No. 17-945

IN THE

Supreme Court of the United States

KEVIN QUINN, *et al.*,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS FOR QUEEN ANNE'S COUNTY, MARYLAND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS THE BOARD OF COUNTY COMMISSIONERS FOR QUEEN ANNE'S COUNTY, MARYLAND AND THE QUEEN ANNE'S COUNTY SANITARY COMMISSION

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QUESTION PRESENTED

South Kent Island ("SKI") is an environmentally sensitive and remote area located on the Eastern Shore of the Chesapeake Bay in Queen Anne's County, Maryland (the "County"). In the 1950s and 1960s, before the County adopted zoning or subdivision regulations, developers created thousands of small residential lots ranging from 5,000 to 10,000 SF on SKI by unilaterally recording plats among the land records. Beginning with the construction of the Chesapeake Bay Bridge in 1952, 1,518 homes were constructed on such lots in eight subdivisions on SKI. It became clear in the mid-1970s, however, that SKI was unsuitable for intense residential development on septic systems because the soils could not effectively absorb effluent, and there is a high water table. By the late 1970s, the failure of septic systems and the inability of the soil to absorb effluent effectively resulted in the cessation of the construction of new homes on SKI. By 2005, some 80% of the existing septic systems in two of the major subdivisions on SKI were failing and untreated sewage was bubbling to the surface or into the groundwater and backing up into homes. The increased risk of human disease caused by contact with bacteria and viruses in fecal matter resulted in the County embarking on a comprehensive program to extend its municipal sewer utility to SKI.

The extension of public sewer to SKI with its hundreds of tiny recorded lots created the potential for an explosion of new development on a massive scale that would overburden other public facilities. To address this problem and to qualify for State financial assistance for the project, the County enacted a Grandfather/Merger Provision under which the County would not grant a building permit

for a vacant lot smaller than the minimum permitted size under current zoning (20,000 SF) unless the lot was merged with contiguous lots under common ownership to the extent possible to comply with the minimum lot size. Under the grandfather component, however, a developer who owned an isolated, substandard lot would still be able to build a home.

Petitioners, Kevin Quinn, et al. ("Quinn"), own twelve lots in the sewer service area established under the County's program. Quinn purchased the lots beginning in 1984 with the understanding that they could not be developed unless and until the County decided to extend public sewer to SKI. He will be required under the Grandfather/Merger Provision to merge the twelve lots into four lots to receive building permits. Quinn brought this action, contending that the requirement that he merge his twelve vacant lots merge into four constituted an uncompensated taking of the vacant lots under the Fifth and Fourteenth Amendments. The Fourth Circuit affirmed the district court's entry of summary judgment in favor of the County on this claim, relying on this Court's decision in *Murr v. Wisconsin,* 137 S. Ct. 1933 (2017). The Fourth Circuit ruled that, in analyzing whether the Grandfather/Merger Provision effected a taking, Quinn's contiguous, vacant lots under common ownership and subject to the merger should be treated as one property. On this basis of this conclusion, the Fourth Circuit ruled that the required mergers did not effect a taking under the tests established by this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978).

The Question Presented is:

In determining whether the County's application of its Grandfather/Merger Provision effects a regulatory taking of Quinn's lots, should the relevant property for analysis include the vacant, contiguous lots held for residential development under Quinn's ownership that must be merged to meet current, minimum lot requirements in the County's zoning ordinance?

PARTIES TO THE PROCEEDINGS BELOW AND DISCLOSURE STATEMENT

Respondents are the Board of County Commissioners of Queen Anne's County, Maryland, the Queen Anne's County Sanitary Commission (collectively, the "County").

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STATEMENT OF THE CASE

1. Factual Background

A. South Kent Island

The County has approximately 265 miles of waterfront on the Chesapeake and Eastern Bays, with much of its waterfront on South Kent Island. (J.A. 128-129).[1] In 1952, the construction of the Chesapeake Bay Bridge connecting Maryland's western and eastern shores was completed and it was opened to traffic. The bridge had the almost immediate effect of opening the County to widespread and unprecedented residential development of farmland. This was so particularly on SKI. (J.A. 129).

This intensive development occurred prior to the County's adoption of zoning and subdivision regulations, and developers were able to create thousands of small lots (approximately 5,000 to 10,000 SF) by unilaterally recording a plat among the land records of the County. 90 Md. Op. Att'y Gen. 60, 62-63 (2005). Residential homes were constructed on 1,518 of these small lots. In all, eight residential subdivisions, each with hundreds of small lots, were developed on SKI along the Chesapeake and Eastern Bays. (J.A. 129, 132-137; S.A. 1-6[2]).

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1. All references to "J.A. _" refer to the Joint Appendix filed in the Fourth Circuit appellate proceedings in this case.

2. All citations to "S.A. _" refer to the Supplemental Appendix filed in the Fourth Circuit appellate proceedings in this case.

B. The County's Adoption Of The NC District In Its Zoning Ordinance In 1987

In 1987, the County enacted a Zoning Ordinance that contained the NC (Neighbor Conservation) Districts, including the NC-20 District, the primary district on SKI. 90 Md. Op. Att'y Gen. at 62-63; Queen Anne's County, Maryland, Code ("County Code") § 18:1-19. Quinn owns a large block of 223 vacant lots on SKI. (J.A. 12-13). He also owns twelve other vacant lots on SKI outside of this large block. His lots are zoned NC-20. *Id.*

C. Massive Septic Failures On SKI And The County's Program To Extend Public Sewer Service

In the years after the construction of the Chesapeake Bay Bridge and the resultant explosion of development on SKI, it became clear that SKI is unsuited for intense residential development on septic systems. (J.A. 129-130). SKI has a high water table and soils with poor permeability for disposing of sewage onsite. *Id.* Further, the small lots developed on SKI did not contain room for replacement septic systems. *Id.*

The residential development on SKI has resulted in a serious public health problem. *Id.* Maryland Department of Health regulations adopted in the 1970s required that percolation tests be conducted during the wet season, with the effect of virtually stopping the development of new homes because lots could not pass percolation tests. (J.A. 46; Code of Maryland Regulations ("COMAR") 10.03.27.01, *et seq.*; Add. 1-44[3]). The more stringent septic

3. All citations to "Add. __" refer to the Addendum appended to the Brief of Appellees in the Fourth Circuit filed by the County.

requirements resulted in a large inventory of small vacant lots that were not buildable for residential purposes unless the County decided someday to extend its municipal sewer utility to SKI. At the time Quinn purchased his lots between 1984 and 2002, the lots were in this unbuildable inventory. By 2005, because of a high water table, poor soil for disposing of sewage, and the small size of the lots, some 80% of the existing septic systems in at least two major subdivisions were failing. (J.A. 129-130); 90 Md. Op. Att'y Gen. at 62-63 (2005).

Failing septic systems discharge untreated or undertreated sewage onto the surface or into groundwater and back into the homes. (J.A. 207-212). This increases the risk of disease caused by human contact with bacteria and viruses in human fecal matter and pollutes the ground and surface waters. (J.A. 207-212; 90 Md. Op. Att'y. Gen. at 63). The County therefore embarked on a comprehensive program to extend sewer service to the subdivisions on SKI with widespread failing septic systems. (J.A. 129-130; S.A. 1-6).

(i) The Sewer Service Area In The County's Water And Sewer Plan And The Availability Of State Funding

The service area to which the County decided to extend public sewer service was established in the County's 2014 Water and Sewerage Plan ("WSP"). (J.A. 207-235). The County is required by State law to adopt the WSP, which identifies the areas to be slated for service. Md. Code Ann., Envir. ("EN") §§ 9-503, 9-505, 9-601(*l*), 9-647 to 649 (2017). The boundaries of the County WSP service area were established to (1) address the public

health problem created by failing septic systems, and (2) limit the number of buildable lots created in order to obtain State financial assistance for the sewer extension project and manage the impact of new development on the capacity of the sewage treatment plant, roads, schools, and other infrastructure. (J.A. 129-131).

The availability of State funding was a key factor in the County's ability to proceed with construction of the public sewer extension project. The County sought State assistance for the project and entered into a Grant Agreement with the State. (J.A. 226-229). The State has a fund that provides assistance to address the environmental and public health problems caused by failing septic systems. *Id.* The State's Bay Restoration Fund, which awards grants to counties and municipalities for the purpose of providing public sewer to properties with failing septic systems, was initially restricted to properties located within the State's "priority funding areas" ("PFAs"). EN § 9-1605.2. This restriction on funding was premised on the State's Smart Growth Law, codified primarily in Md. Code Ann., State Fin. & Proc. ("SFP") §§ 5-7B-01, *et seq.* (2017), which severely limits State funding for growth-related projects outside PFAs. PFAs are intensely developed areas designated for State funding of infrastructure related to future growth. *Id.* § 5-7B-03.

SKI is not located in a State PFA and, thus, was not eligible for State funding to correct the widespread failing septic systems. In 2014, to remove this obstacle to addressing the public health problems on SKI, EN § 9-1605.2(h)(5) was amended to allow the MDE to subsidize a sewerage system that serves areas outside a

PFA, if certain conditions are satisfied. The Maryland General Assembly imposed two conditions that are relevant to this case: (1) it required a PFA exception under SFP §§ 5-7B-06, which mandated approval of the Smart Growth Coordinating Committee ("SGCC"); and (2) prohibited future connections on SKI outside of the service area. EN § 9-1605.2(h)(5)(iv)(2)-(v). The Grant Agreement executed by the County and State incorporated the restrictions required by the amended law. (J.A. 226-229).

Accordingly, State funding outside of a PFA is not available to serve new development, but, rather, is available only to address failing septic systems. On the other hand, State law requires a county sanitary commission to provide services to lots abutting a sewer service line in a service area. EN § 9-661. The State law requirements effectively limit the extension of public sewer service to correct failing septic systems with State funding participation to those serving lots with failing septic systems and lots abutting streets in which sewer lines will be constructed to serve the homes with the failing septic systems. *Id.* The service area ultimately established in the County's WSP was fashioned to meet these State law requirements. (J.A. 130-131).

The County shared the State's concern about potential overdevelopment caused by providing sewer service to existing, but currently unbuildable, vacant lots on SKI. (J.A. 207-221). The County government would have the first responsibility of dealing with the effect of overdevelopment. Overdevelopment of SKI would negatively impact the County's ability to evacuate Kent Island in the event of an emergency, such as a hurricane, and to provide adequate roads, schools, and other public

facilities to serve the increased population. *Id.* Further, the number of lots eligible to receive sewer service had to be restricted as a result of the limited sewage capacity at the wastewater treatment plant. *Id.* Based on State funding limitations, limited sewerage capacity, and concerns with adequate public facilities and safe evacuation during an emergency, not all currently unbuildable, vacant lots on SKI could be served. (J.A. 129-131). The service area adopted by the County and approved by MDE included improved lots with failing septics and 632 vacant lots. (J.A. 227). Vacant lots along paper streets or other streets not containing an improved lot with a failing septic system were excluded from the service area. (J.A. 129-131, 227). The County thereafter adopted legislation to reduce the number of vacant lots that could be developed on public sewer to 632.

(ii) The Grandfather/Merger Provision: Ordinance No. 13-24

To limit the number of vacant lots on SKI that would become buildable as a result of the extension of public sewer service, the County enacted the Grandfather/Merger Provision, which amended County Code § 18:1-19 governing NC Districts (including the NC-20 District), to add a new Subsection G. (J.A. 163-165). The Grandfather/Merger Provision grandfathers existing substandard lots in the NC Districts that are not contiguous with another lot or lots under the same ownership. *Id*. The Grandfather/Merger Provision, however, requires the merger of vacant, substandard lots with contiguous lots under the same ownership to comply with the minimum lot size of the NC District in which the lot is located. *Id.* The effect of the Grandfather/Merger Provision was to reduce to 632

the number of lots on SKI that would become buildable as a result of their inclusion in the sewer service area. (S.A. 7-22).

Under the County's Grandfather/Merger Provision, the merger requirement applies in two circumstances. First, if, as of November 12, 2013 a vacant lot is contiguous with and under the same ownership as another lot (improved or vacant), the vacant lot alone cannot be used for construction of a dwelling. (J.A. 163-165). The vacant substandard lot must merge with the contiguous lot under the same ownership to the extent possible to comply with the minimum lot size requirements of the applicable zoning district. *Id*. Second, a vacant lot that must be merged with another vacant lot must also be merged with a third vacant, contiguous, and substandard lot under the same ownership to the extent necessary to prevent leaving an "orphaned" vacant and substandard lot. *Id*.

D. Impact Of The Grandfather/Merger Provision On Quinn's Residential Lots

Between 1984 and 2002, Quinn purchased numerous vacant lots on SKI that have never been improved because they will not pass percolation tests. (J.A. 12-13). Most of Quinn's lots were in the range of 5,000 to 10,000 square feet. (J.A. 12, 38-40, 130-131, 133, 135). The sewer service area includes twelve of Quinn's lots, but does not include a large block of 223 vacant lots because the lots are located on unconstructed or "paper" streets and thus do not abut a street in which a sewer line will be constructed to serve a home with a failing septic system. (J.A. 12, 17, 130-131).

Accordingly, the Grandfather/Merger Provision applies to twelve of the lots that Quinn owns that are located within the service area. (J.A. 40, 133). The provision, however, is not applicable to Quinn's block of 223 lots that are outside the service area because the ordinance requires merger only when the applicant applies for a residential building permit. *Id.* The block of 223 lots are not eligible for a residential building permit because Quinn cannot provide sewage disposal. (J.A. 129-131).

2. Procedural History

A. District Court Decision

Before the district court, Quinn asserted federal and equivalent state constitutional claims against the County and Maryland Department of the Environment ("MDE"), including a claim against the County alleging that the Grandfather/Merger Provision effected a taking of his vacant lots that are required to merge. The County filed a Motion to Dismiss or, in the Alternative, for Summary Judgment and MDE filed a Motion to Dismiss the single claim against it, that alleged a substantive due process violation. (J.A. 184-208).

The district court granted the County's and State's motions. (J.A. 378). The district court ruled that Quinn's taking claim against the County was without merit on grounds that the Grandfather/Merger Provision did not deprive Quinn of all substantial beneficial use of his lots because the provision permits the vacant lots to be assembled and developed for residential use pursuant to current zoning regulations. (J.A. 353-377). The district court further ruled that, to the extent Quinn's block of

223 vacant lots cannot be developed because they will not pass percolation tests, the County's legislation was not the cause for the lack of development potential of Quinn's property. *Id.* The district court then applied this Court's *ad hoc* test under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), which considers: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with reasonable investment backed expectations; and (3) the character of the regulation. Applying these factors, the district court found that, under the Grandfather/Merger provision, Quinn was entitled to assemble his lots to achieve the maximum yield under current zoning. (J.A. 353-377). The provision did not interfere with Quinn's reasonable investment-backed expectation because at the time he purchased the lots they were unbuildable. *Id.* Further, the district court found that the Grandfather/Merger Provision was a traditional zoning action for the purpose of controlling the extent development in an environmentally sensitive area with limited public infrastructure. *Id.*

B. Fourth Circuit Decision

The Fourth Circuit affirmed the district court, also explaining that the Grandfather/Merger Provision is a standard, commonly used zoning tool designed for a specific and legitimate purpose of imposing a minimum lot size and thereby controlling the nature and scope of development. (Pet. App. 11). The court explained that local governments must be concerned with congestion on roads, overcrowding schools, exceeding the capacity of sewer systems, and the exhaustion or overtaxing of other public services. (Pet. App. 12). In addition, local governments must "consider the costs of overdevelopment

on the environment and the fundamental character of the community." (*Id.*) In short, the Fourth Circuit ruled that "[m]anaging the density of development – even if it disappoints a particular developer – is thus a crucial goal of land use planning." (*Id.*)

In analyzing Quinn's claim that the Grandfather/Merger Provision effected a taking of his lots, the Fourth Circuit relied on this Court's decision in *Murr* to reject Quinn's insistence that the analysis must be confined to his individual, separate lots. The Fourth Circuit found that, under the three-factor standard established by this Court in *Murr,* Quinn's vacant, contiguous lots under common ownership held for future development and subject to merger should be considered as the "whole" or "denominator" property for purposes of regulatory taking analysis. (Pet. App. 13). In *Murr*, this Court explained that courts should consider the following three factors in establishing the denominator parcel: (1) the treatment of the land under state law, including whether existing lot lines are altered by a traditional grandfather/merger provision; (2) the physical characteristics of the property, including the contiguity of separate parcels; and (3) the effect of the burdened land on the value of other contiguous parcels. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945-1946 (2017). In applying *Murr*, the Fourth Circuit ruled that: (1) the County had applied a traditional grandfather/merger provision to require that lot lines be altered; (2) Quinn's lots are vacant and contiguous and no physical or topographical barriers have been identified which would prevent their assemblage and development; and (3) the combined lots could be developed for valuable residential use under the County's current minimum lot size requirements. (Pet. App. 13-17).

Viewing the lots subject to merger as one property for takings clause analysis, the Fourth Circuit found the Grandfather/Merger Provision did not effect a regulatory taking. (*Id.*) The merged lots can be assembled and developed as valuable lots. (*Id.*) The lots have not been deprived of all substantial beneficial use. (*Id.*) Additionally, the Fourth Circuit ruled, under the *Penn Central* factors, any harm Quinn has suffered from having a smaller number of lots that are larger in size does not constitute the economic harm that can give rise to a regulatory taking. (*Id.*) Further, the Grandfather/Merger Provision does not interfere with Quinn's reasonable investment-backed expectations because he bought them on a speculative basis, knowing that they could not be developed unless public sewer service was someday extended to SKI. (*Id.*) Finally, the Fourth Circuit ruled that the Grandfather/Merger Provision arose from a public program that adjusted the benefits and burdens of economic life for the common good. (Pet. App. 19-21). The Grandfather/Merger Provision controls the density of development based on traditional zoning concerns such as congestion, environmental impacts, and the availability of public infrastructure. (*Id.*)

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. The Petition Fails To Demonstrate Any Compelling Reason For The Court To Revisit Its Decision In *Murr*

Quinn's Petition fails at the most fundamental level: it does not identify any particular need, let alone a compelling need for this Court to take up the *Murr*

issues only one year after deciding *Murr*. The Petition does not, and cannot, contend that the Fourth Circuit's decision is in conflict with the decision of another United States Court of Appeals on the same issue. U.S. Sup. Ct. R. 10(a). Nor does the Petition contend that the Fourth Circuit decided an important federal question in a way that conflicts with a decision by a state court of last resort. *Id.* It does not contend that the Fourth Circuit departed from the accepted and usual course of judicial proceedings, or that it sanctioned such a departure by a lower court. *Id.*

Instead, the Petition contends only that the Fourth Circuit decision fails to apply *Murr* correctly. As discussed in Part II, *infra*, that assertion is demonstrably wrong. But, more importantly, the Petition fails to provide any justification for this Court to consider the issue anew, just one year after deciding *Murr*. The Petition does not point to *any* decisions in other jurisdictions, pre- or post-*Murr*, that conflict with the Fourth Circuit's decision. It does not present any credible argument that anyone other than Quinn is affected by the Fourth Circuit's decision.

Indeed, as discussed *infra*, the grandfather/merger provision at issue in this case is analytically *identical* to the provision at issue in *Murr*. Both grandfather/merger provisions involved the retroactive application of a local zoning law. The *only* alleged difference in the cases is that the Grandfather/Merger Provision imposing a new minimum lot size requirement in the present case was adopted after Quinn purchased his substandard lots. This distinction is of no analytical import given that *Murr* affirmed that states may apply laws that restrict lot sizes to preexisting lots. In explaining the first factor of the three-factor test in *Murr*, which requires consideration

of state law governing lot lines and boundaries, this Court emphasized that (1) the Murrs' proposed rule that existing lot lines should always control would "frustrate municipalities' ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist nationwide today," and (2) merger provisions are typically enacted to reduce "existing" substandard lots to implement new minimum lot size requirements. *Murr*, 137 S. Ct. at 1947-1948. Quinn contends that the Fourth Circuit failed to follow this Court's three-factor test established in *Murr* for determining the denominator parcel because the Court did rule that existing lot lines always define the denominator parcel. (Pet. for Writ of Cert. ("Pet.") at 21-26). The Fourth Circuit, however, scrupulously followed this Court's ruling in *Murr* that, under the first factor, states may legitimately enact grandfather/merger provisions to alter existing lot lines. (Pet. App. 13-16). It is Quinn, not the Fourth Circuit, who refuses to follow this Court's decision in *Murr* by insisting that existing lot lines must control the denominator property.

The Petition thus fails at a threshold, fundamental level. It does not identify any pressing reason for this Court to revisit *Murr*, other than general dissatisfaction with the lower courts' straightforward application of *Murr* to the facts in Quinn's case. In other words, Quinn hopes to rewrite or severely constrict the Court's ruling in *Murr* just one year after decision. This case presents no ground warranting grant of a writ of certiorari.

II. In Analyzing Quinn's Challenge To The Grandfather/Merger Provision, The Fourth Circuit Correctly Applied This Court's Three-Factor Test In *Murr* To Identify The Whole Or Denominator Parcel As Quinn's Contiguous, Vacant Lots Under Common Ownership And Subject To Merger And Development As One Lot

A.

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." The Clause is made applicable to the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 247 (1897). In the landmark case, *Pennsylvania Coal Co., v. Mahon*, 260 U.S. 393 (1922), this Court ruled that government regulation can constitute a taking if it goes too far. *Id.* at 415. In *Lingle v. Cherron U.S.A., Inc.*, 544 U.S. 528 (2005), the Court explained government land use regulation constitutes a taking without compensation if the effects of the regulation "are functionally comparable to government appropriation or invasion of private property." *Id.* at 617. Thus, a regulation that effectively deprives the owner of all economically beneficial or productive use of the land will ordinarily constitute a taking. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Further, this Court has ruled that when a regulation impedes the use of property, but does not deny all beneficial use of it, the Court will consider three factors to determine whether there has been a taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with reasonable, investment backed expectations; and (3) the character of the government

regulation. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). The first two *Penn Central* factors, which focus on the effect of the regulation on the value of the property, are the "primary" factors. *Lingle*, 544 U.S. at 538-39. The character of the government regulation component is satisfied if the government can show that the regulation "affects property interests through some public program adjusting the burdens and benefits of economic life to promote the common good." *Lingle*, 544 U.S. at 539 (quoting *Penn Cent.*, 438 U.S. at 124).

B.

Because the tests for determining whether a regulatory taking has occurred require a court to compare the value of the whole property before the regulatory action to the value of what remains in the property, a critical, threshold question is: how should a court define the "whole" property, or the "denominator" property, for purposes of making the required comparison? This Court addressed this question in *Murr* in the context of a traditional grandfather/merger provision that was analytically indistinguishable from the County's Grandfather/Merger Provision. The Court succinctly framed the question as: "whether the landowners can insist on confining the analysis just to the lot in question, without regard to their ownership of the adjacent lot…." *Murr,* 137 S. Ct. at 1939.

In *Murr*, this Court upheld the application of a grandfather/merger provision enacted by St. Croix County, Wisconsin that was virtually identical to the County's Grandfather/Merger Provision. There, the Murrs' parents purchased Lot F in 1960, and thereafter

built a cabin on Lot F near the St. Croix River. *Id.* at 1940. They then transferred title to Lot F to a plumbing company owned by them. *Id.* In 1963, the Murrs' parents purchased a contiguous Lot E as an investment property with the intention of developing it as a separate parcel. *Id.* Lot E remained vacant. The Murrs' parents transferred title to Lot F to the Murrs in 1994, and they then transferred title to Lot E to the Murrs in 1995. *Id.* at 1940-1941.

The 1995 transfer of Lot E to the Murrs brought Lots E and F under common ownership and resulted in the merger of the two lots under a St. Croix County ordinance that required the merger of contiguous lots under common ownership to the extent possible to comply with the minimum lot size set forth in current zoning. *Id.* at 1941. Years later, the Murrs sought to sell Lot E as a separate lot and applied for a variance from the merger requirement. *Id.* When the variance was denied, the Murrs sued St. Croix County, alleging that the merger requirement deprived them of all beneficial use of Lot E and thus constituted a regulatory taking. *Id.* The Wisconsin Court of Appeals rejected the Murrs' argument, holding that the "denominator" property for regulatory taking analysis was the two contiguous parcels under common ownership, and the required merger did not deprive the Murrs of a beneficial use of their property as a whole. *Id.*

This Court affirmed the Wisconsin Court of Appeals, ruling that that court correctly ruled that the denominator property for the regulatory taking analysis was the two contiguous parcels under the common ownership of the Murrs and subject to merger. The Court established a three-factor test for determining the denominator property. First, this Court ruled that courts should give

substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law. *Id.* at 1945. This Court, however, pointedly rejected the Murrs' invitation "to adopt a presumption that lot lines define the relevant parcel in every instance…," stating that this argument ignores the fact that "lot lines are themselves creations of state law, which can be overridden by the State in a reasonable exercise of its power." *Id.* at 1947. The Court further explained that "[t]he merger provision here is a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago." *Id.* Merger provisions, the Court stated, "often form a part of a regulatory scheme that establishes minimum lot size in order to preserve open space while still allowing orderly development." *Id.* Most important, this Court explained that merger provisions are often enacted to reduce the number of existing lots that are substandard and bring them into compliance with modern minimum lot size requirements:

> ***When States or localities first set a minimum lot size***, there often are ***existing*** lots that do not meet the new requirements, and so local governments will strive to reduce substandard lots in a gradual manner. The regulations here represent a classic way of doing this by implementing a merger provision, which combines contiguous substandard lots under common ownership, alongside a grandfather clause, which preserves adjacent substandard lots that are in separate ownership.

Id. at 1947 (emphasis added).[4] Finally, the Court explained that the Murrs' proposed rule, under which existing lot line would always define the denominator property, would "frustrate municipalities' ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist nationwide today." *Id.* at 1947-1948.

Second, the Court stated that, in determining the denominator property for regulatory taking analysis, the courts should take into account the characteristics of the landowner's property, including contiguity, topography, and the surrounding human and ecological environment. *Id.* at 1945-1946. In this regard, the Court noted that traditional grandfather/merger provisions require the merger of contiguous properties under common ownership to meet minimum lot size requirements. *Id.* The Court expressed great doubt as to the validity of a required consolidation for analysis of nonadjacent parcels in different parts of the state. *Id.* at 1945.

Third, this Court stated that courts should assess the effect of the burdened land on the value of other holdings. *Id.* at 1946. The Court noted that separate properties may still have significant value when consolidated for a common use. *Id.* at 1946.

Applying the three factors to the Murrs' case, the Court ruled that the denominator parcel for regulatory taking analysis was the two, contiguous parcels owned

4. The Petition notably fails to address this actual language in *Murr* and instead relies on two questions asked at oral argument, implying that the questions posed by individual Justices take precedence over the Court's actual decision.

by the Murrs, and that the application of the Wisconsin grandfather/merger provision did not effect a taking. *Id.* at 1948-1950. First, the court held that the merger of the two lots under the St. Croix County law was for a specific and legitimate purpose, imposing a minimum lot size, and was "consistent with the widespread understanding that lot lines are not controlling in every case." *Id.* at 1948. Second, the Court noted that the physical characteristics of the property supported its treatment as a unified parcel because the parcels were contiguous and susceptible to a number of potential uses in concert. *Id.* Third, the Court stated that the effect of the required consolidation was mitigated by the fact that using the two separate parcels as one parcel offered significant benefits such as increased privacy and recreational space and a better location for improvements. *Id.* at 1948-1949.

C.

This Court's decision in *Murr* established the validity of traditional grandfather/merger provisions, such as that adopted by the County in the present case, which were enacted for the purpose of imposing minimum lot sizes. The County's Grandfather/Merger Provision is analytically indistinguishable from the St. Croix County provision at issue in *Murr*. Application of the three-part test adopted by this Court in *Murr* leads to the same conclusion: the denominator property for regulatory taking analysis is composed of the contiguous lots under Quinn's common ownership that must be merged in order to meet current minimum lot size requirements.

In *Murr*, this Court ruled that, in identifying the denominator property, courts should give weight to how

the land is divided under state and local law, including the lot lines and the existence of a merger provision. *Murr*, 137 S. Ct. at 1945. The Court described at length how, when new minimum lot size requirements are adopted, traditional grandfather/merger provisions are legitimately applied to reduce the number of existing lots that do not meet the new requirements. *Id.* The Court thus held that there is no presumption that the existing lot lines control. *Id*. at 1947.

In the present case, the existing lot lines were not created by a government subdivision review process, but were unilaterally established by a developer recording a plat among the County's land records in the 1950s when SKI was a remote rural area and before zoning and subdivision regulations were enacted. 90 Md. Op. Att'y Gen, at 62-63. Further, the County's Grandfather/Merger Provision, which requires that existing lot lines be altered, is a legitimate exercise of its land use authority for the purpose of imposing a minimum lot size and controlling the impact of potentially explosive growth of public infrastructure such as roads, schools and the capacity of the wastewater treatment plant. Accordingly, under the *Murr* analysis the first factor strongly militates in favor of treating Quinn's assembled properties after merger as the denominator property.

Second, courts must consider the physical characteristics of the property, including topography and contiguity to other properties owned by the landowner. *Murr*, 137 S. Ct. at 1945-1946. Quinn's twelve lots must be merged into four under the Grandfather/Merger Provision. The properties to be merged to meet the minimum lot size requirement are contiguous, vacant, under common

ownership, and all held for future residential development. They can easily be combined to create a larger residential lots. Thus, as in *Murr*, the second factor strongly militates in favor of treating Quinn's consolidated lots as the denominator property.

Third, courts must assess the effect of the consolidation on the value of the holdings. *Id*. at 1946. In the present case, the twelve properties to be merged into four properties will have significant value for residential use when combined. As in *Murr*, the combined lots will have significant benefits and advantages in terms of increased privacy, increased recreational and building space and a good location for improvements.

The only distinction that Quinn attempts to draw between the *Murr* case and the present case is that the grandfather/merger provision at issue in *Murr* was enacted prior to the Murrs' parents transferring Lots E and F to their children. Quinn argues that the Grandfather/Merger Provision in the present case was adopted in 2014, after he purchased his twelve individual lots. (Pet. at 17). Thus, Quinn argues, in the present case, he had a reasonable expectation that he would be able to develop each individual lot separately. (Pet. at 20). The Fourth Circuit, therefore, correctly rejected this contention as inconsistent with *Murr*. Initially, the court found that, when Quinn purchased his lots between 1984 and 2002, he did so as an entirely speculative investment. (Pet. App. 7, 13-15) It was known since the late 1970s that the soils on SKI would not pass percolation tests. Quinn, therefore, had no reasonable expectation that he could develop the lots for residential use, let alone an expectation that he could develop each lot individually. (Pet. App. 13-15).

Quinn's attempted distinction also is directly contrary to this Court's analysis in *Murr* that grandfather/merger ordinances are enacted to apply new minimum lot size requirements to existing lots that do not meet current requirements. *Murr*, 137 S. Ct. at 1947. Pursuant to *Murr*, Quinn had no reasonable expectation that the County would not subsequently adopt a more stringent minimum lot size requirement and a grandfather/merger provision to require the merger of his vacant, contiguous lots held for residential development to comply with the requirement. This Court observed in *Murr* that grandfather/merger provisions have been employed throughout the country for a century to apply new minimum lot size requirements on existing vacant lots without imposing undue hardships that may result from the change in regulation. *Id*. *See also* 3 Edward H. Zeigler, Jr., *Rathkopf*'s *Law of Zoning and Planning* § 49.13 (39th ed. 2017). Indeed, in 1960, the American Society of Planning Officials included a grandfather/merger provision in the Model Zoning Ordinance published as a guide for local governments nationwide. American Society of Planning Officials, *The Text of a Model Zoning Ordinance*, 26 (2d ed. 1960). Grandfather/merger provisions have been features of local zoning ordinances since at least 1926. *See, e.g.*, *Bankers Trust Co. v. Zoning Bd. of Appeals*, 345 A.2d 544, 546 (Conn. 1974); *Weber v. Village of Skokie*, 235 N.E.2d 406, 410 (Ill. App. Ct. 1968); *Sorenti v. Bd. of Appeals*, 187 N.E.2d 499, 500 & n.1 (Mass. 1963); *Clarke v. Bd. of Appeals*, 155 N.E.2d 754, 755 & n.3 (Mass. 1959); *Vetter v. Zoning Bd. of Appeals*, 116 N.E.2d 277, 277-78 (Mass. 1953); *Ferryman v. Weisser*, 158 N.Y.S.2d 587, 588 (N.Y. App. Div. 1957); *Flanagan v. Zoning Bd. of Appeals*, 149 N.Y.S.2d 666, 667 (N.Y. Sup. Ct. 1956); *Cabral v. Young*, 177 N.Y.S.2d 548, 549 (N.Y. Sup. Ct. 1958). In *Murr*, the Court

again recognized the legitimacy of grandfather/merger ordinances, relying in part on a Brief of *Amici Curae* filed by the National Association of Counties, et al., which listed citations to 132 grandfather/merger ordinances enacted by counties and municipal corporations throughout the country. *Murr,* 137 S. Ct. at 1947-48.

Traditional grandfather/merger provisions have played a critical role in Maryland's efforts to preserve the Chesapeake Bay. In 1984, the Maryland General Assembly enacted the Chesapeake Bay Critical Area Protection Program (the "Critical Area Law") establishing the Chesapeake Bay Critical Area Commission (the "Critical Area Commission"). Md. Code Ann., Nat. Res. ("NR") § 8-1801, *et seq.* The Critical Area Law required the Critical Area Commission to set criteria for regulating development activity in the Chesapeake Bay Critical Area. The Maryland Critical Area Protection Program designated the critical area as all land and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands and the heads of tides. NR § 8-1807(b)(2). The regulations promulgated to implement the Critical Area Law required local jurisdictions to develop a Critical Area Program and designate for certain types of undeveloped areas a land use classification called the Resource Conservation Area ("RCA") that limited residential density to one dwelling unit per 20 acres. COMAR 27.01.02.05. The Critical Area Law required local jurisdictions to include provisions to "grandfather" development existing at the time the local program is adopted or approved by the Critical Area Commission. NR § 8-1808(c)(1)(iii)(5).

To implement the grandfather requirement in the law, the Critical Area Commission promulgated COMAR 27.01.02.07 (the "State Grandfather/Merger Regulation"), which mandated that local jurisdictions include grandfather provisions to protect the owners of lots in existence prior to the adoption of a local jurisdiction's Critical Area Program. Furthermore, to address the potential harm to the Chesapeake Bay caused by the unilateral creation of thousands of small lots in the Critical Area prior to the adoption of local zoning and subdivision regulations, the State Grandfather/Merger Regulation also required that contiguous lots under the same ownership be consolidated or merged as needed to comply with the program. In 2008, the General Assembly enacted the requirements of this regulation into the Critical Area Law itself. NR § 8-1808(c)(1)(iii)(12). The State Grandfather/Merger Regulation and NR § 8-1808(c)(1)(iii)(12) advanced important interests by regulating minimum lot size without imposing undue hardship.

Accordingly, Quinn had no reasonable expectation that the County would not adopt a grandfather/merger provision requiring the merger of his vacant, contiguous – and tiny – lots that had been unilaterally created before zoning and subdivision regulations.

CONCLUSION

For the foregoing reasons, the Respondents respectfully pray that the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit be denied.

Respectfully submitted,

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