



VICTORY FOR COUNTY LAND USE REGULATIONS

St. Croix County's Success Before the U.S. Supreme Court in Murr v. Wisconsin

—Andrew T. Phillips & A.J. Peterman, von Briesen & Roper, s.c.

Earlier this summer, the U.S. Supreme Court decided *Murr v. Wisconsin*, the most important property rights case of that term (137 S. Ct. 1933 (2017)). *Murr* is a regulatory takings case that has important implications for the way that local governments regulate land use. The story begins with the Murrs' attempts to sell one of their two commonly owned contiguous parcels bordering the St. Croix River. A county ordinance prohibited the Murrs from selling or developing the parcels as two distinct properties because they did not meet the minimum area and river-frontage requirements for separate developments, and were considered substandard (*See id.* at 1940).

Because the Murrs were unable to sell or develop one of the parcels, they argued that a regulatory taking had occurred, which would entitle them to compensation. The Takings Clause of the Fifth Amendment requires the government

to pay "just compensation" whenever it "takes private property for public use. Although the county did not physically "take" the Murrs' property, regulations that functionally render the lots, or large portions of the lots, unusable, could be considered a regulatory taking.

Under the U.S. Supreme Court's 1978 *Penn Central* case, whether a regulation restricts property sufficient to create a taking, and require compensation (a critical point for counties), depends on that regulation's impact on the "parcel as a whole." If, as in the case with the Murrs, the "parcel as a whole" looks solely at the single parcel that the Murrs wanted to sell or develop, the regulation would restrict that entire parcel and likely result in a determination that there was a regulatory taking. However, if, like under the regulation, the commonly owned contiguous substandard parcels are combined for purposes of evaluating the impact of a regulation, the reg-

THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT REQUIRES THE GOVERNMENT TO PAY "JUST COMPENSATION" WHENEVER IT "TAKES PRIVATE PROPERTY FOR PUBLIC USE."

ulation only impacts roughly half of the property and may not be deemed a regulatory taking. The Murrs challenged St. Croix County's regulation and the Wisconsin Court of Appeals determined that the Murrs two parcels are a single unit when assessing the effect of the county's regulation, thus upholding the county's "mandatory combination" ordinance.

The Murrs challenged that decision in the U.S. Supreme Court. The U.S. Supreme Court addressed whether the "parcel as a whole" concept creates a rule that two legally distinct but commonly owned contiguous parcels must be combined for takings analysis purposes (*Id.* at 1939). The Wisconsin Counties Association (WCA), in conjunction with the League of Wis-

AMICUS BRIEFS

Amicus Briefs filed by the Wisconsin Counties Association.

U.S. SUPREME COURT

Murr v. St. Croix County (2016)

Coordinated with the League and Towns Association. The issue related to the validity of a county ordinance requiring the combination of contiguous substandard lots under common ownership.

a county considers an application for a conditional use permit.

Fond du Lac County v. Helen E.F. (2012)

The issue related to the appropriate procedure for commitment of persons with Alzheimer's disease and dementia.

WISCONSIN SUPREME COURT

Krueger v. Appleton Area School District (2016)

Coordinated with other school and local government associations. The issue related to the interpretation and application of Wisconsin Open Meetings Law.

Adams v. Livestock Facilities Siting Review Board (2010)

Coordinated with the Towns Association. The issue related to local government authority over large livestock operations.

Allenergy Corp. v. Trempealeau County (2016)

Coordinated with the Towns Association. The issue related to the appropriate process by which

Town of Madison v. County of Dane (2008)

Filed brief and participated in oral argument. The issue related to the appropriate manner by which a county charges for local bridge aid.

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consin Municipalities and the Wisconsin Towns Association, filed an amicus (or “friend of the court”) brief to help the Court decide this issue.

In short, the U.S. Supreme Court upheld the Wisconsin Court of Appeals’ determination. The Court’s majority opinion, authored by Justice Anthony Kennedy, adopted a complex multi-factor test for courts to use in analyzing this issue.

Courts must “determine 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” and include factors such as “the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land” (*Id.* at 1945).

APPLICATION OF [THIS MUTI-FACTOR] TEST WILL LIKELY PROVE DIFFICULT AND POTENTIALLY RESULT IN ADDITIONAL LEGAL CHALLENGES TO LOCAL GOVERNMENT DETERMINATIONS

The Court held that the St. Croix County zoning scheme properly balanced the legitimate goals of regulation with the reasonable expectations of landowners (*Id.* at 1947). St. Croix County did this “by implementing a merger provision, which combines contiguous substandard lots under common ownership, alongside a grandfather clause, which preserves adjacent substandard lots that are in separate ownership” (*Id.*).

Although this case can be viewed as a win for local governments, as property rights advocates were unable to overturn the “parcel as a whole” concept, the multi-factor test described above is not a simple “bright line” test. It is evident that application of the test will likely prove difficult and potentially result in additional legal challeng-

es to local government determinations surrounding the treatment of separate parcels.

In addition to the decision in *Murr*, there are several state legislators anxious to address the takings analysis and “parcel as a whole” concepts. WCA is committed to maintaining a balance between the rights of individual property owners and the rights of local government to regulate land use in a manner consistent with community expectations. WCA will keep counties apprised of further legal and legislative developments in this area.

If you have questions about this case or other governmental law needs, please contact any member of the von Briesen & Roper Government Law Group.

AMICUS BRIEFS

Amicus Briefs filed by the Wisconsin Counties Association.

WISCONSIN SUPREME COURT

Town of Rhine v. Bizzell (2008)

The issue related to a local government’s ability to regulate land use in the context of conditional uses.

WIREDATA v. Village of Sussex (2008)

The issue related to the appropriate manner in which a local government must respond, on behalf of itself and its contractors, to a public records request.

Racine County v. Int’l Assoc. of Machinists (2008)

The issue related to the county’s authority to contract for services in relation to its obligation to collectively bargain with certain employees.

In re Jane E.P. (2005)

The issue related to whether an individual who is not a resident of Wisconsin is nonetheless eligible to be a subject of a Wisconsin guardianship proceeding.

Meriter Hospital, Inc. v. Dane County (2004)

The issue related to the appropriate county reimbursement rate for medical providers that provide care to inmates in the Sheriff’s custody.

OTHER COURTS

Town of Grant v. Portage County – Portage County Circuit Court (2016)

The issues related to the county’s ability to levy a tax on town residents to support county-wide emergency medical services.

County of Fond du Lac v. Muche – Wisconsin Court of Appeals (2016)

The issue related to the enforceability of the county’s social host ordinance.

County of Barron v. Labor and Industry Review Comm’n – Wisconsin Court of Appeals (2009)

The issue related to an independent contractor’s ability to claim unemployment compensation benefits from the county.

In re the Paternity of KJP – Wisconsin Court of Appeals (2006)

The issue related to an indigent litigant’s right to counsel in civil proceedings at county expense.

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