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June Case Law Update
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A summary of Wisconsin court opinions decided during the month of June related to planning

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United States Supreme Court Opinions

New Test for Analyzing Regulatory Takings Claims

In a cased that originated in Wisconsin, **Murr v. Wisconsin**, the U.S Supreme Court determined that the lot merger provisions for substandard or nonconforming lots in St. Croix County's zoning ordinance did not amount to a regulatory taking requiring compensation and announced a new (and confusing) multi-factor test for defining the unit of property that allegedly has been taken.

Background of the Case

Sometimes you will read or hear commentators who state that a court may "strike down" or "invalidate" a regulation as a "taking." This is misleading. It is important to understand that regulatory takings address the issue of whether the public needs to pay for or acquire the private property at issue because the impact of the regulation severely impacts someone's private property rights. In 1927, the U.S Supreme Court theorized that a governmental police power regulation could go "too far" because the impact of the regulation would be similar to the government taking the property using its power of eminent domain which under the 5th Amendment to the U.S. Constitution and similar provisions in many state constitutions requires that the public pay compensation for the appropriation of private property. Sixty years later, the Court reiterated the fact that the 5th Amendment "makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking."

A test developed by the U.S. Supreme Court for determining if a police power regulation goes "too far" requires courts to compare the diminution in the value of a property due to the impact of a regulation with the value that remains in the property. The U.S. Supreme Court has established a very high threshold for a regulatory taking noting that even a landowner with a 95 percent loss of value to their property might not be able to receive compensation. A critical component of the analysis is determining how to define the unit of property whose value will furnish the denominator of the fraction. The Court's decisions focus on the need to consider

the "parcel as a whole" rather than dividing a parcel into discrete segments and analyzing whether a regulation has taken a particular segment.

The *Murr* case presented the U.S. Supreme Court with a unique opportunity to address the issue of how to define the unit of property at issue for the purpose of a regulatory takings analysis. The Murr family owned two lots along the St. Croix River in St. Croix County. The parents had purchased the two lots in the early 1960s in separate transactions and built a recreational cabin on one of the lots. The second lot remained undeveloped.

In the 1970s, the St. Croix River, which establishes part of the border between Wisconsin and Minnesota, was designated for protection under the federal Wild and Scenic Rivers Act. The Wisconsin and Minnesota Departments of Natural Resources (DNR) developed rules requiring local governments along the river to adopt ordinances to protect the St. Croix River. St. Croix County adopted new standards in the County zoning ordinance based on the DNR rules. The new standards included minimum lot size requirements. The lots owned by the Murr family did not comply with the new lot size standards. The two lots became substandard (nonconforming) lots under the ordinance. Existing substandard lots were allowed to continue (grandfathered in) as buildable lots. The zoning ordinance (following state and federal law) also included a lot merger provision that prohibited the sale or development of adjacent substandard lots under common ownership. The two lots, however, could be merged to make a single lot that conformed to the new lot standards. This provision applied to the two lots owned by the Murrs.

In the 1990s, the two lots were transferred to the Murr children. About a decade later, the Murrs proposed moving and improving the cabin and selling the second lot to pay for the project. The Murrs applied to the County for a variance from the lot merger provision to allow the sale of the second lot. The County denied the variance and the Murrs sued the State of Wisconsin and St. Croix County alleging that the County's ordinance had taken their property. The circuit court upheld the County's denial of the variance. The Murrs then appealed the circuit court decision to the Wisconsin Court of Appeals, which, in an unpublished decision, upheld the County's denial of the variance. The Court of Appeals relied heavily on the Wisconsin Supreme Court's 1996 decision in *Zealy v Waukesha*. The Murr's petitioned the Wisconsin Supreme Court to review the Court of Appeals decision but the Wisconsin Supreme Court denied the petition. The Murrs then petitioned the U.S. Supreme Court to review their case and U.S. Supreme Court granted their petition. The selection of an unpublished state court of appeals decision for review by the nation's highest court was a surprise to many observers.

The Decision of the U.S. Supreme Court

The issue for the U.S. Supreme Court was whether the denominator in the taking analysis should be the two lots merged as a single lot under the County's zoning ordinance or should each lot be considered separately.

While the property owners and the State of Wisconsin argued that the Court should adopt a formalistic rule to guide the parcel inquiry, the majority opinion, written by Justice Kennedy

determined "no single consideration can supply the exclusive test for determining the denominator." Instead, the majority announced that courts must consider multiple factors:

"First, courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law." This includes acknowledgement of "legitimate restrictions affecting his or her subsequent use and dispensation of the property."

"Second, courts must look to the physical characteristics of the landowner's property. These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment."

"Third, courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings." The majority opinion notes that "[t]hough a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding beauty."

Applying this multi-factor analysis to the facts of the Murr case, the majority concludes that (1) state and local law indicate the property should be treated as one; (2) the physical characteristics of the property support its treatment as a unified parcel (the rough terrain and narrow shape of the lots make it reasonable to expect that potential uses might be limited); and (3) the second lot brings value to the lot with the cabin by bringing increased privacy and recreational space (the Court noted that the Murrs swim and play volleyball on the second parcel).

The majority opinion also notes that according to appraisals, the value of the combined lots is substantially higher than the value of the two lots as regulated (one lot buildable the other lot not). Appraisals valuing the properties as two distinct buildable lots increased the combined value by less than 10 percent.

The majority concludes that the Wisconsin Court of Appeals was correct in analyzing the property as a single unit and affirmed the judgment of the Wisconsin Court.

Dissenting Opinions

Chief Justice Roberts, wrote a dissenting opinion in which he was joined by Justices Thomas and Alito. Roberts states that he is not troubled by the majority opinion that the regulation at issue in the case does not effect a taking that requires just compensation. Rather, Roberts rejects the majority's "elaborate test" that establishes a "malleable definition of 'private property." Instead, Roberts states that he would follow the Court's "traditional approach: State law defines the boundaries of distinct parcels of land, and those boundaries should determine the 'private property' at issue in regulatory takings cases."

While preferring to rely on state law defined boundaries to define the relevant parcel, Roberts characterizes the confusing test adopted by the majority as a four factor test: (1) the physical characteristics of the law; (2) the prospective value of the regulated land; (3) the reasonable expectations of the owner; and (4) background customs and the whole of our legal tradition.

Justice Thomas wrote a separate dissent stating that the Court should take a "fresh look" at regulatory takings jurisprudence to see if it can be grounded in the original meaning of the takings clause of the 5th Amendment that focused on the direct appropriate of property. His opinion seems to question whether the Court's regulatory takings jurisprudence since the 1920s is grounded in the Constitution.

Justice Gorsuch did not participate in the decision.

[APA-WI along with APA National filed a friend of the court brief supporting St. Croix County in the case.]

State Grant Program Excluding Religious Institutions Violated First Amendment

The Missouri Department of Natural Resources offered state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires. Trinity Lutheran Church applied for such a grant for its preschool and daycare center and would have received one, but for the fact that Trinity Lutheran is a church. The Department had a policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program. A majority of U.S. Supreme Court In **Trinity Lutheran Church of Columbia, Inc. v. Comer**, held that the grant program violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment.

The majority opinion was written by Chief Justice Roberts. Justice Thomas wrote a concurring opinion in which he was joined by Justice Gorsuch. Justice Gorsuch also wrote a concurring opinion in which he was joined by Justice Thomas. Justice Bryer wrote a concurring opinion. Justice Sotomayor wrote a dissenting opinion in which she was joined by Justice Ginsburg.

Wisconsin Supreme Court Opinions

30 Day Period to Review of Town Highway Order Begins on Date Order Recorded

In Pulera v. Town of Richmond, 2017 WI 61, the Wisconsin Supreme Court addressed the question: what event triggers the thirty-day period under Wis. Stat. § 68.13(1)(2013-14)4 during which certiorari review by a court may be obtained for a town board's highway order. The case arose from changes to an intersection located at the county line between Rock and Walworth Counties. Without notifying the Town of Richmond, the Rock County Highway Department made changes to this intersection. To facilitate these changes, the Rock County Highway Department had to discontinue two existing roads.

The Town of Johnstown (Rock County) and the Town of Richmond (Walworth County) held a joint meeting. At the meeting, both town boards retroactively approved changes to the intersection that the Rock County Highway Department had already completed. This required the town boards to approve construction of a new intersection as well as discontinuance of portions of former highways.

The Town Boards subsequently recorded the highway orders with their respective County Register of Deeds. Pulera, a person aggrieved by the highway order sought review of the order in the circuit courts of both counties. Both Towns moved to dismiss the lawsuits as untimely because neither petition was filed within thirty days of Pulera's receipt of the towns' decision to alter the highway. Both circuit courts agreed with the Towns and dismissed the lawsuits. The Wisconsin Court of Appeals certified the question of the time frame for review of highway orders to the Wisconsin Supreme Court. A majority of the Wisconsin Supreme Court concluded that the thirty-day period during which certiorari review is available for a town board's highway order to lay out, alter or discontinue a highway begins to run on the date that the highway order is recorded by the register of deeds. The lawsuits were therefore filed in a timely fashion and the Supreme Court reversed the dismissals by the circuit courts.

Board-Created Committee Subject to Open Meetings Law

In Krueger v. Appleton Area School District Board of Education, 2017 WI 70, the Wisconsin Supreme Court addressed the issue of whether the Appleton Area School District's Communications Arts 1 Materials Review Committee ("CAMRC") was a governmental body subject to Wisconsin's open meetings law. CAMRC was charged by the School Board with assessing textbooks to include in the school curriculum. CAMRC held a meeting that did not comply with Wisconsin's open meetings law. A parent sued for violation of the open meetings law. A unanimous Wisconsin Supreme Court held that the CAMRC violated the open meetings law.

According to the Court, where a governmental entity adopts a rule authorizing the formation of committees and conferring on them the power to take collective action, such committees are "created by rule" under Wis. Stat. §19.82(1) and the open meetings law applies to them. Here, the Board's Rule 361 provided that the review of educational materials should be done according to the Board approved Assessment, Curriculum, & Instruction Handbook (the "Handbook"). The Handbook, in turn, authorized the formation of committees with a defined membership and the power to review educational materials and make formal recommendations for Board approval. Because CAMRC was formed as one of these committees, pursuant to authority delegated to it by the Board by means of Rule 361 and the Handbook, it was "created by rule" and therefore was a "governmental body" under Wis. Stat. §19.82(1).

Wisconsin Court of Appeals Opinions

Local Zoning Preempted by State Landfill Siting Law

In Scenic Pitt LLC v. Village of Richfield, Scenic Pit LLC sought to open a clean fill facility in the Village of Richfield. The Village maintains that a clean fill facility may not be opened and operated at the site Scenic wishes to use because it is not zoned for such activities, and because Scenic must, as a prerequisite, comply with local construction storm water and erosion permitting requirements as well. Scenic argued that the Wisconsin Department of Natural Resources (DNR) has pursuant to Wis. Stat. § 289.43(8) of the state landfill siting law and Wis. Admin. Code § NR 500.08 state statute and the administrative rules promulgated thereunder exempted clean fill facilities from the local approvals identified by the Village, namely, zoning and certain construction stormwater and erosion permitting requirements.

In a decision by the Wisconsin Court of Appeals, the Court agreed that local zoning and other local approvals were preempted by state law. The Court of Appeals decision relies on an earlier Wisconsin Supreme Court decision, *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 547 N.W.2d 770 (1996), that held that state law regarding clean fill facilities preempted municipal regulation of the facilities.

The decision is recommended for publication.

U.S. Court of Appeals for the 7th Circuit Opinions

[No planning-related cases to report.]