Publications

Take No Chances with Regulatory Takings: Three Tips in the Wake of Murr v. Wisconsin

Alert | 07.10.2017

Janet M. Johnson

The U.S. Supreme Court’s recent property rights decision in *Murr v. Wisconsin* demonstrates the importance of real estate developers and landowners understanding legal nuances affecting their property rights and taking steps to protect themselves from unnecessary losses.

This decision is another in a line of regulatory takings cases, in which a private property owner has argued a government regulation limits their private property uses to such an extent that it deprives the owner of its value. Instead of clarifying the tests to be applied, this decision extends the already muddled analysis of whether a taking has occurred to the preliminary question of how to define the “property” that will be the subject of the takings analysis.

Here is a brief background on the case, a summary of the multi-factor balancing test the Court used to evaluate it, and tips to avoid falling into similar situations:

**Background**

The petitioners in *Murr* were four siblings who acquired two adjacent lots along Wisconsin’s St. Croix River from their parents in the 1990s. They argued that a 1976 regulation that treated the two lots as one merged lot, once they became the owners of both, was a regulatory taking of their property. Because the lots were considered merged when they acquired them (their parents had not owned the two lots in the same names, so no merger had occurred earlier), they were prevented from selling one of the lots, which had remained vacant, as a buildable lot. The issue before the Court was how to define the “property” that should be the subject of the takings analysis. Should it be the individual lot that the Murr siblings wanted to sell, but could not? Or, should it be both lots combined, as the Wisconsin Court of Appeals had held?

In a 5-3 decision, the Court upheld the Wisconsin Court of Appeals’ decision that the “property” should be the combined two lots. In doing so, however, the Court rejected the Wisconsin court’s rule that contiguous lots under common ownership should always be considered one parcel. The Court also declined to adopt the test urged by the petitioners, which would have created a presumption that lot lines, as established by state law, set the boundaries of the “property.” Instead, the Court opted for a multi-factor balancing test, which a majority of the justices felt better allowed for flexibility in the analysis essential to regulatory takings cases.

**Multi-Factor Balancing Test**

Far from being a clear cut analysis, the test set forth in *Murr* asks that courts consider a number of factors to “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.”

Those factors include:

- The treatment of the land under state and local law
- The physical characteristics of the land
- The prospective value of the regulated land

As pointed out by Chief Justice Roberts in his dissent, the test adopted by the majority largely seems to echo the substantive analysis of whether a taking has occurred. He argued that the factors the majority identified should be used to analyze whether a taking had occurred, only after it has been determined what constituted the property under “ordinary principles of Wisconsin property law.” In his view, the majority’s approach “is just another opportunity to gerrymander the definition of ‘private property’ to defeat a takings claim.”

In applying the balancing test in *Murr*, the majority of the Court found that all three of the identified factors cut in favor of treating the two lots as one parcel. Significant emphasis was placed on state and local law, in particular the merger provision that prevented the Murr siblings from selling the individual lot to someone wanting to construct a new building on it, even though under separate ownership it would have been grandfathered as a buildable lot. Additionally, the physical characteristics of the land, namely the presence of a steep bluff and the location of the lots along the scenic St. Croix River, which had been designated under the Federal Wild and Scenic Rivers Act and subsequent State and County regulations as requiring protection, supported treating the two lots as one parcel. Finally, the value of the two lots, when combined, was less than 10 percent below the sum of the value of the individual lots had they remained separate buildable

---

Schiff Hardin LLP

schiffhardin.com
Three Tips to Avoid Uncompensated Regulatory Takings

In light of the decision in *Murr*, landowners and real estate developers should consider looking closely at current property holdings and future plans, and take steps to lessen their risk of exposure to uncompensated regulatory takings of the type the Murr siblings experienced. Below are some practical tips to consider:

1. **Research state and local regulations in areas where you own or plan to acquire multiple adjacent parcels or where you plan to subdivide existing property.** Be on the lookout for regulations like the one at issue in *Murr* that effect a merger of contiguous parcels under common ownership. This is particularly true in scenic or environmentally sensitive locations that are more likely to be heavily regulated. While it may seem unrealistic, the decision in *Murr* makes it clear that landowners will be tasked with knowing and understanding existing regulations affecting their property.

2. **Avoid holding adjacent property under common ownership.** If merger provisions exist in an area where you own or plan to acquire multiple adjacent parcels, consider taking steps to avoid triggering those provisions. That may mean having different family members take title to each individual lot or creating special purpose entities to hold title to individual lots.

3. **If property is being acquired purely for investment purposes, consider purchasing non-adjacent lots.** If there is no clear benefit to owning adjacent parcels, it may be safer to invest in clearly separate pieces of property that are not in danger of being treated as one parcel for regulatory takings purposes.

Please contact us with clarifying questions or for more information on uncompensated regulatory takings and other complex real estate issues.

**Professionals**

Janet M. Johnson  
Partner  
312.258.5658  
njohnson@schiffhardin.com  
Chicago

This publication has been prepared for the general information of clients and friends of the firm. It is not intended to provide legal advice with respect to any specific matter. Under rules applicable to the professional conduct of attorneys in various jurisdictions, it may be considered attorney advertising material. Prior results do not guarantee a similar outcome.