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Message from the Chair

I am so proud to report the success of our Section's Annual Meeting program held on January 28, 2016 at the New York Hilton Midtown. Many thanks to all of the efforts of the program co-chairs, Lisa Cobb and Les Steinman, for creating such a wide-ranging and substantive program. Paul F. Ackermann, of the law firm of Wallace & Wallace, LLP and Corporation Counsel of the City of Poughkeepsie, opened the morning session by providing an insightful analysis and summary of key cases in tax certiorari litigation, focusing upon how profit-making activities impact the tax-exempt status of non-profit entities and how environmental issues affect assessed valuation. Daniel Pozin, partner of the law firm of McCarthy Fingar LLP, offered sage and pragmatic advice regarding the use of *in rem* tax foreclosures as a means of recapturing lost municipal revenues. Adam L. Wekstein of the law firm of Hocherman, Tortorella & Wekstein, LLP, and Jennifer L. Van Tuyl, of the law firm of Cuddy & Feder LLP, concluded the morning's program with a well-received and comprehensive overview of significant developments in land use and municipal law.

The afternoon session opened with an interesting and lively presentation by Sharon N. Berlin and Richard K. Zuckerman, partners of the law firm of Lamb & Barnosky, LLP, covering such topics as electronic surveillance in the workplace and related best practices. Former NYSBA President A. Thomas Levin,

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United States Supreme Court to Review "Parcel as a Whole" Concept

By Daniel M. Lehmann

On January 15, 2016, the Supreme Court of the United States granted certiorari from *Murr v. State of Wisconsin*.[1] As a result, the Court will be considering whether the "parcel as a whole" concept of *Penn Central Transportation Company v. City of New York*[2] establishes a rule in regulatory takings cases that two legally distinct, but commonly owned, contiguous parcels must be combined for takings analysis purposes.

Penn Central

In *Penn Central*, the United States Supreme Court considered "whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a 'taking' requiring the payment of 'just compensation.'"[3]

There, New York City, under its Landmarks Preservation Law, designated Grand Central Terminal, which was owned by plaintiff Penn Central, a landmark and the city tax block Grand Central occupied a landmark site.[4] Penn Central subsequently applied to the Landmarks Preservation Commission for permission to construct a 55-story office building to be cantilevered above the existing façade and to rest on the roof of Grand Central.[5] Penn Central also applied for permission to construct a 53-story office building on a portion of the Grand Central site.[6]

The Commission rejected both applications. Penn Central sued, arguing that the application of the Landmarks Preservation Law had taken its property without just compensation in violation of the Fifth Amendment. The trial court held for Penn Central, the Appellate Division reversed,[7] and the Court of Appeals affirmed.[8] The United States Supreme Court affirmed.

The Court's decision is well known for clarifying the test for how far is "too far"[9] for a regulation's restrictions. As the Court explained in *Penn Central*, the test requires an "ad hoc" factual inquiry considering factors of the economic impact of the regulation, its interference with distinct investment-backed expectations, and the character of the government action.

In considering Penn Central's argument that the Landmarks Law deprived Penn Central of any gainful use of its air rights above Grand Central, the Court stated that to agree would mean that it erred, not only in previously upholding laws restricting the development of air rights, but also in approving those prohibiting both the subjacent and the lateral development of particular parcels.[10]

The Court dismissed Penn Central's argument and reasoned that, amongst other things, the Court must consider the nature and extent of the interference with rights in the parcel as a whole, explaining that

> "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.[11]

No Clear Guidance or Definition on What Is the Parcel as a Whole

In *Keystone Bituminous Coal Association v. DeBenedictis*,[12] Pennsylvania passed an act to prevent coal mine subsidence caused by the extraction of underground coal. The act contained a section that required 50% of the coal beneath applicable structures to be kept in place in order to provide surface support.[13]

The petitioners stated that Pennsylvania law recognized a "support estate" in land, in addition to the "mineral estate" and "surface estate," and argued that the 50% rule of the act constituted a taking of their property (the physical coal and the entire destruction of the property's support estate) without compensation in violation of the Fifth Amendment.

The United States Supreme Court disagreed. It stated,

> 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.[14]

The Court quoted *Penn Central*'s "parcel as a whole" reasoning and also reasoned, "where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking because the aggregate must be viewed in its entirety."[15] Though these reasons did not solve all of the definitional issues that may arise in defining the relevant mass of property, these reasons underpinned the Court's rejection of the petitioners' arguments that the taking of its physical coal constituted a compensable taking. The Court held that, under the investment-backed expectation prong of *Penn Central*, there was "no basis for treating the less than 2% of petitioners' coal as a separate parcel of property."[16]

The Court also rejected the petitioners' support estate argument. The Court stated that

> the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated. Its value is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface. Because petitioners retain the right to mine virtually all of the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking. Petitioners may continue to mine coal profitably even if they may not destroy or damage surface structures at will in the process.[17]

Five years later, in *Lucas v. South Carolina Coastal Council*,[18] the Court again avoided the difficult issue of determining what is the "denominator of the fraction," although the Court observed that "uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court."[19]

The Court again confronted this issue in *Palazzolo v. Rhode Island*,[20] but ultimately did not decide it. In *Palazzolo*, Rhode Island effectively regulated the petitioner Palazzolo's undeveloped beachfront properties as coastal wetlands, which greatly limited development. The petitioner brought an inverse condemnation action, arguing that the wetlands regulations had taken his property without compensation in violation of the Fifth Amendment.[21]

To revive the *Penn Central* economic impact prong of his claim by reframing it, the petitioner argued for the first time that the upland parcel of his property was distinct from the wetlands portions, so he should be permitted to assert a taking limited to the wetlands portions of his property. Addressing this argument, and referring to *Penn Central*, the Court stated,

> This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole,[22] but we have at times expressed discomfort with the logic of this rule,[23] a sentiment echoed by some commentators.[24]

However, the Court did not decide the issue because the petitioner did not make the argument in the state courts and did not present the issue in the petition for *certiorari*. Instead, "The case comes to us on the premise that petitioner's entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails."[25]

The Court last mentioned "the parcel as a whole" in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[26] The Tahoe Regional Planning Agency issued two moratoria that virtually prohibited all development on Lake Tahoe for a period of 32 months. The petitioners claimed that the moratoria constituted a *per se* taking of property without compensation under the Fifth Amendment.[27]

Specifically, the petitioners sought to frame the case under the *per se* taking rule by arguing that the Court could "effectively sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria."[28] The Court rejected the petitioners' argument. The Court began by noting that it must focus on *Penn Central*'s "the parcel as a whole" and on *Andrus v. Allard*'s[29] "full bundle of property rights."[30] The Court then concluded that "Petitioners' 'conceptual severance' argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on 'the parcel as a whole.' We have consistently rejected such an approach to the 'denominator' question."[31] Thus, the Court found that the property could not be disaggregated into temporal segments corresponding to the moratoria and then analyzed to determine whether

the petitioners were deprived of all economically viable use during each period.[32] Justice Thomas, in the footnote in his dissent, noted his puzzlement at the majority's decision to embrace the "parcel as a whole" doctrine as settled.[33]

Murr v. State of Wisconsin

The Murrs' parents purchased Lot F, a parcel of land on the St. Croix River, in 1960. They built a cabin on it. In 1963, the Murrs' parents purchased an adjacent lot, Lot E, which was left undeveloped. The Murrs' parents transferred Lot F to the Murrs in 1994 and Lot E in 1995. This brought the lots under common ownership and resulted in a merger of the two lots under a mid-1970s local ordinance, which prohibited individual development or sale of adjacent lots under common ownership unless an individual lot has at least one acre of net project area. But, if abutting commonly owned lots do not contain one acre, the ordinance provides that the abutting lots together suffice as a single, buildable lot. Combined, Lots E and F contain approximately .98 acres of net project area.

The Murrs sought a variance to separately use or sell their two contiguous lots. The zoning board denied their application, the Wisconsin trial court affirmed, the Wisconsin appellate court affirmed, and the Wisconsin Supreme Court denied the petition for review.

Subsequently, the Murrs filed a complaint arguing that the local ordinance effected a taking without compensation. Specifically, they argued that the ordinance deprived them of practically all of the use of Lot E because it could not be sold or developed as a separate lot. They did not include any claim for the taking of Lot F. The Wisconsin trial court rejected the Murrs' complaint. The Murrs argued to the Wisconsin appellate court that the trial court erred by examining the beneficial uses of Lots E and F in combination and that "there [wa]s a genuine issue of material fact as to whether Lots E and F were used together such that they may be considered as one for purposes of the regulatory takings analysis."

The Wisconsin appellate court, citing the Wisconsin Supreme Court, stated that "the issue of whether contiguous property is analytically divisible for purposes of a regulatory takings claim was settled[.]"[34] "[B]efore considering whether a regulatory taking has occurred, 'a court must first determine what, precisely, is the property at issue[.]'"[35]

The Murrs argued that the Wisconsin Supreme Court case was distinguishable "because that case turned on the owner's ability to use one large parcel, whereas the Murrs assert[ed] they have been wholly deprived of the use of at least one of their two separate parcels."[36]

Quoting *Penn Central*'s "parcel as a whole," the appellate court rejected this argument. "There is no dispute that the Murrs own contiguous property. Regardless of how that property is subdivided, contiguousness is the key fact[.]"[37] It is well-established in the state that "contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein."[38] As there was no dispute that the Murrs' property sufficed as a single, buildable lot under the local ordinance, the appellate court held that the Murrs' were not deprived of all economic use and there was no taking.[39] The Wisconsin Supreme Court denied the petition to review.

Conclusion

The United States Supreme Court has its work cut out for it in determining whether Lots E and F, two separate parcels, created, purchased, and taxed as legally separate lots, purchased for different reasons and never developed together, should be considered as "the parcel as a whole" when anyone else other than the Murrs would be permitted to develop Lot E because of the separate, and not common, ownership exception under the local ordinance.

Endnotes

1. 859 N.W.2d 628, 359 Wis. 2d 675 (2014), *rev. den'd*, 366 Wis. 2d 59, 862 N.W.2d 899, *cert. granted*, 136 S. Ct. 890 (2016).
2. 438 U.S. 104, 130-131 (1978).
3. *Id.* at 107.
4. *Id.* at 104.
5. *Id.* at 116.
6. *Id.* at 117.
7. 50 A.D.2d 265, 377 N.Y.S.2d 20 (1st Dep't 1975).
8. 42 N.Y.2d 324, 397 N.Y.S.2d 914 (1977).
9. *Pennsylvania Coal Company v. Mahon* expanded the protection of the Fifth Amendment Takings Clause, holding that just compensation was also required for a regulatory taking, a restriction on the use of property that went "too far." 260 U.S. 393, 415 (1922).
10. 438 U.S. at 130, citing *Welch v. Swasey*, 214 U.S. 91 (1909), *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), and *Gorieb v. Fox*, 274 U.S. 603 (1927).
11. *Id.* Justice Stevens, in his dissent of *Dolan v. City of Tigard*, called this the nondivisibility principle. 512 U.S. 374, 401 (1994).
12. 480 U.S. 470 (1987).
13. *Id.* at 470.
14. *Id.* at 497 (internal quotation marks and citation omitted).
15. *Id.*, quoting *Andrus v. Allard*, 444 U.S. 51 (1979).
16. *Id.* at 471.
17. *See also Concrete Pipe and Prod. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993) (citations omitted).
18. 505 U.S. 1003 (1992).

19. *Id.* at 1054; *See also id.* at 1016-17, n. 7 (comparing *Pennsylvania Coal Company v. Mahon*, holding law restricting subsurface extraction of coal effected a taking, to *Keystone Bituminous Coal Association v. DeBenedictis*, holding nearly identical law did not effect a taking). *Lucas* created the rule that where a regulation deprives land of all economically beneficial use, it is a *per se* taking requiring just compensation.
20. 533 U.S. 606 (2001).
21. *Id.* at 606.
22. *Id.* at 631, citing *Keystone*, 480 U.S. at 497.
23. *Id.*, citing *Lucas*, 505 U.S. at 1054.
24. *Id.*, citing Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 16-17 (1987); John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994).
25. *Id.* at 609.
26. 535 U.S. 302, 326-27, 331 (2002).
27. *Id.* at 302.
28. *Id.* at 303.
29. 444 U.S. 51 (1979).
30. *Tahoe-Sierra*, 535 U.S. at 326-27.
31. *Id.*
32. *Id.* Instead, the Court's analysis should start by asking whether there was a total taking of the entire parcel, and if not, then use the *Penn Central* framework.
33. *Id.* at 355 (Thomas, J., dissenting).
34. *Murr v. State*, 859 N.W.2d 628, 359 Wis. 2d 675 (2014), citing *Zealy v. City of Waukesha*, 201 Wis. 2d 365 (1996).
35. *Id.* at 628.
36. *Id.*
37. *Id.* at 630.
38. *Id.*
39. *Id. But see*, *e.g.*, *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 458 (Mass. 2006) (conflicting with Wisconsin); *City of Coeur D'Alene v. Simpson*, 136 P.3d 310 (Idaho 2006); *State ex rel. R.T.G., Inc. v. Ohio*, 780 N.E.2d 998, 1009 (Ohio 2002) (conflicting with Wisconsin); *Dep't of Transp., Div. of Admin. v. Jirik*, 498 So. 2d 1253 (Fla. 1986) (conflicting with Wisconsin); *Palm Beach Isles Ass'n v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000) (conflicting with Wisconsin); *Am. Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364, 369-71 (9th Cir. 1981) (conflicting with Wisconsin).

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