The California Bar — Real Property Section
36th Annual Retreat
Silverado Resort & Spa
Napa, California

Opening Panel Remarks

Damien Schiff
Senior Attorney
Pacific Legal Foundation[1]

Undoubtedly one of the more perplexing issues in takings law is how to identify the "relevant parcel." Such an inquiry is compelled logically by the seminal regulatory takings decision of the United States Supreme Court, *Pennsylvania Coal Co. v. Mahon*. Under the holding of that case, the government can reduce the value of private property, to some extent, without having to compensate the property owner for that reduction. But if the government "goes too far"—if it reduces the value too much—then the government will be required to compensate the landowner. The Supreme Court's takings jurisprudence therefore necessarily requires a comparison between the value of the property without the challenged regulation, and the value of the property with the challenged regulation. Such a comparison naturally is expressed in terms of a percentage. Yet every percentage analysis requires a denominator. Hence, identifying the denominator—or, in the terms of a later takings case, identifying the "parcel as a whole"—is critical to all regulatory takings claims. It measures the economic impact of the regulation and thus helps to determine whether the regulation has indeed "gone too far."

Since *Pennsylvania Coal*, the Supreme Court has provided limited guidance in how to identify the relevant parcel. In *Penn Central Transportation Co. v. City of New York*, the Court rejected what may be termed "vertical" segmentation. There the Court cabined the ancient maxim that property is owned *ab inferis usque ad caelos*, and denied the efforts of Penn Central Station's owners to obtain compensation for the inability to build up in to the air, because they could still use their property closer to the ground. And in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court rejected a segmentation based on time. Thus, a claimant for just compensation cannot assert, as the landowners in *Tahoe-Sierra* attempted to, that a temporary development moratorium is necessarily a taking simply because nothing can be done with the property during the moratorium. But the Court has never addressed what might be called "horizontal" segmentation,

[1] Attorneys for the Foundation serve as counsel of record in *Murr v. State of Wisconsin*, currently pending in the United States Supreme Court.

i.e., whether and to what extent the relevant parcel may include other adjacent or nearby lots. The Supreme Court will soon do so, however, in *Murr v. State of Wisconsin*.

In 1960, William Murr and his wife purchased a lot along the shores of the St. Croix River. For about 125 miles, the St. Croix forms the border between Wisconsin and Minnesota. In its lower reaches, the river has for some time been a favored vacation spot, known for its scenic charm and recreational opportunities. Shortly after purchase, the Murrs—like many of their neighbors—built a family vacation cabin on their lot. And a few years later, the Murrs acquired, for investment purposes, an immediately adjoining parcel. Unlike their vacation cabin parcel, which title to which they had put in the name of Mr. Murr's plumbing company, the couple put title to their investment parcel in their own name.

But concerns about the environmental impacts of development along the St. Croix led Congress, in 1968, to designate the waterbody as a wild and scenic river. Not long after, Congress directed Wisconsin and Minnesota to produce a comprehensive master plan to govern development in the area. Wisconsin followed by enacting legislation that ultimately resulted in administrative rules establishing restrictive land-use policies to govern new development along the river. In 1976, St. Croix County implemented these policies locally by enacting a zoning ordinance. Among other things, the ordinance imposes minimum lot size requirements. In particular, the ordinance requires that a standard lot have at least one acre of "net project area." Owing to the ordinance's substantial setback and other requirements (for example, requiring buffers around wetlands), a lot that is well over one acre might nevertheless be deemed substandard, because its "net project area" could end up being well less than one acre.

Such was the fate of the Murrs' lots. Their investment parcel, although 1.25 acres in size, has a net project area of only 0.5 acres. Hence, the County ordinance deems it substandard. Now, the County ordinance, like many such ordinances, has a grandfather provision which allows development to proceed on an otherwise substandard lot if the lot was buildable prior to the ordinance's enactment. But the Murrs received no relief from this provision. The County's grandfather provision does not apply if the substandard lot is adjacent to another substandard lot, and if both lots are owned by the same person. In that instance, the ordinance treats the two lots as one lot, and forbids their sale or development as separate lots. Although the Murrs originally purchased the lots under different ownership, in the mid-1990s they deeded both lots to their children in common ownership.

In 2004, when the Murr children approached County officials about possibly selling the investment lot, they were informed that, owing to the grandfather clause's carve-out, they were forbidden to do anything with the parcel. After unsuccessful

attempts to obtain a variance, the Murrs brought a regulatory takings claim. The trial court denied relief, and the Wisconsin Court of Appeals affirmed. Central to that court's rejection of the Murrs' claim was its "relevant parcel" analysis. In the court's view, the relevant parcel is not the investment lot, but rather the investment lot combined with the adjacent, built-out lot. The court explained that "contiguousness is the key fact," and therefore applied the purportedly "well-established rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein."

The Murrs then successfully sought certioriari from the United States Supreme Court, that Court agreeing to hear the case to answer whether "two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?" Perhaps not surprisingly, Wisconsin and St. Croix County have, in their Supreme Court briefing, backed away from the Wisconsin Court of Appeals' categorical rule of contiguous parcel ownership. In its merits brief, Wisconsin, relying on a footnote from the Supreme Court's 1992 regulatory takings decision *Lucas v. South Carolina Coastal Council*, argues for the rule that the relevant parcel depends on "how the owner's reasonable expectations have been shaped by the State's law of property." Thus, "contiguousness," as the lower court infelicitously put it, is not *necessarily* determinative. What really *is* determinative, according to Wisconsin, is whether *state law makes* contiguousness relevant. Implicit, though, in Wisconsin's approach is an acknowledgement of the relevance of lots as they are officially platted. That appears to be the starting point for Wisconsin's "relevant parcel" analysis. But Wisconsin goes on to contend that a state's laws governing how lot lines may change are relevant too. Such laws include, in Wisconsin's view, so-called merger ordinances. These are laws that require the merger of legally created and separate contiguous lots owned by the same person. The merger is required because, through the passage of time and enactment of new laws, the previously standard lots have become substandard. Wisconsin contends that this is what has happened to the Murrs' two riverfront lots by virtue of the County's carve-out to its ordinance's grandfather clause. The County, for its part, agrees—although it adds that the factors germane to the relevant parcel question should include, besides lot lines and contiguousness, ownership history, physical characteristics, unity of use, the extent to which the restricted portion benefits the unregulated portion, and how the government has treated the land. But regardless of how many factors are relevant, Wisconsin and the County are in accord that the Murrs' reliance on their current recorded lot lines is improper. These lot lines no longer accurately depict the actual parcel, which has been changed pursuant to the County's ordinance.

What do the Murrs have to say? Several things, as you can imagine. First, as a point of clarification, the Murrs do *not* contend that lot lines are determinative of the "relevant parcel" analysis. Rather, the Murrs ask simply for *a presumption* that

such lot lines reflect the relevant parcel. And at least on this point, the Murrs and Wisconsin appear to be in agreement: the relevant parcel for takings purposes generally corresponds to the "parcel" or legal unit of property recognized under state law. Second, the Murrs contend that, whatever one might think of merger ordinances, that thought has no bearing on the Murrs' case, for two subsidiary reasons. (A) On the relevant parcel maps maintained by the County, the Murrs have two separate lots. Therefore, they still retain two legally distinct parcels. (B) The County's minimum lot size ordinance, with its grandfather provision and carve-out, is *not* a merger ordinance. It is instead a run-of-the-mill land-use ordinance which dictates the manner of the use of property but not the legal limits of that property. And it cannot be said, *pace* Wisconsin, that *all* of a state's land-use law is relevant to determining the relevant parcel. If that were so—if, in other words, such rules were relevant to determining the extent of one's property right—then a landowner could never state a claim for a taking: the very law that otherwise takes his property would be deemed to take nothing, because its limitations themselves define the extent of the landowner's interests.

But even assuming that merger ordinances could in theory be germane to the "relevant parcel" issue, and that St. Croix County's ordinance is in fact a merger ordinance, it should have no bearing on what the Murrs' relevant parcel is. The purpose of a merger ordinance is to ameliorate the harm that ensues from development on substandard lots. For example, a lot might be too small to support an adequate foundation, or might be positioned so close to other structures that development on it would present a nuisance. Hence, such a lot should be merged with an adjoining lot in the hope that the newly augmented lot will be able to support development. But that purpose would not be served by the merger of the Murrs' lots. Both lots are well over one acre and, even according to the County's restrictive zoning, contain 0.5 acres of buildable area. My own home sits on a smaller lot.

Last month, the Supreme Court heard oral argument in the Murrs' case, and, not surprisingly, the justices focused on this merger question. The Chief Justice, for example, repeatedly inquired about the significance between "effective merger"—what the lower court had determined had occurred with the Murrs' lots—and actual merger. He seemed to be getting at an argument that would downplay the effect of a merger ordinance if the only purpose of that ordinance were to avoid takings liability. On the Court's other ideological side, Justices Kagan and Breyer seemed uncomfortable with a rule that would never take merger ordinances into account. For example, Justice Kagan asked the Murrs' counsel:

> [I]f I'm buying property in this area, I also know that there are these rules about when you can develop on substandard lots and how it is that contiguous lots are understood for purposes of that development potential. So why aren't I buying subject to those preexisting regulations?

But if some justices were uncomfortable with a rule that would ignore parts of a state's law of property, others appeared concerned with a rule that would focus exclusively on that law. As Justice Kennedy responded to Wisconsin's attorney:

> It seems to me that your position is as wooden and as vulnerable [to] criticism . . . as the Petitioner's. You say . . . whatever State law does, that defines the property. But you have to look at the reasonable investment-backed expectations of the owner.

In reply to Justice Kennedy, one might say, as did the Murrs' counsel, that consideration of investment-backed expectations when determining the relevant parcel improperly conflates that analysis with the logically subsequent question of whether the relevant parcel has been taken. Whether the Court will resist such conflation will depend on whether the Court rejects the United States' view, as amicus, expressed by the Deputy Solicitor General:

> I think the clearest articulation I have is to say that you should be looking for what in the interest of fairness and justice is an accurate way to measure economic impact. And that's the point of the relevant parcel determination. It's focused specifically on the economic impact prong of the equation.

In other words, determining the relevant parcel is just one integrated part of the larger regulatory takings analysis, which always begins with, and sometimes ends with, economic impact.

The Court should reject this approach. But in so doing, the Court need not ignore the legitimate governmental interests that undergird many merger ordinances. Wisconsin and St. Croix County argue, not implausibly, that their concerns about purportedly substandard lots along the St. Croix extend beyond whether a vacation cabin may be safely built on them. What also matters is potential development's exacerbation of the area's water quality and other environmental issues. But, critically, the development of the Murrs' investment parcel will not result in a meaningful increase in any environmental harm. No one will build a trash dump, sewage plant, or hotel on the property. It's either a modest residential structure or it's nothing. Surely, the fee simple interest in land, which the Supreme Court has recognized as "an estate with a rich tradition of protection at common law," should support a reasonable expectation to build a family vacation cabin.