

Land Use: How to Deal with Lot Mergers and Takings Claims In Light of *Murr v. Wisconsin*

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

Issued: June 23, 2017

Holding: The Court of Appeals of Wisconsin was correct to analyze the lot owners' property as a single unit in assessing the effect of the challenged governmental action. No taking.

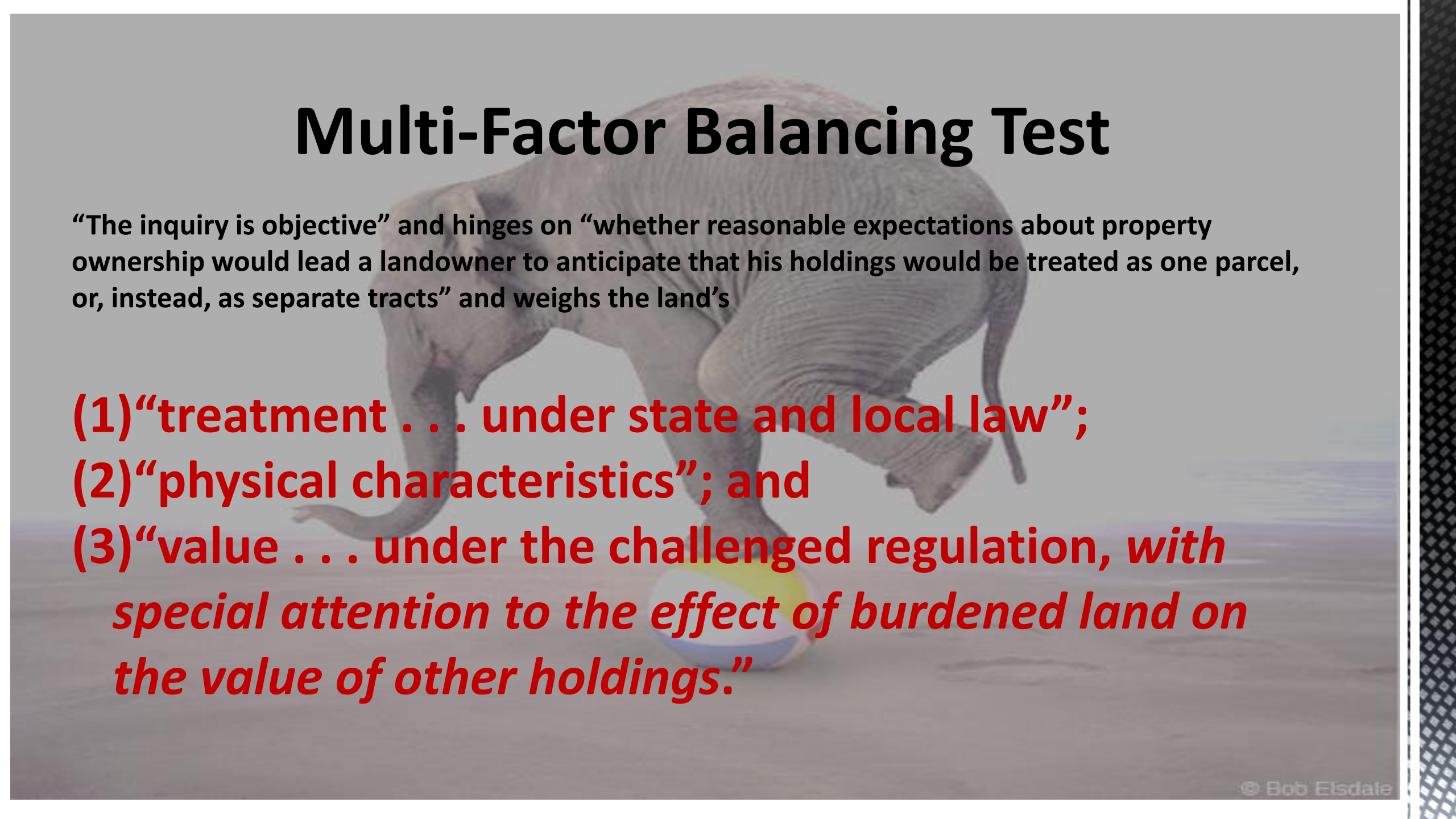


Judgment: 5-3 in an opinion by Justice Kennedy. Chief Justice Roberts filed a dissenting opinion, in which Justices Thomas and Alito joined. Justice Thomas filed a dissenting opinion. Justice Gorsuch took no part in the consideration or decision of the case.

The Tests at Issue

1. **REJECTED** Wisconsin court's rule that contiguous lots under common ownership should always be considered one parcel.
2. **REJECTED** test urged by the petitioners, which would have created a presumption that lot lines, as established by state law, set the boundaries of the "property."
3. **APPROVED** multi-factor balancing test, allowing for flexibility in the analysis essential to regulatory takings cases.

Multi-Factor Balancing Test

A large elephant is shown in profile, balancing on a beach ball on a sandy beach. The elephant's trunk is extended towards the beach ball. The background is a soft-focus view of the ocean and sky.

“The inquiry is objective” and hinges on “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” and weighs the land’s

- (1) “treatment . . . under state and local law”;
- (2) “physical characteristics”; and
- (3) “value . . . under the challenged regulation, *with special attention to the effect of burdened land on the value of other holdings.*”

1. Treatment Under State and Local Law

- “[I]n particular how it is bounded or divided.”
- “The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property. “
- “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. “
- “In a similar manner, a use restriction which is triggered only after, or because of, a change in ownership should also guide a court's assessment of reasonable private expectations.”



1. Treatment Under State and Local Law (Applied)

“First, the treatment of the property under state and local law indicates petitioners' property should be treated as one when considering the effects of the restrictions.”

- “As the Wisconsin courts held, the state and local regulations merged Lots E and F. . . .”
- “The decision to adopt the 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.”



2. Physical Characteristics

- Physical relationship of any distinguishable tracts
- Topography
- Surrounding human and ecological environment
- “In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation.”



Relevant to “reasonable investment-backed expectations” (RIBE) prong of *Penn Central*

2. Physical Characteristics (Applied)

“Second, the physical characteristics of the property support its treatment as a unified parcel. The lots are contiguous along their longest edge.”

- “Their rough terrain and narrow shape make it reasonable to expect their range of potential uses might be limited.”
- “The land's location along the river is also significant. Petitioners could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land.”



3. Value Under the Challenged Regulation



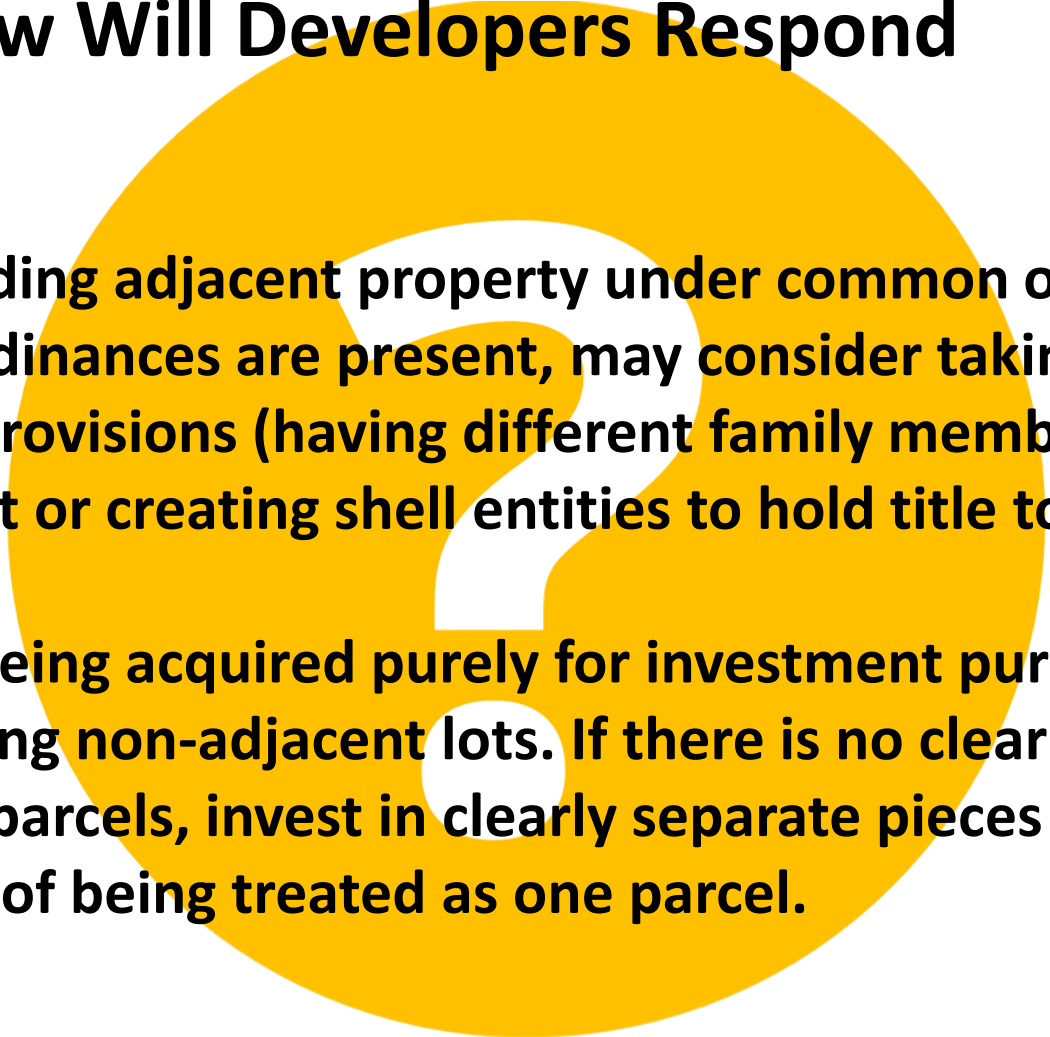
- “Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty. “
- “A law that limits use of a landowner's small lot in one part of the city by reason of the landowner's nonadjacent holdings elsewhere may decrease the market value of the small lot in an unmitigated fashion.”
 - “The absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge.”
- “On the other hand, if the landowner's other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part.”
 - “That, in turn, may counsel in favor of treatment as a single parcel and may reveal the weakness of a regulatory takings challenge to the law.”

3. Value Under the Challenged Regulation (Applied)

“[T]he 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.”

- “Petitioners are prohibited from selling Lots E and F separately or from building separate residential structures on each. Yet this restriction is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements.”
- “The special relationship of the lots is further shown by their combined valuation.. . . [T]he combined lots are valued at \$698,300, which is far greater than the summed value of the separate regulated lots (Lot F with its cabin at \$373,000, according to respondents' appraiser, and Lot E as an undevelopable plot at \$40,000, according to petitioners' appraiser). The value added by the lots' combination shows their complementarity and supports their treatment as one parcel.”

How Will Developers Respond

- 
1. May avoid holding adjacent property under common ownership. Where merger ordinances are present, may consider taking steps to avoid triggering those provisions (having different family members take title to each individual lot or creating shell entities to hold title to individual lots).
 2. If property is being acquired purely for investment purposes, may consider purchasing non-adjacent lots. If there is no clear benefit to owning adjacent parcels, invest in clearly separate pieces of property that are not in danger of being treated as one parcel.



Practice & Planning Tips

1. Take Stock – inventory lots to determine buildout and takings liability.

Parameters:

- a. Contiguous and under common ownership
- b. Environmentally sensitive and uniquely regulated land
 - (1) Protected Riverfront
 - (2) Endangered Species Habitat
 - (3) Coastal Barrier Resources System Unit
 - (4) Historic Area
 - (3) Other regulated areas
- c. Concerned about a particular regulation? Search for acquisitions before effective date—those properties may have a takings claim under RIBE

Practice & Planning Tips



2. Consider Adopting Lot Merger Ordinance

“The merger provision here is likewise a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago. Merger provisions often form part of a regulatory scheme that establishes a minimum lot size in order to preserve open space while still allowing orderly development.”

Components:

- “Combines contiguous substandard lots under common ownership”
- Grandfather Clause, “which preserves adjacent substandard lots that are in separate ownership.”
- Allow for variance in special circumstances

For good discussion of Lot Merger Ordinances, reference the Amicus Brief filed by the National Association of Counties, *et. al.* in *Murr*, available at

http://static1.1.sqspcdn.com/static/f/624306/27111344/1466182049903/Murr_filed.pdf?token=o03jW6PaQsFI4fGzsJf9RxWg7yU%3D



Practice & Planning Tips

3. Think of *Murr* as more than approving lot merger ordinances. Also decided no taking occurred, significantly strengthening defense to RIBE.

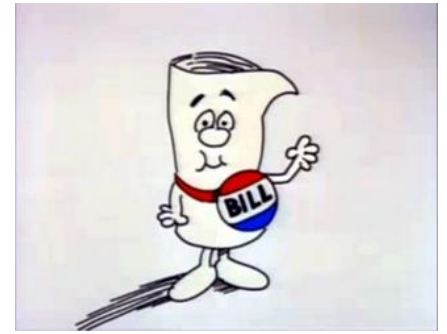
In *Palazzolo*, the Court rejected the so-called “notice rule” (the idea that a property owner is barred from suing for a regulatory taking based on a regulation in place when property was purchased).

- Decision left uncertain issue of whether pre-existing regulation is a factor in evaluating RIBE

Murr settles the issue:

- “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 cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots.”

The Legislative Response



“We spent 10 years in the courts and 4 months in the Wisconsin legislature! Crazy right?”

-Ms. Murr in December 2017 email

- After *Murr*, responsive legislation was introduced in both the Wisconsin State Senate and the Wisconsin State Assembly. Among other things, the legislation sought to prohibit state and local governments from merging a substandard lot with another lot without the consent of the affected property owner.
 - On November 27, 2017, Governor Scott Walker—with Donna Murr by his side—signed the bill into law.
 - As a result, it was expected that the Murr lots can be developed separately.
- Expect additional preemptive legislation. Stay tuned.
- (Several states have statutes specifically authorizing local governments to adopt merger provisions. In some states, merger is a common law doctrine that can apply even in the absence of a local ordinance requiring it. In other states, local governments enact merger provisions pursuant to general legislative grants of zoning authority.)

Post Murr Cases

- Quinn v. Board of County Commissioners for Queen Anne's County, Md., 862 F.3d 433 (4th Cir. 2017)
 - Applied multi-factor test in *Murr*, holding that the 12 lots subject to merger should be viewed as a collective, and that Grandfather/Merger Provision did not effect a taking.
 - RIBE: “[T]he **Grandfather/Merger Provision does not interfere with Quinn’s reasonable investment-backed expectations because his investment in the land was highly speculative**... These types of speculative hopes—dependent on receiving a government service to which the plaintiff has no entitlement—are not the reasonable investment-backed expectations relevant to the *Penn Central* analysis.”
 - **“Finally, the character of the Grandfather/Merger Provision does not suggest a taking. Interference with property is less likely to be considered a taking when ‘it arises from some public program adjusting the benefits and burdens of economic life to promote the common good.’** *Penn Cent.*, 438 U.S. at 124, 98 S.Ct. 2646. Regulations that control development based ‘on density and other traditional zoning concerns’ are the paradigm of this type of public program. *Henry*, 637 F.3d at 277. **The Grandfather/Merger Provision at issue here, like the one in *Murr*, is ‘a reasonable land-use regulation, enacted as part of a coordinated [] state[] and local effort to preserve the . . . surrounding land.’** *Murr*, slip op. at 20, -- U.S. at --, 136 S.Ct. 890. Local governments need to be able to control the density of development to prevent the overburdening of public services, environmental damage, and other harms. In the context of this case, specifically, the Grandfather/Merger Provision is an effort to facilitate the extension of sewer service while mitigating the potential for ensuring overdevelopment.”

Shift focus to reasonableness of regulation?

Questions



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