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Developments in Constitutional Law: Regulatory Takings

Prepared by: Anna Henning, Principal Attorney

State and federal courts have long held that governments may exercise police power over the use of land, for example through local zoning ordinances.[1] However, in rare instances, government regulation may burden property to such a degree as to constitute an unconstitutional "taking," even if the government did not take any actual ownership or possession of the property. Such "regulatory takings" may be challenged under Article I, Section 13 of the Wisconsin Constitution and the "takings clause" of the Fifth Amendment to the U.S. Constitution, which prohibit governments from taking private property for public use without just compensation. This issue brief provides an overview of the tests courts use when analyzing whether such a "regulatory taking" has occurred. It also summarizes a 2017 U.S. Supreme Court decision, *Murr v. Wisconsin*, which addressed a question that had arisen in this area of law.

A Body of Case Law With Multiple Branches

When does government regulation become so burdensome that it constitutes an unconstitutional "taking" of property without just compensation? The U.S. Supreme Court considered that question in a 1922 decision, *Pennsylvania Coal Co. v. Mahon*. In an opinion by Justice Oliver Wendell Holmes, the Court noted that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change." However, the Court concluded that government regulation may be recognized as a taking if it goes "too far" in a particular case.[2] The case law since *Mahon* has developed along several different branches, which Wisconsin court decisions have intertwined, resulting in an arguably "incoherent" body of case law.[3]

Penn Central Balancing Test and the "Substantially All" Categorical Test

In *Penn Central v. New York City*, a 1978 decision, the U.S. Supreme Court developed a multi-factor test to determine whether a given government regulation has gone "too far."[4] Under that test, commonly referred to as the "*Penn Central* balancing test," courts apply multiple factors, such as "the character of the governmental action," "the economic impact of the regulation on the claimant," and "the extent to which the regulation has interfered with distinct investment-backed expectations," to the facts in a given case.

Alternatively, courts have applied a "categorical" test to determine whether government regulation constitutes an unconstitutional taking. This approach, most notably articulated in a 1992 U.S. Supreme Court decision, *Lucas v. South Carolina Costal Council*, asks whether a government's restriction on land use results in a "total" or "*per se*" taking by denying a property owner of all or substantially all economically beneficial or productive use of land.[5] Although the "categorical" nature of this "substantially all" test may suggest that it is more straightforward to apply than the multi-factor *Penn Central* balancing test, the analysis under both tests is fact-specific, and outcomes can be difficult to predict. In other words, with respect to both tests, courts have "eschewed any set formula for determining how far is too far."[6]

Wisconsin courts have characterized the challenges brought under Wis. Const. art. I, s. 13 as being subject to the same standards and analysis as apply to challenges brought under the federal takings clause.[7] However, in recent decades, while federal courts have in some cases applied the *Penn Central* balancing test, Wisconsin courts have tended to focus exclusively on the categorical "substantially all" test. For example, in *Zealy v. City of Waukesha*, the Wisconsin Supreme Court characterized "the rule emerging" for regulatory takings as recognizing an unconstitutional taking if a government regulation

"den[ies a] landowner all or substantially all practical uses of a property…."[8] In some recent cases, litigants have argued that Wisconsin courts should revive *Penn Central* balancing as an alternative approach in Wisconsin cases, but the Wisconsin Supreme Court has not directly addressed that argument.[9]

Separate "Rough Proportionality" Test for Land Exactions

Another line of regulatory takings cases addresses circumstances in which a government requires that a property owner give up some property interest in exchange for permitting the owner to develop the land. The U.S. Supreme Court's seminal cases relating to such "land exactions" are *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*.[10] Prospective developers in those cases were required to grant an easement and dedicate a strip of land, respectively, as conditions for developing property. In *Nollan*, the U.S. Supreme Court held that there must be a "nexus" between the impact that a proposed land use will have and the governmental interest served by a particular exaction. In *Dolan*, the Court further specified that an exaction must also be "roughly proportional" to the nature and impact of the proposed development. In 2013, the U.S. Supreme Court confirmed that *Nollan*'s "rough proportionality test" applies to monetary conditions, such as impact fees.[11]

Murr v. Wisconsin

In *Murr v. Wisconsin*,[12] 582 U.S. __ (2017), the U.S. Supreme Court addressed a question, often referred to as the "denominator question," that had arisen in regulatory takings cases. The "denominator question" asks how courts should determine the scope of a property to which a regulatory takings analysis applies. In prior decisions, both the U.S. Supreme Court and the Wisconsin Supreme Court had held that courts must consider a "parcel as a whole" when determining whether a government regulation constitutes a taking,[13] but it was unclear how that "parcel as a whole" rule should apply in more complicated fact scenarios. The plaintiffs in *Murr* owned two adjacent lots, neither of which had a sufficient area of land zoned for development to be developed independently. Hoping to be able to sell one of the lots and build on the other, the plaintiffs argued that the court should evaluate the effect of the development restriction on one of the lots, without taking into account that the plaintiffs would be able to build on the lots if they were merged.

Once again declining to adopt any "rigid formula" in a regulatory takings case, the Court articulated another multi-factor test to decide the threshold "denominator question." The factors include: (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. As applied to the plaintiffs' property, the Court held that the two lots should be treated as a whole, because state law at the time required the lots to be merged before they could be developed, their physical characteristics (narrow, waterfront lots) made the development restrictions predictable, and the land would have greater value if treated as a whole.

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[1] See e.g., *State v. Harper*, 182 Wis. 148 (1923); *Euclid v. Ambler Realty*, 272 U.S. 365 (1926).
[2] 260 U.S. 393, 413 and 415 (1922). See also *Piper v. Ekern*, 180 Wis. 586 (1923).
[3] See *Eberle v. Dane Cty. Bd. of Adjustment*, 227 Wis. 2d. 609 (Abrahamson, C.J., dissenting).
[4] 438 U.S. 104, 124 (1978).
[5] 505 U.S. 1003 (1992). See also *Agins v. City of Tiburon*, 447 U.S. 255 (1980).
[6] *Lucas*, 505 U.S. at 1015.
[7] See *Eternalist Found. v. Platteville*, 225 Wis. 2d 759, 773 (Ct. App. 1999).
[8] 201 Wis. 2d 365, 374 (1996).
[9] See, e.g., *McKee Family I v. City of Fitchburg*, 2017 WI 34.
[10] 483 U.S. 825 (1987); 512 U.S. 374 (1994). See also *Jordan v. Village of Menomonie Falls*, 28 Wis. 2d 608 (1965) (establishing a similar "reasonable relationship" test under the Wisconsin Constitution before *Nollan* and *Dolan* were decided).
[11] *Koontz v. St. Johns River Water Mgm't. Dist.*, 570 U.S. 2588 (2013).
[12] 582 U.S. __ (2017).
[13] *Penn Central*, 438 U.S. 104 at 130-131; *Zealy v. City of Waukesha*, 201 Wis. 2d at 375-379.