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Justices' Eminent Domain Ruling Clarifies State Law's Reach

By **Andrew McIntyre**

Law360, Minneapolis (June 23, 2017, 8:06 PM EDT) -- The U.S. Supreme Court's decision Friday affirming a Wisconsin court ruling that said two adjacent properties at the center of an eminent domain dispute can be considered one unit for the purposes of calculating loss provides clarity to dozens of states that have laws pertaining to the issue, attorneys say.

In Murr v. Wisconsin, the high court Friday sided 5-3 in favor of Wisconsin, with Justice Anthony Kennedy writing the majority opinion and Justice Neil Gorsuch not participating.

The case dealt with the question of whether the Murr family had experienced total loss of a piece of land adjacent to their waterfront cabin in Wisconsin, a parcel they would have been able to develop decades ago but thanks to a 1975 law are no longer able to.

Lawyers say the decision upholds dozens of laws other states have passed as states walk a fine line between environmental protection and protection of property rights.

"There's over 30 states that have these merger regulations, and this decision upholds all of those regulations," said Arenz Molter Macy Riffle & Larson SC's Remzy Bitar, counsel for the defendants. "It's a victory for regulators who are trying to balance protecting and safeguarding the environment ... with trying to preserve property values as well.

"It's a difficult job. ... In this case, the court found that the [St. Croix] county struck the right balance. Regulators across the country will be very pleased," Bitar added.

The Murr family had owned both plots of land since the 1960s, a time when both pieces of land could be developed, and built a cabin on one while leaving the other undeveloped.

In the 1990s, the parents transferred the title of both properties to their kids, and as a result of that decision the children later ran up against a 1975 law that said properties with less than 1 net acre of developable land couldn't be developed, although the second plot could have been developed if it hadn't been under the same ownership as the contiguous plot where the cabin sits.

The plot of land in question actually is 1.25 acres but has less than an acre of developable land when wetlands and other protected areas are considered.

"In this instance, a mistake was made by the landowners because they allowed the two individual parcels to come into joint ownership after the regulation took effect. They wanted to say the merger provision doesn't apply to us," said Michael Allan Wolf, a professor at the University of Florida Levin College of Law. "To me it was a no brainer. They themselves were responsible."

He added: "Euclid still lives. Zoning lives for another day."

Of course, one question is what reasonable assumptions the Murrs should have had, and what onus should have been placed on the Murrs to be aware of that 1975 law, given that the family had owned the land since the 1960s.

To that extent, Janet Johnson of Schiff Hardin LLP called the 1975 law a "'gotcha' kind of regulation."

Justices John Roberts, Clarence Thomas and Samuel Alito dissented on Friday, and Roberts in his dissent noted that while it's one thing to look at state and local law, "reasonable expectations" the Murrs would have had for use need also to be taken into consideration.

"The court should have provided the guidance everyone involved in the case sought by establishing a presumption that the legally subdivided boundaries of the parcel of land in question constitute the 'property' but that this presumption can be overcome if it can be established that the property has been utilized with other parcels as a unified whole," Johnson said.

"The type of ordinance adopted by St. Croix County, that required the two now 'substandard' lots to be treated as one is a 'gotcha' kind of regulation that only the most sophisticated property owners would ever think to check before acquiring two adjacent substandard lots without a plan to redevelop them as a single parcel," Johnson added.

Lawyers say buyers of adjacent property can often get around related state laws by registering the properties in different names, and had the Murrs done that they would have been able to develop that second piece of land.

"This case will have far reaching implications for buyers of properties long into the future," said Keith Poliakoff of Arnstein & Lehr LLP. "Based on this decision property owners should be very cognizant when they buy two adjacent parcels."

While state regulators have, with the decision on Friday, gotten some assurance that their efforts to strike that balance between environmental protection and property rights may stand up when taken all the way to the nation's top court, lawyers say there will still be challenges.

And states need to be careful when crafting these types of regulations, according to experts.

"State and local governments have to be vigilant and careful as to the kinds of regulations that they promulgate," Wolf said. "There are zealous private property rights advocates that will pounce on anything that is unusual or new, and take it all the way to the Supreme Court."

Indeed, John Groen, executive vice president and general counsel at Pacific Legal Foundation, which represented the Murrs, said Pacific Legal will continue to look at the ways states are viewing this issue, and will continue to fight on behalf of property owners.

"It's a very unfortunate decision, not just for the Murrs, but for all property owners. But this simply illustrates the importance of continuing the battle. We will dust ourselves off and continue to do everything we can to secure property rights," Groen said.

"I think it is an unfortunate development in the law for regulatory takings, and particularly for defining private property. I think ultimately we just need to go to work to get the definition of private property back on the ground with fundamental principles," Groen added.

And given the high court's unwillingness to side with the Murrs in this case, state regulators now have more assurance that their regulations will stand up in court, lawyers say.

"This is a huge win for regulators, and it's a big loss for property owners, especially small property owners," said Chris Carr of Morrison & Foerster LLP. "What [the court's] done here is only going to make it more difficult for landowners, especially small landowners, to defend their property rights."

The plaintiffs are represented by John Groen of Pacific Legal Foundation.

The defendants are represented by Anthony Russomanno of the Wisconsin Department of Justice and Remzy Bitar, who was at Crivello Carlson SC but is now at Arenz Molter Macy Riffle & Larson SC.

The case is Murr vs. Wisconsin, docket number 15-214, in the Supreme Court of the United States.

--Editing by Pamela Wilkinson and Catherine Sum.
