



June 2017

SCOTUS Provides Guidance on the Definition of Relevant Property in a Regulatory Taking Case

On June 23, 2017, the U.S. Supreme Court decided *Murr v. Wisconsin*, No. 15-214, 2017 WL 2694699 (U.S. June 23, 2017), which presented perhaps the most important issue of regulatory takings law that the Court has never addressed – the “relevant parcel” or “parcel-as-a-whole” issue. That issue, which arises in many regulatory takings cases, is how a court should define the property at issue for purposes of assessing whether a regulatory imposition constitutes a taking of that property. The issue is important, and indeed can be determinative, because defining the relevant property narrowly will concentrate the impact of the regulatory imposition and thus make it more likely to constitute a taking. Conversely, defining the relevant property broadly will mitigate the severity of a regulation’s impact on the “parcel-as-a-whole,” making a taking of the whole parcel less likely.

In *Murr*, the Court affirmed (5-3, with Justice Gorsuch not participating) the lower court’s determination that two adjacent and commonly-owned parcels of land were properly considered together in assessing the owners’ takings claim. Based on that determination, the Court also held that the regulation in question did not constitute a compensable taking, because under the applicable land use scheme the Murrs could use the two parcels together without causing a significant loss in value to the whole. Under Wisconsin law, each of the adjacent lots was classified as “substandard” and thus not developable, but a grandfather clause allowed development of a lot by existing owners. However, a statutory exception to the grandfather clause precluded separate development or sale of adjacent lots having the same owner. In effect, this arrangement “merged” commonly owned adjacent lots. The Murrs wanted to sell one of their two adjacent lots, and claimed the statutory exception precluding separate sale and development of that lot was a taking.

In determining that the Murrs’ two lots together were the relevant parcel for takings purposes the Court rejected bright line rules proposed by both the property owners and one of the government respondents, under which state property law principles would generally control the definition of relevant property in regulatory takings cases. The Court explained that “no single consideration can supply the exclusive test.” Instead, it ruled that courts must consider a number of factors, including “the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land.”

While rejecting any bright line test, the Court acknowledged that “substantial weight” should be given to the first factor – the treatment of land under state and local law, and “in particular how it is bounded or divided.” Regarding the second factor, physical characteristics, the Court noted the relevance of “the physical relationship of any distinguishable tracts, the parcel’s topography, and the surrounding human and ecological environment.” As for the third factor, property value, the Court invited special attention to “the effect of burdened land on the value of other holdings.”

At bottom, the Court found this multi-factor test would allow courts to “define the parcel in a manner that reflects reasonable expectations about the property” – *i.e.*, whether a landowner would reasonably “anticipate that his holdings would be treated as one parcel, or, instead, as separate parcels.” The flexibility and complexity of the Court’s test indicate that the answer to the relevant parcel question will require a fact-intensive inquiry in many regulatory takings cases. Indeed, Chief Justice Roberts’ dissent (joined by Justices Alito and Thomas) criticized the majority’s relevant parcel analysis on just that basis: “today’s decision knocks the definition of ‘private property’ loose from its foundation on stable state law rules and throws it into [a] maelstrom of multiple factors.” But while rejecting the majority’s analysis, its “bottom-line conclusion” of no taking did not trouble the dissent, which agreed that the majority made “a fair case that the Murrs can still make good use of both lots.” A brief separate dissent by Justice Thomas urged a re-evaluation of the constitutional basis for regulatory takings claims.

The relevant parcel issue has perplexed lower courts and led to conflicting decisions almost since the Supreme Court recognized the regulatory takings doctrine early in the 20th Century. Property owners and property rights advocates were hoping the Court’s decision in *Murr* would clarify, and perhaps settle, the question. Instead, the Court has provided guidance, but nothing definitive. Lower courts will now have to clarify *Murr*’s multi-factor test by applying it case-by-case in future regulatory takings cases. In doing so, however, lower courts will have the benefit of *Murr*’s focus on the reasonable expectations of the landowner. It is also worth paying attention to the Court’s apparent reliance on a principle – which the dissent accepted as well – that a regulation imposing no great economic loss on the property owner may not be a taking that requires just compensation.

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