

## WCA Files Amicus Brief on Behalf of Counties

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Practice Area: County and Municipal Governance & Government Law

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'Nor shall private property be taken for public use, without just compensation.' This provision of the U.S. Constitution—commonly known as the Takings Clause—has thrust Wisconsin and St. Croix County into the national discussion about individual property rights and regulatory takings. This case addresses a dispute that has existed for decades: whether two legally distinct but commonly owned contiguous parcels should be considered legally combined for a takings analysis. The answer to this question has enormous consequences because fifty of Wisconsin's seventy-two counties (almost 70%) have ordinances or rules that effectively combine commonly-owned, contiguous, substandard lots into a single lot.

Because of the potentially game-changing nature of this case for member counties, the Wisconsin Counties Association, in conjunction with the League of Wisconsin Municipalities and the Wisconsin Town Association, filed an amicus (or "friend of the court") brief to help the Supreme Court decide this issue. Below is a summary of the case and brief description of the Associations' arguments.

### Background Facts

In the early 1960s, the parents of the petitioners (the Murrs) in this lawsuit purchased two adjacent riverfront lots on the Lower St. Croix River, with one lot held by the family plumbing business (called Lot F) and the second lot kept in the parents' names (called lot E). Shortly after purchasing the properties, the parents built a cabin on Lot F. At that time, Congress enacted legislation designed to protect the St. Croix River, which resulted in numerous sets of overlapping zoning requirements.

In the early to mid-90s, the parents gifted the lots to their children, which effectively brought the lots under the Murrs' common ownership. Because of the federal and state protections, both lots were designated substandard because they did not satisfy the minimum net-project-area and river frontage requirements to serve as building sites under the DNR regulations and a St. Croix County ordinance. Although each lot is approximately 1.25 acres, topographical constraints limit the combined net project area to only 0.98 acres.

The zoning ordinance at issue prohibits the individual development or sale of adjacent substandard lots under common ownership, unless an individual lot was at least one acre. While the Murrs could build a new cabin to replace the existing one on Lot F, they could not sell or build on Lot E.

### The Lawsuit

On at least two occasions, the Murrs attempted to get variances and special use permits in order to convey or build on Lot E. Throughout, the County zoning staff reviewed the applications and recommended to the Board of Adjustment (BOA) that the applications be denied. The BOA did just that. After receiving the second denial, the Murrs sued the state and county and claimed that the ordinance in question resulted in an uncompensated taking of their property that deprived them of “all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot.”

At the trial court, the circuit judge applied the county’s ordinance and affirmed the relevant BOA determination that the two lots should be treated as commonly-owned, contiguous, and substandard lots. In addition, the circuit court held that the Murrs did not file their lawsuit within the six-year limit set by Wisconsin law.<sup>1</sup> The Wisconsin Court of Appeals affirmed the BOA in whole, but did not address the six-year limitation issue, presumably because it affirmed the BOA. While the Wisconsin Supreme Court denied the Murrs’ request to hear their case, the United States Supreme Court decided to review the Wisconsin Court of Appeals decision.

The sole issue presented to the U.S. Supreme Court is whether the takings clause permits a local government to maintain a regulation that automatically combines two legally distinct but commonly owned contiguous substandard parcels. More specific to the facts of this case, the question is whether St. Croix County can combine the Murrs’ commonly-owned, contiguous, substandard lots into a single lot when determining if a regulatory taking has occurred. In its brief, the Association argued that the Supreme Court should not even address the merits of the constitutional question and should dispose of the case for a variety of procedural reasons: dismiss the writ of certiorari as improvidently granted; remand the case to the Wisconsin state courts for further proceedings; or certify a question of Wisconsin state law to the Wisconsin Supreme Court.

The association made these arguments because a constitutional decision on the merits would be unnecessary and possibly inappropriate based on the principle of constitutional avoidance, which holds that courts should only resolve constitutional questions if there is no other ground upon which to dispose of the case.<sup>2</sup> Application of this rule would recognize Wisconsin’s long tradition of decentralizing decisions that affect local communities to the local leaders that represent those citizens.

This fall, the United States will hear oral argument in *Murr v. Wisconsin*. The outcome in this case could have a significant impact on the way local governments address substandard lots. The association will keep you apprised as the case progresses.

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<sup>1</sup> Wis. Stat. § 893.93(1)(a).

<sup>2</sup> See *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014).

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