No. 15-214

In the Supreme Court of the United States

JOSEPH P. MURR, ET AL., PETITIONERS

v.

STATE OF WISCONSIN, ET AL.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF WISCONSIN, DISTRICT III

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

A county ordinance prevents the separate sale or development of commonly owned, contiguous lots abutting the St. Croix River that are considered substandard because they do not meet minimum area and river-frontage requirements for independent development. Decades after the ordinance was enacted, petitioners acquired two contiguous substandard lots that are subject to the ordinance.

The question presented is whether the Wisconsin Court of Appeals erred in considering the two lots together as the relevant "parcel as a whole" in rejecting petitioners' claim that the ordinance effected a regulatory taking.

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INTEREST OF THE UNITED STATES

This case concerns whether adjacent lots under common ownership should be considered together when analyzing whether an exception to a grandfather provision in a zoning law resulted in a regulatory taking. Various Acts of Congress authorize federal agencies to regulate the permissible uses of privately-owned real property, or for States to carry out such programs pursuant to federal standards. The United States therefore has a substantial interest in the proper application of the Just Compensation Clause to such regulatory efforts. In addition, the property at issue in this case abuts a river designated under the Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.*, and the county ordinance alleged to effect a taking was designed to protect the river.

STATEMENT

1. a. The Wild and Scenic Rivers Act created the National Wild and Scenic Rivers System (WSRS) to manage and protect "certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." 16 U.S.C. 1271. Those rivers and "the related adjacent land" are administered "to protect and enhance the values" for which they were included in the WSRS, with "primary emphasis" on "esthetic, scenic, historic, archeologic, and scientific features." 16 U.S.C. 1273(b), 1281(a).

Congress initially selected eight rivers to include in the WSRS, including the first 112 miles of the St. Croix River, which originates in northwest Wisconsin and then traces the border between Wisconsin and Minnesota. Wild and Scenic Rivers Act, Pub. L. No. 90-542, § 3(a)(6), 82 Stat. 908 (16 U.S.C. 1274(a)(6)); 40 Fed. Reg. 43,245 (Sept. 19, 1975). In 1972, Congress authorized the addition of the lower leg of the St. Croix River, which continues an additional 52 miles along the Wisconsin-Minnesota border before joining the Mississippi River. See Lower St. Croix River Act of 1972, Pub. L. No. 92-560, § 2, 86 Stat. 1174 (16 U.S.C. 1274(a)(9)); 40 Fed. Reg. at 43,245. Congress "found that the Lower St. Croix River and its immediate environment possess outstanding scenic and esthetic, recreational, and geologic values" and that the area "should be protected for the benefit and enjoyment of present and future generations." 40 Fed. Reg. at 43,244.

b. Wisconsin manages the land along the stretch of the St. Croix River at issue in this case. 41 Fed. Reg.

26,236 (June 25, 1976); see 16 U.S.C. 1273(a) (providing for state administration of WSRS rivers under specified circumstances). The "overall goal" of river management is "to preserve the existing scenic and recreational resources * * * through controlled development." 40 Fed. Reg. at 43,244. Because "sound local zoning ordinances" are "essential" to achieving that goal, *id.* at 43,253, Wisconsin's legislature directed the State's Department of Natural Resources (DNR) to set minimum standards "for local zoning ordinances which apply to the banks, bluffs and bluff tops of the lower St. Croix River." Wis. Stat. Ann. § 30.27(2)(a). Those standards recognize that residential development "poses the greatest single threat to maintaining a pleasant and scenic river environment." 40 Fed. Reg. at 43,246.

The property at issue in this case abuts a "rural residential" portion of the St. Croix River, which is a "primarily natural" area of "low-density" development with "large lots." Wis. Admin. Code NR (NR) § 118.04(4)(a); see Wis. C.A. R. (R.) 22-102. Under regulations that became effective in 1976, riverfront lots in the rural-residential zone may serve as building sites only if they have at least 200 feet of river frontage and at least one acre of "[n]et project area," defined as "developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands," NR § 118.03(27); see *id.* § 118.06(1)(a)(2)(A) and (c)(3). No "more than one single-family residence" may be built on a lot that complies with those requirements. *Id.* § 118.06(1)(b).

A lot that does not meet the minimum size requirements is considered "[s]ubstandard" and generally may not "be used as [a] building site[]." NR

§§ 118.03(48), 118.06(1)(a). DNR provided an exception, however, by grandfathering substandard lots that were "of record in the register of deeds office on January 1, 1976," *id.* § 118.08(4), the effective date of the restrictions, see *id.* § 118.05(1) and (5) (1975). Under the grandfather provision, preexisting substandard lots "may be allowed as building sites" if they are "in separate ownership from abutting lands." *Id.* § 118.08(4)(a)(1). But a so-called merger provision provides that "[a]djacent substandard lots in common ownership" may not "be sold or developed as separate lots" unless "each of the lots has at least one acre of net project area." *Id.* § 118.08(4)(a)(2).

A landowner who wishes to build on a substandard lot that does not meet the requirements of the grandfather provision may seek a variance from the local zoning authority. NR § 118.09(4)(b). A variance may be granted to address an "unnecessary hardship" arising from "special conditions." *Ibid.* "Economic considerations alone may not constitute a hardship," however, "if a reasonable use for the property exists under the conditions allowed by the local zoning ordinance." *Ibid.*

Local zoning ordinances must incorporate DNR's minimum standards for development in the protected St. Croix River area. Wis. Stat. Ann. § 30.27(3). As relevant here, St. Croix County (County) and the unincorporated Town of Troy, which is located in the County, administer and enforce development restrictions identical to those mandated by DNR. See County Ordinance § 17.36; Pet. App. B3.

2. a. Petitioners are four siblings who jointly own 2.52 acres of property along the St. Croix River in the Town of Troy. Pet. App. B1. The property, which is

part of the St. Croix Cove subdivision, "is bisected by a steep 130 foot bluff" but "is moderately level at the top and also below at the river level." *Id.* at B1-B2. "[A]n unrecorded subdivision map" splits petitioners' land into "Lot E" and "Lot F," *id.* at A2 n.1, with the dividing line running from the river's edge to the blufftop, *id.* at A3. See J.A. 28 (St. Croix Cove Plat Map).

Lots E and F are substandard because they do not satisfy the minimum net-project-area and river-frontage requirements to serve as building sites under the DNR regulations and county ordinance. While Lots E and F are each "approximately 1.25 acres" in size, Pet. App. B2, their combined net project area is only 0.98 acres due to topographic constraints, *id.* at A3. Lot E has only 100 feet of river frontage and Lot F has only 58 feet. J.A. 27; R. 17-117. The subdivision homeowners' association owns an adjacent beach that "takes a notch out of [Lot F] * * * and cuts down on the frontage" of that lot. J.A. 51.

On July 21, 1959, the County register of deeds recorded a single lot encompassing what are now Lot E, Lot F, and a landlocked tract on the other side of Lot F known as "Lot G." See R. 17-123; see also J.A. 28. On July 27, 1959, the register recorded a separate lot encompassing only Lot E, thereby subdividing the prior lot. See R. 17-124 to 17-125. In 1962, the register recorded a portion of what is now Lot F, known as the "Boathouse" parcel, which juts into Lot G. See R. 17-126. The record does not show whether the rest of Lot F was ever recorded independent of Lot G.

Petitioners' parents purchased Lot F in 1960. J.A. 117; Pet. App. A3. In 1961, they conveyed that area to their family plumbing company. *Ibid.* In the mid-

1960s, petitioners' parents acquired Lot E and the Boathouse parcel in their own names. *Ibid.*; see R. 22-67. In 1982, the rest of Lot F was transferred from the plumbing company to petitioners' parents. See R. 17-127, 22-84; see also Wisconsin Br. 18 n.9; County Br. 11 & n.5.[1]

In 1994, petitioners' parents conveyed Lot F to petitioners as joint tenants. R. 17-112; see Pets. Br. 4 (describing conveyance as a gift). In 1995, petitioners' parents conveyed Lot E to petitioners as joint tenants. R. 17-113. That second conveyance, which occurred long after the merger provision was enacted, brought the lots under petitioners' common ownership. Pet. App. A3.

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[1] Although petitioners state (Br. 30) that their parents purchased Lots E and F "in completely distinct transactions" separated by several years, an examination of the public records maintained by the County Registers Office indicates some uncertainty about the nature of the conveyances. The public deed for the initial acquisition in 1960, which is not in the certified record, indicates that petitioners' parents were purchasing a unified parcel containing all the land comprising Lots E, F, and G. Warranty Deed No. 265,236 (recorded May 8, 1961); see *United States* v. *Teschmaker*, 63 U.S. (22 How.) 392, 404-405 (1860) (taking judicial notice of land-title records); see also *Massachusetts* v. *Westcott*, 431 U.S. 322, 323 & n.2 (1977) (taking judicial notice of Coast Guard records). But the transferors had previously conveyed Lot E to third parties. Warranty Deed No. 260,460 (recorded Dec. 29, 1959). In 1961, petitioners' parents purported to transfer a unified parcel containing Lots E, F, and G to their plumbing company. Warranty Deed No. 265,237 (recorded May 8, 1961). In the mid-1960s, petitioners' parents separately acquired Lot E and the Boathouse portion of Lot F in their own names. Warranty Deed No. 277,337 (recorded Aug. 25, 1964) (Boathouse parcel); Warranty Deed No. 283,267 (recorded Feb. 1, 1966) (Lot E). In 1982, they reacquired the rest of Lot F from their plumbing company. Warranty Deed No. 378,007 (recorded June 8, 1982).

There is presently a "recreational cabin" on Lot F and an "outbuilding" on the Boathouse parcel. Pets. Br. 3; J.A. 34; see R. 17-127. There are no permanent structures on Lot E, but a survey map filed in March 2006 depicts a volleyball court on Lot E next to the cabin on Lot F. R. 17-127.

b. In 2006, petitioners applied for several variances from the County Board of Adjustment (Board). Initially, petitioners sought to "redivide the lot line[s]," creating one lot above the bluff that they could sell and one lot below the bluff that they could retain. R. 22-134; see County Br. 14 n.7. Petitioners subsequently revised their application, eliminating the request to redraw the lot lines and instead seeking to "subdivid[e] their property, sell[] the portion contained in Lot E and build[] a residence outside of the existing cabin's footprint on Lot F." Pet. App. B4; see County Br. 14 n.7.

The Board denied petitioners' request. J.A. 61-63. As relevant here, the Board found that the denial of a variance to separately develop or sell the substandard lots "would not constitute an unnecessary hardship because it would not deprive [petitioners] of reasonable use of their property." J.A. 65. The Board emphasized that petitioners could develop or sell the property "as a single, more conforming parcel that is more suitable for residential development." *Ibid.* And the Board further noted that a variance was not "necessary to secure to [petitioners] similar rights [as] neighboring landowners," because "[a]t least eight other property owners in the immediate * * * area own one or more contiguous substandard lots along the river with just one building site." J.A. 67. The Board observed as well that the merger provision

"protect[s] existing property owners and the general public from the adverse [e]ffects of overcrowding and poorly planned development" in the protected river area. *Ibid.* Accordingly, the Board concluded, "[g]ranting th[e] variance would not meet the spirit and intent" of the merger provision. J.A. 65.

c. Petitioner Donna Murr filed suit against the Board in state court, arguing, as relevant here, that the regulatory restriction on separate sale and development did "not apply to merge her two contiguous parcels, because the parcels did not come under common ownership until after the [merger provision's] effective date." *Murr* v. *St. Croix Cnty. Bd. of Adjustment*, 796 N.W.2d 837, 843 (Wis. Ct. App.), review denied, 803 N.W.2d 849 (Wis. 2011) (Tbl.).

The Wisconsin Court of Appeals rejected that interpretation of the merger provision because it would undermine the "manifest intent of the [regulations] to preserve property values while limiting environmental impacts." *Murr*, 796 N.W.2d at 843-844. The court observed that the grandfather provision allows "every person who already owned a lot" to "build on their lot or sell it as a developable lot" regardless of size. *Id.* at 844. But applying that exemption to subsequent owners of adjacent substandard lots would frustrate the law's environmental purpose, "with no countervailing property value concern." *Ibid.* The court emphasized that petitioner was "charged with knowledge of the existing zoning laws" and, unlike preexisting owners, "had the option to acquire, or not acquire, an adjacent lot and merge it into a single more desirable lot." *Ibid.* The court accordingly affirmed the Board's decision, *id.* at 840, noting that petitioner did not contend that she was entitled to a hardship variance if

the merger provision applied to her property, *id.* at 842 n.7.

d. In 2012, petitioners filed this suit in state court, alleging that the Board's denial of a variance constituted a taking requiring compensation. J.A. 9-10.

The trial court awarded summary judgment to respondents. Pet. App. B1-B10. Viewing "the property in question as a whole," *id.* at B8, the court observed that petitioners retained "several available options" for "recreational and residential use of the property despite the denial of the variance," *id.* at B9. Although only one home could be built on the merged lot, that residence "could be located entirely on Lot E, entirely on Lot F, or could straddle both lots." *Ibid.* The court further noted that petitioners "have an elevated level of privacy because they do not have close neighbors and are able to swim and play volleyball" on Lot E. *Ibid.* The court also explained that the market value of the property was not "significantly impacted by the denial of [a] variance to separately sell or develop the lots," noting the conclusion of respondents' appraiser that there was "less than a ten percent difference" in the market value of petitioners' property as a unified parcel with one building site, compared to its value as two separate, buildable lots. *Ibid.* The court accordingly concluded that there was no regulatory taking.

e. The Wisconsin Court of Appeals affirmed, concluding that petitioners had "not alleged a compensable taking as a matter of law" even with "all pertinent facts and reasonable inferences from those facts [viewed] in the light most favorable to [them]." Pet. App. A2, A18.

The court of appeals rejected petitioners' argument that "there is 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." Pet. App. A9. The court observed that the ordinance had "effectively merged [petitioners'] two adjacent, riparian lots," *id.* at A1-A2, and it concluded that petitioners' "contiguous property" was not "analytically divisible for purposes of a regulatory takings claim," *id.* at A9. The court "disagree[d]" that any alleged "expectation of separate use" for Lots E and F could justify considering them in isolation. *Id.* at A17 n.8. "A property owner's subjective, desired use," the court reasoned, cannot "determin[e] the extent of the property at issue for purposes of a regulatory taking." *Ibid.*

The court of appeals drew support for its conclusion that Lots E and F should be considered together from *Zealy* v. *City of Waukesha*, 548 N.W.2d 528 (Wis. 1996). Pet. App. A9-A11. There, the Wisconsin Supreme Court had relied on the "historical formulation of the takings inquiry," as well as "practical considerations," to reject a landowner's attempt to "segment [his] property" so as to isolate the portion directly affected by a restriction. *Id.* at A10. Applying *Zealy*, the court of appeals concluded that "contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." *Id.* at A11.

Focusing on the "property as a whole," the court of appeals held that no taking had occurred. Pet. App. A12. It first rejected petitioners' contention that the merger provision "deprive[d] [them] of all or substantially all practical use of their property." *Id.* at A2.

The court explained that "[t]here is no dispute that [petitioners'] property suffices as a single, buildable lot," with the possibility of erecting a home on Lot E, Lot F, or a combination of the two. *Id.* at A12. The court concluded that petitioners' "ability to use Lot E for residential purposes, standing alone, is a significant and valuable use of the property." *Id.* at A13.

The court of appeals also rejected petitioners' "oblique[] suggest[ion] that * * * a partial taking has occurred" under the "ad hoc factual, traditional takings inquiry." Pet. App. A14 (citation omitted). The court found no genuine issue of material fact regarding the economic impact of the regulation, which the trial court had concluded decreased the property's value by less than ten percent. *Id.* at A15-A16. The court of appeals further determined that petitioners had no reasonable, investment-backed expectation of selling or developing Lots E and F separately. *Id.* at A16-A17. The court emphasized that the merger provision "was on the books for nearly two decades before [petitioners] became the common owners of Lots E and F," and that they "presumably knew that bringing their substandard, adjacent parcels under common ownership resulted in a merger" of the lots. *Ibid.* Because petitioners "never possessed an unfettered 'right' to treat the lots separately," the court concluded that any "expectation of separate treatment" was "unreasonable." *Id.* at A17-A18 (citation and internal quotation marks omitted). Finally, "the nature and character of the government action" also weighed against a taking, given the "strong public interest in preventing degradation of the natural environment" and the regulation's aim of

"preserv[ing] property values while limiting environmental impacts." *Id.* at A14-A15 (citation omitted).

SUMMARY OF ARGUMENT

The Wisconsin Court of Appeals correctly considered the merger provision's impact on Lots E and F together in rejecting petitioners' regulatory-takings claim.

A. 1. Principles of fairness and justice help to identify the relevant property against which to measure the impact of a regulation in a regulatory-takings case, just as those concepts animate the Just Compensation Clause more generally. In line with this Court's avoidance of per se rules in this context, various factors may properly inform the determination of the parcel as a whole.

The factors that bear on that determination in cases involving real property may be categorized along the three dimensions that identify the relevant interests of an owner in land—spatial, temporal, and functional. Spatial considerations provide the natural starting point. In particular, commonly owned, contiguous land should often sensibly be considered as one unit in the particular regulatory context. Temporal considerations account for the history surrounding the owner's acquisition of the property and the relation of that timing to the enactment of the challenged regulatory restriction. Functional considerations include the owner's use of the property, his objectively reasonable expectations, and whether the property is linked through development plans or a reciprocity of advantage.

2. Petitioners' and Wisconsin's argument that state lot lines should carry dispositive or presumptive weight in evaluating a regulatory-takings claim is

unavailing. This Court has previously rejected the argument that the "legalistic distinctions" established by state property law dictate the relevant parcel. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 500 (1987) (*Keystone*). And there is no reason to think that the considerations that inform a locality's decision to approve a subdivision of land necessarily correspond to the factors that guide a determination whether multiple lots should be viewed as a more integrated whole for purposes of a regulatory-takings analysis.

B. 1. Spatial, temporal, and functional considerations establish that Lots E and F should be considered together in assessing the impact of the merger provision. The commonly owned lots are contiguous and feature the same topography. They were acquired close in time, and petitioners combined the lots by bringing them under common ownership long after the merger provision was enacted. And as petitioners' experience demonstrates, the entire area may be used as an integrated whole, with privacy and additional recreational space provided by the unified parcel.

2. The merger provision's state-law effect of binding Lots E and F together provides an additional reason to consider the economic impact on the whole of petitioners' property. The merger provision does not bar the sale or development of Lot E, but only conditions those actions by linking them to Lot F. Any analytically coherent attempt to value what petitioners have lost in being unable to separately sell or develop Lot E must therefore also account for what they have gained by merging their land into one larger parcel. This Court took that approach in *Penn Central Transportation Co.* v. *New York City*, 438

U.S. 104 (1978) (*Penn Central*), holding that a regulatory restriction's allowance of transferable development rights to be used on the owner's neighboring properties must "be taken into account in considering the impact of [the] regulation." *Id.* at 137.

3. Petitioners' arguments that Lot E should be isolated from Lot F when considering the effect of the merger provision lack merit. Petitioners are wrong to invoke whatever effect state law would otherwise give to the boundaries for their substandard lots, while ignoring the state law merging those boundaries, which petitioners triggered by bringing the lots under common ownership. Their contention that they subjectively expected to treat Lots E and F as distinct parcels contradicts the record and was in any event objectively unreasonable once they voluntarily merged the lots. And their acquisition of the lots in two transactions a year apart does not overcome the many factors linking those lots and demonstrating that they are fairly and justly treated as one parcel as a whole.

ARGUMENT

THE WISCONSIN COURT OF APPEALS CORRECTLY CONSIDERED THE IMPACT OF THE MERGER PROVISION ON LOTS E AND F TOGETHER IN REJECTING PETITIONERS' REGULATORY-TAKINGS CLAIM

The Fifth Amendment's Just Compensation Clause, made applicable to the States through the Fourteenth Amendment, see *Penn Central*, 438 U.S. at 122, provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. The purpose of the Clause is to ensure that the government does not "forc[e] some people alone to bear public burdens which, in all fairness and

justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

"The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). A per se rule of compensation is warranted for permanent physical appropriations because "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

Until this Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), "it was generally thought that the [Just Compensation] Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (citations omitted; second set of brackets in original). The Court has since concluded, however, that even where an owner is not divested of title to or possession of real property, land-use regulation may effect a taking if it is "so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle*, 544 U.S. at 537.

In particular, the Court held in *Lucas* that a regulation that results in "the complete elimination of a property's value" may constitute a total taking. *Lingle*, 544 U.S. at 539. The Court explained that, "from the landowner's point of view," such a "total deprivation" is "the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017. A regulation may also be found to effect a taking under the "ad hoc, factual inquir[y]" set forth in *Penn Central*. 438 U.S.

at 124. The *Penn Central* standards involve a "careful examination and weighing of all the relevant circumstances," *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring), including the "economic impact of the regulation on the claimant," the "extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action," *Penn Central*, 438 U.S. at 124. The *Lucas* and *Penn Central* standards "share a common touchstone" of "identify[ing] regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539.

In analyzing regulatory-takings claims, the Court has "remain[ed] cognizant that 'government regulation—by definition—involves the adjustment of rights for the public good.'" *Lingle*, 544 U.S. at 538 (quoting *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979)). "Zoning laws" like the one at issue in this case are "the classic example" of a "public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124-125; see *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (recognizing the uniform judgment that zoning laws are valid to address "the evils of over-crowding and the like"). Apart from serving important public purposes, these regulations "secure[] an average reciprocity of advantage" within the community that benefits affected property owners. *Mahon*, 260 U.S. at 415; see NR § 118.01 (deeming development restrictions in the protected St. Croix River area "necessary * * * to maintain property values").

The Court has further recognized that to require compensation whenever a generally applicable law "curtails some potential for the use or economic exploitation of private property * * * would effectively compel the government to regulate by purchase." *Allard*, 444 U.S. at 65 (emphasis omitted). But "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Mahon*, 260 U.S. at 413. To succeed on a takings claim, then, a property owner must show that he has been subject to a "deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking." *Keystone*, 480 U.S. at 493.

A. Identification Of The Relevant Property Against Which To Measure Impact In A Regulatory-Takings Case Requires Consideration Of A Variety Of Factors

To assess the effect of government regulation on an owner's property rights, courts considering a regulatory-takings claim must identify "the relevant mass of property" against which to measure the regulation's economic impact on investment-backed expectations and to provide context for assessing the nature of the governmental action—what is known in shorthand as the "parcel as a whole." *Keystone*, 480 U.S. at 497. The Court has "consistently rejected" the "circular" approach of "defining the [relevant] property interest taken in terms of the very regulation being challenged." *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002) (*Tahoe-Sierra*). Thus, a property owner may not divide his entire parcel into discrete parts—"whether limited by time, use, or space," *id.* at 319 (summarizing court of appeals' decision)—in order

to allege a total taking of one of those parts. See *id.* at 331 (error to "disaggregate[] [claimants'] property into temporal segments"). Instead of "divid[ing] a single parcel into discrete segments and attempt[ing] to determine whether rights in a particular segment have been entirely abrogated," the Court focuses "on the nature and extent of the interference with rights in the parcel as a whole." *Penn Central*, 438 U.S. at 130-131.

1. In identifying the relevant property to consider when assessing a takings claim, principles of fairness and justice serve as the polestars, just as they animate the Just Compensation Clause more generally. See *Armstrong*, 364 U.S. at 49. Because those concepts "are less than fully determinate," the Court has recognized the virtue in "examin[ing] a number of factors" instead of attempting to prescribe "a simple mathematically precise formula" to govern the takings inquiry. *Tahoe-Sierra*, 535 U.S. at 326, 336 (internal quotation marks omitted). There are numerous types of interests in property and a "nearly infinite variety of ways in which government actions or regulations can affect [those] interests." *Arkansas Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511, 518 (2012). Courts require flexibility to consider those circumstances that "are probative of what fairness requires in a given case." *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring). A variety of factors therefore may properly bear on determination of the relevant property, with the ultimate goal of "identify[ing] the parcel as realistically and fairly as possible, given the entire factual and regulatory environment." *Ciampitti* v. *United States*, 22 Cl. Ct. 310, 319 (1991).

In cases involving real property, the factors relevant to the parcel-as-a-whole determination are appropriately grouped into three categories—spatial, temporal, and functional—which reflect the dimensions of a property owner's interests in land. See *Tahoe-Sierra*, 535 U.S. at 327, 331-332 (analyzing the temporal dimension, and recognizing that property owners also have interests in the various uses of their property and the "metes and bounds that describe its geographic dimensions"); see also *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 216 F.3d 764, 774 (9th Cir. 2000) (further describing those categories), aff'd, 535 U.S. 302 (2002).

Spatial considerations provide the natural starting point—and, quite often, the end point—for the inquiry. In particular, commonly owned, contiguous land will often form one relevant unit of property in the context of a particular regulation. See, *e.g.*, *Giovanella* v. *Conservation Comm'n*, 857 N.E.2d 451, 457-459 (Mass. 2006), cert. denied, 549 U.S. 1280 (2007); *Bevan* v. *Brandon Twp.*, 475 N.W.2d 37, 43 (Mich. 1991), cert. denied, 502 U.S. 1060 (1992). The temporal dimension encompasses the "term of years that describes * * * the owner's interest," *Tahoe-Sierra*, 535 U.S. at 332, including the dates when an owner acquired the property immediately affected and any larger tracts with which it is associated, as well as the relation of that timing to the application of the regulatory regime. And the functional dimension includes the use to which the owner has put the property, the owner's objectively reasonable expectations regarding the property, whether the property is linked through an identified or implicit development scheme, and the extent to which regulated portions of

land are integrated with and enhance the value of unregulated portions. See, *e.g.*, *District Intown Props. Ltd. P'ship* v. *District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999), cert. denied, 531 U.S. 812 (2000); *Giovanella*, 857 N.E.2d at 457-458 (collecting cases discussing those factors and others).

Contiguity plays an important role in the parcel-as-a-whole analysis because it frequently corresponds to other factors demonstrating that, in fairness and justice, commonly owned tracts of land should be considered together in assessing the takings claim. For example, contiguous lots will frequently benefit from a direct reciprocity of advantage, with regulated segments enhancing the value and use of unregulated portions. And often "[c]ommon sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property." *Giovanella*, 857 N.E.2d at 458. Yet no bright-line rule requires aggregation of contiguous, commonly owned land in *all* cases, even those in which the history and use of the property demonstrate that the regulation's impact should be assessed on separate parcels. "The temptation to adopt what amount to *per se* rules in either direction must be resisted." *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring).

2. Petitioners and Wisconsin contend that the Court should adopt a presumption—or even a bright-line rule—that each individual "lot" recognized under state property law must be considered in isolation. See Pets. Br. 24-29; Wisconsin Br. 33-37. The Court should decline that invitation to transform the parcel-as-a-whole inquiry into a rigid single-factor test that turns solely on "legalistic distinctions" of state property law. *Keystone*, 480 U.S. at 500.

A rule or presumption that individual lots must be considered in isolation from contiguous, commonly owned land would disserve principles of fairness and justice by excluding or marginalizing other relevant factors. Cf. *Tahoe-Sierra*, 535 U.S. at 334 ("[T]he ultimate constitutional question is whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by [a] * * * categorical rule[] or by a[n] * * * inquiry into all of the relevant circumstances in particular cases."). The considerations that govern a locality's decision to approve the subdivision of real property do not necessarily correspond to the factors that inform a determination whether it is fair to view land as a more integrated whole for purposes of a regulatory-takings analysis. Here, for example, the relevant regulation defines "[l]ot" broadly as any "contiguous parcel of land with described boundaries," NR § 118.03(23), with no requirement that those boundaries be drawn to isolate portions of land that are not properly considered with neighboring parcels for state regulatory purposes. When contiguous land is otherwise linked through features like common ownership, common acquisition, common use, and a common development plan, it would make scant sense—and lead to unfair results—to place dispositive or even presumptive weight on lot lines to measure the impact of a regulatory restriction on the property owner.

To give an example, developers frequently acquire a large tract of land and then receive approval to subdivide the tract pursuant to development plans, sometimes in stages and with only some portions subject to certain regulatory restrictions, such as protection for wetlands. In that situation, spatial, temporal, and

functional considerations will often warrant considering the entire tract as the relevant parcel when determining whether the regulatory scheme has "place[d] a burden on the use of only a small fraction" of the developer's overall property. *Keystone*, 480 U.S. at 500 n.27. An analysis single-mindedly focused on lot boundaries at a particular moment in time—while ignoring the full spatial, temporal, and functional dimensions that link a single lot to a broader tract—would dramatically shift the equilibrium of the regulatory-takings analysis by disconnecting the parcel-as-a-whole inquiry from the practical reality of how land has actually been acquired, used, developed, and conveyed.[2]

Just such a scenario is presented in a case in which the government has sought this Court's review. See *Lost Tree Vill. Corp.* v. *United States*, 707 F.3d 1286, 1288-1291 (Fed. Cir. 2013) (developer acquired 1300-acre parcel and profitably subdivided it into gated community with nearly 1400 home sites, before seeking compensation for alleged total taking of residual 4.99-acre area of regulated wetlands and submerged lands), petition for cert. pending, No. 15-1192 (filed Mar. 22, 2016). Other examples abound. See, *e.g.*, *Palm Beach Isles Assocs.* v. *United States*, 208 F.3d 1374, 1377-1378 (Fed. Cir.) (claimants developed and

[2] Such a rule could also permit property owners to manufacture total-takings claims by subdividing their property into regulated and unregulated portions. Even when a claimant does not purposefully engage in manipulation, that pattern of subdivision could follow naturally from the ordinary course of development. A parcel-as-a-whole test keyed to existing lot lines therefore could fundamentally alter the subdivision process by forcing States and localities to consider whether the approval of particular lot configurations might expose them to total-takings liability.

sold 261 acres of 311.7-acre parcel before alleging taking of 50.7 acres subject to regulatory restrictions), aff'd on reh'g, 231 F.3d 1354 (Fed. Cir. 2000); *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171, 1173-1174 (Fed. Cir. 1994) (claimants developed 199 acres of 250-acre parcel into single-family homes before alleging taking of 12.5-acre tract subject to regulatory restrictions); *Reahard* v. *Lee Cnty.*, 968 F.2d 1131, 1133 (11th Cir. 1992) (claimants "subdivided, developed, and sold" 500 acres of 540-acre parcel of "waterfront land" as a "single-family subdivision" before alleging taking of 40-acre residuum).

Notably, this Court in *Keystone* rejected an argument that a State's recognition of a distinct real-property interest should control the parcel-as-a-whole determination. See 480 U.S. at 500-502. There, the Court rejected a takings claim arising from a statute that allegedly "destroy[ed] the value of the[] [claimants'] unique support estate," which "consists of the right to remove the strata of coal and earth that undergird the surface" above a coal mine or "to leave those layers intact to support" structures upon the surface. *Id.* at 500 (citation omitted). For over a century, landowners had "sever[ed] title" to the support estate and conveyed it as a "separate, recognized interest in realty" distinct from the mineral and surface estates. *Id.* at 478-479. Because state law "regard[ed] the support estate as a separate interest in land," the claimants contended that it must be viewed "as a distinct segment of property for 'takings' purposes." *Id.* at 500-501.

The Court in *Keystone*, however, declined to rely on "legalistic distinctions" established by state property law to define the relevant parcel. 480 U.S. at 500.

It did not matter that "state law allowed the separate sale of the segment of property," because the support estate intrinsically had "value only insofar as it protect[ed] or enhance[d] the value" of the claimants' separate and distinct mineral estates. *Id.* at 500-501. The Court accordingly held that the support and mineral estates should be considered together as the relevant parcel. *Id.* at 501. Viewed that way, "the burden the Act place[d] on the support estate d[id] not constitute a taking" because "virtually all" of the coal in the mineral estate was unaffected by the regulation. *Ibid.*[3]

Keystone further refutes petitioners' (Br. 27-29) and Wisconsin's (Br. 23-24, 31) argument that lot lines should define the relevant parcel because owners expect their fee-simple estates to be independently useable and saleable. That argument conflates the parcel-as-a-whole inquiry with the antecedent question whether petitioners have a protected property interest in the first place. To be sure, state law creates property rights and interests protected by the Just Compensation Clause. See, *e.g.*, *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972). Thus, in *Keystone*, there was no dispute that state law accorded protection to the support estate as a distinct fee-simple estate that could be independently sold. 480 U.S. at 478, 500-501; see *Captline* v. *County of*

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[3] *Keystone* also signaled that interests in real property that cross lot lines may be considered together as the parcel as a whole. The Court observed that even if the "support estate [were] a distinct segment of property for 'takings' purposes," it would be appropriate to consider the economic impact of the regulation by aggregating all the support estates the claimants had purchased across "a great deal of land." 480 U.S. at 501.

Allegheny, 459 A.2d 1298, 1301 (Pa. Commw. Ct. 1983), cert. denied, 466 U.S. 904 (1984). But as *Keystone* demonstrates, state law does not dictate when discrete property rights should be combined to form the parcel as a whole for a takings inquiry. 480 U.S. at 500-502.

Nor is a parcel-as-a-whole rule based solely on existing lot lines necessary to protect property owners' reasonable expectations regarding the permissible uses of their land. No matter the size of the relevant parcel, the *Penn Central* standards direct courts to consider a regulation's interference with reasonable, investment-backed expectations. "[T]he force of th[at] factor" can be "so overwhelming * * * that it disposes of the taking question," depending on the circumstances of the individual case. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984). And the inquiry into the "character of the governmental action" offers another check on government regulation. *Penn Central*, 438 U.S. at 124; see *Hodel* v. *Irving*, 481 U.S. 704, 716 (1987) (finding a taking based on the "extraordinary" character of the government regulation). In short, the contextual *Penn Central* analysis affords suitable protection for property rights, well-grounded in this Court's precedents, with no need to adopt the "blunt * * * instrument" of a per se rule or presumption to govern the parcel-as-a-whole determination. *Tahoe-Sierra*, 535 U.S. at 342 (quoting *Palazzolo*, 533 U.S. at 628).

B. The Wisconsin Court Of Appeals Correctly Considered Lots E And F Together In Assessing Petitioners' Takings Claim

In this case, spatial, temporal, and functional considerations align to demonstrate that Lots E and F

are properly considered together for purposes of measuring the merger provision's impact.

1. At the outset, Lots E and F are commonly owned, contiguous lots. Moreover, they "have a common topography": Both lots are bisected by a steep bluff and feature relatively level areas atop that bluff and below it along the river. Pet. App. A3. Each lot individually falls far short of the longstanding and generally applicable minimum area and river-frontage requirements designed to protect both the river's important scenic values and owners' property values. But when merged, as called for by state and local law, they at least approach the minimum standards deemed necessary to accomplish those purposes. Spatially, Lots E and F are properly viewed as an integrated whole.

Temporal considerations reinforce the conclusion that Lots E and F should be considered together in determining the impact of the restrictions. Petitioners acquired both lots close in time, and in acquiring the second lot they merged it with the other lot by bringing it under common ownership long after the regulatory restriction was enacted. As the Wisconsin Court of Appeals emphasized, petitioners were "charged with knowledge of the existing zoning laws" and "had the option to acquire, or not acquire, an adjacent lot and merge it into a single more desirable lot." Pet. App. A16-A17 (citation omitted). Because "the regulatory regime in place at the time the claimant acquires the property at issue" is relevant to the takings analysis, *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring), the timing and circumstances of petitioners' acquisition of the land support

the conclusion that it is fair and just to view the lots together for purposes of takings analysis.

Functional considerations further strengthen that conclusion. As the volleyball court on Lot E shows, that area adjacent to Lot F functions as a side yard for petitioners' existing cabin. See R. 17-127. Thus, as petitioners acknowledged below, they may use Lot E as "an extension of [their] use of Lot F and their cabin," and they "find some use and enjoyment of the extra space." R. 22-18 to 22-19. Petitioners "have an elevated level of privacy because they do not have close neighbors and are able to swim and play volleyball" on Lot E, removed from the homeowners' association beach that cuts into Lot F. Pet. App. B9. Those linked uses, moreover, ensure that Lot E enhances the value of Lot F—and vice versa. As the trial court observed based on respondents' unrebutted appraisal, there "is less than a ten percent difference" between the value of the tracts as two separate, buildable lots and the value of the land as a unified larger parcel, with only one building site but significantly more private river frontage and a buffer from neighbors. *Ibid.*; see J.A. 58-59; R. 17-42 to 17-55. Lots E and F together thus properly form the parcel as a whole along every dimension.[4]

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[4] Petitioners contend (Br. 13) that the Wisconsin Court of Appeals erroneously adopted a per se rule that commonly owned, contiguous parcels must always be considered together as the parcel as a whole. Although some language in the court's opinion supports that reading, see Pet. App. A11, the court went on to consider, and reject as unpersuasive, petitioners' arguments for dividing their contiguous property into discrete segments. *Id.* at A11-A12, A17 nn.8-9. In any event, as discussed in the text, the court reached the right result in finding that Lots E and F together formed the relevant parcel.

2. The nature of the challenged regulatory restriction supplies a further basis to consider the economic impact on that entire area. The parcel-as-a-whole inquiry is not an end in itself, but is instead a guide in "compar[ing] the value that has been taken from the property with the value that remains." *Keystone*, 480 U.S. at 497. Because the merger provision links Lots E and F, there is no realistic or analytically coherent way to conduct that comparison here without considering the impact on both merged portions of petitioners' property.

Notably, the merger provision does not bar petitioners from selling or developing Lot E—but rather only conditions those actions by linking them to Lot F. Petitioners remain free to sell the property as a whole or to build and maintain a home "entirely on Lot E, entirely on Lot F, or * * * straddl[ing] both lots." Pet. App. A6. Because the regulatory restriction binds the parcels together for purposes of sale and development, any attempt to value the impact on Lot E must also account for the corresponding effect on Lot F.

The valuation evidence illustrates the point. Analyzing the lots as two independent parcels with two separate building sites before the variance denial, Lot E was worth $410,000 (according to petitioners' appraiser, R. 22-182), and Lot F was worth $373,000 (according to respondents' unrebutted appraisal, R. 17-55 to 17-56), for a combined value of $783,000. After the variance denial, when the lots were effectively merged into one for sale and development, respondents' unrebutted appraisal established that Lots

E and F together were worth $698,300. R. 17-46.[5] The net impact of the merger provision was therefore a decrease in value of $84,700 ($783,000 minus $698,300)—which necessarily has to be calculated by looking at *both* portions of petitioners' property.[6]

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[5] Petitioners' appraiser stated that Lot E's market value was $40,000 after the variance denial, but he based that on the counterfactual assumption that Lot E could be separately sold from Lot F but not developed. See R. 22-188. Petitioners did not dispute that, under the merger provision as it *actually* operated, the two lots together with one building site had a combined value of $698,300. Because the lots merged, with the possibility of building a home on any part of the property, it is artificial to try to apportion their combined value between the two lots. But even using petitioners' proposed post-merger value of $40,000 for Lot E, Lot F's post-merger value would be $658,300, calculated by taking the combined value of $698,300 and subtracting the $40,000 attributed to Lot E. Compared to Lot F's pre-merger value of $373,000, that represents an increase in value of $285,300. If the merger provision reduced Lot E's value by $370,000 ($410,000 minus $40,000), but increased Lot F's value by $285,300, then the net impact is a reduction in overall value of $84,700.

[6] The reduction in total value of $84,700 is properly treated as the numerator of the equation measuring economic impact. Notably, whether the denominator is Lot E alone ($410,000), or both lots in combination ($783,000, representing $410,000 for Lot E and $373,000 for Lot F), the overall economic impact of a 21% or 11% reduction in value, respectively, does not approach the level generally thought necessary to find a regulatory taking. See *CCA Assocs.* v. *United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011) ("[W]e are aware of no case in which a court has found a taking where diminution in value was less than 50 percent") (citation and internal quotation marks omitted), cert. denied, 133 S. Ct. 422 (2012). Moreover, the Wisconsin Court of Appeals found that petitioners had no reasonable, investment-backed expectation of separately selling or developing Lot E, Pet. App. A17-A18, and that "the nature and character of the government action" weighed against finding a taking, *id.* at A14. As this Court has recognized,

This Court conducted a similar analysis in *Penn Central* when it rejected the claim that New York City's landmarks-preservation law effected a taking of the air rights above Grand Central Terminal by preventing the construction of an office building atop the Terminal. 438 U.S. at 135-138. Although the law "restrict[ed] the owner's control over" the Terminal, it also "enhance[d] the [owner's] economic position" by permitting the owner "to transfer development rights" to nearby parcels in common ownership, with eight other buildings "eligible to be recipients of development rights afforded the Terminal by virtue of [its] landmark designation." *Id.* at 113-115. The Court concluded that, even if the transferable development rights would "not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on [the owner]." *Id.* at 137. "[F]or that reason," the Court held that the transferable development rights "are to be taken into account in considering the impact of [the] regulation." *Ibid.*; see *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 749 (1997) (Scalia, J., concurring in part and concurring in the judgment) (positing an understanding of *Penn Central* as holding that "[t]he relevant land * * * was the aggregation of the owners' parcels

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density ordinances "benefit the [claimants] as well as the public" by "assuring careful and orderly development of residential property with provision for open-space areas." *Agins* v. *City of Tiburon*, 447 U.S. 255, 262 (1980). Although petitioners suggest (Br. 31) that they were singled out, here, as in most cases, the ordinance had a similar effect on nearby properties. J.A. 67; see *Agins*, 447 U.S. at 262.

subject to the regulation (or at least the contiguous parcels); and the use of that land, as a whole, had not been diminished" in light of the transferable development rights).

Just as in *Penn Central*, the value that accrues to petitioners from combining Lots E and F "mitigate[s] whatever financial burdens the law has imposed" in barring separate sale or development of Lot E. 438 U.S. at 137. The necessity of taking that effect "into account in considering the impact of [the] regulation" fortifies the conclusion that Lots E and F must be considered together for purposes of takings analysis. *Ibid.*

3. Petitioners' arguments to the contrary lack merit.

Petitioners primarily contend (Br. 27) that Lots E and F should be considered in isolation because lot lines establish that they are "two separate pieces of property." But petitioners' reliance solely on the aspects of state law that give effect to lot boundaries ignores that state law in this case (like zoning regulations in many jurisdictions, see County Br. 41-45) also provides that contiguous, commonly owned substandard lots are effectively merged into one. Pet. App. A1-A2; see Wisconsin Br. 37-43. The merger provision reflects a governmental determination that contiguous, substandard lots should be combined when possible, without causing undue hardship, because they are unsuited for separate development. See J.A. 65 (Board's finding that Lots E and F together constituted a "single, more conforming parcel that is more suitable for residential development"). The merger provision accordingly operates to render the grandfather provision inapplicable when the hardship calcu-

lus giving rise to the rationale for grandfathering is inapplicable. See 2 Kenneth H. Young, *Anderson's American Law of Zoning* § 9.67, at 325-330 (4th ed. 1996) (describing the common exception to grandfather provisions for adjacent substandard lots in common ownership, which must be combined to "meet, or more closely approximate, the frontage and area requirements" of zoning ordinances, and noting that such a merger "may be regarded as imposing no unnecessary hardship"). Thus, to the extent that state law informs the analysis, it demonstrates that Lots E and F are properly considered in combination.

Petitioners further contend (Br. 30) that they had distinct expectations for Lots E and F, with no intent to "blur the property lines." But while petitioners now assert (Br. 30) that "Lot E was purchased as an investment" and "the plan was to simply let the investment grow in value until some future time," they previously testified that their parents had hoped to build a retirement home atop the bluff "in the middle of the two existing lots" while retaining the beachfront cabin. J.A. 91; see R. 22-68 (testimony by petitioner Donna Murr that her parents' "goal and their desire all along [wa]s to * * * redraw the lot lines, build a house on top, keep the cabin at the bottom"). Petitioners further testified that they themselves would have liked to reorient the lots lines and sell an as-yet-unrecorded lot atop the bluff while keeping an as-yet-unrecorded beachfront lot containing portions of both Lots E and F. R. 22-77, 22-134. Thus, "the history of the * * * purchase, use, and plans for the parcels" cuts against petitioners' argument that Lots E and F are "separate and distinct." Pets. Br. 30.

In any event, the regulatory scheme existing at the time petitioners chose to bring the lots under common ownership greatly undermines their alleged expectation of separate use. Pet. App. A17-A18. The merger provision had been on the books for decades, *id.* at A16, and Wisconsin law had even earlier recognized that "[l]ands adjacent to or near navigable waters exist in a special relationship to the state." *Just* v. *Marinette Cnty.*, 201 N.W.2d 761, 769 (Wis. 1972); see *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring in the judgment) ("Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."). Because petitioners did not "ha[ve] an unfettered right to use their land as they pleased at the inception of their ownership," their alleged unilateral expectations of separate use provide no basis to isolate Lot E from Lot F when analyzing their regulatory-takings claim. *Id.* at A16.

Finally, petitioners emphasize (Br. 30) that they acquired Lots E and F in different transactions a year apart. But their parents' decision to structure those gifts sequentially does not override the many other factors demonstrating that the whole area is rightly considered the parcel as a whole. The Wisconsin Court of Appeals thus correctly measured the impact of the merger provision by reference to petitioners' entire property interest and rightly concluded that no taking had occurred.

CONCLUSION

The judgment of the Wisconsin Court of Appeals should be affirmed.

Respectfully submitted.

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