



Relevant Parcel Analysis and *Murr*: ***Understanding the Supreme Court's Latest "Takings" Case***

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PROGRAM OUTLINE

- Review takings law and the “parcel as a whole” rule
- The *Murr v. Wisconsin case*
- Implications for Rocky Mountain states
- Questions and Answers

BASICS OF TAKINGS

“nor shall private property be taken for public use, without just compensation”

- Fifth Amendment to the U.S. Constitution

Meaning that the Government must pay:

- When it directly appropriates property
- When “regulatory actions . . . are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.” *Lingle v. Chevron U.S.A. Inc.* (U.S. 2005)

BASICS OF REGULATORY TAKINGS

When is a regulatory action functionally equivalent to a direct appropriation?

- When there is a permanent physical invasion of property (*Loretto v. Manhattan Teleprompter*)
- Sometimes for exactions or proposed exactions (*Nollan/Dolan/Koontz*)
- When there is deprivation of all “economically beneficial uses” (*Lucas*)
- Based on an “ad hoc, factual inquiry” examining: 1) economic impact, 2) interference with reasonable, investment backed expectations, and 3) the character of the government action (*Penn Central*)

ANALYZING ECONOMIC IMPACT

Under *Lucas* and *Penn Central*, economic impact means what proportion of value has a land owner lost:

Value “taken” from property

= Economic impact to owner

Value of entire property

“Takings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. . . . This Court focuses rather both on the character of the government action and on the nature and extent of the interference with rights in the **parcel-as-a-whole.**” *Penn Central*

PARCEL AS A WHOLE — EASY CASES

Height Restrictions

Disallowed

Allowed



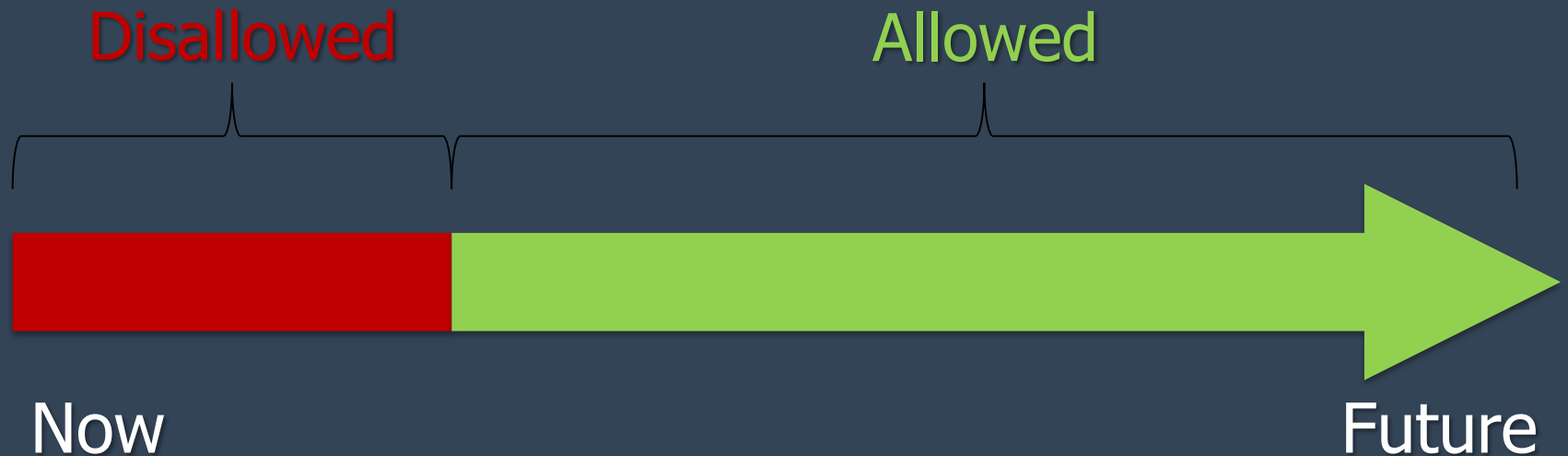
PARCEL AS A WHOLE – EASY CASES

Setback Requirements



PARCEL AS A WHOLE – EASY CASES

Temporary Building Moratorium

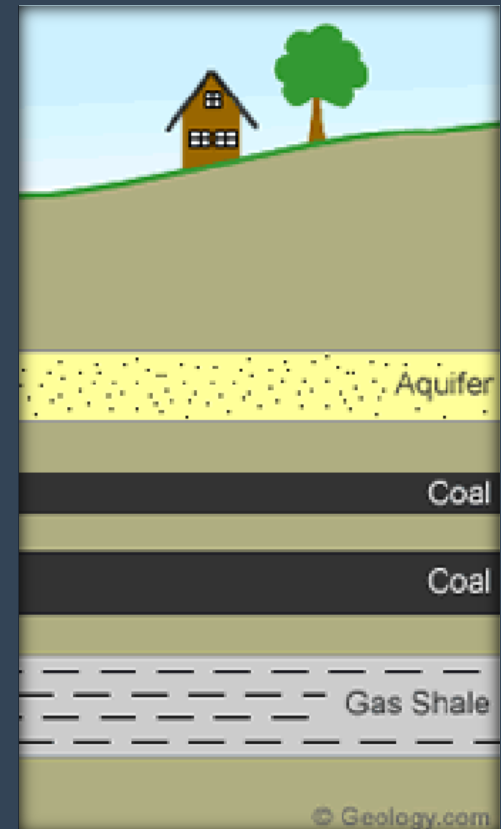


PARCEL AS A WHOLE — HARD CASES

Severed Mineral Estate

“A mineral estate may be considered the **relevant parcel** for a compensable regulatory taking if the **mineral estate was purchased separately from the other interests in real property.**” *State ex rel. Shelly Materials, Inc. v. Clark County Board of Commissioners* (Ohio 2007)

“[T]he appropriate focus of a takings inquiry is the **property rights as an aggregate rather than merely the mineral rights.**” *Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners of County of La Plata* (Colo. 2001)



PARCEL AS A WHOLE — HARD CASES

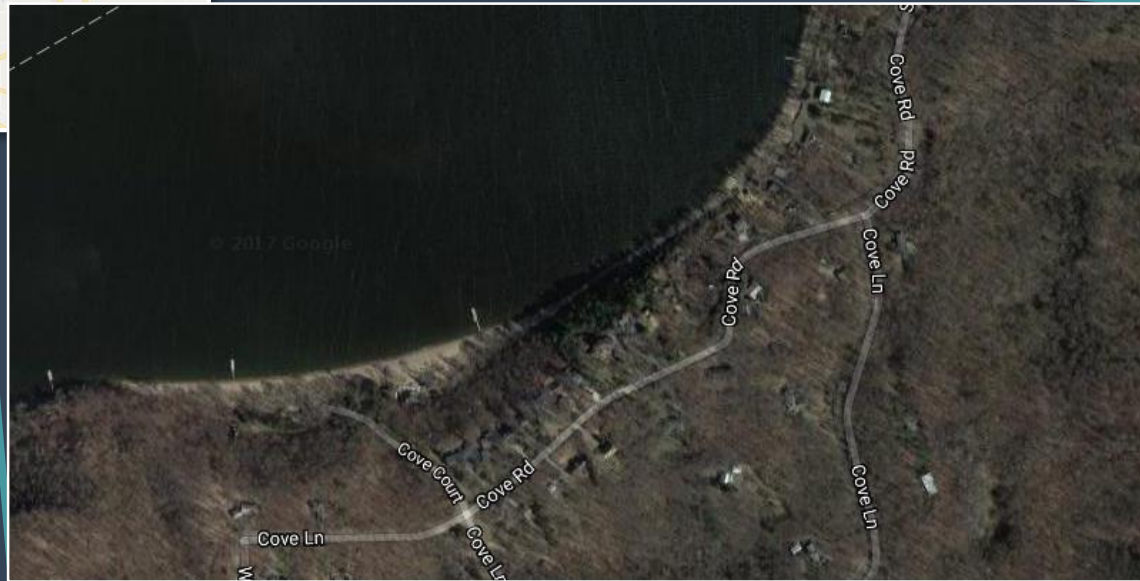
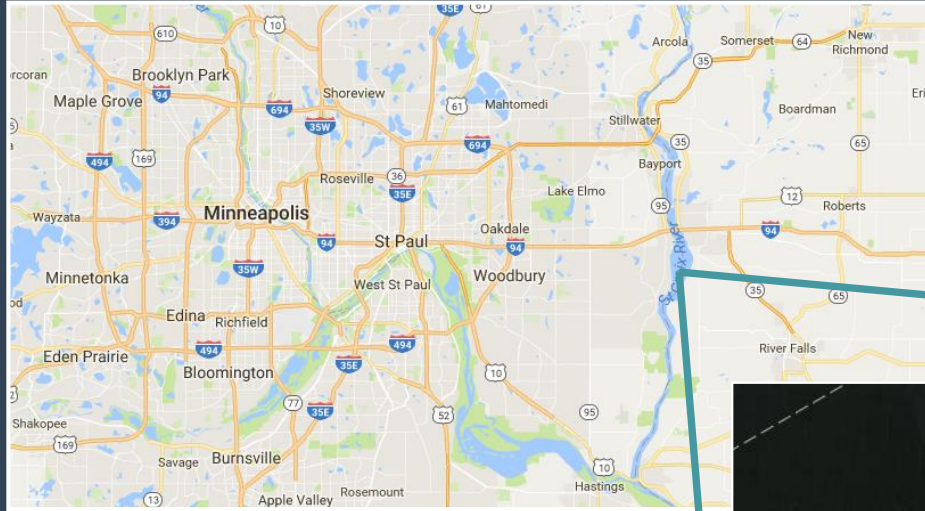
Retained Property

Because Plat 57 was not developed as part of original subdivision plan, and is not contiguous with any other property retained by developer, it is the relevant parcel. *Lost Tree v. United States* (Fed. Cir. 2013)



Murr v. Wisconsin

THE PROPERTY

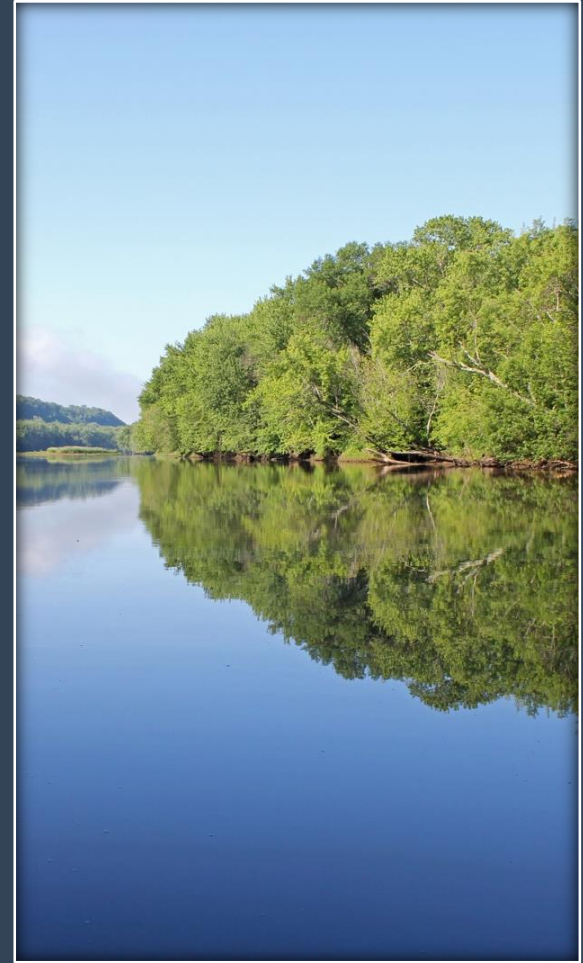


THE PROPERTY

- Platted in 1959
- Family owned Lots E and F in 1963
- Cabin on Lot F, Lot E remained vacant
- Lot F owned by family business entity, Lot E owned individually by the Murrs
- Lot F conveyed to six Murr children in 1994
- Lot E conveyed to six Murr children in 1995

THE REGULATION

- St. Croix River designated as a National Wild and Scenic River in 1972
 - Wisconsin required to develop a management and development program
 - State regulations prevent use of lots for buildings unless each lot has at least one acre of land suitable for development
- Local governments required to adopt parallel provisions; authorized to grant variances in case of unnecessary hardship



THE REGULATION

- St. Croix County adopted state-compliant regulations in 1975, requiring net project area of one acre for new residential project
- Lots existing before 1976 could be developed as single-family residence *if held in separate ownership*

THE PROBLEM



- Lot E is 1.25 acres, but net project area is only 0.5 acres due to floodplain, slopes, road right-of-way, and wetlands
- Murrs wanted to sell Lot E in order to fund a project to expand the cabin on Lot F

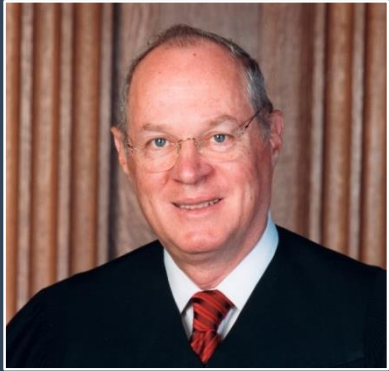
THE PROCESS

- Murr family sought a variance from the County regulation
- Variance was denied by St. Croix County Board of Adjustment
- Family appealed to St. Croix County Circuit Court
 - Murrs asserted a regulatory takings claim
 - Court granted summary judgment to St. Croix County
- Appeal to Wisconsin Court of Appeals, affirmed
- Wisconsin Supreme Court denied certiorari
- U.S. Supreme Court granted certiorari
 - Case Decided June 23, 2017

THE QUESTION

In a regulatory taking case, does the "parcel as a whole" concept as described in Penn Central Transportation Company v. City of New York, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

THE DECISION

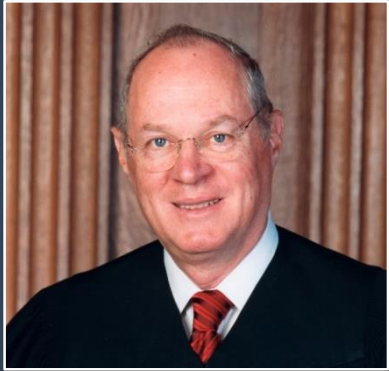


Justice Kennedy

Joined By Justices:
Ginsburg
Breyer
Sotomayor
Kagan

- Three factors to be employed in determining the “denominator”
 1. Treatment of land under state and local law
 2. Physical characteristics of the land
 3. Prospective value of regulated land
- Consider reasonable expectations of owner—whether the property will be treated as one or two parcels

THE DECISION



Justice Kennedy

Joined By Justices:
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Kagan

No compensable taking...

1. State and local law treatment: Wisconsin law merged the property when it came under common ownership in 1995
2. Property characteristics: topography and narrow shape of lots suggested that use would be limited
3. Value: benefits of treating property as a whole; combined appraised value is higher than sum of two lots' value

THE DISSENT



Justice Roberts

Joined By Justices:

Thomas

Alito

- State subdivision law should control what constitutes the parcel
 - Gaming the subdivision system is unlikely
- Majority confuses what constitutes the “property”
- Would remand to Wisconsin courts to determine whether Lot E is a proper subdivision lot under Wisconsin law, and whether it has been taken

THE AFTERMATH

- *Quinn v. Bd. of Cnty. Comm'rs*, 862 F.3d 433 (4th Cir. 2017) (rejecting challenge to grandfather/merger provision applied to small lots)
 - Only case to substantively apply *Murr*

Implications of *Murr* on Rocky Mountain States

COMMON STATUTORY SCHEMES

- More prevalent in East Coast and Upper Midwestern states
- Few state statutes
- Primarily local ordinances
- Exist within subdivision/protected area-related legislation

General Rule = Merger of contiguous parcels under common ownership OK as method of bringing nonconforming lots into compliance with updated zoning requirements (e.g., minimum lot size for development)

MURR CASE OPPONENTS AND PROPONENTS

- **Pro State of Wisconsin (i.e., Pro Parcel Merger)**
 - States of CA, HI, IL, ME, MA, MN, OR, VT, and WA
 - National Association of Counties
 - National League of Cities
 - U.S. Conference of Mayors
 - International City/County Management Association
 - International Municipal Lawyers Association
 - American Planning Association
- **Pro Murr Family (i.e., Anti Parcel Merger)**
 - States of NV, AK, AZ, AR, KS, OK, SC, WV, and WY
 - Mountain States Legal Foundation
 - National Association of Homebuilders
 - National Association of Realtors
 - Chamber of Commerce

MURR CASE OPPONENTS AND PROPONENTS

- **Pro State of Wisconsin (i.e., Pro Parcel Merger)**
 - Key Argument: Proper Exercise of Police Power
 - “Merger has long been recognized as the most reasonable way to reconcile the landowner’s interest in developing a non-conforming lot with the community’s interest in preventing congestion.”
 - “...merger provisions are so common,...that they are within the reasonable expectations of landowners and their lawyers.”
 - Focus on statutes and ordinances
- **Pro Murr Family (i.e., Anti Parcel Merger)**
 - Key Argument: Improper Infringement on Private Property Rights
 - “Expanding the ‘Parcel as a Whole’ Rule Would Dangerously Increase the Federal Government’s Power to Seize the Property of the States Without Compensation.”
 - “Aggregating Separate Parcels for Takings Purposes Creates Perverse Incentives and Inhibits Socially Beneficial Use of Property Rights.”
 - Focus on case law

State	Statute	Relevant Language
Massachusetts	Mass. Gen. L. ch. 40A, Sec. 6 <i>Existing structures, uses, or permits</i>	"Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land , conformed to then existing requirements and had less than the proposed requirement..."
Minnesota	Minn. Stat. Sec. 394.36(5)(d) <i>Existing nonconforming lots in shoreland areas</i>	(d) A lot subject to paragraph (c) not meeting the requirements of paragraph (c) must be combined with the one or more contiguous lots so they equal one or more conforming lots as much as possible.
Rhode Island	Gen. L. Sec. 45-24-38 <i>Substandard lots of record</i>	"Provisions may be made for the merger of contiguous unimproved, or improved and unimproved, substandard lots of record in the same ownership to create dimensionally conforming lots or to reduce the extent of dimensional nonconformance."
Vermont	Vt. Stat. tit. 24, Sec. 4412(2)(B) <i>Municipal and Regional Planning and Development</i>	"The bylaw may provide that if an existing small lot subsequently comes under common ownership with one or more contiguous lots , the nonconforming lot <u>shall</u> be deemed merged with the contiguous lot."

The background of the slide is a photograph of a wide river, likely the Lower St. Croix River, flowing through a lush, green landscape. In the foreground, the dark, silhouetted branches of trees frame the right side of the image. The river stretches towards the horizon under a cloudy sky. A large white circle is overlaid on the left side of the image, containing the title and text.

ST. CROIX COUNTY, WISCONSIN'S LOT MERGER STATUTE

§17.36I.4.a (Substandard Lots) – Lots of record as of January 1, 1976, that are made substandard by the St. Croix County Lower St. Croix Riverway Overlay District regulations may be developed if contiguous parcels are held in separate ownership or each lot under common ownership \geq 1 acre of net project area.

COLORADO'S LOT MERGER STATUTE

C.R.S. §30-28-139 provides that before a county may merge two adjacent lots in common ownership, the owner must be given a chance to request a hearing and that if a hearing is requested, the lots may not be merged unless the property owner has given their consent.



NEW MEXICO'S LOT MERGER STATUTE

47-6-9.1. Merger of contiguous parcels; prohibition.

A. Contiguous parcels that are owned by a single owner shall not be required by a board of county commissioners to be merged into one parcel if:

(1) each of the contiguous parcels:

(a) is shown on the official plat map of the county; or

(b) was created by a deed or survey recorded with the office of the county clerk;

(2) the chain of title to the contiguous parcels clearly demonstrates that the parcels have been considered separate prior to transfer into common ownership; and

(3) the owner of the contiguous parcels has taken no action to consolidate the parcels.

B. Nothing in this section limits a board of county commissioners, pursuant to **notice and public hearing**, from requiring consolidation of contiguous parcels in common ownership for the purpose of enforcing minimum zoning or subdivision standards on the parcels.

Town / City	Ordinance	Relevant Language
Baker, MT	Sec. 17.36.020(b) <i>Nonconforming lots of record</i>	"If two or more nonconforming lots with contiguous frontage in single ownership are of record at the time of passage or amendment hereof, and if any of the lots do not meet the requirements established for lot width and area, the lands involved <u>shall be considered to be an undivided parcel</u> for the purposes of this title, and no portion of this parcel shall be used or sold in a manner which diminishes compliance; nor shall any division of any parcel be made which creates a lot with width or area that fails to meet the requirements stated in this title."
Cherry Hills Village, CO	Sec. 16-2-70(a)(1) <i>Merger of nonconforming lots of record</i>	"Where two (2) or more contiguous lots of record are under identical ownership upon or after the effective date of this Section (February 25, 2001, hereinafter the "Effective Date"), and all, one (1) or more of such contiguous lots fails to conform to the applicable minimum lot area requirement for such lots, all such contiguous lots of record <u>shall be merged</u> and considered for the purpose of this Chapter and of Chapter 17 of this Code as a single and undivided lot."
Clovis, NM	Sec. 17.80.212(A) <i>Nonconforming lots</i>	"Where any nonconforming lot is held in common ownership with adjoining lot(s) , it <u>shall be combined</u> to make one or more conforming lots."
Holladay, UT	Sec. 13.76.050(A) <i>Lots in separate ownership</i>	"In any zone, when a lot lacks sufficient area to meet the minimum required by this code and there is abutting property under the same ownership , the two (2) parcels <u>shall be combined</u> ."

CONCLUSIONS FOR WESTERN STATES

- Existing statutes and ordinances that mandate lot merger remain constitutional post-*Murr*, and are arguably strengthened by *Murr*
- **Western cities** appear more willing than states to *mandate* merger for substandard, contiguous lots with common ownership
- **Western states** more likely to limit government-initiated lot mergers to situations where property owner is on board, or at least is afforded due process

QUESTIONS AND ANSWERS

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