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Less Than Meets The Eye: Murr's Impact Is Likely Limited

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Law360, New York (July 3, 2017, 10:29 AM EDT) --

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The Supreme Court's most closely watched property rights case this term, Murr v. Wisconsin, involved what has come to be termed the "denominator problem" in regulatory takings law. The problem is this: where a plaintiff asserts that an onerous governmental regulation amounts to a taking of his or her property, a court must assess the impact of the regulation on the "parcel [of property] as a whole,"[1] not on just one subcomponent of it. But because any given person or company may possess a multitude of different property interests, identifying the relevant parcel for a court to analyze — the "denominator" of the takings inquiry — is sometimes a complicated endeavor. This has long been a source of confusion and discord for litigants and courts alike, and the court granted certiorari in Murr to shed some light on the matter.

The court delivered its opinion in Murr last Friday, adopting a multifactor balancing test for identifying the relevant parcel of property. The court's opinion is at least a mild victory for state and local governments and a defeat for property rights advocates, many of whom preferred more of a bright-line test relying exclusively on state property law to define the relevant parcel. Mostly, though, Murr seems likely to wind up being something of a dud — a less significant case than many expected. It is difficult to envision many takings claims that will fail after Murr but would have succeeded beforehand, or vice versa. Litigants in regulatory takings cases will have to be familiar with the new landscape created by Murr, but the case ultimately may prove to be of more interest to law professors than practitioners.

Factual and Legal Background

The petitioners in Murr were siblings who owned two contiguous lots of riverfront property (Lot E and Lot F) along the scenic St. Croix River in northwestern Wisconsin. The Murrs' parents purchased the two lots separately in the 1960s, then transferred ownership of both lots to the petitioners in the 1990s. During the intervening years, Wisconsin and St. Croix County adopted more stringent land-use regulations, which prohibited the use of adjacent parcels of land as separate building sites unless each parcel had at least one acre of land suitable for development (which Lot E and Lot F did not). The law also contained a so-called "merger" provision, which effectively combined two such parcels into one if and when they came into common ownership. A grandfather clause exempted existing property owners from these regulations, but when the Murrs' parents transferred ownership to the siblings in the 1990s, the two lots were merged, and the siblings were not allowed to sell or develop Lot E separately from Lot F.

The Murrs filed suit in Wisconsin state court, alleging that they had suffered a regulatory taking of Lot E (which they wanted to sell) because of the newly imposed restrictions on the sale or development of the land. The Wisconsin Court of Appeals rejected their claim, holding in relevant part that the "denominator" — i.e., the parcel of land at issue in the takings claim — was not Lot E alone, but Lot E and Lot F combined. Because the combined parcels retained substantial value, the court reasoned, the regulatory takings claim failed. After the Wisconsin Supreme Court denied review, the U.S. Supreme Court granted certiorari.

The Court's Opinion

By a vote of 5 to 3 (with Justice Gorsuch not participating), the Supreme Court sided with Wisconsin and St. Croix County, affirming the judgment below. Justice Kennedy, joined by the four more liberal justices, emphasized that "[a] central dynamic of the Court's regulatory takings cases" has been "flexibility," with the court generally eschewing bright-line rules regarding types of governmental action (apart from physical appropriations or occupations of property) that constitute takings.[2] Thus, the majority reasoned, "no single consideration can supply the exclusive test for determining the denominator. Instead, 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."[3] The key question courts must answer is "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," in light of "background customs and the whole of our legal tradition."[4] The majority rejected the competing "formalistic" approaches proposed by the Murrs (who would have had courts look simply to lot lines) and by Wisconsin (which would have had courts look simply to state law), concluding that "[n]either proposal suffices to capture the central legal and factual principles that inform reasonable expectations about property interests."[5]

The majority had little difficulty concluding that the Murrs' takings claim failed under the test the court adopted. Most significantly, the operation of the state law merger provision meant that, by virtue of the Murrs' "voluntary conduct in bringing the lots together under common ownership after the regulations were enacted," it was reasonable to treat the two lots as one for takings purposes.[6] And the other relevant factors pointed in the same direction: both the "physical characteristics of the property" (sharing steep terrain abutting a river) and the "prospective value" of the two lots joined together (which was "far greater than the summed value of the separate regulated lots") supported treating the two parcels as one.[7]

Chief Justice Roberts dissented, joined by Justices Thomas and Alito. The chief justice faulted the majority for adopting an "elaborate" multifactor test, rather than following the court's "traditional approach" of looking to state law to "define[] the boundaries of distinct parcels of land" that "determine the 'private property' at issue in regulatory takings cases."[8] In the dissent's view, the majority wrongly conflated the ultimate "'question of what constitutes a taking'" — where the court has repeatedly stressed the need for a flexible, open-ended inquiry — with the antecedent question of how to identify the property interest at stake in the first place, which the court had never before done "by relying on anything other than state property principles."[9] While the dissent did not take issue with the court's "bottom-line conclusion" that the Murrs had not suffered a taking, it would have vacated the judgment of the Wisconsin court and remanded "for the court to identify the relevant property using ordinary principles of Wisconsin property law."[10]

An Incremental Shift, Not a Sea Change

Murr had been a closely watched case. Scholars have debated the "denominator problem" for years, and courts had been inconsistent in their approaches to the issue. Whatever one thinks of the merits of the multifactor test adopted by the court in Murr, lower courts will, at the very least, have more to guide them — though the broad language of the majority opinion leaves quite a few details to be filled in in future cases, and quite a bit of discretion to trial courts.

Still, it is doubtful that Murr will actually change the outcome in many cases. The chief justice's dissent expressed concern that the test will stack the deck against property owners, since considering factors other than state law at the property-definition phase will allow the "government's goals" to "shape the playing field before the contest over whether the challenged regulation goes 'too far' even gets underway."[11] That may be true — but the main consequence is that regulatory takings claims that would have failed anyway may now fail for additional reasons. If Murr adds another weapon to the arsenal of takings defendants, it's a weapon that will be useful primarily against already-doomed claims.

This is so, above all, because the Murr test bears significant resemblance to the test for adjudicating regulatory takings claims on the merits set forth by the court in the landmark Penn Central case, which calls for an "essentially ad hoc, factual inquir[y]" looking to (among other things) the "economic impact of the regulation" at issue, the property owner's "investment-backed expectations," and "the character of the governmental action."[12] Indeed, at oral argument, Wisconsin's attorney described the approach the court would later adopt as "Penn Central squared," an apt formulation the chief justice endorsed later in the argument.[13] For lower courts inclined to find a taking under Penn Central, the Murr property-definition test will pose no obstacle to their reaching that same result. For lower courts not inclined to find a taking under Penn Central, the case will have no effect on the outcome.

If Murr is to have any significant impact at all, it will be not in regulatory takings cases governed by Penn Central, but in the narrow category of cases in which plaintiffs assert so-called Lucas takings claims, arguing that a regulation deprives them of "all economically beneficial or productive use" of their property.[14] Not surprisingly, Murr itself originated as a Lucas claim.[15] Conceivably, one effect of Murr will be to import Penn Central–type considerations (regarding the property owner's reasonable expectations and the nature of the governmental action) into cases involving Lucas claims, which previously were governed by a bright-line rule more favorable to property owners.

But even this effect of Murr will probably be limited. For one thing, because the Lucas test is so demanding — finding a taking only where a regulation deprives a property owner of all beneficial use of land — successful Lucas takings claims are quite rare. The lion's share of regulatory takings claims are analyzed under Penn Central, where Murr can be expected to have minimal effects, as discussed above.

Also rare are regulatory takings claims involving adjacent parcels of real property under common ownership, which was the situation in Murr. A more common fact pattern involves either nonadjacent parcels or different types of property interests entirely. One example is Penn Central, where the court rejected the plaintiff's attempt to disaggregate (for purposes of its takings claim) its surface-estate rights and its "air rights," where it sought to build an office building atop Grand Central station.[16] Another is the court's opinion in the 2002 Tahoe-Sierra case, in which the court rejected the plaintiff's attempt to "effectively sever" the plaintiff's temporal property interest and claim a total taking of property during the 32 months in which a building moratorium was in effect.[17] Murr is unlikely to change the outcome

in such cases, where courts generally have had little trouble arriving at a sound definition of the property at issue.

To top it off, the practical difference between the Murr majority's approach and the dissent's approach may be quite small. Whereas the dissent would have looked exclusively to state law at the property-definition stage, the majority instructs courts to accord state law "substantial weight."[18] The difference between "substantial weight" and conclusive weight may well amount to an academic distinction more than anything else, as evidenced by the apparent agreement between the Murr majority and dissent on the bottom-line result. Those who prefer clear rules to malleable standards will be dissatisfied, but with few real-world consequences.

This is not to suggest that takings litigants (or their attorneys) can simply disregard Murr. The case certainly has altered the shape of takings doctrine, and could shed light on other unresolved questions of law — most notably, on the way in which courts assess the effect of regulations enacted prior to a plaintiff's purchase of land, an issue left open by the court's 2001 opinion in Palazzolo v. Rhode Island.[19] But those who anticipated a landmark ruling changing the outcome in many takings cases are likely to be disappointed.

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[1] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 131 (1978).

[2] Murr v. Wisconsin, 582 U.S. ___ (2017), slip op. at 8.

[3] Id., slip op. at 11.

[4] Id., slip op. at 12.

[5] Id., slip op. at 14.

[6] Id.., slip op. at 17-18.

[7] Id., slip op. at 18-19.

[8] Id., slip op. at 2 (Roberts, C.J., dissenting).

[9] Id., slip op. at 9.

[10] Id., slip op. at 1, 13.

[11] Id., slip op. at 10.

[12] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[13] Tr. of Oral Arg., Murr v. Wisconsin, at 35, 48 (available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-214_l6hn.pdf" https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-214_l6hn.pdf).

[14] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

[15] Murr, slip op. at 19.

[16] Penn Central, 438 U.S. at 130.

[17] Tahoe-Sierra Preserv. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002).

[18] Murr, slip op. at 12.

[19] 533 U.S. 606 (2001).
