where specific environmental regulations are applied. These areas include (a) habitat for endangered species that are regulated under the Endangered Species Act (ESA); (b) units of the Coastal Barrier Resources System (CBRS) where development in discouraged and made ineligible for Federal Flood Insurance under the National Flood Insurance Program (NFIP) pursuant to the Coastal Barrier Resources Act (CBRA); and (c) waterfront protected areas such as the Lower St. Croix area at issue in *Murr*. As *Murr* opined, purchasers of property in these areas are essentially on notice that regulation might affect their use and enjoyment of the property, and the purchasers will have a more difficult time establishing reasonable investment-backed expectations under *Penn Central v. New York City*, 438 U.S. 104 (1978).

B. Adoption of Merger Ordinances

If a local government determines that it has a substantial inventory of contiguous lots under common ownership, then it should consider adopting a merger ordinance to retire development rights and minimize takings liability. After *Murr*, it cannot be disputed that merger provisions are generally "a legitimate exercise of government power" to establish "a minimum lot size in order to preserve open space while still allowing orderly development." The Court provided a strong endorsement for merger provisions, citing the Amicus Brief filed by the National Association of Counties, *et. al.* that discussed the long history and rationale for merger provisions and provided over 100 examples of such provisions. The Court even declined to follow the rule proposed by Petitioners in part because it "would frustrate municipalities' ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist nationwide today."

1. "Contiguous substandard lots under common ownership"

In adopting a merger ordinance, local governments should be mindful of the specific provisions that the *Murr* court deemed proper (or in the words of the court, "classic"). First, the merger ordinance should only combine "contiguous substandard lots under common ownership." In its decision, the Supreme Court disapproves of the adoption of merger provisions that seeks to consolidate nonadjacent property. The Court cautioned that "[t]he absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge."

What is a "substandard lot"?

The lots at issue in *Murr* were "substandard" because they did not meet minimum lot size requirements. Merger ordinances such as the one at issue in *Murr* are typically lot size oriented. "When States or localities first set a minimum lot size, there often are existing lots that do not meet the new requirements, and so local governments will strive to reduce substandard lots in a gradual manner." The court did not discuss other factors that might make a lot "substandard" and therefore subject to merger. For example, local governments may adopt environmental criteria for lots, seeking to limit development on environmentally sensitive lots. If two contiguous lots are environmentally sensitive, then it may be in the interest of the local government to merge the lots to advance conservation goals. Although the theory of merger approved by *Murr* arguably applies to environmentally sensitive lands or other "substandard" situations, the Court's focus on lot size leaves open the question of how the Court might treat those other situations.

Grandfather Clauses

Second, the merger ordinance should include "a grandfather clause, which preserves adjacent substandard lots that are in separate ownership." For the area where the Murr property is located, Wisconsin state rules prohibited the use of lots as separate building sites unless they had at least one acre of land suitable for development. However, the rules included a grandfather clause that relaxed this restriction for substandard lots which were "in separate ownership from abutting lands" on January 1, 1976, the effective date of the regulation. Consistent with state rules, the St. Croix County zoning ordinance contained an identical restriction.

Variance Procedures

Finally, the merger ordinance should include a variance procedure "for landowners in special circumstances." The *Murr* court found that the variance procedure that was available to the Murrs "ameliorated" "the harshness" of the merger provision.

Developer Avoidance of Merger Provisions

In response to *Murr*, local governments should be aware that developers may take steps to avoid triggering merger provisions. For example, developers may avoid holding adjacent property under common ownership by having family members or shell entities hold title to individual lots. If property is being acquired purely for investment purposes, investors may also seek to purchase only non-adjacent lots.

In seeking to address situations where developers attempt to avoid "common ownership" by having family members hold title to individual lots, the 1980's litigation of *W.A. Perkins, et. al. v. Monroe County, et. al.* provides a cautionary tale for local governments. The litigation sought to invalidate sections of the Monroe County (Florida) Code that limited development on contiguous lots under common ownership. "Common ownership" was defined to mean "a shared interest in real property by the same person or any persons related by marriage or blood within an immediate family including parents, spouses, siblings

and children." The trial court summarized the impact of the regulations as follows:

> Under the contiguous lot provisions of the Monroe County Code . . . the right of a property owner to build upon his lot in an improved subdivision is determined by whether or not he or one of his immediate family, by blood or marriage, owns an adjacent lot. Thus if a brother or sister own adjacent lots in an improved subdivision falling within the contiguous lot definitions, only one may build on his or her lots. However, if two unrelated persons owned the identical lots, both would be able to build.

Not surprisingly, the court found the regulations to violate due process and enjoined their enforcement:

> The regulation of use of property under the guise of police power based upon who owns the property rather than the nature or quality of the property advances no recognized benefit to the public.. . .

The contiguous lot provisions as adopted are discriminatory in substance and operation. The regulations require identification of family members and definition of their relationships for equitable enforcement. This identification and definition is impossible for the building, zoning and taxing officials as there is no way to determine who are "immediate family members" for relatives with different last names. It is clear that these provisions fail to establish any means by which their enforcement could be reasonably or impartially accomplished. The provisions can only be enforced in an arbitrary and capricious manner.

> Even if the government officials could identify immediate family members owning adjacent lots, the provisions fail to provide a procedure for determining which of the two family members owns the buildable lot and which the non-buildable lot. Thus, if a brother and sister own two adjacent lots subject to the contiguous lot restrictions, the County must discriminate against one by prohibiting building while rewarding the other with building rights. The contiguous lot provisions fail to provide procedures for making this discriminatory determination.
>
> The contiguous lot provisions are ultimately discriminatory because there is no just basis for the classifications created by the provisions. The classifications are arbitrary and capricious.

Under *Murr*, Monroe County's attempt to limit development on commonly owned contiguous lots would likely have survived constitutional challenge. However, the County's now deleted definition of "common ownership" to include immediate family remains legally flawed, and should serve as a cautionary example for local governments seeking to stay ahead of developers that may put adjacent holdings in the names of their family members.

C. Beyond Merger—Strengthening the Defense to Reasonable Investment-Backed Expectations.

Murr is an important decision for local governments beyond the merger context. In addition to approving merger provisions as a legitimate exercise of government power and determining that the Murr property should be evaluated as a single parcel, the decision found that no regulatory taking of the property occurred under *Lucas v. South Carolina Coastal Council* or *Penn Central v. New York City*. The Court's evaluation of the claim under *Penn Central* is significant because it strengthens a local government's defense against alleged interference with reasonable investment-backed expectations where the landowner purchases property after the adoption of the complained of regulation.

The Murrs did not suffer a compensable taking under *Lucas*, "as they have not been deprived of all economically beneficial use of their property.. . . They can use the property for residential purposes, including an enhanced, larger residential improvement.. . . The property has not lost all economic value, as its value has decreased by less than 10 percent."

The Court also found that that the Murrs did not suffer a taking "under the more general test of *Penn Central*." As to the economic impact prong, the Court stated: "The expert appraisal relied upon by the state courts refutes any claim that the economic impact of the regulation is severe." As to the "character of government action" prong, the Court found that "the governmental action was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land." It is the following statement under the "reasonable investment-backed expectations" prong that is a significant development in case law for local governments: "Petitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots."

Previously in *Palazzolo v. Rhode Island*, the Supreme Court rejected the "notice rule" that holds "[a] purchaser or a successive title holder . . . is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Palazzolo* provided the following rationale for rejecting the "notice rule":

> The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. See, *e.g., Phillips v. Washington Legal Foundation,* 524 U.S. 156, 163, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998). So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.
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> The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning

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and land-use restrictions. See *Pennsylvania Coal Co.*, 260 U.S., at 413, 43 S.Ct. 158 ("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"). The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Nor does the justification of notice take into account the effect on owners at the time of enactment, who are prejudiced as well. Should an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim (which, as this case demonstrates, will often take years), under the proposed rule the right to compensation may not be asserted by an heir or successor, and so may not be asserted at all. The State›s rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation"); cf. Ellickson, Property in Land, 102 Yale L.J. 1315, 1368-1369 (1993) (right to transfer interest in land is a defining characteristic of the fee simple estate). The proposed rule is, furthermore, capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.

Palazzolo's rejection of the "notice rule" left uncertain the issue of whether the acquisition of title after the adoption of the complained of regulation could still be considered as a factor in weighing the reasonableness of the landowner's investment-backed expectations. *Murr* resolves this uncertainty in the government's favor. While the Court cited *Palazzolo* for the proposition that "[a] valid takings claims will not evaporate just because a purchaser took title after the law was enacted," it went on to state "[a] reasonable restriction that predates a landowner's acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property." Applying this factor, the Court concluded that "Petitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots."

Local governments should also be aware that the reverse is true—the purchase of property *before* a regulatory restriction can also be a factor in weighing reasonable investment-backed expectations.

D. Monitor the Legislative Response

"We spent 10 years in the courts and 4 months in the Wisconsin legislature! Crazy, right?"

In response to *Murr*, local governments can expect legislative attempts to preempt their authority to adopt merger ordinances. In November 2017, for example, Wisconsin Governor Scott Walker signed into law legislation that places new limitations on the authority of local governments and state agencies to enact or enforce lot merger provisions similar to the one found in the St. Croix County Zoning Ordinance.

Act 67 "prohibits cities, villages, towns, and counties from enacting or enforcing ordinances or taking any other action that prohibits a property owner from conveying an ownership interest in a substandard lot or from using a substandard lot as a building site if the substandard lot does not have any structures placed partly upon an adjacent lot and the substandard lot is developed to comply with all other ordinances of the political subdivision."

Act 67 also "prohibits cities, villages, towns, counties, and state agencies from enacting or enforcing any ordinance or administrative rule or taking any other action that requires one or more lots to be merged with another lot, for any purpose, without the consent of the owners of the lots that are to be merged."

Governor Walker signed the bill into law with Donna Murr by his side. As a result, it is expected that the Murr lots can be developed separately.

CONCLUSION

On one level, *Murr v. Wisconsin* is the Supreme Court's confirmation that localities have the authority to craft laws restricting the development of adjoining parcels, and that the enforcement of such rules does not illegally undermine investment expectations or effect an unconstitutional taking. However, the actions after *Murr* by the Wisconsin statehouse illustrates the prerogative of a legislature to remediate, in short order, what it perceives to be now-outdated overreach, and to assert its preemptive authority over localities that might wish to limit development through the merger of adjoining parcels. ML