

# KA NU HOU

## FROM THE CHAIR

October 2017

Aloha Section Members:

Welcome to this year's Ka Nu Hou, the newsletter of the Real Property & Financial Services Section of the Hawaii State Bar Association ("RPFSS"). We had an exciting year of Brown Bag Lunch & Learn Presentations by distinguished members of our Section and the local real estate community.

On behalf of the Section, I would like to thank **Michael Hamasu**, **Brandon Bera**, **Alika Cosner**, **Mike Perkins**, and **Julia Matsuura** of Colliers International for their 2017 Colliers Real Estate Forecast in February. I would also like to thank the **Honorable Gary W.B. Chang**, presiding judge of the Land Court of the State of Hawaii, for his comprehensive overview of "Land Court Issues". In April, we were fortunate to have **Natasha Baldauf** (Sullivan Meheula Lee), deliver an informative presentation on "Recent Developments in Native Hawaiian Burial Rights Issues". In May, we were fortunate to have **Mario Siu-Li**, Chief of the Subdivision Branch in the Site Development Division of the Department of Planning and Permitting, City and County of Honolulu speak about "Lot Determinations and Applicable Situations". We had a very interesting presentation in June by **Paul Alston** and **Nickolas Kacprowski** from Alston Hunt Floyd & Ing, on "Preparing for Contract Disputes: Litigators' Tips". In July, **Andrea Ushijima** and **Rick Kiefer** (Cades Schutte), and **Kimi Ide-Foster** (Chun Kerr LLP), presented the 2017 Legislative Update. In August, the Section had a terrific presentation by **Keith Hunter**, CEO of Dispute Prevention & Resolution, Inc., on "Pause to Consider the ADR Clause: Drafting Tips and Recent Developments". In September, **Lorrin Hirano** (Title Guaranty of Hawaii, Inc.) spoke on "Hawaii Title Insurance Issues Involving Series LLCs and Federal FinCEN Requirements".

If you are interested in presenting a Brown Bag presentation on a topic of interest to the Section, please contact me at [RPFSS@HSBA.org](mailto:RPFSS@HSBA.org) with your suggestions.

Most recently, we welcomed **Kenneth A. Adams**, the nationally and internationally recognized speaker and author of *A Manual of Style for Contract Drafting* (4th Ed. 2017) to present his "Drafting Clearer Contracts" seminar at the Hawaii State Bar Association's Annual Bar Convention on October 18, 2017. Thank you to all who attended!

Our featured author in this issue is **Nainoa J. Watson**, a 2016 graduate of the University of Hawai'i William S. Richardson School of Law. Mr. Watson was the 2016 recipient of the RPFSS Award that is presented annually to a student(s) of the William S. Richardson School of Law who have shown excellence in writing on issues concerning real property. Nainoa's award-winning paper is entitled, "The Relevant Parcel Question of Regulatory Takings". He graciously authored an Afterward to his original article following the long-awaited United States Supreme Court decision in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

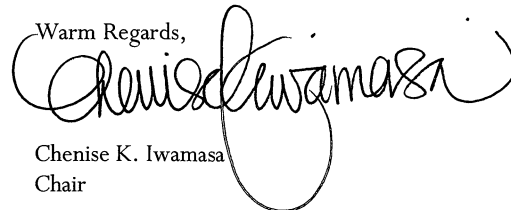
### Upcoming Events:

**November 17, 2017**, 12:00 p.m. to 1:00 p.m., Brown Bag Lunch & Learn entitled "2017 Litigation Update" with **Gregory W. Kugle** and **Mark M. Murakami** (Damon Key Leong Kupchak Hastert), to be held in the HSBA Conference Room, 1100 Alakea Street, Suite 1000. A big MAHALO to Greg and Mark for volunteering to put on this Brown Bag year after year!

**December 1, 2017**, 12:00 p.m. to 2:00 p.m., The RPFSS Annual Meeting will be held at The Plaza Club, 900 Fort Street Mall, Suite 2000. Mark your calendars!

Thank you to our 2017 Officers and Board of Directors who so generously volunteer their time and energy to implement the Section's initiatives to assist Hawaii attorneys practicing in the areas of real property and financial services to: develop and encourage the highest standards of conduct and competence; to sponsor, encourage, and promote scholarship; and to promote good fellowship among Section members. We hope you will attend our Annual Meeting in December to connect with our fellow Section members.

Warm Regards,



Chenise K. Iwamasa  
Chair

## The Relevant Parcel Question of Regulatory Takings

By Nainoa J. Watson

April 24, 2016

### I. INTRODUCTION: *MURR v. WISCONSIN*

The property involved in *Murr v. Wisconsin* sits on the shoreline of Lake St. Croix, a lake on the border of Minnesota and Wisconsin fed by the St. Croix River. A large cove located on the Wisconsin shoreline of the lake contains the St. Croix Cove Subdivision. This subdivision consists of over forty waterfront parcels, including the two contiguous parcels involved in this dispute, Lot E and Lot F.

The Murrs' father originally purchased Lots E and F in the early 1960s in two separate transactions, the first for Lot F in 1960 and the second for Lot E in 1963. He built a 950 square-foot cabin on Lot F that the family continues to use as a three-season vacation home. Lot E was purchased as an investment property and has remained vacant and undeveloped. On the advice of his accountant, the Murrs' father placed title to Lot F in his business entity while placing title to Lot E in his and his wife's names. Both waterfront parcels are approximately one hundred feet wide and over one acre in size each.

In 1975, St. Croix County enacted the Lower St. Croix Riverway Ordinance in response to the Wisconsin Legislature's push for regulations encouraging the management and protection of areas surrounding the St. Croix River. The ordinance requires a minimum "net project area" of at least one acre for each individual lot.<sup>1</sup> Despite being approximately 1.25 acres in overall size, after deducting for slope preservation zones, floodplains, road rights-of-way, and wetlands Lot E yields a net project area of just half an acre, well below the required minimum size. Lot F also falls below the minimum required net project area. As a result, Lots E and F are classified as substandard lots under the 1975 ordinance.

The Murrs' father transferred his business entity's interest in Lot F to his adult children in 1994, and in 1995 he transferred his and his wife's interest in Lot E to them as well. By placing the two contiguous parcels in common ownership, the Murrs' father unwittingly triggered the land use regulation at the center of this dispute. The regulation in relevant part reads, "Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area."<sup>2</sup> Since Lot E does not satisfy this net project area requirement, as a result of the land transfer it can no longer be developed or sold unless combined with Lot F.

Joseph Murr, Michael Murr, Donna Murr, and Peggy Heaver (the Murrs) are the plaintiffs in this case. In 2004, they began looking into selling Lot E, planning to use the proceeds to upgrade and flood proof the cabin located on Lot F. After the St. Croix County Board of Adjustment denied their variance requests, they appealed to the courts and commenced this suit.

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<sup>1</sup> St. Croix County Code of Ordinances, § 17.36 G.1.b.

<sup>2</sup> St. Croix County Code of Ordinances, § 17.36 I.4.a.2.

The Murrs argue that the government ordinance constitutes a regulatory taking of Lot E requiring just compensation. They base their claim on the Fifth and Fourteenth Amendments to the United States Constitution, which provide respectively “nor shall private property be taken for public use, without just compensation”<sup>3</sup> and “nor shall any state deprive any person of life, liberty or property, without due process of law.”<sup>4</sup> The Murrs argue that Lots E and F are two legally distinct lots and should not be considered one parcel for the purposes of a takings analysis. According to the Murrs, Lot E alone comprises the entire relevant parcel and as a result of the 1975 ordinance, is rendered virtually useless. Moreover, they contend that the Supreme Court needs to clarify how to define the relevant parcel by using the facts of this case to provide guidance for the lower courts.

The State of Wisconsin and St. Croix County (Wisconsin), defendants in this case, argue that the relevant parcel includes both Lot E and Lot F. When measured together, the 1975 ordinance does not deprive the Murrs of all, or substantially all, of the beneficial use of their combined property and therefore does not amount to a compensable taking. Wisconsin also argues that the Supreme Court has already addressed the question of what to include in the relevant parcel and that further guidance by the Court is unnecessary. Lower courts should continue to use a flexible, ad hoc approach when defining the relevant parcel.

Whether the Supreme Court considers Lot E and Lot F a single or separate parcels in its takings analysis will play a significant role in the outcome of this case. If, as the Murrs contend, the Court treats the lots as two separate parcels, the Court will probably find that a regulatory taking of Lot E has occurred. If, on the other hand, the Court agrees with Wisconsin that the two lots should be treated as one parcel, the Court will probably find that no regulatory taking has occurred. In illustrating the importance of the relevant parcel concept, *Murr v. Wisconsin* presents the question: in a regulatory takings case, does the “parcel as a whole” concept establish a rule that two commonly owned, contiguous parcels must be combined for the purposes of a takings analysis?

This paper begins by providing the history and progression of United States Supreme Court cases involving regulatory takings, explaining the importance of the relevant parcel concept and exposing questions the Supreme Court has yet to answer. The next section examines how state and lower federal courts have approached determining the relevant parcel given the ambiguities left by the Supreme Court, uncovering common factors used by courts across the country. The final section contemplates the potential repercussions of a ruling in favor of the Murrs or a ruling in favor of Wisconsin, concluding that however the United States Supreme Court decides, it will need to strike a balance between the interests of both landowners and the government while simultaneously providing sufficient clarity for lower courts to base future decisions.

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<sup>3</sup> U.S. CONST. AMEND. V.

<sup>4</sup> U.S. CONST. AMEND. XVI.

## II. THE HISTORY OF REGULATORY TAKINGS AND IMPORTANCE OF THE RELEVANT PARCEL

The United States Supreme Court first recognized a regulation could result in a constitutional taking in *Pennsylvania Coal Co. v. Mahon*.<sup>5</sup> In the most famous passage of his opinion, Justice Holmes explained “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>6</sup> The contested regulation, the Kohler Act, prohibited the mining of coal deposits below another landowner’s property if it would cause the subsidence of the surface property.<sup>7</sup> At the time, Pennsylvania law allowed for surface and subsurface interests in property to be separately bought and sold.<sup>8</sup> After determining that the Act went “too far,” the court declared it a regulatory taking, entitling the coal company to just compensation.<sup>9</sup>

Over fifty years later, *Penn Cent. Transp. Co. v. New York City* gave the Court an opportunity to further explore its criteria for when a regulation “goes too far.”<sup>10</sup> When the owner of Grand Central Station was denied a permit to build a fifty-story office building on top of Grand Central, the station owner alleged a regulatory taking of the airspace above the terminal. Justice Brennan explained that in balancing the interests of the landowner and the government, the Court mainly considers: (1) the character of the government’s action; and (2) the economic impact of the regulation, particularly the extent to which the regulation has interfered with the landowner’s distinct investment backed expectations.<sup>11</sup> Addressing the issue of conceptual severance, the Court stated:

Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the *parcel as a whole*—here, the city tax block designated as the ‘landmark site’.<sup>12</sup> (emphasis added)

The Court in *Penn Central* refused to separate the air rights from the station owner’s other interest in the property and as a result found that the regulation did not constitute a compensable taking.

While *Penn Central* introduced criteria for a takings analysis, the Court did not specify the economic reduction necessary to find a taking under the new test. *Lucas* introduced the doctrine of categorical takings in which compensation is required when a regulation denies “all economically beneficial or productive use of land.”<sup>13</sup> (emphasis added) However, in *Palazzolo* the Court emphasized that even “[w]here a regulation

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<sup>5</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

<sup>6</sup> *Id.* at 415.

<sup>7</sup> *Id.* at 412-13.

<sup>8</sup> *Id.* at 412.

<sup>9</sup> *Id.* at 414.

<sup>10</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>11</sup> *Id.* at 124.

<sup>12</sup> *Id.* at 130-31.

<sup>13</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred.”<sup>14</sup> Despite this clarification, many courts still tend to deny compensation where there has been less than a total taking.<sup>15</sup>

For this reason, determining the relevant parcel becomes highly outcome determinative in the regulatory takings context. As Justice Stevens explained in *Keystone*:

Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property “whose value is to furnish the denominator of the fraction.”<sup>16</sup>

In order for the landowner to receive compensation, the value of his property must be substantially, if not entirely, reduced. As a result, landowners prefer to define the original property, the denominator, as narrowly as possible to increase the diminution in value of the land. The government, on the other hand, prefers to define the denominator as broadly as possible so that a court will find the diminution in property value insufficient for a compensable taking. Essentially, whether a landowner is deemed to have lost sufficient economic value of his property depends on the relevant parcel of land that is used as the basis for comparison.<sup>17</sup>

Despite the importance of the relevant parcel, the Supreme Court has yet to articulate a method for defining it. Justice Scalia addressed this omission in *Lucas* footnote 7:

Regrettably, the rhetorical force of our “deprivation of all economically feasible use” rule is greater than its precision, since the rule does not make clear the “property interest” against which the loss of value is to be measured . . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our “deprivation” fraction has produced inconsistent pronouncements by the Court . . . . In any event, we avoid this difficulty in the present case . . . .<sup>18</sup>

While only commenting within the context of categorical takings, Scalia’s statement applies equally to partial takings. Unfortunately, the Court’s subsequent guidance after *Lucas* has been ambiguous at best, expressing discomfort with the “parcel as a whole” concept<sup>19</sup> while also reaffirming its imprecise application.<sup>20</sup>

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<sup>14</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

<sup>15</sup> STEVEN J. EAGLE, *REGULATORY TAKINGS* 833 (3RD ED. 2005).

<sup>16</sup> *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987), quoting FRANK I. MICHELMAN, *Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1192 (1967).

<sup>17</sup> JOHN E. FEE, *The Takings Clause As a Comparative Right*, 76 S. CAL. L. REV. 1003 (2003).

<sup>18</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, n.7 (1992).

<sup>19</sup> *See, Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001).

<sup>20</sup> *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 327 (2002).

Resolving lingering questions of how to define the relevant parcel has large implications for regulatory taking claims. As Justice Holmes explained, “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”<sup>21</sup> However, “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>22</sup> In the interests of justice and fairness, the Court must strike a balance between the concerns of the landowner and the interests of the government.

### III. HOW STATE AND FEDERAL COURTS HAVE DEFINED THE RELEVANT PARCEL

Given the ambiguities left by the Supreme Court, over time state and federal courts have developed their own unique approaches for defining the relevant parcel. Despite these unique approaches and wide array of fact patterns, by examining the twelve cases covered in this section some similarities and common factors will begin to emerge. Most of the courts advocate for a flexible approach and many also take into account the landowner’s economic expectations and treatment of the property. However, some of the courts have developed conflicting approaches that the Supreme Court will ultimately need to resolve. The next two subsections respectively address the different state and federal approaches used to define the relevant parcel. The final subsection analyzes some of the similarities and differences between these varied approaches.

#### A. State Courts

This subsection examines the approaches used to define the relevant parcel in six state supreme court cases involving commonly owned, contiguous properties. Each case presents a unique take on defining the relevant parcel, but most of these courts consider the landowner’s investment backed expectations and treatment of the property as important factors when making their decisions.<sup>23</sup> Despite this common thread, it is clear from surveying these six cases that ambiguities in defining the relevant parcel exist and that different courts could reach opposite conclusions when ruling on the same facts.

In *City of Coeur d’Alene v. Simpson*, the Supreme Court of Idaho found that the relevant parcel included only the landowner’s shoreward property and not a contiguous parcel inland of the affected property.<sup>24</sup> Jack and Virginia Simpson purchased two parcels of property in 1994, physically separated by a road running parallel to Lake Coeur d’Alene. Both parcels shared a single street address and from 1928 to 2001 had always been conveyed together.

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<sup>21</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>22</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>23</sup> See *Giovanella v. Conservation Comm’n*, 857 N.E.2d 451, 457-58 (Mass. 2006); *Machipongo Land & Coal Co. v. Dep’t of Env’tl. Prot.*, 799 A.2d 751, 768-69 (Pa. 2002); *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1009 (Ohio 2002); *K & K Constr. v. Department of Natural Resources*, 575 N.W.2d 531, 581-82 (Mich. 1998); *Department of Transp., Div. of Admin. v. Jirik*, 498 So.2d 1253, 1255 (Fla. 1986).

<sup>24</sup> *City of Coeur D’Alene v. Simpson*, 136 P.3d 310, 320 (Idaho 2006).

In 1997 the Simpsons installed a chain link fence on the shoreward parcel to prevent people from accessing the lake through their property. The City issued a stop work order, citing a city ordinance that prohibited construction within forty feet of the shoreline. After the Simpsons refused to comply with the ordinance, the City sought a permanent injunction requiring the Simpsons to remove the fence. The Simpsons countered with a regulatory takings claim, arguing that the ordinance deprived them of all economically viable use of their property. In 2001, during this litigation, the Simpsons formed Beach Brothers, Inc., transferred the shoreward property to the newly formed corporation, and named their two adult sons as its sole shareholders. The district court held that no taking had occurred because when considering both parcels together they retained their value.

In remanding *Simpson*, the Idaho Supreme Court held that the relevant parcel should only include the shoreward parcel. The court explained that “in defining the proper denominator parcel, the task is to ‘identify the parcel as realistically and fairly as possible’ in light of the regulatory scheme and factual circumstances.”<sup>25</sup> The court mainly focused on the separation of ownership between the two parcels after the Simpsons transferred the shoreward parcel to Beach Brothers, Inc.

The record indicated that the Simpsons made the transfer for estate planning purposes and to avoid potential personal liability claims. The court found this separation of ownership sufficient to confine the relevant parcel to the shoreward property owned by Beach Brothers, Inc. However, the court cautioned “a rule that separate ownership is always conclusive against the government would be powerless to prevent landowners from merely dividing up ownership of their property so as to definitively influence the denominator analysis.”<sup>26</sup> Had the court found the Simpsons transferred the land to influence litigation, it would not have ruled in their favor.

In *Giovanella v. Conservation Comm’n of Ashland*, the Supreme Court of Massachusetts found that the relevant parcel included the landowner’s two contiguous lots and not just the lot affected by the regulation.<sup>27</sup> John Giovanella purchased a piece of property and three months later discovered that the previous owner had subdivided it into two equal lots. Lot 2 already had a house built on it, but Lot 1 remained vacant. Nine months after Giovanella purchased the property, the town adopted a wetlands protection bylaw that prohibited construction within twenty-five feet of any wetland area. Lot 1 had a small patch of wetland located on the corner of the property. A few months later, Giovanella decided to build a house on Lot 1, but the Conservation Commission of Ashland (Commission) refused to allow the development to move forward based on the new bylaw. As a result, Giovanella commenced a takings claim against the Commission. More than a year after the Commission had rejected his application, Giovanella sold Lot 2, but retained Lot 1 in hopes of someday being able to build on it.

In denying Giovanella’s takings claim, the Massachusetts Supreme Court focused primarily on the contiguity of the two lots. The court explained, “the extent of contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant

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<sup>25</sup> *Id.* at 319.

<sup>26</sup> *Id.* at 320.

<sup>27</sup> *Giovanella v. Conservation Comm’n*, 857 N.E.2d 451, 460 (Mass. 2006).

parcel. Common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property.”<sup>28</sup>

However, the court made clear that it was not creating a bright line rule.<sup>29</sup> “The presumption in favor of contiguity may be overcome to either increase or decrease the size of the parcel by the application of additional factors.”<sup>30</sup> The most significant factor the court considered was an owner’s treatment of property as a distinct economic unit. Other factors included:

Whether the property is divided by a road; whether property was acquired at the same time; whether the purchase and financing of parcels were linked; the timing of development; whether the land is put to the same use or different uses; whether the owner intended to or actually did use the property as one economic unit; and the treatment of property under State law.<sup>31</sup>

In applying its relevant parcel test, the court found that Giovanella failed to present sufficient evidence to overcome the court’s presumption in favor of contiguity. The court explained that Giovanella did not show that he either planned to, or actually did, treat the two lots as separate economic units.<sup>32</sup> Had Giovanella been able to show separate business plans or financing for the two lots, the court may have ruled in his favor.

In *Machipongo Land and Coal Co. v. Dep’t of Env’tl. Prot.*, the Supreme Court of Pennsylvania found that the lower court’s inclusion of only the landowner’s affected property was overly narrow and remanded the case for further proceedings.<sup>33</sup> Machipongo Land and Coal Co. (Machipongo) owned over one thousand acres of property in Clearfield County, Pennsylvania. In 1992, in compliance with the Federal Surface Mining Control and Reclamation Act and State law, the county declared 373 acres of Machipongo’s land unsuitable for mining. Machipongo subsequently filed a takings claim. The trial court ruled in favor of Machipongo, holding that the relevant parcel included only the 373 acres affected by the regulation.

In remanding the case, the Pennsylvania Supreme Court found the trial court’s relevant parcel too narrow while also finding the government’s suggested relevant parcel’s inclusion of all of Machipongo’s Clearfield County landholdings too broad. The court explained that the lower court needed to “adopt a ‘flexible approach, designed to account for factual nuances.’”<sup>34</sup> In its guidance, the court articulated a number of factors to consider, including:

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<sup>28</sup> *Id.* at 458.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 457-58.

<sup>32</sup> *Giovanella v. Conservation Comm’n*, 857 N.E.2d 451, 460 (Mass. 2006).

<sup>33</sup> *Machipongo Land & Coal Co. v. Dep’t of Env’tl. Prot.*, 799 A.2d 751, 768-69 (Pa. 2002).

<sup>34</sup> *Machipongo Land & Coal Co. v. Dep’t of Env’tl. Prot.*, 799 A.2d 751, 768 (Pa. 2002), quoting *Loveladies Harbor v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).



unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings, the timing of transfers, if any, in light of the developing regulatory environment, the owner's investment backed-expectations, and the landowner's plans for development.<sup>35</sup>

The court noted that none of these factors were inherently more important than any other and that this list was not exclusive.

In *State ex rel. R.T.G., Inc. v. State*, the Supreme Court of Ohio found that the relevant parcel included only the landowner's property affected by the regulation.<sup>36</sup> The Ohio Reclamation Board of Review declared over eight hundred acres of land unsuitable for mining, including four hundred acres of land owned by R.T.G., Inc. (RTG), a coal mining company. RTG owned a total of approximately five hundred acres of land in the area. As a result, RTG filed a takings claim against the state.

In finding that the relevant parcel included only the four hundred acres affected by the regulation, the court focused primarily on RTG's investment backed expectations. The court explained, "although contiguous tracts of property are typically considered as a single relevant parcel for purposes of a takings analysis, factual nuances may dictate a more flexible approach."<sup>37</sup> RTG had spent a significant amount of time and money preparing the land for mining and due to economies of scale, the court found that mining just the one hundred acres outside of the regulated area was economically impracticable. The court held that "because there is no evidence that the coal outside the regulated area can be economically mined independent of the reserves in the regulated area, we hold that the relevant parcel . . . is limited . . . to RTG's coal that is located within the [regulated] area."<sup>38</sup>

In *K&K Constr. v. Department of Natural Resources*, the Supreme Court of Michigan found that the relevant parcel included three out of four contiguous lots owned by the landowner and remanded the case, instructing the lower court to determine the potential inclusion of the fourth lot.<sup>39</sup> J.F.K. Company (JFK) owned eighty-two acres of property that had been subdivided into four contiguous lots. Lot 1 consisted of approximately fifty-five acres zoned for commercial use, twenty-seven of which were wetlands. Lots 2, 3, and 4 were zoned for multiple family residential housing. Lot 3 was already developed, but Lots 2 and 4 remained vacant.

JFK submitted a plan to the Department of Natural Resources (DNR) for the development of Lots 1, 2, and 4. Pursuant to this plan, JFK applied for a permit to fill part of the wetlands on Lot 1. The DNR denied the permit request, finding that approximately twenty-eight acres of the property were protected wetlands under the Wetland Protection Act. In response, JFK filed a takings claim against DNR.

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<sup>35</sup> *Machipongo Land & Coal Co. v. Dep't of Env'tl. Prot.*, 799 A.2d 751, 768-69 (Pa. 2002).

<sup>36</sup> *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1009 (Ohio 2002).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *K & K Constr. v. Department of Natural Resources*, 575 N.W.2d 531, 584-85 (Mich. 1998).

In finding that the relevant parcel included Lots 1, 2, and 4, and possibly Lot 3, the court focused on the contiguity and common ownership of the lots as well as JFK's proposed comprehensive development plan. The court made clear that JFK's "proposed use of the property is highly relevant to establishing the denominator parcel."<sup>40</sup> The court explained "Where 'a property owner treats a series of properties as one income-producing unit, the value lost to the claimant is not simply the loss of the segregated parcel affected by the Government action,' rather it is the loss as it relates to the value of the entire unit."<sup>41</sup> Since JFK's development plan included Lots 1, 2, and 4, the court decided that at the very least these lots should comprise the relevant parcel.

In remanding the issue of whether Lot 3 should be included, the court explained "the failure to include a parcel of land in a development plan should not, by itself, exclude that parcel from consideration as part of the denominator. To so conclude would encourage piecemeal development."<sup>42</sup> The court instructed the trial court to determine whether Lot 3 was "sufficiently connected to the other parcels."<sup>43</sup>

In *Department of Transp., Div. of Admin. v. Jirik*, the Supreme Court of Florida found that the relevant parcel included only the parcel affected by the regulation and not all three of the landowner's contiguous lots.<sup>44</sup> Clara Jirik owned five contiguous canal-front lots in Plantation Key, Florida. She sold two of the lots, but retained ownership of the three remaining undeveloped lots. Some time later, the Florida Department of Transportation (DOT) built a bridge supported by a retaining wall that completely blocked access from the road to Lot 1 and partially blocked access to Lot 2 as well. After the DOT built the bridge, the only way to access Lot 1 was to cut through Lot 2. As a result, Jirik filed a takings claim against the DOT for the substantial diminution in value of Lot 1 resulting from the newly constructed bridge.

In finding that the relevant parcel included only Lot 1 and not all three contiguous lots, the court explained that "the factors to be considered in making such a determination are (1) physical contiguity, (2) unity of ownership, and (3) unity of use."<sup>45</sup> The court further explained that "the respective importance of each factor depends upon the fact situation in individual cases. The factor most often controlling, however, in determining whether land is a single tract is unity of use."<sup>46</sup>

The court focused primarily on the third prong of its test because it was undisputed that Jirik was the sole owner of the three contiguous lots. "Given the complexity and formalities of modern-day city planning, we believe that a presumption of separateness as to vacant platted urban lots is reasonable and would facilitate the determination of the separateness issue in the absence of contrary evidence."<sup>47</sup> In its analysis, the court noted that the property was subdivided, that Jirik had sold two of the

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<sup>40</sup> *Id.* at 581-82.

<sup>41</sup> *K & K Constr. v. Department of Natural Resources*, 575 N.W.2d 531, 582 (Mich. 1998), quoting *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 73 (1997).

<sup>42</sup> *K & K Constr. v. Department of Natural Resources*, 575 N.W.2d 531, 584 (Mich. 1998).

<sup>43</sup> *Id.*

<sup>44</sup> *Department of Transp., Div. of Admin. v. Jirik*, 498 So.2d 1253, 1257 (Fla. 1986).

<sup>45</sup> *Id.* at 1255.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1257.

parcels, and that each remaining parcel: (1) had independent access to the road prior to the bridge construction, (2) did not depend on the others for reasonable use, and (3) was individually large enough to accommodate a home or small business.<sup>48</sup> Based on the facts of the case, the court held that the DOT failed to present sufficient evidence to overcome its presumption of separateness.

#### B. Federal Courts

This subsection examines the approaches used to define the relevant parcel in six federal court cases involving commonly owned, contiguous properties. Again, each case presents a unique take on defining the relevant parcel, but the advancement of a “flexible approach” creates a common theme among these six cases.<sup>49</sup> In applying this “flexible approach,” however, it is clear once again that different courts could easily reach opposite conclusions about the same facts.

In *Lost Tree Village Corp. v. United States* the Federal Court of Appeals held in favor of the landowner, reasoning that the relevant parcel should include only the land affected by the regulation.<sup>50</sup> Lost Tree Village Corporation (Lost Tree) entered an option agreement to purchase approximately 2,750 acres of property on Florida’s coastline. Lost Tree purchased nearly all of the property covered by the option agreement over a period of about five years, from 1969 to 1974. Over the next thirty years, Lost Tree developed approximately 1,300 acres of its landholdings into an upscale, gated residential community.

In 2002, Lost Tree decided to develop a five-acre plat of land, Plat 57, after learning that the company would obtain “mitigation credits” as a result of improvements a neighboring landowner had agreed to make as part of a development project. Lost Tree filed a permit application to fill the wetlands comprising the majority of Plat 57, but in 2004 the Army Corps of Engineers denied the company’s request based on the availability of less environmentally damaging alternatives. As a result, Lost Tree filed a takings claim against the government.

The Court of Federal Claims denied Lost Tree’s takings claim, including contiguous plats surrounding Plat 57 as part of the court’s relevant parcel. The Federal Court of Appeals reversed, deciding that Plat 57 alone comprised the relevant parcel. By narrowing the relevant parcel, the court found that a compensable regulatory taking of Plat 57 had occurred. In its reasoning, the court explained that it “has taken a ‘flexible approach, designed to account for factual nuances,’ in determining the relevant parcel where the landowner holds (or has previously held) other property in the vicinity.”<sup>51</sup> The

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<sup>48</sup> *Id.*

<sup>49</sup> See *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1294 (Fed. Cir. 2013); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000); *District Intown Props. Ltd. Pshp. v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999); *Loveladies Harbor v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

<sup>50</sup> *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1294 (Fed. Cir. 2013).

<sup>51</sup> *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013), quoting *Loveladies Harbor v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

court emphasized that the “critical issue is the economic expectations of the claimant with regard to the property.”<sup>52</sup>

The court found that the company did not treat Plat 57 as part of the same economic unit as the surrounding land because it had never included the plat in any of its previous development plans. While Lost Tree developed the surrounding properties, Plat 57 essentially sat idle until 2002 when the company submitted its permit application to fill the wetlands. This was enough for the court to differentiate Plat 57 from the company’s surrounding contiguous landholdings in defining the relevant parcel.

In *Palm Beach Isles Associates v. United States*, the Federal Circuit Court of Appeals ruled that the relevant parcel included only land that was affected by the regulation and did not include the landowner’s former contiguous landholdings sold prior to the enactment of the regulation.<sup>53</sup> Palm Beach Isle Associates (PBIA) purchased 311.7 acres of land in 1956. A road split the land, with 261 acres to the east of the road and 50.7 acres to the west. In 1968 PBIA sold the 261-acre parcel to a developer for \$1 million, but retained the 50.7-acre parcel, evidently planning to develop it at some point in the future.

While PBIA had applied and been approved to fill 49.3 acres of submerged land on the 50.7-acre parcel in 1957, the permit had since expired and the company’s subsequent request in the mid-1990s was denied by the Army Corps of Engineers. The Corps’ denial letter explained the rejection was primarily due to environmental concerns predicated on the Clean Water Act, passed by Congress in 1972. PBIA subsequently filed suit, alleging that the denial of the permits prevented any economically viable use of the 50.7-acre parcel and therefore constituted a regulatory taking.

The Court of Federal Claims agreed with the government and included all 311.7 acres of land in its relevant parcel. The court reasoned that since PBIA had purchased all 311.7 acres in one transaction and received adequate compensation when it sold the 261-acre parcel for \$1 million, the court was justified in denying PBIA’s takings claim. Upon review, the Federal Circuit Court of Appeals reversed, finding that the relevant parcel included only the 50.7-acre property.

The court stated that its “precedent displays a flexible approach, designed to account for factual nuances.”<sup>54</sup> In rejecting the government’s argument, the court explained “[t]he timing of property acquisition and development, compared with the enactment and implementation of the governmental regimen that led to the regulatory imposition, is a factor, but only one factor, to be considered in determining the proper denominator analysis.”<sup>55</sup> The court primarily focused on PBIA’s treatment of the two parcels as separate properties. The company never had a plan to develop the parcels as a single unit and sold off the 261-acre parcel prior to and independent of the 1972 Clean Water Act. As a result, the court found it inappropriate to include any property other than the 50.7-acre property in its relevant parcel.

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<sup>52</sup> *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013), quoting *Norman v. United States*, 429 F.3d 1081, 1091 (Fed. Cir. 2005).

<sup>53</sup> *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000).

<sup>54</sup> *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000), quoting *Loveladies Harbor v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

<sup>55</sup> *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000).

In *Loveladies Harbor, Inc. v. United States* the Federal Circuit Court of Appeals held that the relevant parcel included only the land that the landowner included in its permit application and not its surrounding landholdings.<sup>56</sup> Loveladies Harbor, Inc. (Loveladies) purchased a 250-acre tract in 1958. Loveladies developed 199 acres of the land before Congress passed the Clean Water Act in 1972. In the late 1970s the company attempted to develop its remaining 51 acres, which required obtaining a permit to fill wetlands located on the property.

After a lengthy process of negotiations, Loveladies agreed to and secured a fill permit for 12.5 of the 51 acres from the New Jersey Department of Environmental Protection (NJDEP) in exchange for agreeing to preserve the remaining wetland area on the property. However, despite the agreement with NJDEP, the Army Corps of Engineers denied Loveladies' permit request to develop the 12.5 acres, prompting the company to file a takings claim against the government. The government argued that the relevant parcel should include the original 250-acre parcel owned by Loveladies when the permit was denied in 1982. Loveladies, on the other hand, argued for the court to adopt a bright line rule that the relevant parcel should only consist of the area included in a landowner's permit application.

The court held that the relevant parcel included only the 12.5 acres sought in the permit application. The court explained that its "precedent displays a flexible approach, designed to account for factual nuances."<sup>57</sup> The court then went on to say that "these factual nuances include consideration of the timing of transfers in light of the developing regulatory environment" and that "land developed or sold before the regulatory environment existed should not be included in the denominator."<sup>58</sup> In distinguishing Loveladies' 12.5-acre parcel from its remaining 51 acres, the court reasoned that since Loveladies effectively promised the remaining 38.5 acres to New Jersey in exchange for the NJDEP permit, it would be unfair to include it in the court's takings analysis. As a result, the court held that the 12.5-acre relevant parcel was deprived of all of its economically feasible use and that Loveladies was entitled to just compensation.

In *District Intown Props. Ltd. Pshp. v. District of Columbia*, the United States Court of Appeals held that the relevant parcel included the landowner's entire property and refused to distinguish between the property's nine contiguous subdivided lots.<sup>59</sup> District Intown Limited Properties Partnership (District Intown) purchased a lot across from the National Zoo in Washington D.C in 1961. District Intown subdivided the property into nine contiguous lots in 1988 and about a year later applied for permits to construct townhouses on eight of the nine subdivided lots. Five days before District Intown received zoning approval, the Historic Preservation Review Board declared all nine lots historic landmarks because of their close proximity to the National Zoo. As a result of their new landmark status, the permit applications for the development were rejected, prompting District Intown to file a takings claim against the District of Columbia.

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<sup>56</sup> *Loveladies Harbor v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *District Intown Props. Ltd. Pshp. v. District of Columbia*, 198 F.3d 874, 882 (D.C. Cir. 1999).

In finding that all nine contiguous lots comprised the relevant parcel, the court considered several factors, including “the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot.”<sup>60</sup> The court also included *Loveladies*’ “flexible approach” test, taking into account “whether there remained substantial economically viable uses for plaintiff’s property after the regulatory imposition” and “the timing of transfers in light of the developing regulatory environment.”<sup>61</sup>

However, in its analysis the court erroneously concluded “*Loveladies Harbor* argues against treating the property burdened by the regulation separately from contiguous property.”<sup>62</sup> The court focused on the *Loveladies* court’s inclusion of one previously filled acre in its 12.5-acre relevant parcel as justification for treating all nine contiguous lots as one parcel. However, the *District Intown* court failed to acknowledge that in *Loveladies* the government had argued that the relevant parcel included the original 250-acre parcel remaining when *Loveladies*’ fill permit was denied. Rather than treating all of the landowner’s contiguous property as the relevant parcel, the court in *Loveladies* actually focused primarily on the property burdened by the regulation when it defined its relevant parcel. As a result of this oversight, the *District Intown* court misapplied the *Loveladies* holding in its analysis.

The *District Intown* court also misapplied *Penn Central* in its analysis. The court quoted *Penn Central* where Justice Brennan wrote, “taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”<sup>63</sup> In applying this to the nine subdivided lots, the court failed to take into account that Justice Brennan was referring to separating air rights from other property rights within a single city block, not to land already separated into legally distinct parcels. As the United States Supreme Court made clear in *Lucas*, *Penn Central* does not explain how to determine the relevant parcel in cases involving contiguous landholdings. Therefore, the *District Intown* court misapplied *Penn Central* in its analysis as well.

In *American Sav. & Loan Assoc. v. County of Marin*, the United States Court of Appeals found that the relevant parcel could not be defined until the landowner submitted a development plan explaining how it planned to treat each parcel.<sup>64</sup> American Savings & Loan owned two contiguous lots, the twenty-acre “Point” and the fifty-acre “Spit.” After American Savings & Loan acquired the property, due to environmental concerns the county passed an ordinance limiting the number of “multiple residential units” to one-per-five-acres on the Spit and four-per-acre on the Point. As a result, American Savings & Loan filed a takings claim against the county.

In finding that American Savings & Loan needed to submit a development plan before the relevant parcel could be determined, the United States Court of Appeals explained that while the facts tended to show that the two lots should be considered separately, “because [American Savings & Loan] did not submit a development plan, it is

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<sup>60</sup> *Id.* at 880.

<sup>61</sup> *Id.* at 881.

<sup>62</sup> *Id.*

<sup>63</sup> *District Intown Props. Ltd. Pshp. v. District of Columbia*, 198 F.3d 874, 881 (D.C. Cir. 1999), quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978).

<sup>64</sup> *American Sav. & Loan Asso. v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981).

unclear whether the Spit and Point would be treated separately at the development stage. This fact could be crucial.”<sup>65</sup> The court decided that “[American Savings & Loan] must initially bear the burden of showing that the Spit and Point have been, or would be, treated separately when its development plans are submitted and considered.”<sup>66</sup> If the company planned to treat each lot separately for development, the parcels would be analyzed individually.

In *Forest Properties, Inc. v. United States*, the United States Court of Appeals found that the relevant parcel included both of the landowner’s contiguous properties, not just the one affected by the regulation.<sup>67</sup> Forest Properties, Inc. (Forest) owned sixty-two acres of land that it planned to develop into a residential subdivision. The development plan required filling in roughly nine acres of lake-bottom that Forest had received in a separate transaction from its other fifty-three acres of land. The Army Corps of Engineers denied Forest’s permit request to fill the nine acres of lake-bottom, prompting Forest to file a takings claim against the government. Despite the denial of its permit application, however, Forest was still able to develop the remaining fifty-three acres of land after revising its development plan.

In finding that the relevant parcel included all sixty-two acres of land and not just the nine acres of lake-bottom, the court explained “where the developer treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel.”<sup>68</sup> After examining the facts, the court concluded that at the time Forest acquired both properties, it was understood that they would be developed as a single project. That Forest had acquired its interest in the two properties at separate times, in separate transactions, and that the two properties were each capable of separate development did not affect the court’s decision. The court explained it “looked to the economic reality of the arrangements, which transcended these legalistic bright lines.”<sup>69</sup>

### C. Comparing State and Federal Courts

The twelve cases covered in this section each present a unique approach to defining the relevant parcel, but by examining them together some common factors begin to emerge. Most of the courts expressed a preference for maintaining a flexible approach when defining the relevant parcel,<sup>70</sup> with some enumerating nonexclusive lists of possible factors for consideration.<sup>71</sup> Many of the courts also found the landowner’s investment backed expectations and proposed plans for development especially important in their decisions.<sup>72</sup> However, despite these similarities, the United States Supreme Court still

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1366.

<sup>70</sup> *E.g.*, *Loveladies Harbor v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

<sup>71</sup> *See, e.g.*, *Giovanella v. Conservation Comm’n*, 857 N.E.2d 451, 457-58 (Mass. 2006).

<sup>72</sup> *See* *Giovanella v. Conservation Comm’n*, 857 N.E.2d 451, 457-58 (Mass. 2006); *Machipongo Land & Coal Co. v. Dep’t of Env’tl. Prot.*, 799 A.2d 751, 768-69 (Pa. 2002); *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1009 (Ohio 2002); *K & K Constr. v. Department of Natural Resources*, 575 N.W.2d 531, 581-82 (Mich. 1998); *Department of Transp., Div. of Admin. v. Jirik*, 498 So.2d 1253, 1255 (Fla. 1986).

needs to clarify how to define the relevant parcel in order to resolve some conflicting approaches created by the lower courts.

Federal courts frequently considered the landowner's economic treatment of its property as an important factor for consideration.<sup>73</sup> In *Lost Tree*, the court held that the relevant parcel only included Plat 57 in large part because Lost Tree had never included it in any previous development plan.<sup>74</sup> Similarly, in *Palm Beach* the court reasoned that since PBIA had treated its two parcels as separate properties, the relevant parcel only included the 50.7-acre property PBIA still owned.<sup>75</sup> In line with this reasoning but ruling against the landowner, the court in *Forest Properties, Inc.* found that the relevant parcel included the entirety of the landowner's property because the company planned to develop it all as a single project.<sup>76</sup> Finally, the court in *American Sav. & Loan* chose not to define the relevant parcel until the landowner submitted a development plan explaining how it planned to treat each parcel.<sup>77</sup>

Similar to the federal courts, many state courts also considered the landowner's economic treatment of the property as an important factor.<sup>78</sup> The court in *K&K Constr.* held that the relevant parcel included three out of four contiguous lots primarily because of their inclusion in the landowner's proposed development plan.<sup>79</sup> Likewise, the court in *Giovanella* ruled against the landowner because he failed to present sufficient evidence showing that he treated his two lots as separate economic units.<sup>80</sup> From examining these cases it is clear that the landowner's economic treatment of its property plays an important role when defining the relevant parcel.

Despite these similarities, it is also evident that some of the courts could have easily reached opposite conclusions on the same facts. The court in *State ex rel. R.T.G., Inc.* appeared to heavily favor the landowner, demonstrating a willingness to separate property interests within a single, albeit relatively large, parcel of land.<sup>81</sup> Conversely, the *District Intown* court showed a preference for the government, refusing to treat nine legally distinct subdivided lots as separate relevant parcels.<sup>82</sup> Had either of these courts been confronted with the facts of the other, it seems likely that both outcomes would have been reversed.

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<sup>73</sup> See *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000); *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999); *American Sav. & Loan Asso. v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981).

<sup>74</sup> See *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013).

<sup>75</sup> *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000).

<sup>76</sup> *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999).

<sup>77</sup> *American Sav. & Loan Asso. v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981).

<sup>78</sup> See *Giovanella v. Conservation Comm'n*, 857 N.E.2d 451, 460 (Mass. 2006); *K & K Constr. v. Department of Natural Resources*, 575 N.W.2d 531, 584 (Mich. 1998).

<sup>79</sup> *K & K Constr. v. Department of Natural Resources*, 575 N.W.2d 531, 584 (Mich. 1998).

<sup>80</sup> *Giovanella v. Conservation Comm'n*, 857 N.E.2d 451, 460 (Mass. 2006).

<sup>81</sup> *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1009 (Ohio 2002).

<sup>82</sup> *District Intown Props. Ltd. Pshp. v. District of Columbia*, 198 F.3d 874, 882 (D.C. Cir. 1999).



Another difference between the courts concerned which party bore the burden of proof. The *American Sav. & Loan* court placed the burden on the landowner to show that it planned to treat its contiguous properties as separate economic units.<sup>83</sup> Similarly, in ruling against the landowner, the *Giovanella* court created a presumption in favor of contiguity, presuming that landowners generally purchase contiguous property to treat them as a single unit.<sup>84</sup> Going in the opposite direction, the *Jirik* court ruled in favor of the landowner, creating a presumption of separateness, placing the burden on the government to prove that contiguous properties should be considered together in a takings analysis.<sup>85</sup> The Supreme Court needs to use the facts of *Murr v. Wisconsin* to resolve these types of conflicting approaches.

#### IV. IMPLICATIONS FOR *MURR V. WISCONSIN*

##### A. Procedural History of *Murr v. Wisconsin*

Both the Wisconsin trial court and the Wisconsin Court of Appeals included Lot E and Lot F in the relevant parcel. The inclusion of Lot F made the diminution in value insufficient for the courts to find a compensable regulatory taking. In its analysis, the Wisconsin Court of Appeals explained that the determining factor in its decision was the contiguity of the two lots.

The court relied on *Zealy v. City of Waukesha* in concluding that both lots comprised the relevant parcel. In that case, the Supreme Court of Wisconsin found that the relevant parcel included all 10.4 acres of the landowner's contiguous property.<sup>86</sup> The property, owned by Alfred Zealy, had originally been classified for residential use, but the city changed the zoning on 28.6 acres of land to create a conservation district, including 8.2 acres of Zealy's property. As a result, Zealy filed a takings claim against the city. In finding that the relevant parcel included all 10.4 acres of Zealy's property rather than just the affected 8.2 acres, the Wisconsin Supreme Court explained "the United States Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel; rather, the Court has consistently held that a landowner's property in such a case should be considered as a whole."<sup>87</sup> The court relied heavily on *Penn Central* in its analysis.

While the court reached the proper decision in *Zealy*, its application to *Murr v. Wisconsin* is questionable. In *Zealy*, the landowner attempted to segment a single lot when defining the relevant parcel, not differentiate between two legally distinct lots. The Court of Appeals ignored this discrepancy, stating, "There is no dispute that the Murrs own contiguous property. Regardless of how that property is subdivided, contiguity is the key fact under *Zealy*."<sup>88</sup> The court also disregarded the "unity of use" concept argued for by the Murrs in finding the regulation did not amount to a compensable taking.

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<sup>83</sup> *American Sav. & Loan Asso. v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981).

<sup>84</sup> *Giovanella v. Conservation Comm'n*, 857 N.E.2d 451, 458 (Mass. 2006).

<sup>85</sup> *Department of Transp., Div. of Admin. v. Jirik*, 498 So.2d 1253, 1257 (Fla. 1986).

<sup>86</sup> *Zealy v. City of Waukesha*, 548 N.W.2d 528, 533 (Wis. 1996).

<sup>87</sup> *Id.* at 532.

<sup>88</sup> *Murr v. State*, 2014 Wisc. App. LEXIS 1041, 12-13 (Wis. Ct. App. 2014).

### B. Ruling in Favor of the Murrs

Once again, the Murrs argue that Lots E and F are two legally distinct lots and should not be considered one parcel for the purposes of a takings analysis. According to the Murrs, Lot E alone comprises the entire relevant parcel and as a result of the 1975 ordinance, is rendered virtually useless. A ruling in favor of the Murrs would benefit landowners and could provide that common ownership and contiguity alone are not sufficient for defining the relevant parcel.

Taking into account lower court decisions, the Supreme Court could first adopt a “flexible approach, designed to account for factual nuances.”<sup>89</sup> Given the inherently fact specific nature of regulatory taking cases, a flexible approach would best serve the equitable interests of both the landowner and the government. However, an approach that allows for too much flexibility would fail to remedy the ambiguous nature of defining the relevant parcel and create no more certainty in outcome than already exists. Clearly, more comprehensive guidance is necessary.

In its analysis, the Supreme Court could focus on the Murrs’ investment backed expectations and treatment of Lots E and F. The Murrs’ father purchased the two lots at separate times, in separate transactions, and for different reasons. Lot F served as a vacation property and was developed soon after purchase while Lot E functioned as an investment property, essentially sitting idle and vacant for decades. Neither the Murrs’ father nor the Murrs made any attempt to develop or sell Lot E prior to this dispute. The Court could compare this to the *Lost Tree* case, in which that court ruled that Plat 57 alone comprised the relevant parcel because of its absence from previous development plans.<sup>90</sup> Many of the other cases discussed also support this approach.<sup>91</sup> The Murrs’ investment backed expectations and treatment of the two lots as separate economic units seem to favor excluding Lot F from the relevant parcel.

Going further, the Court could adopt the “presumption of separateness” approach proposed by the Florida Supreme Court in *Jirik*.<sup>92</sup> This approach would presume that Lots E and F are separate parcels, placing the burden of proof on Wisconsin to demonstrate that the two lots should together comprise the relevant parcel. While this approach clearly favors landowners, it would provide lower courts with some applicable guidance and create more certainty in the outcome for these types of cases. However, the danger with too heavily favoring landowners is that it constricts the government’s ability to make regulatory changes meant to benefit the general public. The Court has already expressed discomfort with this type of result.<sup>93</sup>

### C. Ruling in Favor of Wisconsin

Wisconsin argues that the relevant parcel includes both Lot E and Lot F and when measured together, the 1975 ordinance does not deprive the Murrs of all, or substantially all, of the beneficial use of their combined property. A ruling in favor of Wisconsin would benefit the government and could provide that common ownership and

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<sup>89</sup> *Loveladies Harbor v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

<sup>90</sup> *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1294 (Fed. Cir. 2013).

<sup>91</sup> *See, e.g., Giovanella v. Conservation Comm’n*, 857 N.E.2d 451, 457-58 (Mass. 2006).

<sup>92</sup> *Department of Transp., Div. of Admin. v. Jirik*, 498 So.2d 1253, 1257 (Fla. 1986).

<sup>93</sup> *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

contiguity are sufficient for defining the relevant parcel. This represents the most simplistic approach and would remove any uncertainty about what to include in a takings analysis. However, the rigidity of this approach would probably lead to inequitable results given the fact specific nature of regulatory takings cases. For this reason, the Court should advance the flexible approach advocated for by most of the lower courts.<sup>94</sup>

In ruling for Wisconsin, the Supreme Court could adopt the “presumption of contiguity” proposed by the court in *Giovanella*.<sup>95</sup> This approach would presume that Lots E and F are one unified parcel, placing the burden of proof on the Murrs to demonstrate that they treated the two lots as distinct economic units. The court in *American Sav. & Loan* placed this burden on the landowner as well.<sup>96</sup>

In failing to overcome this presumption, the Court could focus on the Murrs’ parents never attempting to separately develop or sell Lot E, the transferring of the property well after the regulatory imposition, and the retained value of the two lots when considered together. While this approach clearly favors the government, it would provide lower courts with some applicable guidance and create more certainty in the outcome for these types of cases. However, the danger with too heavily favoring government is that it may force some individuals to bear burdens that should be borne by the public as a whole.<sup>97</sup> The Court must find a careful balance.

Wisconsin could also attempt to distinguish the facts of this case from the relevant parcel disputes decided by the lower courts. While this case involves two small contiguous parcels, the majority of lower court cases involved vast landholdings spanning hundreds of acres.<sup>98</sup> Many of these cases also involved the denial of permit applications to fill wetlands,<sup>99</sup> a different type of regulatory imposition than an ordinance setting a minimum net project area. By distinguishing the facts of this case from previous lower court decisions, Wisconsin could convince the Supreme Court that even if the Court defines the relevant parcel in a way that generally favors landowners, *Murr v. Wisconsin* presents a situation where the government should nevertheless prevail.

Lastly, one considerable advantage for Wisconsin is the procedural history of this case. With the passing of Justice Scalia, the possibility now exists for the Court to split

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<sup>94</sup> See, e.g., *Loveladies Harbor v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

<sup>95</sup> *Giovanella v. Conservation Comm’n*, 857 N.E.2d 451, 458 (Mass. 2006).

<sup>96</sup> *American Sav. & Loan Asso. v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981).

<sup>97</sup> See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>98</sup> See *Machipongo Land & Coal Co. v. Dep’t of Env’tl. Prot.*, 799 A.2d 751, 768 (Pa. 2002); *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1009 (Ohio 2002); *K & K Constr. v. Department of Natural Resources*, 575 N.W.2d 531, 581-82 (Mich. 1998); *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000); *Loveladies Harbor v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994); *American Sav. & Loan Asso. v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981).

<sup>99</sup> See *Giovanella v. Conservation Comm’n*, 857 N.E.2d 451, 458 (Mass. 2006); *K & K Constr. v. Department of Natural Resources*, 575 N.W.2d 531, 581-82 (Mich. 1998); *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000); *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999); *Loveladies Harbor v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

with a four-to-four decision, effectively upholding the Wisconsin Court of Appeals' ruling in favor of the government. While convenient for Wisconsin, this outcome may do little to resolve the question of what courts should include in the relevant parcel. In the event of a deadlock, the Supreme Court may not publish a clarifying opinion, leaving lower courts with little choice but to continue floundering over the issue until another opportunity to resolve this question presents itself to the Court.

## V. CONCLUSION

By granting the Murrs' Petition for Writ of Certiorari, the Supreme Court acknowledges that *Murr v. Wisconsin* provides an opportunity to clarify how to define the relevant parcel when analyzing commonly owned, contiguous properties. Whether a landowner is found to have lost sufficient economic value of his property depends on the relevant parcel of land that is used as the basis for comparison.<sup>100</sup> State and lower federal courts have attempted to formulate criteria to address this issue, but have failed to reach a consensus on exactly what factors to include and how to apply their different approaches.

Despite the discord among lower courts, some common factors have emerged that the Supreme Court can incorporate into its decision. Most of the lower courts advocate for a flexible approach<sup>101</sup> and many also consider the landowner's investment backed expectations and treatment of the property as important factors when making their decisions.<sup>102</sup> The Court may also chose between a presumption in favor of contiguity<sup>103</sup> or a presumption of separateness,<sup>104</sup> but will have to carefully balance the interests of the involved parties if it chooses to adopt one of these presumptions.

However the Court rules, it will need to strike a balance between the interests of landowners and the interests of government while providing sufficient guidance for lower courts to base future decisions. The underlying policies of the Takings Clause dictate that the government cannot force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>105</sup> However, "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."<sup>106</sup> Almost one hundred years after *Pennsylvania Coal Co.* introduced the concept of regulatory takings, *Murr v. Wisconsin* provides an opportunity for the Court to finally settle the most significant unresolved question involving the relevant parcel. Hopefully the Court's decision will be worth the wait.

## VI. AFTERWARD

In its long awaited decision, the US Supreme Court held five to three for Wisconsin, finding the two lots together comprised the relevant parcel and that, as a

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<sup>100</sup> JOHN E. FEE, *The Takings Clause As a Comparative Right*, 76 S. CAL. L. REV. 1003 (2003).

<sup>101</sup> *See, e.g.*, *Loveladies Harbor v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

<sup>102</sup> *See, e.g.*, *Giovanella v. Conservation Comm'n*, 857 N.E.2d 451, 457-58 (Mass. 2006).

<sup>103</sup> *Giovanella v. Conservation Comm'n*, 857 N.E.2d 451, 458 (Mass. 2006); *See American Sav. & Loan Asso. v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981).

<sup>104</sup> *Department of Transp., Div. of Admin. v. Jirik*, 498 So.2d 1253, 1257 (Fla. 1986).

<sup>105</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>106</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

result, there was no compensable taking.<sup>107</sup> The Court based its decision on its newly articulated test for determining the relevant parcel, which requires courts to consider (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.<sup>108</sup> In his opinion, Justice Kennedy further explained that

the endeavor should 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. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition.<sup>109</sup>

In applying its new test, the Court found that each of the three factors weighed in favor of Wisconsin's argument of treating the two lots as one unified parcel.<sup>110</sup> The first factor weighed in favor of Wisconsin because, according to the Court, the merger provision served a "specific and legitimate purpose" and because the parcels were subject to the regulatory burden only because of the Murrs' voluntary conduct in bringing the lots under common ownership.<sup>111</sup> Applying the second factor, the Court explained that the lots' narrow shape and contiguity along their longest edge supported treating them as a unified parcel. Further, the land's location along the river also played a significant role because the Murrs could have anticipated regulations given their proximity to the highly protected river. Lastly, the third factor favored Wisconsin because the two lots, when used together, allowed for increased privacy and recreational space. Additionally, their combined financial value compared to their individual values (when considering Lot E as an undevelopable lot) showed their complimentary nature and supported their treatment as a unified parcel. Considering all these factors together, the Court found that Lots E and F should be treated as one parcel for the purposes of its takings analysis.

In his dissent, Justice Roberts explained that while he did not necessarily find the outcome of this case inappropriate, he found the test articulated by the majority problematic.<sup>112</sup> Justice Roberts argued for the relevant parcel to simply be drawn along lines designated by State law, absent exceptional circumstances. In other words, if the lower court determined on remand that Lot E represented a legally distinct lot under general state law principals, it alone should comprise the relevant parcel.

However, upon determining the relevant parcel, Justice Roberts explained the next step in the analysis—i.e. determining whether a taking occurred—could take the landowner's surrounding property into consideration. In this case, the use of Lot E as a valuable addition to Lot F could be relevant to whether the "regulation denies all economically beneficial or productive use" of Lot E under the *Lucas* test.<sup>113</sup> Further, the benefits of the merger ordinance, location of the property near the highly regulated river, and the alleged lack of productive use of Lot E independent of Lot F all speak to "the economic impact of the regulation," interference with "investment-backed expectations,"

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<sup>107</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1948-50 (2017).

<sup>108</sup> *Id.* at 1945.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1948-49.

<sup>111</sup> *Id.* at 1948.

<sup>112</sup> *Id.* at 1950.

<sup>113</sup> *See, Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

and the “character of the governmental action” under the *Penn Central* analysis.<sup>114</sup> In other words, while state law principles would likely confine the relevant parcel to Lot E, the second step of the takings analysis would account for the proximity of Lot F, in addition to all the other relevant factors. Justice Roberts’ approach creates a simple definition for the relevant parcel that lower courts could easily apply while at the same time allowing for them to take real world factual nuances into consideration in the second step of their analysis.

Unfortunately, the majority’s decision does little to remedy the confusion surrounding how to define the relevant parcel. It remains to be seen how courts will apply the three-factor test, creating uncertainty for both the government and landowners alike. This uncertainty will ultimately lead to more litigation surrounding the relevant parcel, as courts attempt to apply the new test to a wide variety of fact patterns. The dissent offers a more succinct approach that would have favored landowners while at the same time allowing for courts to include an array of relevant facts in their analysis. Regrettably, the majority did not endorse this approach. The true repercussions of *Murr v. Wisconsin* will become more evident over time, but for now the battle between landowners and the government over how to define the relevant parcel will continue to rage on, with the fight now focusing on the Supreme Court’s new three-factor test.

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<sup>114</sup> See, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).