MURR AND MERGER

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In *Murr v. Wisconsin*,[1] the Supreme Court finally answered the "denominator" question that had been lurking beneath Takings Clause jurisprudence for decades. The Court's answer was a multifactor test that, although nominally a middle position between the two extremes offered by the litigants, is in practice likely to be a big win for regulators. Under this test, conventional forms of land use regulation that affect owners of multiple, contiguous lots, in ordinary circumstances, are unlikely to be deemed regulatory takings, even if the regulation has severe effects on one of those lots.[2]

The outcome of *Murr* was an unpleasant surprise for property rights advocates, who had good reasons to expect a victory. The Court granted the Murrs' certiorari petition despite the absence of any published opinions from the courts below. The Wisconsin Supreme Court had denied review, and the Wisconsin Court of Appeals had written an unpublished opinion. When the Court grants certiorari in such circumstances, it is usually with an eye toward reversing. The certiorari grant thus strongly suggested that there were at least five votes in the Murrs' favor. One of those votes presumably belonged to Justice Scalia, who died a few weeks after certiorari was granted. The Court then declined to schedule oral argument for a remarkably long time. The Murrs filed their reply brief in July 2016. In the normal course, the case would have been argued in October. But the Court did not schedule argument until March 2017, most likely in the hope that Justice Scalia's successor would be confirmed so the Court could avoid a four-four tie. The delay likewise suggested that even without Justice Scalia there would be four votes in the Murrs' favor. As it happened, Justice Gorsuch was not confirmed until April, so the Court had only eight Justices for *Murr*, and a four-four tie was widely thought to be a probable outcome.

Why did the government win? I would like to suggest that one important reason was the sheer ordinariness of the land use regulation

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

2. *Id.* at 1945.

at issue in the case. The ordinance that the Murrs alleged to be a taking was a "merger" provision, which allows the development of a substandard lot only if the lot is in separate ownership from adjacent lots.[3] Merger provisions are very common. Merger has been a standard tool of land use regulation for decades. That turned out to be important, for two reasons.

First, although defining the denominator is in principle a separate question from whether a taking has occurred, in practice the two questions are often inseparable. Answering the denominator question is often outcome-determinative. Picking the smaller denominator would imply that the regulation at issue is a taking; picking the larger denominator would imply that it is not.

Second, most of the Court's regulatory takings cases can be grasped intuitively by asking a simple question: is the regulation being challenged a normal part of the regulatory landscape, or is it exceptional? Is it a restriction that everyone should expect, or is it an unfair surprise? At bottom, the point of regulatory takings doctrine is to protect the reasonable expectations of property owners. A regulation that seems to come from out of the blue or affects the property of only a small number of people is far more likely to be a taking than a regulation that is familiar and affects everyone. Merger is in the latter category. It is a familiar part of zoning ordinances throughout the country. No well-informed lawyer could be surprised by a merger provision.

Because merger is so ordinary and because picking the smaller denominator favored by the Murrs would have invalidated merger provisions, the Court refused to pick the smaller denominator. As a strategic matter, *Murr v. Wisconsin* turned out to be the wrong case for property rights advocates to take to the Supreme Court.

I. THE DENOMINATOR QUESTION

One important component of regulatory takings doctrine has always been the extent to which regulation reduces the value of property. If we consider two regulations, one of which causes the value of property to fall by one percent and the other of which causes the

3. *Id.*

value of property to fall by ninety-nine percent, it is obvious that the second regulation is a far more serious incursion on property rights than the first. It would be hard to imagine any coherent regulatory takings doctrine that does not take into account the economic impact of regulation.

But one percent or ninety-nine percent of what? How to define the denominator of this fraction has always posed a puzzle. The property owner wants the denominator to be as small as possible, to make the diminution in value look bigger. The government has the opposite incentive. This debate took place as early as *Pennsylvania Coal v. Mahon*,[4] which is conventionally said to be the Supreme Court's first regulatory takings case. The case involved a state law banning underground coal mining that would cause the subsidence of a house on the surface. Justice Holmes, writing for the majority, defined the denominator as the coal company's subsurface rights to the coal (the company had sold the surface rights to the homeowners and had retained only the subsurface rights).[5] With the denominator so defined, the state law took away virtually one hundred percent of the coal company's property. As Holmes put it, "[T]he extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate . . . ."[6] In dissent, Justice Brandeis argued that the denominator should be the value of the entire parcel of land, including the subsurface, the surface, and the air rights. He explained:

> If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole. The estate of an owner in land is grandiloquently described as extending ab orco usque ad coelum [from Hades up to heaven]. But I suppose no one would contend that by selling his interest above 100 feet from the surface he could prevent the state from limiting, by the

4. Pa. Coal v. Mahon, 260 U.S. 393 (1922).
5. *Id.* at 413–14.
6. *Id.* at 414.

> police power, the height of structures in a city. And why should a sale of underground rights bar the state's power?[7]

Brandeis recognized that the denominator can be manipulated by the landowner to make the impact of the regulation look more severe. His examples involved the vertical division of property, because those were the facts of *Pennsylvania Coal*, but his concern applies equally well to the horizontal division of property. For example, a landowner who is not allowed to build within six feet of the property line might, if he is allowed to choose his own denominator, claim a one hundred percent reduction in the value of that six-foot strip.

The problem never went away. In *Penn Central*, the 1978 case that marked the origin of contemporary regulatory takings jurisprudence, Justice Brennan's majority opinion insisted that the denominator was not just the air rights above the train station, which the Penn Central Railroad wanted to lease to a company that would build a skyscraper, but rather the entire parcel on which the train station was located.[8] The New York Court of Appeals, the court below, had defined the denominator even more broadly to include other parcels of land near the train station that were also owned by Penn Central, on the theory that the train station made these parcels more valuable than they would otherwise have been.[9] A few years later, in another case involving a coal-mining statute, the Court effectively overruled *Pennsylvania Coal* on the denominator question, defining it as the whole parcel, not just the underground coal.[10] In subsequent cases, the Court noted the existence of the question without attempting to resolve it.[11]

The difficulty of the denominator question, as it existed prior to *Murr*, is perhaps most easily seen with a stylized example. Imagine a landowner who owns ten equally sized, contiguous parcels, numbered one through ten. Parcel six has an environmental feature, such as a wetlands or an endangered species, that causes the government to prohibit building on parcel six, which renders parcel six

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7. *Id.* at 419 (Brandeis, J., dissenting).
8. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978).
9. Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1276–77 (N.Y. 1977).
10. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497–501 (1987).
11. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331–32 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

worthless. Has the landowner lost one hundred percent of the value of parcel six? Or has he lost ten percent of the value of his land as a whole? Or consider a more realistic example. A real estate developer purchases a large tract of undeveloped land. She plans to subdivide the tract into fifty residential parcels, to build a house on each parcel, and to sell the parcels to fifty different purchasers. If, before the subdivision takes place, the government prohibits building on the area that was intended to be residential parcel thirty-three, the value of the tract will decline by two percent. What if the government prohibits building in that area after the subdivision takes place, but before any of the fifty parcels is sold? Has the developer lost one hundred percent of parcel thirty-three? Or only two percent of the combined area of all fifty parcels?

In principle, defining the denominator is a separate and prior question from deciding whether a taking has occurred. In practice, however, the questions blend together because a very small diminution in value is virtually never a taking, while a very large diminution in value is quite likely to be a taking and complete diminution in value, except in certain circumstances, is always a taking.[12] Choosing a denominator thus often means deciding whether a taking has occurred. The debate is sometimes couched as a technical question of defining the scope of a claimant's property right, but everyone realizes that it is often a debate over outcomes rather than methods.

The debate has been colored by the awareness that either party, the property owner or the government, has some ability to manipulate the size of the denominator. A property owner anticipating regulation that will affect part of his land may be able to divide one parcel into two or more, while the government may be able to combine two or more parcels into one. Empirical examples of these strategies seem to be rare, but the possibility that they might be implemented has counseled against any rule that would give either the property owner or the government the unilateral ability to define the denominator. On one side, if the denominator were a matter of personal choice, it would be open to manipulation by the property owner. On the other, if the denominator were a matter of state or local law, it would be open to manipulation by the state or local government.

12. *See Lucas*, 505 U.S. at 1003.

Murr presented the denominator question in the context of a merger provision.[13] The Murrs owned two adjacent lots, Lot E and Lot F, along the St. Croix River in Wisconsin. There was a cabin on Lot F. Lot E was undeveloped. Both lots were too small to build on, under a county ordinance requiring at least one acre of buildable land. Because both lots were in existence before the enactment of the ordinance, both were "nonconforming" lots—that is, they benefited from a grandfather clause that allowed building despite their size.[14] But the grandfather clause included a merger provision: it applied only to lots in separate ownership from adjacent lots.[15] If two adjacent lots were owned by the same person and the combined area of the two lots was large enough to build on, the grandfather clause did not apply to either of the individual lots. The merger provision did not literally merge the lots, but it required treating them as a single lot for the purpose of the lot size requirement.[16]

Because of this merger provision, it was unlawful to develop Lot E separately. The Murrs alleged that this was a regulatory taking.[17] Here was where the denominator question arose: in evaluating the economic impact of the St. Croix County ordinance, which was the appropriate denominator, Lot E alone, or Lots E and F combined? If the answer was Lot E, the Murrs would have a strong takings claim because they were completely denied the ability to develop Lot E. But if the answer was Lot E and F combined, their takings claim would be considerably weaker. They were allowed to develop Lots E and F combined, and they lost only about ten percent of the lots' combined value by not being allowed to develop both lots separately.[18] The Wisconsin courts held that the appropriate denominator was Lots E and F combined.[19]

II. MERGER PROVISIONS

If one had to predict the outcome of the Court's regulatory takings cases in recent times with knowledge of only a single fact about each

13. Murr v. Wisconsin, 137 S. Ct. 1933, 1940–41.
14. *Id.* at 1940.
15. *Id.* at 1947.
16. *Id.* at 1940–41.
17. *Id.* at 1941.
18. *Id.*
19. *Id.* at 1941–42.

case, perhaps the most useful fact to know would be whether the regulation at issue is common or unusual. Regulations that the Court has found to be takings have tended to fall unfairly on one person or a small number of people. In *Lucas v. South Carolina Coastal Council*, the challenged statute had the effect of preventing a single beachfront landowner from building a house after all his neighbors had already been allowed to build one.[20] By contrast, the Court has found no taking where property owners challenged the sort of ordinary, ubiquitous regulations that affect large numbers of people, such as the historic landmark ordinance in *Penn Central*.[21] Most regulation falls somewhere between these two extremes, and although people can disagree about how commonplace any particular sort of regulation actually is, this is still a useful generalization. Ordinary zoning ordinances, of the sort that exist in most cities of any size, are very unlikely to be regulatory takings. It would be very surprising if the Court were to use the Takings Clause to upset the expectations of millions of homeowners.

The merger provision at issue in *Murr* is not quite as commonplace as, say, the separation of commercial and residential uses in a normal zoning ordinance, but it is closer to that than any regulation the Court has considered in any of its previous takings cases. According to their brief, the Murrs were "flabbergasted"[22] when they learned, too late, about the merger provision. If so, it is because they received poor legal advice when they placed the two parcels into common ownership. Merger provisions are such normal features of zoning ordinances that any competent real estate lawyer would know about them. Merger provisions are common because they serve an important purpose: they reconcile the community's interest in preventing the harms caused by congestion with the landowner's interest in developing a substandard lot.

Minimum lot size requirements have long been the standard way of preventing the harms caused by congestion. Since the advent of zoning, state and local governments have sought to regulate the density of development, in order to prevent overcrowding, to avoid depleting natural resources, to preserve the character of communities,

20. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1008 (1992).

21. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

22. Petitioners' Brief on the Merits at 27, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214).

and to sustain property values. Minimum lot size requirements "are by far the most common form of density control in zoning ordinances."[23] Today, lot size requirements can be "found in virtually all zoning ordinances."[24]

Courts have consistently recognized that minimum lot size requirements serve important public purposes, including

> preventing the evils of overcrowding and the ill effects of urbanization, control of traffic, protection of property values, protection of aesthetics and the character of an area, protection of open space, the provision of adequate public facilities, protection of the water supply, preventing erosion and providing emergency access, preventing water pollution, preservation of agricultural lands, and the protection of environmentally sensitive areas including wildlife habitat.[25]

As early as 1926, the Court noted that "[t]here is no serious difference of opinion in respect of the validity of laws and regulations fixing . . . the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like."[26] More recently, the Court observed that minimum lot size requirements are a way of protecting a town's residents "from the ill effects of urbanization."[27] The state courts have likewise emphasized the value of lot size restrictions in limiting traffic congestion,[28] safeguarding the environment,[29] conserving the water supply,[30] and sustaining neighboring property values.[31]

Merger has long been recognized as the most reasonable way to reconcile the landowner's interest in developing a nonconforming lot with the community's interest in preventing congestion. A "nonconforming" lot is one that was of lawful size before the enactment

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23. Gavin L. Phillips, *Validity of Zoning Laws Setting Minimum Lot Size Requirements*, 1 A.L.R. 5th 622 (1992).

24. 1 DOUGLAS W. KMIEC & KATHERINE KMIEC TURNER, ZONING AND PLANNING DESKBOOK 109 (2015).

25. 3 SARA C. BRONIN & DWIGHT H. MERRIAM, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 51:12, Westlaw (4th ed. 2017) (citations omitted).

26. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

27. Agins v. City of Tiburon, 447 U.S. 255, 261 (1980).

28. Simon v. Town of Needham, 42 N.E.2d 516, 518 (Mass. 1942).

29. Gardner v. N.J. Pinelands Comm'n, 593 A.2d 251, 258 (N.J. 1991).

30. Ketchel v. Bainbridge Twp., 557 N.E.2d 779, 783 (Ohio 1990).

31. La Grange State Bank v. Village of Glen Ellyn, 591 N.E.2d 480, 486 (Ill. App. Ct. 1992).

of a minimum lot size requirement but is now too small. Nonconforming *lots* are analogous to nonconforming *uses*—that is, uses of land that were once lawful but do not comply with a new zoning restriction, as when a business finds itself located within an area newly zoned for residential use. Nonconforming lots and nonconforming uses are allowed to continue because of the obvious unfairness in forcing them to terminate immediately.

But there is one major difference between nonconforming lots and nonconforming uses. Nonconforming uses are typically phased out over time.[32] Zoning ordinances often establish an "amortization" period, which "simply designates a period of time granted to owners of nonconforming uses during which they may phase out their operations as they see fit and make other arrangements."[33] Provided the amortization period is long enough to allow the owner to recoup his investment, courts have generally concluded that amortization strikes an appropriate balance between the landowner's reasonable expectations and the public's interest in advancing the goals served by the zoning ordinance.[34]

Amortization will not work for nonconforming lots, however, because the size of a lot cannot be phased out over time. Most nonconforming lots are thus grandfathered in permanently; they are forever exempt from the minimum lot size requirement that would otherwise be applicable.[35] But this outcome limits the community's ability to accomplish the goals that the lot size requirement was intended to serve. Because of the impossibility of amortizing nonconforming lots, local governments have sought some other way to strike a sensible balance between private and public interests.

The solution has been merger. Where the owner of an undeveloped, nonconforming lot also owns another contiguous lot, and where the two lots together would be large enough to comply with the lot size minimum, ordinances often treat the two lots as one for this purpose. Typically, the lots are not literally merged. The sole effect of most "merger" provisions is simply that the exemption for nonconforming lots is denied to a landowner who also owns an adjacent lot.[36]

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32. 4 SARA C. BRONIN & DWIGHT H. MERRIAM, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 74:18, Westlaw (4th ed. 2017).

33. Village of Valatie v. Smith, 632 N.E.2d 1264, 1266 (N.Y. 1994).

34. 2 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 12:23, Westlaw (5th ed. 2017).

35. *Id.* § 12:12.

36. *See, e.g.,* EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25:179.6,

Such merger provisions have been features of local zoning ordinances for a very long time. Great Neck Estates, New York, enacted one in 1926.[37] Bayville, New York, enacted one in 1927.[38] Nahant, Massachusetts, enacted one in 1940.[39] Attleboro, Massachusetts, enacted one in 1942.[40] Skokie, Illinois, enacted one in 1946.[41] Hempstead, New York, and Wellesley, Massachusetts, both enacted theirs in 1951.[42] Weston, Connecticut, enacted one in 1953.[43] Berlin, Connecticut, enacted one in 1954.[44] Redford, Michigan, enacted one sometime before 1957.[45] Old Lyme, Connecticut, enacted one in 1957.[46]

By 1960, merger provisions were so common that the American Society of Planning Officials included one in *The Text of a Model Zoning Ordinance* it published for the benefit of local governments nationwide.[47] A few years later, the leading zoning treatise of the era explained that the owner of a nonconforming lot

> is entitled to an exception only if his lot is isolated. If the owner of such a lot owns another lot adjacent to it, he is not entitled to an exception. Rather, he must combine the two lots to form one which will meet, or more closely approximate, the frontage and area requirements of the ordinance.[48]

Westlaw (3d ed. 2017) ("Municipalities often have ordinances which treat commonly owned, contiguous lots, one or more of which are nonconforming, as one conforming lot."); Jock v. Zoning Bd. of Adjustment, 878 A.2d 785, 794 (N.J. 2005) ("The term 'merger' is used in zoning law to describe the combination of two or more contiguous lots of substandard size, that are held in common ownership, in order to meet the requirements of a particular zoning regulation.").

37. Ferryman v. Weisser, 158 N.Y.S.2d 587, 588 (N.Y. App. Div. 1957).

38. Flanagan v. Zoning Bd. of Appeals, 149 N.Y.S.2d 666, 667 (N.Y. Sup. Ct. 1956), *aff'd*, 151 N.Y.S.2d 618 (N.Y. App. Div. 1956).

39. Clarke v. Bd. of Appeals, 155 N.E.2d 754, 755 & n.3 (Mass. 1959).

40. Vetter v. Zoning Bd. of Appeals, 116 N.E.2d 277, 277–78 (Mass. 1953).

41. Weber v. Village of Skokie, 235 N.E.2d 406, 410 (Ill. App. Ct. 1968).

42. Cabral v. Young, 177 N.Y.S.2d 548, 549 (N.Y. Sup. Ct. 1958); Sorenti v. Bd. of Appeals, 187 N.E.2d 499, 500 & n.1 (Mass. 1963).

43. Bankers Trust Co. v. Zoning Bd. of Appeals, 345 A.2d 544, 546 (Conn. 1974).

44. Schultz v. Zoning Bd. of Appeals, 130 A.2d 789, 790 (Conn. 1957).

45. Korby v. Twp. of Redford, 82 N.W.2d 441, 443–44 (Mich. 1957).

46. Corsino v. Grover, 170 A.2d 267, 269 (Conn. 1961).

47. AMERICAN SOCIETY OF PLANNING OFFICIALS, THE TEXT OF A MODEL ZONING ORDINANCE 26 (2d ed. 1960).

48. 2 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 8.49 (1968). *See also* John R. McGill, Note, *Substandard Lots and the Exception Clause—"Checkerboarding" as a Means of Circumvention*, 16 SYRACUSE L. REV. 612, 614 (1965) ("[M]ost ordinances include a section which exempts substandard lots in existence at the time the ordinance is enacted (or amended) provided they are held in single, separate ownership.").

Merger provisions became common because local governments and state courts recognized that they represent an appropriate middle ground between two unattractive extremes—prohibiting the development of substandard lots, which would be a hardship to their owners, and allowing the development of *all* substandard lots, which would be a hardship to neighbors and the community. As the Maine Supreme Court explained, a merger provision "is designed to strike a balance between a municipality's interest in abolishing nonconformities and the interests of property owners in maintaining land uses that were allowed when they purchased their property."[49]

On one side of the balance, the public has an interest in "the reduction of nonconforming lots,"[50] which exacerbate the congestion that motivated the enactment of the lot size minimum. "Otherwise, subdivisions in their infancy could perpetuate for years the problems zoning was designed to eliminate."[51] On the other side of the balance, while any restriction on development will have some effect on the owner of property, "the financial hardship on the owner in complying is not nearly as great [where he is able] to conform by enlarging lot sizes or combining two lots into one."[52] The state courts have thus widely recognized that merger provisions "operate to decrease congestion in the streets and to prevent the overcrowding of land"[53] without imposing unreasonable burdens on individual landowners.

For this reason, countless ordinances all over the country include merger provisions like the one challenged by the Murrs. Several states have enacted statutes specifically authorizing local governments to include merger provisions in their zoning ordinances.[54] In

49. Day v. Town of Phippsburg, 110 A.3d 645, 649 (Me. 2015). *See also* Kalway v. City of Berkeley, 60 Cal. Rptr. 3d 477, 483 (Cal. Ct. App. 2007) (observing that merger provisions "balance the interests of the public and private ownership").

50. Goulet v. Zoning Bd. of Appeals, 978 A.2d 1160, 1165 (Conn. App. Ct. 2009).

51. York Twp. Zoning Bd. of Adjustment v. Brown, 182 A.2d 706, 707 (Pa. 1962) (citation and internal quotation marks omitted).

52. *Id.*

53. Brum v. Conley, 572 A.2d 1332, 1334 (R.I. 1990).

54. *See, e.g.*, CAL. GOVT. CODE § 66451.11 (Deering 2018) ("A local agency may, by ordinance which conforms to and implements the procedures prescribed by this article, provide for the merger of a parcel or unit with a contiguous parcel or unit held by the same owner if any one of the contiguous parcels or units held by the same owner does not conform to standards for minimum parcel size . . . ."); MASS. GEN. LAWS. ch. 40A, § 6 (2018) (providing that lot size minimum requirements shall not apply to a nonconforming lot that "was not held in common ownership with any adjoining land"); MINN. STAT. § 394.36(5)(d) (2017) (providing that nonconforming lots "must be combined with the one or more contiguous lots so they equal one

some states, merger is a common-law doctrine that can apply even in the absence of a local ordinance requiring it.[55] In other states, local governments enact merger provisions pursuant to general legislative grants of zoning authority.[56] Many municipalities have merger provisions in their zoning ordinances, including, just to name a few, Charlotte, El Paso, Miami, Minneapolis, New Orleans, Palm Springs, Pittsburgh, and Tampa.[57]

With just a few minutes of research, one can find many periodicals and web pages explaining that the purchaser of a vacant, nonconforming lot should be careful to ascertain whether the lot is governed by a merger provision.[58] Practice guides for attorneys likewise advise

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or more conforming lots as much as possible"); N.M. STAT. ANN. § 47-6-9.1 (West 2018) (stating power of local governments to require "consolidation of contiguous parcels in common ownership for the purpose of enforcing minimum zoning or subdivision standards on the parcels"); 45 R.I. GEN. LAWS § 45-24-38 (2018) (authorizing local governments to provide "for the merger of contiguous unimproved, or improved and unimproved, substandard lots of record in the same ownership to create dimensionally conforming lots"); VT. STAT. ANN. tit. 24, § 4412(2)(B) (2018) (authorizing local governments to provide that "if an existing small lot subsequently comes under common ownership with one or more contiguous lots, the conforming lot shall be deemed merged with the contiguous lot").

55. *See, e.g.*, Remes v. Montgomery Cty., 874 A.2d 470, 485 (Md. 2005) (referring to the discussion of merger in *Friends of the Ridge* as "a statement of the common law"); Friends of the Ridge v. Balt. Gas & Elec. Co., 724 A.2d 34, 38 (Md. 1999) (discussing merger); Timperio v. Zoning Bd. of Appeals, 993 N.E.2d 1211, 1215 (Mass. App. Ct. 2013) ("It is well settled that '[u]nder the common-law merger doctrine, when adjacent nonconforming lots come into common ownership, they are normally merged and treated as a single lot for zoning purposes.'") (quoting Hoffman v. Bd. of Zoning Appeal, 910 N.E.2d 965, 971 (Mass. App. Ct. 2009)).

56. *See, e.g.*, Neumann v. Zoning Bd. of Appeals, 539 A.2d 614, 616 (Conn. App. Ct. 1988) (noting that "many zoning ordinances" in the state include merger provisions, without any reference to legislation specifically authorizing them).

57. There is a list of more than one hundred such ordinances in Brief of Amici Curiae Nat'l Ass'n of Counties et al. at 14–31, Murr v. Wisconsin, 137 S. Ct. 1933 (2017).

58. *See, e.g.*, Kathleen Deegan Dickson, *The Law of Merger*, N.Y. REAL ESTATE J., Nov. 11, 2014, http://nyrej.com/78995 ("Take caution when purchasing a vacant parcel of land [because of] the possibility of the merger of lots . . . ."); Richard Gallogly, *Merger by Acquisition: Grandfathered Status Can Be Lost*, MASS. LAND USE MONITOR, Aug. 22, 2013, http://www.massachusettslandusemonitor.com/zoning/the-status-of-a-pre-existing-nonconforming-lot-is-subject-to-change/ (explaining "the grandfathered status of a lawful pre-existing nonconforming lot is not perpetual, and can be lost if the lot later comes into common ownership with adjoining land"); Anthony S. Guardino, *Lot Merger and Single and Separate Exemptions*, N.Y. LAW J. LONG ISLAND WEEKLY, Dec. 11, 2004, http://www.farrellfritz.com/wp-content/uploads/art-183.pdf ("[L]ot merger frequently play[s] a crucial role in the zoning approval process . . . ."); Lloyd Pilchen, *When Two Become One: A Look at the Law of Merger of Adjoining Parcels*, 7 AMERICAN SURVEYOR, no. 4, May 22, 2010, http://www.amerisurv.com/content/view/7419 ("Local governments typically only seek to impose a merger when [the adjoining lot] does not conform to today's zoning standards, such as minimum lot area or street frontage."); Anne L.H. Studholme, *Understanding "Merger" of Nonconforming Lots*, HILL WALLACK, http://www.hill

that local zoning ordinances may treat a nonconforming lot as merged with an adjoining lot in common ownership.[59] In short, a well-advised owner or purchaser of land should expect that the land may be governed by a lot size minimum and an associated merger provision. These are common zoning rules that are well within the reasonable expectations of landowners and their lawyers.

In deciding *Murr*, the Court seems to have been influenced by how common these merger provisions are. Near the beginning of oral argument, Justice Ginsburg asked: "[T]hese merger rules have a long history. Many States have them. So why isn't that background State law that . . . would apply?"[60] Justice Kennedy worried that if the Murrs prevailed, "all of those other State regulations are also invalid"[61]—that is, the Court would be invalidating merger provisions in towns all over the country. Kennedy repeated this concern in his opinion for the Court. "The merger provision here," he observed, is "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."[62] He noted that the Murrs' proposed rule "would frustrate municipalities' ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist today."[63]

The sheer ordinariness of the merger provision at issue in *Murr* thus played an important part in the Court's decision to adopt a government-friendly standard for identifying the appropriate denominator in regulatory takings cases. Of course, that was not the only consideration in the case. This issue has been around for so long

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wallack.com/?t=40&an=15702 (last visited Jan. 9, 2018) ("Those thinking of buying a parcel composed of undersized lots need to understand the doctrine of merger . . . .").

59. *See, e.g.*, 28 MICHAEL PILL, ET AL., MASSACHUSETTS PRACTICE, REAL ESTATE LAW § 23.6, Westlaw (4th ed. 2017) ("Always check the local zoning bylaw or ordinance . . . [B]uilding lots which do not meet current zoning dimensional requirements, and which came into common ownership or control subsequent to the zoning change that rendered them nonconforming, are merged into a single lot for zoning purposes . . . ."); 36 DAVID J. FRIZELL & RONALD D. CUCCHIARO, NEW JERSEY PRACTICE: LAND USE LAW § 15.7, Westlaw (3d ed. 2017) (suggesting that merger can be easily avoided by titling adjacent nonconforming parcels in different entities, because "[s]o long as the legal titles are kept separate, the doctrine will not be used to merge lots that are under a single 'dominion and control.'"); 9B ROBERT A. FULLER, CONNECTICUT PRACTICE: LAND USE LAW & PRACTICE § 53:6, Westlaw (4th ed. 2017) ("[T]here can be lot merger . . . where the zoning regulations contain a merger provision for nonconforming contiguous lots.").

60. Transcript of Oral Argument at 11, Murr v. Wisconsin, 137 S. Ct. 1933 (2017).

61. *Id.* at 12.

62. *Murr*, 137 S. Ct. at 1947.

63. *Id.* at 1947–48.

that there are many standard arguments on both sides, all of which were duly made by the parties and their many amici. But one has to wonder whether the Court would have reached the same result in a case involving a limitation on land use that was not so normal. If the denominator issue had been litigated in a case involving a regulation that was an unfair surprise, one that upset a landowner's reasonable expectations, perhaps the result would have been different.