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## U.S. Supreme Court Surveys: 2016 Term. *Murr. v. Wisconsin*: Identifying the Proper "Parcel as a Whole" in Regulatory Takings Cases

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# United States Supreme Court Surveys: 2016 Term

## ***Murr v. Wisconsin*: Identifying the Proper “Parcel as a Whole” in Regulatory Takings Cases**

**Bruce I. Kogan\***

### INTRODUCTION

The United States Supreme Court periodically addresses claims from individual property owners that their private property has been taken from them by governmental action for which they are entitled to be justly compensated under the Takings Clause of the Fifth Amendment to the U.S. Constitution.<sup>1</sup> Such a case was decided during the last term of the Supreme Court in *Murr v. Wisconsin*, wherein the Court, by a 5–3 majority, held that the merger provision of an environmental protection zoning statute did not amount to a taking.<sup>2</sup>

Takings cases arise either as a result of a direct taking, or a so-called regulatory taking. Instances where a governmental entity seeks to occupy or take title to private property are direct

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1. U.S. CONST. amend. V. The final clause of the Fifth Amendment reads, “nor shall private property be taken for public use, without just compensation.” *Id.*

2. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017).

takings.<sup>3</sup> When the government does not seek to physically acquire or occupy the land, but merely to regulate its use, an owner may still seek just compensation on the theory that the regulation in effect took the property by depriving the owner of its use and value.<sup>4</sup> *Murr v. Wisconsin* is an example of a regulatory takings case.

The petitioners in *Murr* were a set of four siblings who owned two adjacent lots (Lots E and F) along the St. Croix River in northwest Wisconsin.<sup>5</sup> The St. Croix River is a scenic vista, and has been protected under federal and state law dating back to the 1970s.<sup>6</sup> The lots in question were originally acquired by the petitioners' parents in 1960 (Lot F) and 1963 (Lot E).<sup>7</sup> The topography of the lots is quite unique.<sup>8</sup> Each lot has a higher level portion that drops off into a steep bluff down to a lower level portion along the riverfront.<sup>9</sup> Additionally, both lots measure approximately 1.25 acres overall, but because of the waterline and the steep bank, each has considerably less land suitable for development.<sup>10</sup> During the three decades of the Murr parents' ownership of these lots, title to Lot E was held in the parents' names while Lot F was titled in the name of the family plumbing company.<sup>11</sup> The Murr parents built a cabin for their family's recreational use on Lot F, but did not undertake any development

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3. Direct takings typically proceed by the governmental entity giving notice of its intention to take or condemn the identified property. *See, e.g., United States v. Pewee Coal Co.*, 341 U.S. 114 (1951). Legal challenges to direct takings normally consist of the owner contesting the amount of compensation offered as being insufficient to justly compensate the loss occasioned by the taking. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519 (1992). On rare occasions, the owner may contest the entire condemnation on the theory that the taking is not for a "public use" as in *Kelo v. City of New London*, 545 U.S. 469 (2005).

4. In the seminal regulatory takings case, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), Justice Holmes stated, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."

5. *Murr*, 137 S. Ct. at 1939, 40.

6. *Id.* at 1940.

7. *Id.*

8. *See id.*

9. *Id.*

10. *Id.*

11. *Id.* at 1941.

of the adjacent Lot E.<sup>12</sup>

The regulatory scheme that the federal government initiated in 1972 with the passage of the Wild and Scenic Rivers Act and the Lower Saint Croix River Act of 1972 designated the river for protection against overdevelopment that might undermine the picturesque grandeur and recreational value of the river and the surrounding area.<sup>13</sup> The Lower Saint Croix River Act required the State of Wisconsin to enact a management and development program for the river, which it did by statute,<sup>14</sup> and by regulations promulgated thereunder by the Wisconsin Department of Natural Resources (DNR) by 1976.<sup>15</sup> For the area where the Murr lots are located, the state DNR regulations prevent the use of the lots as separate building sites unless they have at least one acre of land suitable for development, which neither Lot E nor Lot F had by virtue of their unique topography.<sup>16</sup> However, like many other land use regulatory regimes, the DNR regulations grandfathered pre-existing substandard lots which were in separate ownership as of January 1, 1976, when the regulations took effect.<sup>17</sup> Such pre-existing non-conforming lots in separate ownership (like lots E and F while the Murr parents and the family plumbing company owned them separately) were allowed to be developed as separate building sites.<sup>18</sup> Again the DNR regulations, like many other land use regulatory regimes, also contained a merger provision which provides that adjacent substandard lots under common ownership “may not be ‘sold or developed as separate lots’ since they separately did not meet the size requirement.”<sup>19</sup> The DNR regulations also required localities such as St. Croix County to adopt parallel provisions, which it did in its zoning ordinance.<sup>20</sup>

Eventually the Murr parents transferred these lots to their four children (the petitioners) in 1994 (Lot F) and 1995 (Lot E).<sup>21</sup>

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12. *Id.* at 1940, 41.

13. 16 U.S.C. § 1274(a)(6), (a)(9) (2012).

14. WIS. STAT. ANN. § 30.27(l) (West 2017).

15. WIS. ADMIN. CODE NR § 118.01-.09 (West 2017).

16. “Even when combined, the lots’ buildable area is only 0.98 acres due to the steep terrain.” *Murr*, 137 S. Ct. at 1940.

17. *Id.*

18. *Id.*

19. *Id.* (citing WIS. ADMIN. CODE NR § 118.08(4)(a)(2)).

20. *Id.*

21. *Id.* at 1941.

Title to both lots was taken in the names of the four Murr siblings.<sup>22</sup> By the mid-2000's, the cabin on Lot F had fallen into disrepair, and the Murr siblings sought to sell Lot E to fund the improvement and movement of the cabin to a different location on Lot F.<sup>23</sup> Neither Lot E nor Lot F contained the minimum one acre of land suitable for development, and by now they were in common ownership which triggered the merger provisions of the local zoning ordinance and the state DNR regulations.<sup>24</sup>

The Murr siblings sought relief from the strict enforcement of the regulations by applying for variances from the Saint Croix County Board of Adjustment (the Board) that would permit the separate sale or use of the substandard lots, without which they claimed they would be unable to improve or move the cabin on Lot F.<sup>25</sup> The Board denied the requested variances, and the Wisconsin state courts affirmed the Board's denial, agreeing with the Board's interpretation that the ordinance "effectively merged" Lots E and F, so that the Murr siblings, "could only sell or build on the single larger lot."<sup>26</sup> This led the Murr siblings to bring the inverse takings action in state court, claiming that the state and county regulations amounted to a regulatory taking by depriving them of "all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot."<sup>27</sup> The trial court granted summary judgment to the state, finding that the Murrs retained various options for the use and enjoyment of their land (they could preserve the existing cabin, relocate the cabin, or eliminate the cabin and build a new residence on Lot E, on Lot F or across both lots).<sup>28</sup> The trial court also found the Murrs had not been deprived of all economic value of their property by the mandated merger of lots E and F, since the appraised values presented by the state showed only a minimal decrease in market value (less than 10%) for the merged lots (\$698,300) as compared to what they might be worth as two separate lots (\$771,000).<sup>29</sup>

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22. *See id.*

23. *Id.*

24. *See id.*

25. *Id.*

26. *Id.* (quoting *Murr v. St. Croix Cty. Bd. of Adjustment*, 796 N.W.2d 837, 844 (Wis. Ct. App. 2011)).

27. *Id.*

28. *Id.*

29. *Id.*

The Wisconsin Court of Appeals affirmed the lower court and rejected the owners' request to analyze the effect of the regulations on Lot E only.<sup>30</sup> Instead, the state appeals court held the takings analysis properly focused "on the Murrs' property as a whole"—that is, the merged Lots E and F together.<sup>31</sup> From that perspective, there was not a sufficient deprivation of all or practically all of the economic value of the Murrs' property.<sup>32</sup> The Wisconsin Supreme Court did not grant review, which led to the Murrs' petition for certiorari to the U.S. Supreme Court.<sup>33</sup>

#### I. REGULATORY TAKINGS BACKGROUND

Governments have historically taken private property from individual owners through the exercise of the power of eminent domain<sup>34</sup> when it was perceived that there was a public need for that property.<sup>35</sup> It is logical that the government would not want to rely solely on the free will, market-based decisions of an individual owner to agree to sell his property to the government at a fair price when there might be significant temptation for that individual to hold out or extort the government in its circumstance of need. The power of eminent domain was so inherent to the founding fathers' notion of government that the first seven articles that made up the original U.S. Constitution neither mentioned it nor delegated it to any particular branch of government.<sup>36</sup> The primary goal of the founders at the Constitutional Convention in

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30. *Id.*

31. *Id.*

32. *Id.* at 1941.

33. *Id.*

34. The term "eminent domain" was derived from *De Jure Belli Ac Pacis* (On the Law of War and Peace), a legal treatise written by the Dutch jurist Hugo Grotius in 1625, and is still used in the United States to describe the power of the government to condemn and appropriate property from individual owners (the same concept is referred to today in England as "Compulsory Purchase"). JULIUS L. SACKMAN, *NICHOLS ON EMINENT DOMAIN* § 1.12 (3d ed. 2015).

35. *Kohl v. United States*, 91 U.S. 367, 371 (1875) ("It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions.")

36. U.S. CONST. art. IV, § 3, cl. 2 delegates to Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," but this does not seem to speak with any specificity about takings or eminent domain.

1787 was to address the shortcomings of the structures of government outlined in the predecessor Articles of Confederation.<sup>37</sup> Therefore, the original seven Articles of the new Constitution did not address the relationship between the individual and the government.<sup>38</sup> The first ten amendments to the Constitution (usually referred to as “The Bill of Rights,” adopted by Congress in 1789 and ratified by the States by 1791) were intended to clarify the rights and liberties of individuals or the people collectively vis-à-vis the government that had not previously been addressed.<sup>39</sup>

The Fifth Amendment contains two clauses germane to individual property ownership and the government’s power to appropriate such property. The first is the “Due Process” clause, which continues the theme set out throughout the Fifth Amendment of what a person shall not be required to suffer at the hands of the government: “nor be deprived of life, liberty, or property, without due process of law.”<sup>40</sup> The final clause of the Fifth Amendment then provides: “nor shall private property be taken for public use, without just compensation.”<sup>41</sup> This is the so-called “Takings Clause,” although it is sometimes referred to as the “Just Compensation Clause” depending upon whether one is focusing on the government’s power to take or the individual’s right to be justly compensated for what has been taken.

Direct takings initiated by declarations of intent to condemn continue even today, but a new type of takings claim—the so-

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37. See John P. Roche, *The Triumph of Reform Politics: Overthrowing the Articles of Confederation*, 1987 UTAH L. REV. 809, 809 (1987).

38. See Garrett Epps, *The Bill of Rights*, 82 OR. L. REV. 517, 518–19 (2003) (noting that the framers did not include these provisions because individual rights were already provided for by the states).

39. See *id.*

40. U.S. CONST. amend. V.

41. *Id.* This same notion has inserted itself into the foundational or constitutional principles of many other nations. For example, the Constitution of Australia permits the federal government to make laws with respect to “the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.” Australian Constitution s 51(xxxi). The French Declaration of the Rights of Man and the Citizen mandates that “just and prior indemnity” be paid before expropriation of private property. 1791 CONST. art. 17. Article eight of the European Convention on Human Rights and its accompanying protocols contain similar protections against uncompensated interference with one’s home and possessions. See E.T.S. No. 5, art. 8.

called “Regulatory Taking”—joined them in the early years of the twentieth century.<sup>42</sup> The early part of the last century saw the advent of comprehensive land use planning through the development of zoning.<sup>43</sup> Landowners, alleging pre-zoning unlimited rights to use their land in any way they chose, or as the market dictated, brought inverse takings claims on the basis that the municipality had deprived them of some quotient of their ownership rights through zoning.<sup>44</sup> These challenges generally failed as in *Village of Euclid v. Ambler Realty Co.*, where the Supreme Court upheld zoning as a legitimate exercise of the government’s “police power” to take reasonable action to protect the public health, safety, and welfare.<sup>45</sup> In part, those early decisions (and even some much more recent ones) rest on long-standing background principles of nuisance law that already limited what an owner of land could do on his or her property.<sup>46</sup> Under nuisance law, uses that unreasonably interfere with the reasonable use and enjoyment rights of adjacent landowners (private nuisance), or the peace, safety and tranquility of the general public or community (public nuisance) may be enjoined in equity.<sup>47</sup> These inherent background principles suggest that a government regulation that prohibits a property owner from doing something that is harmful to the public welfare is not a taking since the property owner never had the right to use their property

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42. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (concluding that “if a regulation goes too far it will be recognized as a taking”); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (identifying that the language in *Mahon* gave birth to regulatory takings).

43. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386–87 (1926); see also 1 Patrick J. Rohan & Eric Damian Kelly, *Zoning and Land Use Controls* § 1.02[1] (recounting that “[i]t was not until the twentieth century, however, that local governments began to develop comprehensive zoning of uses throughout a community”).

44. See, e.g., *Vill. of Euclid*, 272 U.S. at 365 (“The ordinance is assailed on the grounds that it is in derogation of section 1 of the Fourteenth Amendment to the federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the state of Ohio.”).

45. *Id.* at 389–90.

46. See, e.g., *id.* at 387–88 (explaining that “the law of nuisances . . . may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the [police] power”).

47. *Nuisance*, BLACK’S LAW DICTIONARY (10th ed. 2014).

to commit that harm.

Comprehensive community planning such as zoning was not the only type of regulation of private property owners that government attempted in the early part of the twentieth century. The U.S. Supreme Court first recognized a valid regulatory taking claim in *Pennsylvania Coal Co. v. Mahon*, when interpreting a coal mining regulation enacted by the Commonwealth of Pennsylvania, which required the owners of the sub-surface coal deposits to remove the coal in such a way so as to guarantee the vertical support of the owners of the surface lands above the coal.<sup>48</sup> While perhaps a legitimate exercise of the State's police power, Justice Holmes ruled that "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."<sup>49</sup> This simple rule has engendered a complex body of decisional law in the ninety-five years since 1922. During that interval, we have seen much more extensive efforts by government at all levels—federal, state, and local—to adopt regulations that promote or protect the public health, safety and welfare.<sup>50</sup> Individuals and entities impacted by those regulations have pushed back by seeking just compensation for what they claim is a regulatory taking of their private property rights.<sup>51</sup>

The complexity of "regulatory takings" law that has evolved since *Pennsylvania Coal Co. v. Mahon* has extended to increased efforts by government bodies to protect environmentally or culturally sensitive areas by extensive and diverse protective regulations.<sup>52</sup> Government entities regulate private property owners in many ways and those regulations apply in varying circumstances and contexts. If the regulation is so burdensome that it denies the property owner all economically beneficial or productive use of the property, then it is deemed a "categorical

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48. 260 U.S. 393, 414 (1922).

49. *Id.* at 415.

50. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1047 (1998) (noting that "[m]ore than a century ago, the Court explicitly upheld the right of States to prohibit uses of property injurious to public health, safety, or welfare without paying compensation").

51. See, e.g., *id.* at 1009 ("Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation.").

52. See generally *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

taking” that must be justly compensated under the Takings Clause.<sup>53</sup> Short of a complete denial of all productive use, adjudging whether the extent of the regulation is a permissible exercise of the police power or goes “too far” requires *ad hoc* and perhaps unpredictable facts and circumstances analyses. That was the case forty years ago in a landowner’s challenge to New York City’s historic landmark preservation law designed to protect structures of architectural and cultural significance.<sup>54</sup> Even though the Supreme Court found no unconstitutional taking in *Penn Central Transportation Co. v. City of New York*, the Court nonetheless gave us the now familiar set of “Penn Central” factors to be balanced to determine whether regulation has gone “too far” stating:

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.<sup>55</sup>

. . .

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in

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53. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

54. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 115–16 (1978).

55. *Id.* at 124 (internal citations omitted).

the parcel as a whole..... 56

Particularized fact-intensive legal inquiries arise frequently in connection with regulations intended to protect environmentally sensitive areas, whether along scenic rivers or in fragile coastal zones.<sup>57</sup> Courts adjudicating the inverse takings claims that riparian or coastal property owners have brought must apply the *Penn Central* factors in resolving a myriad of questions, such as the value of the land in question, including whether all economically beneficial or productive use of the land has been denied; whether an owner's investment-backed expectations are "reasonable" and, if so, to what extent does the regulation interfere.<sup>58</sup> Similarly, the courts will inquire into whether the owner has been deprived of his property when he retains significant and valuable (albeit reduced) use of the parcel as a whole despite the regulation.<sup>59</sup> Additional questions address general welfare and fairness, including whether the character of the regulation was substantially related to promotion of the general welfare; and whether through the regulation government is asking only some people to bear public burdens that, in all fairness and justice, should be borne by the public as a whole in achieving admittedly legitimate public objectives.<sup>60</sup>

All of this is the gist of the environmental protection regulatory takings cases such *Lucas v. South Carolina Coastal Council* and *Palazzolo v. Rhode Island*, which are cited and discussed in *Murr v. Wisconsin*.<sup>61</sup> In *Lucas*, an individual purchased two oceanfront lots on a South Carolina barrier island for nearly one million dollars with the intention to build single-family homes.<sup>62</sup> Two years later, the state amended its beachfront management legislation to include Lucas' land in the act's prohibition against building any habitable structures.<sup>63</sup> While recognizing that landowners must conform to nuisance control regulations, the U.S. Supreme Court held that this regulation

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56. *Id.* at 130–131.

57. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

58. *See Penn Cent. Transp. Co.*, 438 U.S. at 124.

59. *See Palazzolo*, 533 U.S. at 630–32.

60. *See Penn Cent. Transp. Co.*, 438 U.S. at 124.

61. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942–43 (2017).

62. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006–07 (1992).

63. *Id.* at 1007.

amounted to a categorical taking since it deprived Lucas of all economic benefit of ownership of the parcel as a whole, and thus, warranted just compensation.<sup>64</sup>

In *Palazzolo*, an individual had purchased eighteen acres on Winnapaug Pond, an environmentally sensitive wetland, in Westerly, Rhode Island, through a corporate entity in 1959, well in advance of the Coastal Resources Management legislation first adopted by Rhode Island in 1971.<sup>65</sup> When the corporation dissolved in 1978, the title to the land was transferred to Mr. Palazzolo.<sup>66</sup> Over the years, Palazzolo submitted several ambitious development plans for the land to the state Coastal Resources Management Council, none of which were approved as submitted.<sup>67</sup> Palazzolo sued the state, raising a *Lucas*-like claim that he had been totally deprived of all economic benefit from his ownership of the land.<sup>68</sup> On this point, Palazzolo was undercut at the U.S. Supreme Court by the jointly stipulated facts to the effect that there was a small developable upland portion of the larger parcel as a whole worth at least \$200,000 upon which a substantial residence could be built.<sup>69</sup> Because the Rhode Island Supreme Court had not undertaken a full *Penn Central* analysis, the case was remanded back to the state courts for further proceedings.<sup>70</sup>

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64. *Id.* at 1019.

65. *Palazzolo v. Rhode Island*, 533 U.S. 606, 613–14 (2001).

66. *Id.* at 614.

67. *Id.* at 614–15.

68. *Id.* at 615–16.

69. *Id.* at 616, 622.

70. *Id.* at 632. On remand, the Rhode Island Superior Court engaged in a thorough *Penn Central* analysis and ruled in favor of the State, holding that: (1) the owner's proposed residential development of the property constituted a public nuisance because it would have resulted in ecological disaster to the pond the salt marsh bordered; (2) as the development constituted a public nuisance, the State's denial of the fill permits could not constitute a taking; (3) under the public trust doctrine, the portion of the owner's property that lay below the 1986 mean high water mark could never be developed; (4) the case fell under a partial takings inquiry because the State's coastal development regulations did not ban all economically beneficial use of the property; (5) the regulations did not have an adverse economic impact on the owner because development costs of the property would actually result in an economic loss to the owner; (6) the owner's investment-backed expectations were not realistically achievable, and thus, the third-prong of the *Penn Central* analysis was not satisfied; and (7) there was no Fifth Amendment taking. *Palazzolo v. Rhode Island*, No. WM 88-

In both of these cases, the impact of the regulations on the “parcel as a whole” was crucial. If all or substantially all of the economic value of the parcel of the whole was deprived by the regulation as in *Lucas*, then there was a compensable taking.<sup>71</sup> If the landowner retained substantial economic value in the parcel as a whole (albeit significantly reduced by the regulation), as in *Palazzolo*, then there was not a compensable taking.<sup>72</sup> Obviously, identifying the proper “parcel as a whole” may be determinative of the outcome of the case. In *Lucas*, the parcel as a whole was the two oceanfront lots together that the owner could no longer use for any development.<sup>73</sup> In *Palazzolo*, the parcel as a whole was the entire eighteen-acre tract (including the dry upland developable portion) and not just the wetlands portion upon which Mr. Palazzolo was not permitted to fill and build.<sup>74</sup> Similarly, in *Murr v. Wisconsin*, the Supreme Court had to address “a question that is linked to the ultimate determination whether a regulatory taking has occurred: What is the proper unit of property against which to assess the effect of the challenged governmental action?”<sup>75</sup>

## II. MAJORITY ANALYSIS IN *MURR V. WISCONSIN*

Justice Kennedy’s majority opinion recognizes that there are two competing objectives of the Court’s regulatory takings jurisprudence, which seeks to balance the right of the individual private property owner to retain and enjoy the interests and freedoms at the core of private property ownership against the government’s well-established power to adjust those rights for the public good.<sup>76</sup> Kennedy then notes that striking that balance 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.’”<sup>77</sup>

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0297, 2005 WL 1645974, at \*5–8, \*14–15 (R.I. Super. Ct. July 5, 2005).

71. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

72. 533 U.S. at 632.

73. 505 U.S. at 1006–07.

74. See 533 U.S. at 631–32.

75. 137 S. Ct. 1933, 1943 (2017).

76. *Id.*

77. *Id.* (quoting *Palazzolo*, 533 U.S. at 617–18).

Striking that proper balance in regulatory takings cases will require “a careful inquiry informed by the specifics of the case,” including a comparison of the value of the property both before and after the imposition of the regulation to measure whether the regulation has gone too far.<sup>78</sup> If all or substantially all of the economic value of the property as a whole is eliminated as a result of the regulation, then a taking has occurred.<sup>79</sup> If the property owner is still left with a significant portion of economic value or beneficial use from the property as a whole although some rights have been impinged upon and some value lost, then a taking is not likely to have occurred.<sup>80</sup> In order to make that comparison, Justice Kennedy says that it is necessary to identify “the proper unit of property against which to assess the effect of the challenged governmental action.”<sup>81</sup> The Murrs argued that the proper unit of property for this assessment is Lot E, the undeveloped lot rendered essentially valueless since it can no longer be separately sold or developed according to the State of Wisconsin and the County of Saint Croix.<sup>82</sup> The State and County argued that the proper unit of property for this assessment is the now merged property as a whole, Lots E and F together, which retained in excess of 90% of their original value, despite the impact of the regulation.<sup>83</sup>

This assessment process can be conceptualized as a fraction, the numerator of which is the value of the property retained by the owner after the impact of the regulation and the denominator of which is the value of the property as a whole prior to the imposition of the regulation. What is no longer in the numerator is the value of the property rights lost or diminished as a result of the regulation.<sup>84</sup> The Court will not focus only on the property

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78. *Id.*

79. *Id.* at 1942 (quoting *Palazolo*, 533 U.S. at 617).

80. *See id.* at 1943 (citing *Palazolo*, 533 U.S. at 617).

81. *Id.*

82. *Id.* at 1941.

83. Brief for Respondent State of Wisconsin at 21, 2526, *Murr*, 137 S. Ct. 1933 (No. 15-214) (noting that the state and county restated the lower court’s decision affirming summary judgment for the state and county).

84. *Cf. Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (“Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property ‘whose value is to furnish the denominator of the fraction.’”)

rights targeted by the regulation if the property as a whole continues to retain substantial value and use.<sup>85</sup>

Justice Kennedy refers to the identification of the proper unit of property for this assessment as the “denominator question,”<sup>86</sup> and says that “no single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These 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.”<sup>87</sup>

The majority opinion says that courts first “should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law,” and also other legitimate restrictions of state or local law affecting the “subsequent use and dispensation of the property.”<sup>88</sup> In this regard, the parties had each argued that state and local law favored their position.<sup>89</sup> The Murrs urged the Court to adopt a presumption that lot lines established under applicable state law define the relevant parcel in every instance, making Lot E alone the proper denominator.<sup>90</sup> Wisconsin argued that state law had for forty years included the challenged merger provisions which would consider the two lots as a single whole, making Lots E and F combined the proper denominator.<sup>91</sup>

Justice Kennedy rejected both parties’ request to have the Court adopt a “formalistic rule to guide the parcel inquiry” because “[n]either proposal suffices to capture the central legal and factual principles that inform reasonable expectations about property interests.”<sup>92</sup> Lot boundaries alone cannot be the sole test

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(quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1192 (1967)).

85. See *Murr*, 137 S. Ct. at 1944.

86. *Id.* at 1943 (quoting *Keystone Bituminous Coal Ass’n*, 480 U.S. at 497).

87. *Id.* at 1945.

88. *Id.*

89. See Brief for Petitioner at 27–29, *Murr*, 137 S. Ct. 1933 (No. 15-214); Brief for Respondent State of Wisconsin, *supra* note 83, at 37–43; Brief for Respondent St. Croix County at 28–35, *Murr*, 137 S. Ct. 1933 (No. 15-214).

90. *Murr*, 137 S. Ct. at 1947.

91. See Brief for Respondent State of Wisconsin, *supra* note 83, at 1.

92. *Murr*, 137 S. Ct. at 1946.

for a variety of reasons identified in the opinion.<sup>93</sup> Several states' lot lines have "varying degrees of formality" and may be adjusted informally by their owners with "minimal governmental oversight."<sup>94</sup> In locales where minimum lot size may be more formally established by state or local law, "there often are existing lots that do not meet the new requirements," and it is not uncommon for local zoning and subdivision laws to include both a grandfathering of non-conforming lots in separate ownership and a merger provision for contiguous substandard lots in common ownership.<sup>95</sup>

Lot lines are significant, but so are reasonable restrictions such as merger provisions when adopted as part of a legislative determination to adjust rights of property owners for a legitimate public purpose. Merger provisions have been around for nearly a century and "form part of a regulatory scheme that establishes a minimum lot size in order to preserve open space while still allowing orderly development."<sup>96</sup> Justice Kennedy noted that the "decision to adopt the merger provision at issue here was for a specific and legitimate purpose, consistent with the widespread understanding that lot lines are not dominant or controlling in every case."<sup>97</sup> "Petitioners' land was subject to this regulatory burden, moreover, only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted."<sup>98</sup> "As a result, the valid merger of the lots under state law informs the reasonable expectation they will be treated as a single [lot]."<sup>99</sup>

The majority opinion also regarded the "physical characteristics of the property" as supporting its treatment as a "unified parcel."<sup>100</sup> The rough and steep terrain, their narrow shape and the riverfront location of these contiguous lots made "it reasonable to expect their range for potential uses might be limited."<sup>101</sup> The Murr siblings "could have anticipated public

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93. *Id.* at 1947–48.

94. *Id.* at 1948.

95. *Id.* at 1947.

96. *Id.*

97. *Id.* at 1948.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

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.”<sup>102</sup>

As to the element of prospective value of the regulated land, Justice Kennedy noted 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.”<sup>103</sup> Although the Murr siblings are prohibited from separately selling the lots or building separate residences on each lot, this restriction is mitigated by the offsetting benefits of “using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements.”<sup>104</sup> The combined valuation also “shows their complementarity and supports their treatment as one parcel.”<sup>105</sup>

Having thus found that the proper unit of property for assessing the impact of the merger regulation was Lots E and F combined, the majority had little difficulty in carrying out the *Penn Central* analysis.<sup>106</sup> The regulation did not deprive the Murrs of all or substantially all of the economic value and use of their property because the reduction in value of combined Lot E and F was less than ten percent.<sup>107</sup> The merger provision, adopted twenty years before their parents transferred the two lots to the Murr siblings, meant that they should not have reasonably expected that they could be separately developed once the siblings voluntarily accepted title in common ownership.<sup>108</sup> The character of the governmental action was not a physical occupation, but rather more in the nature of a reasonable regulation adjusting the benefits and burdens of economic life to promote the common good by protecting the scenic beauty and recreational quality of the St. Croix River.<sup>109</sup> Accordingly, the majority opinion upheld the State

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1949.

106. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949–50 (2017) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

107. *Id.* at 1949 (first citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992); then citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001); and then citing *Lucas*, 505 U.S. at 1019).

108. *Id.* at 1948.

109. *Id.* at 1940 (citing WIS. STAT. § 30.27(1) (1973)).

Court of Appeals decision that there was no taking requiring just compensation.<sup>110</sup>

### III. DISSENTING ANALYSIS IN *MURR V. WISCONSIN*

Chief Justice Roberts authored a dissenting opinion in which Justices Thomas and Alito joined. Justice Roberts primarily dissents from the methodology that the majority employs to define the “private property” at issue in takings cases.<sup>111</sup> Justice Roberts says that the Court’s “decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them.”<sup>112</sup> For Justice Roberts, this inquiry is straightforward:

State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel at issue. Even in regulatory takings cases, the first step of the Takings Clause analysis is still to identify the relevant “private property.” States create property rights with respect to particular “things.” And in the context of real property, those “things” are horizontally bounded plots of land.<sup>113</sup>

Instead, Justice Roberts regards the majority as constructing a “new, malleable definition of ‘private property[,]’ adopted solely ‘for purposes of th[e] takings inquiry,’” which undermines the Takings Clause protection of individuals forced to bear the full weight of actions that should be borne by the public at large.<sup>114</sup> The perceived malleability arises from the majority’s approach to the “denominator question,” and its multi-element facts and

110. *Id.* at 1950.

111. *Id.* at 1950 (Roberts, C.J., dissenting) (disagreeing only about the majority’s methodology of determining the proper parcel to assess in regulatory takings cases and not the outcome in this particular case; Roberts begins his dissent by saying that the majority’s bottom-line conclusion that no taking has occurred does not trouble him since the majority presents a fair case that the Murrs can still make good use of both lots and that the challenged ordinance is a commonplace tool to preserve scenic areas for the benefit of the landowners and the public alike).

112. *Id.*

113. *Id.* at 1953 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 331 (2002)).

114. *Id.* at 1950 (alteration in original).

circumstances test for defining the private property at issue that included not only state and local property law concepts, but also the physical characteristics of the land, the prospective value of the regulated land, the reasonable expectations of the owner, background customs, and the whole of our legal tradition.<sup>115</sup> The dissenting opinion suggests that the majority is stacking the deck in favor of the government by including these other factors in cases where the individual owns more than one contiguous parcel, because the majority said that the consideration of these other factors could easily and improperly be used to argue that the landowner should have anticipated that his holdings together would be treated as one parcel.<sup>116</sup>

Justice Roberts acknowledges that the use of the multi-element facts and circumstances analysis from *Penn Central* is appropriate in determining whether a particular parcel of private property as a whole has been so burdened by a regulation to amount to a regulatory taking, but not at the earlier stage in which the particular piece of private property is identified or defined.<sup>117</sup> This, for Justice Roberts, is a simpler task resolved by reference to established state property law and for land that would normally be by the lot boundaries for the parcel affected by the regulation.<sup>118</sup>

Since the majority, in Justice Roberts' view, improperly conflated the multi-element approach into its method for defining the particular parcel at issue, he would have remanded the matter back to the Wisconsin Court of Appeals for a more straightforward determination of the property at issue before conducting its facts and circumstances analysis of whether the regulation had gone too far and amounted to a taking of the separate Lot E.<sup>119</sup>

Justice Thomas filed a separate dissenting opinion that questioned whether the Court's regulatory takings jurisprudence arising from the "goes too far" approach of *Pennsylvania Coal Co. v. Mahon* can be reconciled with the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or

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115. *Id.*

116. *Id.* at 1954.

117. *Id.*

118. *Id.*

119. *Id.* at 1956.

Immunities Clause of the Fourteenth Amendment.<sup>120</sup>

#### IV. DISCUSSION

If, as is likely, the Supreme Court is going to continue to apply the *Penn Central* factors in takings cases, then the factor looking at the extent of regulation's interference with reasonable investment-backed expectations of landowners will continue to be critical. Landowners will always want to claim that they had reasonable expectations to use the land for any and all of its potential economically valuable purposes. They will want to claim that any regulatory restriction that substantially diminishes the use of the property should amount to a taking. Government entities that adopt regulations that restrict use and development of property will continue to claim that there were legitimate public purposes for the regulation and the landowner has not been deprived by the regulation of all economical use and value in most instances.

The majority opinion in *Murr* seems consistent with prior takings jurisprudence that the expectations of the landowners that they could use their land for any and all economically valuable purposes are not reasonable expectations in light of the various factors affecting its potential use such as the land's physical characteristics, the prospective value of the land for different uses, and its treatment under applicable state and local law.<sup>121</sup> These are the factors that Justice Kennedy articulates in his test for determining the proper parcel as a whole,<sup>122</sup> but they

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120. *Id.* at 1957 (Thomas, J., dissenting) (first citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); then citing *Legal Tender Cases*, 12 Wall. 457, 551 (1871); then citing *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1879); then citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992); and then citing Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 *SAN DIEGO L. REV.* 729 (2008)).

121. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (stating that "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"); see also *Lucas*, 505 U.S. at 1035 (noting that "reasonable expectations must be understood in light of" the common law and state regulations on property); see also *Ballard v. Hunter*, 204 U.S. 241, 262 (1907).

122. *Murr*, 137 S. Ct. at 1945 (majority opinion).

certainly inform the owner's reasonable investment-backed expectations. If state and local law restrict the use and development of the land, then it is not reasonable for the owner to expect that the land could still be used for a prohibited purpose.

The Supreme Court was focused on the denominator question in *Murr*: how should courts identify the proper parcel as a whole before applying the traditional multi-factor test from *Penn Central* to that specific parcel.<sup>123</sup> Justice Kennedy's majority opinion says that no single factor can supply the exclusive test for determining the denominator and he offers up a multi-factor test including the treatment of the land under state and local law, the physical characteristics of the land, and the prospective value of the land.<sup>124</sup> The majority opinion assesses the applicable state and local law to include the regulatory scheme adopted in 1976, which limited development of parcels along the St. Croix River with less than one acre of land suitable for development, and which mandated merger of substandard lots in common ownership.<sup>125</sup>

Because the Murr parents in the 1960's had been prescient in arranging their ownership of Lots E and F in separate ownership, the lots, while owned by the parents, were not subject to the regulation's restrictions because of the grandfathering provision of the regulations.<sup>126</sup> While the intentions of the Murr parents in titling the two lots in separate forms of ownership are not discussed in either the majority or dissenting opinions, it is likely that the Murr parents had different intentions for what they planned to do with Lots E and F. Their actions in building a recreational cabin on Lot F demonstrate their intentions to use that lot for family enjoyment and recreational occupancy. Their intentions with respect to Lot E are not so clear, but their actions in acquiring it three years after acquiring Lot F and not titling it the same way as Lot F may mean that they always intended to use, develop, or sell Lot E separately from Lot F. In fact, because of the grandfathering provisions of the regulations, the Murr parents could have separately sold or developed Lots E and F, even after the adoption of the regulations in 1976 and up until

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123. *Id.* at 1944.

124. *Id.* at 1945.

125. *Id.* at 1948.

126. *Id.* at 1940.

1995, when the Murr siblings accepted title to both lots in their four names in common ownership of both lots. At that point in 1995, the lots were in common ownership and could no longer be separately sold or developed since they separately lacked the minimum one acre of land suitable for development. When combined, Lots E and F just about met the one-acre minimum.

Justice Kennedy appears to place a significant amount of weight to the change in titling of the Murr lots that occurred in 1994 and 1995 stating:

Petitioners' land was subject to this regulatory burden, moreover, 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 that they will be treated as a single property.<sup>127</sup>

Chief Justice Roberts in dissent is critical of the majority's multi-factor approach wherein "the government can argue that—based on all the circumstances and the nature of the regulations—Lots A and B should be considered one 'parcel,'"<sup>128</sup> but the dissent does not directly or indirectly question the majority's characterization of the merger as resulting from the "voluntary conduct" of the petitioners.

It is true that the Murr parents conveyed the lots out of separate ownership and into common ownership by their children in 1994 and 1995.<sup>129</sup> That certainly was the voluntary act of the Murr parents and it could also be said that acceptance of those conveyances by the petitioner-Murr siblings was voluntary since donees of gifts do not have to accept them. However, it would have been highly unusual under the circumstances for the Murr children to decline the generosity of their parents on account of the form of title being conveyed. It also was highly unlikely that the Murr children would have been focused on the impact of the regulations then in existence on how they should or should not have accepted title from their parents. Perhaps their attorneys should have counseled them to continue the separate titling of Lots E and F with one lot being placed in the names of the four

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127. *Id.* at 1948.

128. *Id.* at 1955 (Roberts, C.J., dissenting).

129. *Id.* at 1941 (majority opinion).

children and the other in the name of a corporate entity as their parents had done, and perhaps it was malpractice of the attorneys not to have done so. However, that does not mean that it was the intention of the Murr children, in accepting the transfer of both lots in the names of the four Murr siblings, to have the lots merged for purposes of future sale and/or development. Justice Kennedy's characterization of the petitioners conduct as voluntarily producing a merger of the two lots into a single lot seems to miss the question of the intentions of the Murr children, which should have been more thoroughly examined.

Justice Kennedy's discussion of the merger as resulting from the voluntary conduct of the parties also seems inconsistent with a portion of the *Palazzolo* opinion. Specifically, it is inconsistent with the Supreme Court's rejection of the State of Rhode Island's argument that Mr. Palazzolo lacked standing to challenge the coastal management regulations that restricted the use of his land because the regulations were adopted before the land had been transferred from his solely owned corporation to his name individually.<sup>130</sup> The Supreme Court rejected the State's claim that Palazzolo lacked standing because he acquired formal legal title after the enactment of the CRMC statute.<sup>131</sup> The Court was unwilling "to put an expiration date on the Takings Clause" since "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land."<sup>132</sup>

The Murr siblings are that future generation in this case. Their parents held the lots in separate ownership in 1976 when the regulations were adopted.<sup>133</sup> The Murr parents could have challenged the application of the regulations to either of their lots in 1976 as a taking had the regulations not contained the grandfathering provision for substandard lots in separate ownership as of the adoption date.<sup>134</sup> Grandfathering of pre-existing nonconforming properties or uses is a common statutory element when land use regulations are adopted or amended to impose restrictions that had not previously applied.<sup>135</sup> Without

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130. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

131. *Id.*

132. *Id.*

133. *Murr*, 137 S. Ct. at 1940.

134. WIS. ADMIN. CODE NR § 118.08(4) (West 2017).

135. Grandfathering of pre-existing nonconforming properties or uses is

grandfathering, governmental entities adopting or further restricting zoning or other regulatory schemes would be inundated with takings claims. The Murr parents owned their lots in 1976 and one could say that they also owned the grandfathering rights conferred by the regulations. It is not clear that the Murr parents intended to forfeit those grandfathered rights in 1994 and 1995 when they transferred the lots to their future generation children. The intentions of the parties should have been more thoroughly examined by the Court before concluding that there was “voluntary conduct in bringing the lots under common ownership after the regulations were enacted.”<sup>136</sup>

#### CONCLUSION

In *Murr v. Wisconsin*, the Supreme Court took on the question of how to identify the proper “parcel as a whole” for purposes of conducting a *Penn Central* facts and circumstances takings analysis of the impact of merger provisions in environmental protection zoning regulations on multiple lots owned by a family.<sup>137</sup> Are the multiple lots to be treated as separate parcels or are they to be combined into a single parcel as a result of the merger provisions? As Justice Kennedy notes, the answer to this preliminary question may be determinative of the *Penn Central* analysis.<sup>138</sup>

Justice Kennedy, writing for the majority, articulated a new facts and circumstances test for identifying the proper “parcel as a whole” (or “denominator”) that includes the treatment of the land under state and local law, the physical characteristics of the land, and the prospective value of the regulated land.<sup>139</sup> Using those factors in this case, Justice Kennedy concluded that the proper parcel to analyze under the *Penn Central* factors was the merged Lots E and F as a single combined parcel.<sup>140</sup>

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probably more commonplace than the merger provisions that Justice Kennedy says are legitimate exercises of government power “with a long history of state and local merger regulations that originated nearly a century ago.” *Murr*, 137 S. Ct. at 1947.

136. *Id.* at 1948.

137. *Id.* at 1952.

138. *Id.* at 1952–53.

139. *Id.* at 1945.

140. *Id.* at 1949.

Justice Roberts dissented from the methodology utilized by the majority of constructing a preliminary facts and circumstances test to be employed in identifying the proper parcel before conducting the traditional *Penn Central* factors analysis.<sup>141</sup> He “would stick with [the] traditional approach: State law defines boundaries of distinct parcels of land, and those boundaries should determine the ‘private property’ at issue in regulatory takings cases.”<sup>142</sup> The traditional approach, for Justice Roberts, means that the proper parcel in this case should have been Lot E alone (although he does agree that ownership of adjacent property may be taken into account in the subsequent *Penn Central* analysis).<sup>143</sup> The new majority approach may not make takings cases all that much more complicated than they already are since landowners, government entities adopting regulatory measures, and courts adjudicating the effect of those restrictions on private property will still have to conduct overall facts and circumstances balancing analyses. The extent of interference with distinct and reasonable investment-backed expectations will still be a critical factor. The intentions of the owners and how their investment-backed expectations are formed when more than one parcel of private property is involved should be examined more thoroughly by courts than was done by the majority when it concluded that the Murr siblings voluntarily submitted their previously grandfathered lots to the regulatory burden.

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141. *Id.* at 1950.

142. *Id.*

143. *Id.* at 1956.