PROTECTING WATER RESOURCES AFTER MURR v. WISCONSIN

American Planning Association | Water & Planning Connect
Plans, Codes, and Water
September 11, 2018

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QUESTION

How many of you are working on shoreline / riparian regulations?
What kinds of tools –

- Use restrictions?
- Minimum lot size / density?
- Riparian setbacks?
- Impervious surface limits?
- Transfer of development rights / density allocations?
- Eliminating / reducing parking requirements?
- Right-sizing landscaping requirements?
- Others?

Source:
https://www.extension.umn.edu/environment/agroforestry/riparian-forest-buffers/riparian-forest-buffers.html
QUESTION

• How many of you have received threats of litigation?
• How many of you have been sued over the shoreline regulations?
• Was it fun?
QUESTION

- Property owners spends –
  - $50M acquiring property
  - $17M on development rights
  - Is placed in water and sewer service area
- Community considers new planning policies
- New regulations limit development to 17% of overall development

**Question:** is this a taking of private property?
WHY IS THIS IMPORTANT?

- Public interest
- Direct financial costs
- Administrative costs
- Ethical obligations
- Acceptability of regulations
- Property rights
LEGAL ISSUES IN A NUTSHELL

Facial

Authority
- Home Rule
- Dillons Rule
- Preemption

Constitutionality
- Due Process
- Equal Protection
- Takings

Applied

Enforceability
- Application of regulations (zoning districts, permitting)
- Substantial competent evidence
"Whether the current zoning is consistent with the policies and long-range planning goals for the area is a factor courts consider in determining whether the zoning substantially benefits the public health, safety, and welfare….This is particularly relevant when the zoning ordinance at issue was adopted after extensive study and public debate."

<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Holding</th>
</tr>
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<tbody>
<tr>
<td>1922</td>
<td>Pennsylvania Coal v. Mahon</td>
<td>Regulation is taking if it goes too far</td>
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<td>1927</td>
<td>Village of Euclid v. Ambler Realty</td>
<td>Police power includes zoning</td>
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<td>1928</td>
<td>Nectow v. City of Cambridge</td>
<td>Zoning invalid if does not accomplish a valid public purpose (doubtful after Lingle)</td>
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<td>1980</td>
<td>Agins v. City of Tiburon</td>
<td>Taking if regulation does not substantially advance legitimate state interests (overruled in Lingle)</td>
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<tr>
<td>1982</td>
<td>Loretta v. Teleprompter Manhattan</td>
<td>Per se taking #1: permanent physical invasion</td>
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<tr>
<td>1985</td>
<td>Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City</td>
<td>Takings claim not ripe without final decision on merits of application</td>
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<tr>
<td>1986</td>
<td>MacDonald, Sommer &amp; Frates v. Yolo County</td>
<td>Ripeness</td>
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<td>1987</td>
<td>First English Evangelical Lutheran Church v. County of Los Angeles</td>
<td>Regulatory taking requires just compensation</td>
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<tr>
<td>1987</td>
<td>Nollan v. California Coastal Comm’n</td>
<td>Essential nexus</td>
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<td>1987</td>
<td>Keystone Bituminous v. De Benedictis</td>
<td>Extent of deprivation is measured against the value of the parcel as a whole</td>
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<tr>
<td>1992</td>
<td>Lucas v. South Carolina Coastal Comm’n</td>
<td>Per se taking #2: all economic use</td>
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<td>1994</td>
<td>Dolan v. City of Tigard</td>
<td>Rough proportionality</td>
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<td>1997</td>
<td>Suitum v. Tahoe Regional Planning Agency</td>
<td>Claim ripe despite failure to sell TDRs</td>
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<td>1999</td>
<td>Monterey v. Del Monte Dunes at Monterey, Ltd.</td>
<td>Government may not burden property by imposing repetitive or unfair land-use procedures to avoid a final decision, triable by jury</td>
</tr>
<tr>
<td>2001</td>
<td>Palazzolo v. Rhode Island</td>
<td>Acquisition of title after regulations become effective do not bar takings claims</td>
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<tr>
<td>2002</td>
<td>Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency</td>
<td>Rejects per se takings claim for moratoria</td>
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<tr>
<td>2005</td>
<td>Lingle v. Chevron U.S.A., Inc.</td>
<td>Substantial advancement no longer supports taking independently</td>
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<tr>
<td>2010</td>
<td>Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Protection</td>
<td>Application of state law defining shoreline rights</td>
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<tr>
<td>2013</td>
<td>Koontz v. St. Johns River Water Mgmt. Dist.</td>
<td>Monetary exactions are subject to nexus and proportionality</td>
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<tr>
<td>2017</td>
<td>Murr v. Wisconsin</td>
<td>Whether compensable property interests are created by lot lines is determined by state law</td>
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REGULATORY TAKINGS

Ad-Hoc Analysis
- Affects Property Rights
- Case-by-Case Inquiry
- Factors:
  - Economic Impact
  - Investment-Backed Expectations
  - Character of Regulation

Categorical Taking
- All Use Denied
- Automatic
- Only Inquiries
  - Is All Use Taken?
  - Compensation
Total Taking

- Coastal Zone Management Act (1977)
- At purchase (1986):
  - Single-Family Residential allowed; and
  - most lots in area had homes
Lucas v. South Carolina Coastal Council (U.S. 1992)
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<th>Court</th>
<th>Holding</th>
<th>Rationale</th>
</tr>
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</table>
| State Supreme Court   | No taking | • Valid purpose  
|                       |           | • Use prohibited was “noxious” |
| US Supreme Court      | Taking    | • Per se, or “total,” taking |
|                       |           | 1. “all [e.g., not 95%] economic use” is deprived; and |
|                       |           | 2. Prohibited use not “nuisance” under preexisting principles of property law |

*Lucas v. South Carolina Coastal Council (U.S. 1992)*
MURR V. WISCONSIN (U.S. 2017)
THE ISSUE

2 parcels
1 restricted
1 taken

1 parcel
1 set of restrictions
No taking
St. Croix River federally designated
State / County regulations adopted
(including grandfathering / lot merger provision)
LOT MERGER

- Substandard + Separate Ownership
- Substandard + 1 net acre
- Substandard + Common ownership < 1 net acre each
- Substandard + Common ownership 1 net acre total
ISSUE #1: THE TAKINGS EQUATION

• **Issue**: Which property furnishes the denominator – a single parcel affected by the merger, or both parcels considered together?

• **Holding**: Consider both together
  
  • **State law** defined established that lot lines do not define individual lots decades before properties merged
  
  • **Physical characteristics** (irregular topography, physical connectivity) favored a single parcel
  
  • **Offsetting benefits** (views, recreation)

\[
x \div (1 + 1) = > 0
\]

OR

\[
0 \div 1 = 0
\]

&

\[
x \div 1 = > 0
\]
ISSUE #2: TAKING?

Ad-Hoc Analysis

Economic impact
- Only 10% value lost resulted from combining the lots

Investment-backed expectations
- Regulations predated acquisition of both lots
- Longstanding use of lot merger
- Balances rights of lots in preexisting ownership
- Avoids gamesmanship
- Avoids proliferation of small lot

Character of regulation

Cabin

$413,000

$698,300

$771,000

54%

91%
Categorical v. Ad-hoc dichotomy
• All use = 100%
• Economic test significant
• Deference to traditional and well-known land use tools
BACKGROUND

- County plan to address failing septic systems by:
  - extending sewer to homes with failing septic
  - limiting resulting new development
- Grandfather/Merger (G/M) Provision
  - Lots worth $30,000 and $50,000 before G/M
  - G/M requires 12 lots to merge into 4

DECISION

Murr factors:

State Law
- No right to sewer

Physical Characteristics
- Spec purchase
- No physical / topographic barriers

Offsetting Benefits
- Value for “assemblage”

Density controls ▶️ prevent overburdening of public services, environmental damage, other harms
BACKGROUND

- 2,750 acre planned \ 1,300 developed
- 4.99 acre remnant (Plat 57)
- Submerged lands / wetlands
- § 404 Permit denied
- Development purpose realized
- Value:
  - $4.76M with permit ($4.25M net development costs)
  - $27,500 without permit | 99.4% loss
  - 58.4% with 2 other parcels + scattered wetlands

DECISION

- Parcel Analysis
- Economic Expectations
- Not part of same application
- No permits/utilities
- Categorical Taking
- Residual / “De minimus” value
- Land sale not an economic use

Lost Tree Village v. U.S., 707 F.3d 1286 (Fed Cir. 2013) & 787 F.3d 1111 (Fed Cir. 2015), cert. denied, 137 S. Ct. 2325 (2017)

BACKGROUND

- 35,000 lot condemned
- "Staten Island Bluebelt"
- Common development
- 6 houses built on adjacent lot
- Condemned lot used as wetlands mitigation with buffers and conservation easement

DECISION

Murr factors

- State Law
  - Flexible zoning
  - Lots combined
- Physical characteristics
  - Wetlands v. Wetland+Upland
- Offsetting Benefits
  - Mitigation
  - Agreed to restrictions to develop other property

= One Parcel

Taking? $1,661,000

No Taking? $456,000
BACKGROUND

- 4 acre preliminary plat
- 1999 LOMR = 751’ FE
- Phase 1: 1.3 acre
  - 6 4plex x $242k = $1.45M
- Phase 2: 2.7 acre
  - New study = 762’ FE
  - 270k yards dirt + retaining walls + footings

DECISION

Murr factors
State law
- 2 Phases
- No "environmental or other regulation."
Physical characteristics
  - Phase 1 uses 751’
Offsetting Benefits
  - ?

= Two Parcels
Before 2010:
- $50M land acquisition
- $12M TDRs (receiving area)
- Triggers for water and sewer met

After 2010:
- Application held up
- Watershed study initiated
- Area Plan amendment adopted:
  - ↑ Open Space to 80%
  - Impervious surface limits (6-15%)

Effect:
- 17% developable (93 of 541 acres)
- No taking

E: 75-93% in other cases, 83% here
I: speculative investment
C: public health, protect creek
BACKGROUND

- Resolution to acquire 9 lots, 2 purchased
- Regulations in effect:
  - Community Plan designation as park
  - Coastal Permit
  - "Hotel-Multifamily" zoning allows SF
  - Covenants limited to SF
- 2 offers for $7M
- Environmental assessment began and withdrawn
- Planning Department refused to re-process application

DECISION

- No Categorical Taking
- 2 purchase offers ($4.5/$4.6M)
- Investment as bona fide use
- Some value in park use (concessions, etc.)
- Effect of covenants excluded from jury

Leone v. County of Maui, 141 Haw. 68, 404 P.3d 1257 (2017)

POST-MURR
**BACKGROUND**

- Property owner illegally blocked access to beach from a single access road
- Coastal development permit (CDP) required before closing public access
- Trial court injunction requires appellants to allow public coastal access at the same level that existed when owner bought the property

**DECISION**

- Constitutional challenge to the Coastal Act permitting requirement not ripe
- Trial court injunction pending approval of CDP not a per se taking
POST-MURR
POST-MURR

- Act 67 (Wis. Stat. §§ 66.10015(1)(e), -(2)(e), -(4), 227.10(2p))
  - Substandard lot = legally created + no longer meets minimum lot size
  - Cannot prevent property owner from –
    - Conveying lot
    - Building on lot if –
      - Adjacent lot never developed
      - Complies with all other ordinances
    - Cannot require lot merger without consent
TAKE-AWAYS

1. *Murr* is not limited to lot merger
2. Look to state law and timing of regulations to define property interests
3. Address character of regulations in plans
4. Provide flexible land development regulations
5. Adapt traditional land use controls where possible
The Takings Denominator in Zoning Lot Merger Cases: *Murr v. Wisconsin*

by Mark White, Esq.

Mark White is a partner with White & Smith, LLC in Kansas City and Charleston. His practice includes drafting zoning and development codes, and assisting local governments with comprehensive plan implementation. He is also an adjunct Professor of Planning at the University of Kansas.

In *Murr v. Wisconsin*, a 5-3 decision, the United States Supreme Court rejected a takings challenge to a zoning “lot merger” provision – a mainstay of residential and environmental zoning regulations. In its first decision since 2001 to tackle an economic regulatory takings claim resulting from a zoning regulation on its merits, the Court handed local governments an important – but not complete – victory. This article explains the complicated fact pattern leading to the decision, and explains its meaning and limitations for future zoning code drafters.

The Facts
In 1960, the Murr's parents bought a long, narrow lot along the St. Croix River (Lot “F”) and built a recreational cabin. The next year, they transferred Lot “F” to their family business and, in 1963, purchased an adjacent lot (Lot “E”) in their own names. The lots share not only a common property line, but also a bluff that bisects the lots and renders parts of the area unbuildable.