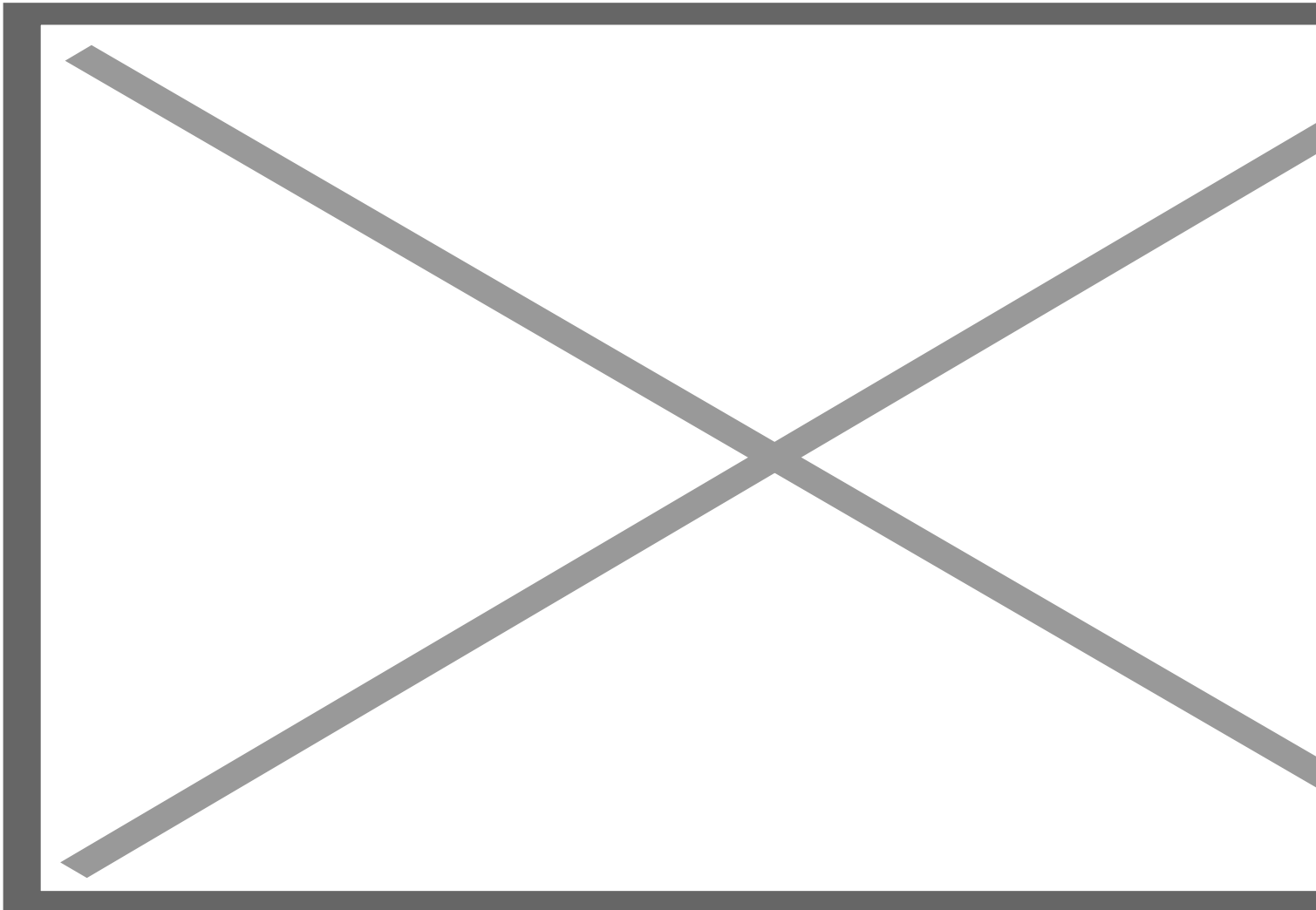


## Supreme Court Announces New Test for Regulatory Takings Claims

Under the doctrine of regulatory takings, a regulation of property that goes "too far" in burdening property rights will be recognized as a Fifth Amendment taking. The Supreme Court's recent decision in [Murr v. Wisconsin](#) (U.S. Supreme Court No. 15-214, June 23, 2017), represents an important step in the evolution of regulatory takings jurisprudence. It addresses the issue of how to define the "proper unit of property" in the regulatory takings analysis, a question often termed "the denominator problem." In *Murr*, the Court rejected the notion that a legally defined parcel is necessarily the relevant unit of analysis finding that, under certain circumstances, multiple legal parcels may jointly constitute the relevant unit of property. But the Court avoided adopting a bright-line rule to determine the relevant unit of property and instead adopted a complex, multifactor test to address the denominator problem. **Background of this Case** The property at issue in *Murr* consisted of two adjacent lots, Lot E and Lot F, in Troy, Wisconsin, owned by two brothers and two sisters, the petitioners in the case. Local regulations prevented these lots from being sold or developed unless there was a minimum of one acre of developable land. A lot merger provision also provided that adjacent lots under common ownership could not be sold or developed as separate lots if they did not meet the size requirement.



The two lots were situated along the St. Croix river, with a steep bluff cutting through the lots limiting the lots'

developable area. Though each lot was approximately 1.25 acres in size, the lots' combined buildable area was only 0.98 acres due to the terrain. The petitioners' parents purchased Lot F in 1960 and built a small cabin on it. Lot F was later transferred to the family plumbing company. In 1963, they purchased neighboring Lot E, which they held in their own names. The lots remained under separate ownership until 1995, when they were transferred to the petitioners. The petitioners became interested in moving the cabin on Lot F to a different portion of the lot and selling Lot E to fund the project. However, based on the lot merger provision, the local zoning board determined that the lots could not be separately sold or developed. The petitioners filed an action, alleging that these restrictions amounted to a regulatory taking by effectively depriving them of all or practically all use of Lot E.

**The Takings Clause** The Takings Clause of the Fifth Amendment provides that property shall not "be taken for public use, without just compensation." Traditionally, the Takings Clause reached only a direct appropriation or physical occupation of property. The Court's regulatory takings jurisprudence was initiated by *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), which declared that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Two subsequent Supreme Court decisions provide guidance on application of this principle. In *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003 (1992), the Court stated that, with certain qualifications, a regulation which "denies all economically beneficial or productive use of land will require compensation under the Takings Clause." When a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking may still be found based on multiple factors described in *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 124 (1978), which include (1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.

**The Decision** The central issue of this case was the denominator problem: whether Lot E separately or Lot E and Lot F should constitute the relevant unit of property for the regulatory takings analysis. The majority declined to adopt a formalistic rule. After reviewing its regulatory takings jurisprudence, the majority concluded that "no single consideration" is determinative and that courts "must consider a number of factors" to ascertain the relevant unit of property. The majority opinion determined that an "objective analysis" that ascertained "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" was required and prescribed three factors to be considered: (1) the treatment of the land under state and local law; (2) the physical characteristics of the land; and (3) the prospective value of the regulated land. Applying this multifactor standard, the court concluded that Lots E and F should be evaluated together for the regulatory takings claim. In applying the first prong, the majority found that, under Wisconsin property law, the two lots should be treated as one. The valid merger of the lots under state law informed the reasonable expectation that they would be treated as a single property. Moreover, the property was subject to this regulatory burden only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted. The physical characteristics of the property also supported treatment as single parcel. The lots here were contiguous and their narrow shape along with their location made it reasonable to expect a limited range of uses. Finally, the value that Lot E brought to Lot F also weighed in favor of treating the properties as one parcel. The Court observed that using the property as an integrated whole could increase privacy and recreational space. After determining that the proper unit of property was the combined lots E and F, the majority concluded that no regulatory taking had occurred. When considered jointly, the value of the parcels decreased at most by a minimal amount, thus foreclosing any claim that the property had lost all economic value. The majority also found that petitioners had not suffered a taking under the *Penn Central* test. The economic impact of the regulation on the property was not severe and petitioners could not claim that they reasonably expected to sell or develop their lots separately given the regulations that were in place at the time of acquisition.

**Conclusion** The likely outcome of this decision will be to further complicate regulatory takings claims. Regulatory takings claims brought under either *Penn Central* or *Lucas* are now subject to the new threshold test of determining the scope of the property subject to the regulatory takings claim. The new test is complex and open-ended, and courts will be tasked with the challenge of interpreting and implementing it in a wide array of factual settings. With regard to claims brought under *Penn Central*, it is not clear that the new test will have a significant effect in biasing regulatory takings analysis toward

the government. The *Penn Central* test already provides courts with broad discretion to consider and weigh a variety of factors. But the new test may have more impact on claims brought under *Lucas*, where the definition of the unit of property is critical to determining whether the property has been deprived of all of its economically beneficial or productive use.

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