COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2828 **Cir. Ct. No. 2012CV258**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

JOSEPH P. MURR, MICHAEL W. MURR, DONNA J. MURR AND PEGGY M. HEAVER,

PLAINTIFFS-APPELLANTS,

V.

STATE OF WISCONSIN AND ST. CROIX COUNTY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Joseph Murr, Michael Murr, Donna Murr and Peggy Heaver (collectively, the Murrs) appeal a judgment dismissing their regulatory takings claim upon motions for summary judgment by the State of Wisconsin and St. Croix County. We agree with the circuit court that the

challenged regulatory action, an ordinance that effectively merged the Murrs' two adjacent, riparian lots for sale or development purposes, did not deprive the Murrs of all or substantially all practical use of their property. Accordingly, we affirm.

BACKGROUND

¶2 This appeal represents the second time the Murrs' dispute with the County over the use of their property has come before this court. In ***Murr v. St. Croix County Board of Adjustment***, 2011 WI App 29, ¶¶1-2, 332 Wis. 2d 172, 796 N.W.2d 837, we concluded the circuit court properly affirmed the County's denial of Donna Murr's request for a variance to separately sell or develop what are known as Lots E and F, two contiguous parcels on the St. Croix River.[1]

¶3 Our earlier opinion sets forth the history of the property, which we briefly restate here. Furthermore, as this is an appeal from a decision granting summary judgment against the Murrs, we view all pertinent facts and reasonable inferences from those facts in the light most favorable to the Murrs. *See* ***Thomas ex rel. Gramling v. Mallett***, 2005 WI 129, ¶4, 285 Wis. 2d 236, 701 N.W.2d 523.

¶4 The Murrs' parents purchased Lot F in 1960. ***Murr***, 332 Wis. 2d 172, ¶4. They built a cabin near the river and transferred title to their plumbing company. ***Id.*** In 1963, the Murrs' parents purchased an adjacent lot, Lot E, which

[1] Donna Murr was the only named party in the previous suit. *See* ***Murr v. St. Croix Cnty. Bd. of Adjustment***, 2011 WI App 29, ¶4 n.4, 332 Wis. 2d 172, 796 N.W.2d 837. Her interests are aligned with those of her siblings in the present matter, so for ease of reading we will refer to the Murrs collectively in our recitation of the facts pertaining to the earlier suit.

In addition, our previous decision did not specifically identify the lots using the "E" and "F" nomenclature. The Murrs represent this nomenclature comes from an unrecorded subdivision map. For ease of reading, we will supplement the statement of facts in our earlier opinion with the appropriate designation.

has remained vacant ever since. ***Id.*** The Murrs allege Lot E was purchased as an investment property, with the intention of developing it separate from Lot F or selling it to a third party.

¶5 The lots have a common topography. Each is bisected by a 130-foot bluff, but they are moderately level at the top and near the river. ***Id.*** Together, the lots contain approximately .98 acres of net project area.[2] ***Id.*** The Murrs' parents transferred Lot F to the Murrs in 1994, followed by Lot E in 1995.[3] ***Id.***

¶6 The 1995 transfer of Lot E brought the lots under common ownership and resulted in a merger of the two lots under ST. CROIX COUNTY, WIS., CODE OF ORDINANCES, LAND USE & DEV., Subch. III.V, LOWER ST. CROIX RIVERWAY OVERLAY DIST. § 17.36I.4.a. (July 1, 2007) (the Ordinance), which has been in place since the mid-1970s. *See* ***State v. St. Croix Cnty.***, 2003 WI App 173, ¶4, 266 Wis. 2d 498, 668 N.W.2d 743. The Ordinance prohibits the individual development or sale of adjacent, substandard lots under common ownership, unless an individual lot has at least one acre of net project area.[4]

[2] "Net project area" means "developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands." WIS. ADMIN. CODE § NR 118.03(27) (Feb. 2012).

[3] Although not material to our decision because ownership was at all times common, we note that the Murrs' parents conveyed the contiguous properties to two other siblings in addition to the Murrs. The record indicates those siblings subsequently quitclaimed their ownership interests to the Murrs.

[4] As set forth in our earlier decision, the Ordinance reads:

> **(4) SUBSTANDARD LOTS** Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:
>
> (a) 1. The lot is in separate ownership from abutting lands, or

(continued)

However, if abutting, commonly owned lots do not each contain the minimum net project area, they together suffice as a single, buildable lot. ***Murr***, 332 Wis. 2d 172, ¶11 n.9.

¶7 Years later, after repeated flooding, the Murrs decided to flood proof the cabin on Lot F and sell Lot E as a buildable lot. Among other things, the Murrs sought a variance to separately use or sell their two contiguous lots. ***Id.***, ¶5. The DNR and county zoning staff opposed the Murrs' application and, following a public hearing, the St. Croix County Board of Adjustment denied the application. ***Id.***, ¶6. The Murrs sought certiorari review and the circuit court affirmed the portion of the Board's decision relevant to this appeal. ***Id.*** On appeal, we agreed with the circuit court that the Board acted appropriately. ***Id.***, ¶2. The Wisconsin Supreme Court denied the Murrs' subsequent petition for review.

> 2. The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.
>
> (b) All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with the requirements of this subchapter and any underlying zoning or sanitary code requirements.

Murr, 332 Wis. 2d 172, ¶10 & n.8 (noting that the Ordinance's internal paragraph lettering and numbering is illogical and potentially confusing, such that use of lettering and numbering of the administrative code provision on which the Ordinance is based, WIS. ADMIN. CODE § NR 118.08(4) (Feb. 2012), is more appropriate). As we previously noted, the administrative code provision is "not a model of clear draftsmanship," and we renew our call, implicit in our previous decision, for the DNR to review its language. *See* ***id.***, ¶11.

¶8 The Murrs then filed a complaint against the State and County pursuant to WIS. STAT. § 32.10,[5] alleging that the Ordinance resulted in an uncompensated taking of their property under WIS. CONST. art. I, § 13.[6] The Murrs alleged that the Ordinance and the administrative code provision on which it was patterned, WIS. ADMIN. CODE § NR 118.08(4) (Feb. 2012), 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." They asserted Lot E could not be put to alternative uses like agriculture or commerce due to its size, location and steep terrain. Finally, they alleged the lot was usable only for a single-family residence, "and without the ability to sell or develop it the lot is rendered useless."

¶9 The State and County separately sought summary judgment. Their motions essentially advanced the same arguments: the Murrs' claim was time barred; the Murrs failed to exhaust their administrative remedies; they had no protectable property right to sell a portion of their property; and they were not deprived of all or substantially all the beneficial use of their property.

¶10 The circuit court granted summary judgment to the County and State. The court first concluded the Murrs' claim was time barred, reasoning that the Ordinance "had immediate economic consequence[s]" when it was enacted. Despite this conclusion, the court also reached the merits of the Murrs' claim. It determined that the applicable law required it to analyze the effect of the

[5] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[6] The Murrs represented they had served the State and County with a Notice of Claim that demanded compensation for the taking of their land. The County denied the claim by letter dated October 3, 2011. The State did not issue a denial, but the claim was deemed denied due to the passage of time.

Ordinance on the Murrs' property as a whole, not each lot individually. Accordingly, the court held there was no taking because the Murrs' property, taken as a whole, could be used for residential purposes, among other things. Specifically, the court noted the undisputed fact that, even under the Ordinance, "[a] year-round residence could be built on top of the bluff and the residence could be located entirely on Lot E, entirely on Lot F, or could straddle both lots." Further, the court determined the Murrs' property—again, defined as Lots E and F combined—retained significant value, citing an appraisal opining that the merger decreased the property value by less than ten percent. The court denied a subsequent motion for reconsideration, and the Murrs now appeal.

DISCUSSION

¶11 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). As the moving parties, the County and the State must show a defense that would defeat the Murrs' claim. *See* ***Voss v. City of Middleton***, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991).

¶12 The Murrs argue the circuit court erred for two reasons. First, they assert their claim is not time barred. They reason their claim was not ripe until their request for a variance was denied and they exhausted their appellate rights from that decision. Second, the Murrs argue the Ordinance deprived them of all, or substantially all, beneficial use of their property. We conclude the Murrs'

takings claim fails on its merits as a matter of law. Accordingly, we do not reach the issue of whether their claim was timely filed and assume, without deciding, that it was. *See* ***Raasch v. City of Milwaukee***, 2008 WI App 54, ¶2, 310 Wis. 2d 230, 750 N.W.2d 492 (citing ***Gross v. Hoffman***, 227 Wis. 296, 299-300, 277 N.W. 663 (1938)) (where one issue is dispositive, we need not address other issues).

¶13 The federal and state constitutions do not prohibit the taking of private property for public use, but they do require that the government provide just compensation for any taking. ***260 N. 12th St., LLC v. DOT***, 2011 WI 103, ¶43, 338 Wis. 2d 34, 808 N.W.2d 372.[7] "A 'taking' need not arise from an actual physical occupation of land by the government." ***Eberle v. Dane Cnty. Bd. of Adjustment***, 227 Wis. 2d 609, 621, 595 N.W.2d 730 (1999). A "taking" can also occur if the government enacts a regulation "that is 'so onerous that its effect is tantamount to a direct appropriation.'" ***E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist.***, 2010 WI 58, ¶22, 326 Wis. 2d 82, 785 N.W.2d 409 (quoting ***Lingle v. Chevron U.S.A. Inc.***, 544 U.S. 528, 537 (2005)). The Murrs allege the latter type of taking—a regulatory or constructive taking—occurred here. Whether the Ordinance constituted a taking of the Murrs' property without compensation is a question of law. *See* ***Zealy v. City of Waukesha***, 201 Wis. 2d 365, 372, 548 N.W.2d 528 (1996).

[7] The Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, "mandates that private property shall not 'be taken for public use, without just compensation.'" ***260 N. 12th St., LLC v. DOT***, 2011 WI 103, ¶43, 338 Wis. 2d 34, 808 N.W.2d 372 (quoting U.S. CONST. amend. V). Similarly, the Wisconsin Constitution prohibits the taking of private property "'for public use without just compensation therefor.'" ***Id.*** (quoting WIS. CONST. art. I, § 13).

¶14 A landowner who believes the government has taken his or her property without instituting formal condemnation proceedings may bring an inverse condemnation claim under WIS. STAT. § 32.10 to recover just compensation. *See* ***E-L Enters.***, 326 Wis. 2d 82, ¶36. That statute, which is the legislative fulfillment of WIS. CONST. art. I, § 13, is, by its terms, designed solely to deal with the traditional exercise of the government's eminent domain power vis-à-vis physical occupation. ***E-L Enters.***, 326 Wis. 2d 82, ¶36. However, our supreme court has concluded regulatory takings are also cognizable under § 32.10. *See* ***E-L Enters.***, 326 Wis. 2d 82, ¶37.

¶15 The landmark case in this respect was ***Howell Plaza, Inc. v. State Highway Commission***, 66 Wis. 2d 720, 226 N.W.2d 185 (1975). There, the court concluded "that there need not be an actual taking in the sense that there be a physical occupation or possession by the condemning authority …." ***Id.*** at 730. To state a claim under WIS. STAT. § 32.10 in the absence of physical occupation, the facts alleged must demonstrate that a government restriction "deprives the owner of all, or substantially all, of the beneficial use of his property." ***Id.*** at 726; *see also* ***E-L Enters.***, 326 Wis. 2d 82, ¶37.

¶16 Here, the Murrs seek compensation solely for the alleged taking of Lot E. They contend that, given the application of the Ordinance, Lot E "serves no purpose or use" and has no value because it "cannot be sold." The Murrs argue the circuit court erred by examining the beneficial uses of Lots E and F in combination. Instead, citing ***Jonas v. State***, 19 Wis. 2d 638, 121 N.W.2d 235 (1963), and ***Lippert v. Chicago & Northwestern Railway Co.***, 170 Wis. 429, 175 N.W. 781 (1920), the Murrs contend 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.

¶17 Contrary to the Murrs' assertions, the issue of whether contiguous property is analytically divisible for purposes of a regulatory takings claim was settled in ***Zealy***. There, our supreme court concluded that before considering whether a regulatory taking has occurred, "a court must first determine what, precisely, *is* the property at issue …." ***Zealy***, 201 Wis. 2d at 375. The landowner in ***Zealy*** argued the City of Waukesha accomplished a regulatory taking by creating a conservancy district over 8.2 acres of his 10.4-acre parcel, thereby precluding residential development on the majority of the property. ***Id.*** at 370-71. The court, however, rejected the owner's attempt to so segment the property, concluding a "landowner's property in such a case should be considered as a whole." ***Id.*** at 376. Because the landowner retained over two acres zoned for business and/or residential use, and farming was permitted within the conservancy district, no compensable taking occurred. ***Id.*** at 378-80.

¶18 In so holding, the court credited both the Supreme Court's historical formulation of the takings inquiry and practical considerations. "[T]he United States Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel …." ***Id.*** at 375-76. Instead, to determine whether a particular government action has accomplished a taking, courts are to focus "'both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole ….'" ***Id.*** at 376 (quoting ***Penn Cent. Transp. Co. v. New York City***, 438 U.S. 104, 130-31 (1978)). This analysis preserves a municipality's authority to place reasonable limits on the use of property without requiring the payment of compensation for every incidental infringement of property rights. *See* ***id.*** (quoting ***Keystone Bituminous Coal Ass'n v. DeBenedictis***, 480 U.S. 470, 498 (1987)).

¶19 The Murrs contend ***Zealy*** is distinguishable because that case turned on the owner's ability to use one large parcel, whereas the Murrs assert they have been wholly deprived of the use of at least one of their two separate parcels. We disagree. There is no dispute that the Murrs own contiguous property. Regardless of how that property is subdivided, contiguousness is the key fact under ***Zealy***. *See* ***Zealy***, 201 Wis. 2d at 375-76 (observing the Supreme Court "has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel …."). This is evident from our supreme court's subsequent decision in ***R.W. Docks & Slips v. State***, 2001 WI 73, 244 Wis. 2d 497, 628 N.W.2d 781. There, a developer partially completed a marina and condominiums but the DNR, noting an emergent weedbed along the shoreline, refused to grant a permit for the dredging necessary to complete the remaining 71 boat slips. ***Id.***, ¶¶8-9. Applying ***Zealy***, the court held that the developer's subsequent takings claim must be analyzed "in light of the marina as a whole rather than the parcel that was to have contained the 71 boat slips." ***Id.***, ¶27.

¶20 Neither ***Jonas*** nor ***Lippert***, the authorities on which the Murrs rely, cast any doubt upon what has become a well-established rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein. *See* ***R.W. Docks & Slips***, 244 Wis. 2d 497, ¶¶25-27 & n.5 (reaffirming ***Zealy*** and declining to revisit the issue). ***Jonas*** and ***Lippert*** both involved formal condemnation proceedings; they were not regulatory takings cases. *See* ***Jonas***, 19 Wis. 2d at 639; ***Lippert***, 170 Wis. at 429-30. As such, the issue was not whether there had been a taking but rather the amount of compensation due.

¶21 When properly viewed as valuation cases, it becomes clear ***Jonas*** and ***Lippert*** are inapplicable. The property owners in those cases argued they

were entitled to "severance" damages—an amount representing diminutions in the value or use of other property attributable to the loss of the condemned property. *See* ***Jonas***, 19 Wis. 2d at 642; ***Lippert***, 170 Wis. at 430-32. The availability of such damages turns on "[u]nity of use," a concept which assesses whether the properties "are used as a unit so that each is dependent and related to the use of the other, or [whether they are] … devoted to separate and distinct uses, so as to constitute independent properties." *See* ***Jonas***, 19 Wis. 2d at 642; ***Lippert***, 170 Wis. at 431-32; *see also* ***Spiegelberg v. State***, 2006 WI 75, ¶14, 291 Wis. 2d 601, 717 N.W.2d 641 ("The unity of use rule permits a condemnee to receive compensation when a taking from one property must be considered in terms of its effect on another property, in order for those affected … to be fully compensated."); ***Bigelow v. West Wis. Ry. Co.***, 27 Wis. 478, 487 (1871). Nothing to which the Murrs have directed our attention persuades us the unity of use concept should be applied to determine whether a regulatory taking has occurred in the first instance.

¶22 With the analysis properly focused on the Murrs' property as a whole, it is evident they have failed to establish a compensable taking, as a matter of law. There is no dispute that their property suffices as a single, buildable lot under the Ordinance. *See* ***Murr***, 332 Wis. 2d 172, ¶11 n.9. Thus, the circuit court properly observed the Murrs can continue to use their property for residential purposes. Specifically, the Ordinance allows the Murrs to build a year-round residence on top of the bluff, if they choose to raze their cabin located near the river. Notably, this use may include Lot E, as the new residence could be located entirely on Lot E, entirely on Lot F, or it could straddle both lots. The Murrs' ability to use Lot E for residential purposes, standing alone, is a significant and valuable use of the property. *See* ***Palazzolo v. Rhode Island***, 533 U.S. 606, 631

(2001) (regulation permitting a landowner to build a substantial residence does not leave property economically idle under the Takings Clause). Accordingly, the Murrs have not been denied "all or substantially all practical use[]" of their parcel. ***Zealy***, 201 Wis. 2d at 374.

¶23 The Murrs, at least implicitly, acknowledge that they *could* locate a residence on Lot E if they so choose. However, they then focus on what Lot E *cannot* be used for. The Murrs point to deposition testimony indicating Lot E is unsuitable for use in wildlife conservation, agriculture or forestry. In framing the issue in this way, the Murrs ignore the applicable test. We are not concerned with what uses are prohibited or what are the "highest and best uses," but rather only what use or uses remain. *See* ***Zinn v. State***, 112 Wis. 2d 417, 424, 334 N.W.2d 67 (1983) (taking occurs when a restriction placed on the property practically or substantially renders the property useless for all reasonable purposes).

¶24 "Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property." ***Keystone Bituminous Coal Ass'n***, 480 U.S. at 498. The critical question is whether the property owner has been denied "all or substantially all practical uses of [the] property …." ***Zealy***, 201 Wis. 2d at 374. Here, as in ***Zealy***, the "extent of the parcel at issue … is clearly identified, and just as clearly the parcel retains substantial uses." ***Id.*** at 380.

¶25 The Murrs obliquely suggest that even if their property has not suffered a loss of all or substantially all its practical use, they are nonetheless entitled to compensation because a partial taking has occurred. In addition to the "categorical" takings analysis, set forth above, courts also use an "ad hoc factual, traditional takings inquiry" that analyzes the "nature and character of the

governmental action, the severity of the economic impact of the regulation on the property owner, and the degree to which the regulation has interfered with the property owner's distinct investment-backed expectations in the property." ***R.W. Docks & Slips***, 244 Wis. 2d 497, ¶17.

¶26 With respect to the nature and character of the government action, when a property owner does "not suffer the loss of substantially all of the beneficial uses of his land," we need not consider whether the regulation advances a legitimate state interest. ***Zealy***, 201 Wis. 2d at 380-81. In any event, the Murrs do not contend the County lacked a valid public purpose for enacting the Ordinance. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments). Indeed, in our earlier decision regarding the Murrs' property, we observed that the Ordinance is part of a federal and state effort to protect the "national wild and scenic rivers system," including the Lower St. Croix River. ***Murr***, 332 Wis. 2d 172, ¶10. The Ordinance and similar laws were designed to "preserve property values while limiting environmental impacts." ***Id.***, ¶14.

¶27 To that end, our supreme court's decision in ***Just v. Marinette County***, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), is instructive. There, a shoreland zoning ordinance established a conservancy district over wetlands within 1,000 feet of a lake and prohibited any filling without a permit. ***Id.*** at 12-14. This, in effect, prevented "the changing of the natural character of the land …." ***Id.*** at 17. The landowner asserted the ordinance was unconstitutional because it amounted to constructive taking without compensation. ***Id.*** at 14. The court disagreed, finding the ordinance a valid exercise of the police power to "protect navigable waters and the public rights therein from the degradation and deterioration which results from uncontrolled use and development of shorelands." ***Id.*** at 10, 14-16. The court

emphasized that the owner could still use the land "for natural and indigenous uses," and remarked that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." ***Id.*** at 17. ***Just*** establishes that because of the strong public interest in preventing degradation of the natural environment, property owners advancing takings claims based on environmental legislation have a much more difficult time showing they were deprived of all or substantially all practical use of their property. *See* ***Howell Plaza, Inc. v. State Highway Comm'n***, 92 Wis. 2d 74, 85-86, 284 N.W.2d 887 (1979).

¶28 The Murrs also argue a genuine issue of material fact exists regarding the severity of the Ordinance's economic impact on their property. They contend the degree to which the Ordinance compromised the value of their property is disputed. The Murrs disagree with the circuit court's conclusion that the property decreased in value by less than ten percent when considered as a whole versus as two separate lots. Rather, the Murrs argue the record includes expert opinions that Lot E is "up to 90% less valuable than land that can be independently developed."

¶29 Any disagreement between experts as to the value of the property does not create a genuine issue of material fact in this case. The Murrs' valuation argument assumes they had an unfettered right to use their land as they pleased at the inception of their ownership. This is not so. The Ordinance was on the books for nearly two decades before the Murrs became the common owners of Lots E and F. This is precisely why we concluded in the Murrs' earlier appeal that any diminution in their property's value occurred at the time they took title to both contiguous lots:

> Because the provisions are already effective prior to subsequent owners' acquisition of their lots, there is no concern that the provisions would deprive those persons of their property. Any effect on property values has already been realized.
>
> Further, because Murr is charged with knowledge of the existing zoning laws, *see* ***State ex rel. Markdale Corp. v. Board of Appeals of Milwaukee***, 27 Wis. 2d 154, 162, 133 N.W.2d 795 (1965), as a subsequent owner she was already in a better position than any person who owned at the [Ordinance's] effective date. Unless she or a subsequent owner brought her vacant lot under common ownership with an adjacent lot, that parcel would forever remain a distinct, saleable, developable site. Unlike those who owned on the effective date, she had the option to acquire, or not acquire, an adjacent lot and merge it into a single more desirable lot.

Murr, 332 Wis. 2d 172, ¶¶16-17. In sum, the Murrs knew or should have known that their lots were "heavily regulated from the get-go." *See* ***R.W. Docks & Slips***, 244 Wis. 2d 497, ¶29.

¶30 This reasoning also disposes of the Murrs' assertion that they have always intended Lot E to be developed or sold individually. We regard this as an argument under the factor assessing the degree to which the regulation has interfered with the property owner's distinct investment-backed expectations in the property.[8] The Murrs presumably knew that bringing their substandard, adjacent parcels under common ownership resulted in a merger under the Ordinance. Accordingly, even if the Murrs did intend to separately develop or sell

[8] While the precise contours of their argument are unclear, to the extent the Murrs are attempting to argue their expectation of separate use should inform the contiguous property rule of ***Zealy v. City of Waukesha***, 201 Wis. 2d 365, 375-76, 548 N.W.2d 528 (1996), we disagree. A property owner's subjective, desired use is irrelevant to determining the extent of the property at issue for purposes of a regulatory taking. *See* ***id.*** at 377-78 ("Looking to a landowner's anticipated use of various parcels and sub-parcels of land in order to determine the extent of the parcel at issue would require ascertaining a landowner's subjective intent before being able to evaluate a possible takings claim.").

Lot E, that expectation of separate treatment became unreasonable when they chose to acquire Lot E in 1995, after their having acquired Lot F in 1994.[9] In short, the Murrs "never possessed an unfettered 'right'" to treat the lots separately. *See* ***Murr***, 332 Wis. 2d 172, ¶30.

¶31 Based on the foregoing, we conclude the circuit court properly granted summary judgment in favor of the County and State. The undisputed facts establish that the Murrs' property, viewed as a whole, retains beneficial and practical use as a residential lot. Accordingly, we conclude they have not alleged a compensable taking as a matter of law.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[9] In their reply brief, the Murrs argue that ***Palazzolo v. Rhode Island***, 533 U.S. 606 (2001), stands for the proposition that "acquiring land after enactment of a regulation is not fatal to a regulatory takings claim." While that is an arguably accurate recitation of ***Palazzolo***'s holding, it does not benefit the Murrs here. We reject any notion that the Murrs' investment-backed expectations can be used to limit ***Zealy***'s holding regarding how the relevant property is defined. *See* ***Zealy***, 201 Wis. 2d at 375-77. Future generations continue to have the right to challenge unreasonable limitations on the use and value of land, regardless of when the property was purchased. *See* ***Palazzolo***, 533 U.S. at 627-28. This does not mean, however, that they can expect their opinions about the future use of property to affect how the relevant property is defined for purposes of determining whether a regulatory taking has occurred.