

FALL 2017 NEWSLETTER

LAND USE, ZONING, and REGULATORY TAKINGS

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UNITED STATES SUPREME COURT

Murr v. Wisconsin, 137 S.Ct. 1933 (June 23, 2017)

In a regulatory taking, the determination of the proper parcel depends on the circumstances.

Petitioners owned two adjacent lots (Lots E and F) along the St. Croix River in the town of Troy, Wisconsin. At the time, state and local regulations prevented the use or sale of adjacent lots under common ownership as separate building sites unless they had at least one acre of land suitable for development. Both of Petitioners' lots had less than one acre suitable for development. Petitioners were interested in selling Lot E and sought variances from the St. Croix County Board of Adjustment. The Board denied the request, and the state court affirmed finding that the local ordinance effectively merged the lots so Petitioners could only sell or build on the single combined lot.

Petitioners filed suit against the State alleging that the regulations constituted a regulatory taking that deprived them of all, or practically all, of the use of Lot E. The court granted summary judgment to the State finding that the Petitioners had other options to enjoy and use their property and the Petitioners had not been deprived of all economic value of their property, because the decrease in market value of the unified lots was less than ten percent. The Wisconsin Court of Appeals affirmed, holding that the takings analysis properly focused on Lots E and F together and that, using that framework, the merger regulation did not effect a taking. Petitioners filed petition with the U.S. Supreme Court.

The issue to be determined was do you consider Petitioners' two lots as a single unit in assessing the effect of a challenged governmental action or view each lot separately. The Supreme Court has not set forth specific guidance on how to identify the relevant parcel; however, it has declined to artificially limit the parcel to the portion of the property targeted by the challenged regulation, and has cautioned against viewing property rights under the Takings Clause as co-extensive with those under state law. Courts must consider a number of factors in determining the proper denominator of the takings inquiry. Courts should give substantial weight to the property's treatment, in particular how it is bounded or divided, under state and local law. Courts must look to the property's physical characteristics. Courts should assess the property's value under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. A reasonable restriction that predates a landowner's acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property.

Petitioners urged the Court to adopt a presumption that lot lines control, but lot lines are creatures of state law, which can be over-ridden by the state in a reasonable exercise of its power to regulate land.

First, the Court found that the treatment of the property under state and local law indicates Petitioners' property should be treated as one when considering the effects of the restriction. As the Wisconsin court held, the state and local regulations merged Lots E and F. The decision to adopt a merger provision at issue here was for a specific and legitimate purpose, consistent with the widespread understanding that lot lines are not dominant or controlling in every case. Petitioners' land was subject to this regulatory burden, moreover, only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted. As a result, the valid merger of the lots under state law informs the reasonable expectation they will be treated as a single property.

Second, the Court found that the physical characteristics of the property support its treatment as a unified parcel. The lots are contiguous and their rough terrain and narrow shape make it reasonable to expect their range of potential use might be limited. The land's location along the river is also significant. Petitioners could have anticipated public regulations might affect their enjoyment of their property as the river was a regulated area under federal, state and local law long before Petitioners possessed the property.

Third, the Court found that the prospective value that Lot E brings to Lot F supports considering the two as one parcel for purposes of determining if there is a regulatory taking. Lot E brings prospective value to Lot F and the restriction on using the individual lots is mitigated by the benefit of using the property as an integrated whole, allowing increased privacy and recreational space plus an optimal location for any improvements.

The U.S. Supreme Court affirmed the judgment of the Wisconsin Court of Appeals.

UNITED STATES COURT OF APPEALS

***Hackbelt 27 Partners, L.P. v. City of Coppell*, 661 F. App'x. 843 (5th Cir. 2016)**

Hackbelt owned undeveloped land zoned for agricultural use. The City adopted a Comprehensive Master Plan which provided a basis for considering and evaluating land use decisions and planning for future development and redevelopment projects. Under the Master Plan the City's strategy "focused on creating new mixed-use neighborhoods and community activity centers." The Master Plan designated Hackbelt's property as a "mixed-use community center" but did not change the property's existed zoning for agriculture.

Hackbelt entered into a contract to sell a portion of its property to developers for a mixed-use project. Hackbelt filed an application to change the zoning from agricultural to a "Planned Development District for mixed-use." The development plan included a hotel, retail, office, and residential. The City's Planning and Zoning Commission denied the zoning request. Hackbelt

appealed to the City Council. The City Council sent the request back to the Planning and Zoning Commission with comments. The City Council was concerned the development looked like three separate projects rather than an integrated mixed-use development. Hackbelt filed an amended application which was denied by the Planning and Zoning Commission and the City Council. As a result of the denial of its application, Hackbelt had to terminate the contract with the developers, resulting in termination fees of \$235,000. Hackbelt filed suit in state court alleging the denial of its application violated federal rights and constituted a regulatory taking under the state constitution. The City remanded the case to federal court and filed summary judgment which was granted by the district court on all claims. Hackbelt appealed.

The Fifth Circuit found that the Supreme Court of Texas has utilized two standards when determining whether a regulatory taking has occurred. First, the application of a general zoning law to a particular property constitutes a regulatory taking if the ordinance does not substantially advance legitimate state interests. Second, a regulatory taking occurs when the property regulation unreasonably interferes with the landowner's rights to use and enjoy their property. The Court found the "substantially advances" standards no longer applicable due to recent supreme court rulings but regardless "found that Hackbelt's claim would fail under such analysis." In deciding whether governmental decision substantially advances legitimate state interest, Texas courts have looked to whether the government's legitimate interests were furthered by its action. Hackbelt failed to raise a dispute of material fact regarding whether the City's zoning decisions substantially advance a legitimate state interest under the *Mayhew* standard. Promoting the general welfare of the community is a legitimate government interest. The City denied Hackbelt's application for many reasons including it was not sufficiently cohesive and was not what the City had in mind for a mixed-use development that would create an attractive entryway to the city. Hackbelt argued that there is a material fact dispute because the City failed to follow its Master Plan. However, Hackbelt conceded that the law does not require the City to approve any zoning change application it receives even if that application meets all the requirements of the Master Plan. Accordingly, Hackbelt has not established a material fact dispute as to whether the City's decision substantially advances a legitimate government interest.

In determining whether an unreasonable interference has occurred, Texas courts follow the U.S. Supreme Court's *Penn Central* inquiry which requires a court to consider all circumstances surrounding the alleged taking. Three key factors are: (1) the economic impact on the claimant; (2) the extent of the interference with the claimant's investment-backed expectations; and (3) the character of the government's action. As for the economic impact, Hackbelt's property is still zoned and may be used for agriculture. Hackbelt has not argued the denial of its application has taken any value from the property for agricultural purposes. Hackbelt argues that its property has suffered an adverse economic impact insofar as it cannot utilize the property as designated under the Master Plan. However, the classification as a mixed-use community center was nothing more than a potential future use; nothing in the Master Plan guaranteed it would be rezoned accordingly. When analyzed, the economic impact of a regulation, the "loss of anticipated gains or potential future profits" is typically not considered.

The City's decision did not interfere with Hackbelt's investment-backed expectations. Not every investment-backed expectation can form the basis for a regulatory taking claim. Instead, a claimant must establish interference with a "reasonable investment-backed expectation." Knowledge of existing zoning is to be considered in determining whether the regulation interferes with investment-backed expectations. Hackbelt claims that the City's denial of its application has caused it to lose its development contracts, resulting in substantial financial loss. However, Hackbelt had no reasonable expectation to build a mixed-use development on property which had been zoned for agricultural use only.

Hackbelt made no attempt to explain how the "character" of the City's action could weigh in favor of finding a regulatory taking. The City did not acquire Hackbelt's property or impose any regulation that further restricted Hackbelt's existing use. Rather, the City merely denied Hackbelt's request to rezone his property. Hackbelt remains free to submit another application, sell the property, or put it to use under its current zoning. Hackbelt has not established a material fact dispute regarding whether the City's denial of its zoning request unreasonably interfered with its right to use and enjoy its property.

The Fifth Circuit affirmed the district court's granting of summary judgment.

TEXAS COURT OF APPEALS

***City of Floresville v. Starnes Investment Group*, 502 S.W.3d 859 (Tex. App. – San Antonio 2016)**

In December 2011, Starnes was interested in purchasing some property and contacted the City and was told the property was inside the City limits. In March 2012, Starnes purchased the property and filed a zoning application. In June 2012, the City Attorney contacted Starnes and stated that the property was not within City limits and the City's zoning requirements were not applicable but he still needed to get approval from the County. Starnes received approval from the County. In April 2013, the City Attorney contacted Starnes and informed him his property was within the City limits and the City's zoning approval was now required. In September 2013, the City approved Starnes' zoning application and the property was connected to City water and sewer services.

Starnes filed suit asserting a takings/inverse condemnation claim under the Texas Constitution. Starnes argued that the delay in approving its zoning application and delay in providing water and sewer deprived it of its reasonable investment-backed expectations – all economically beneficial or productive use of its property. The City filed special exceptions and plea to the jurisdiction. At the hearing, the court orally granted special exceptions and allowed Starnes to replead. Starnes filed an amended petition. The court held a subsequent hearing on January 5, 2016, and entered an order granting the special exceptions and denying the plea. The City appealed arguing that Starnes failed to allege a claim for which the City's governmental immunity has been waived and, thus, the court lacks jurisdiction.

The Court of Appeals held that a valid inverse condemnation claim does establish a waiver of immunity under the Takings Clause. However, if plaintiff fails to allege a valid takings claim, the government entity retains its immunity from suit. Whether the particular facts are enough to constitute a taking is a question of law. In a takings case, the requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or notice that the harm is substantially certain to result. It is not enough that the act causing harm be intentional – there must also be knowledge to a substantial certainty that the harm will occur. Takings cannot rest on the mere negligence of the government.

The Court found that there was no dispute that the information intentionally provided by the City's Attorney in March, 2012, was incorrect. However, Starnes alleged no facts that the information from the City Attorney was the result of anything more than either a mistake or negligence. Starnes alleged no facts that the City knew to a substantial certainty that harm would occur as a result of delay in its mapping project or the incorrect information it provided while the mapping project was ongoing.

The Court found that Starnes presented no facts that there was a public benefit as a result of the City's actions and thus, Starnes has failed to show an intentional taking.

The Court of Appeals reversed the trial court's denial of the City's plea to the jurisdiction on the taking/inverse condemnation claim.