No. 17-945

In The Supreme Court of the United States

KEVIN QUINN and QUEEN ANN RESEARCH AND DEVELOPMENT CORPORATION,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS FOR QUEEN ANNE'S COUNTY, MARYLAND; QUEEN ANNE'S COUNTY SANITARY COMMISSION; ROBERT M. SUMMERS, PH.D., in his official capacity as the Secretary of the Maryland Department of the Environment; and MARYLAND DEPARTMENT OF THE ENVIRONMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

A. Quinn's Petition presents compelling reasons for the Court's review.

The County claims that Quinn's Petition fails to identify a need for review, and it mischaracterizes Quinn's Petition as seeking to "revisit" the rule announced in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017). The County is wrong. The Court's review is warranted here because the Fourth Circuit "decided an important question of federal law that has not been, but should be, settled by this Court" and because the Fourth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

First, the question of federal law presented in Quinn's Petition is different from the question decided in *Murr*. In *Murr*, the regulatory burden of the merger ordinance applied "only because of [the property owner's] voluntary conduct in bringing the lots under common ownership *after the regulations were enacted*." 137 S. Ct. at 1948 (emphasis added). There, the property owner took common ownership of the lots subject to then-existing local zoning laws. But here, Quinn acquired each separate parcel decades before the enactment of the forced-merger Ordinance. Quinn purchased each individual lot as a separate parcel, with the unrestricted ability to construct a residence on each lot and to sell each one separately. The Court has not settled the question of how to define the relevant parcel where, as here, government regulation forces the retroactive merger of commonly owned, contiguous parcels of property

despite the property owner's reasonable expectations as shaped by the separate treatment of the parcels under state and local law. As explained below in Section B, this distinction is analytically significant to Quinn's reasonable expectations as a property owner and warrants the Court's review.

Second, the Court's review is warranted because the Fourth Circuit's decision, in a published opinion, conflicts with *Murr*. *Murr* required the court to apply a multifactor test to determine Quinn's reasonable expectations about whether his property would be treated as one aggregated parcel or, instead, as separate lots. Rather than applying each of the *Murr* factors, the Fourth Circuit considered only one: the physical characteristics of Quinn's lots. The Court should not permit the Fourth Circuit's decision to stand because *Murr*'s multifactor analysis must be followed. The Fourth Circuit's opinion, if undisturbed, will encourage courts to disregard how property "is bounded and divided, under state and local law," which is the one factor that should be given "substantial weight." *Murr*, 137 S. Ct. at 1945. If courts ignore the historical treatment of lot lines, so will the state and local governments that seek to avoid paying just compensation for a regulatory merger that eliminates all economic use of the property. The Fourth Circuit's disregard for this Court's precedent is a compelling reason to grant review.

B. The Petition presents circumstances that are analytically distinct from the facts of *Murr*, and the Fourth Circuit's failure to apply the *Murr* factors warrants summary reversal or plenary review by the Court.

Before a lower court can determine whether a government regulation has resulted in a compensable taking, it must first define the denominator—that is, "the proper unit of property against which to assess the effect of the challenged governmental action." *Murr*, 137 S. Ct. at 1943; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). The inquiry should determine "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Murr*, 137 S. Ct. at 1945. As the *Murr* Court made clear, "courts should give substantial weight to the treatment of the land, in particular how it is bounded and divided, under state and local law." *Id.*

The County incorrectly claims that the forced-merger Ordinance is "analytically indistinguishable" from the regulation at issue in *Murr*. Resp't Br. 15. According to the County, application of the *Murr* factors should result in treating Quinn's parcels post-merger for takings purposes. *Id.* at 19. But the County's argument—like the Fourth Circuit's opinion—ignores a number of significant facts that courts must consider when assessing Quinn's reasonable expectations.

It is undisputed that Quinn purchased each of his parcels as separately recorded, individually platted units of real property and has always treated them as separate units. However, the County claims that "the existing lot lines were not created by government subdivision review process, but were unilaterally established by a developer recording a plat among the County's land records in the 1950s." Resp't Br. 20. According to the County, this means that Quinn did not have a reasonable expectation that his existing lot lines would not be altered by a forced-merger ordinance. The County's argument ignores all of the other circumstances that shaped Quinn's reasonable expectations that his parcels would be treated separately.

On July 2, 1962—before Quinn purchased his parcels—the Queen Anne's County Planning & Zoning Commission issued a Certificate of Exemption, which was recorded among the land records. J.A. 288 (recorded at Book 67, Page 138). The Certificate of Exemption provided that the exempt lots "may be used for a single family dwelling irrespective of its area or frontage." *Id.* Thus, when Quinn purchased his lots, he was entitled to develop and build a separate residence on each individual lot. *See id.*; *see also* Pet. App. 28-29.

Quinn purchased most of his separate parcels in 1984. Years later, in 1987, the County zoned the area of Quinn's parcels as "Neighborhood Conservation Zoning District 20." Properties in this district that were recorded and platted after 1987 may not be used for residential development unless the lot size equals or exceeds 20,000 square feet.

Pet. App. 26. Because Quinn purchased most of his lots before 1987, those lots were grandfathered into the new square footage requirement. Quinn was able to obtain separate permits for a residential building on each of those lots, even if the lots did not conform to the square footage requirement of the 1987 law. In fact, Quinn did build and separately sell certain lots through the late 1980s. J.A. 280. Quinn's lots have always been treated separately for purposes of imposition of real property tax. J.A. 282.

It was not until May 27, 2014—decades after Quinn purchased his properties—that the County enacted the Ordinance, which forces the merger of Quinn's contiguous lots that do not conform to the 20,000 square foot requirement. The Ordinance does not apply prospectively to properties that come into common ownership after the Ordinance was enacted. Rather, the Ordinance retroactively forces the merger of commonly owned, contiguous parcels that were under common ownership as of November 12, 2013, notwithstanding their separate treatment under state and local laws.

These facts highlight the legally significant differences between Quinn's reasonable expectations and the reasonable expectations of the property owners in *Murr*. In *Murr*, the property owners could not have reasonably expected that their parcels would be treated separately because they acquired common ownership of the parcels after the merger regulations were enacted and in force. *Murr*, 137 S. Ct. at 1948 ("Petitioners' land was subject to this regulatory burden … only because of voluntary conduct in bringing the lots under common

ownership after the regulations were enacted."). The Court emphasized that the *preexisting* government regulation would significantly shape the Murrs' reasonable expectations, explaining that the Murrs "cannot claim that they reasonably expected to sell or develop their lots separately given the regulations *which predated their acquisition of both lots*." *Id.* at 1949 (emphasis added).

Unlike in *Murr*, the County's forced-merger Ordinance did not predate Quinn's acquisition of his separate parcels. Quinn purchased his separate parcels decades before the Ordinance was enacted, and he had rights to separately develop, sell, and transfer each individual parcel. The Fourth Circuit did not even address the distinctions between Quinn and the Murrs. By failing to do so, the court did not give any weight, let alone "substantial weight," to "the treatment of [Quinn's] land, in particular how it is bounded and divided, under state and local law." *Murr*, 137 S. Ct. at 1945.

The County attempts to side-step the critical distinctions between Quinn's reasonable expectations under state and local law and the reasonable expectations of the property owners in *Murr*, pointing only to Quinn's supposed inability to immediately construct a dwelling on his parcels because the parcels currently lack waste disposal. Although this analysis might eventually be relevant in determining the *value* of each parcel that is impacted by the Ordinance, it has no application to the threshold "denominator" question. Moreover, whether Quinn's lots can pass a septic system "percolation test" today does not mean the lots will

not pass percolation tests in the future.[1] And it does not foreclose the possibility that septic technology will allow Quinn to construct a dwelling on each parcel irrespective of sewer service and current percolation standards. Such technology presently exists. Finally, whether Quinn has the ability to immediately construct a dwelling on his parcels has no bearing on Quinn's reasonable expectation that he would be able to separately transfer or sell each lot (with or without a dwelling).

The government entities in *Murr* even acknowledged that the Murrs' parcels would be defined as separate parcels if they had been acquired before the merger ordinance became effective. As explained in the Petition, the State of Wisconsin in its merits brief acknowledged that "[w]here the State has chosen to make separately platted lots individually developable and saleable, a landowner's objectively reasonable expectations will naturally be that a lot is a separate 'parcel.'" Brief of Respondent State of Wisconsin, *Murr v. Wisconsin*, No. 15-214, 2016 WL 3227033, at *24. The County, however, claims that the sequence of property acquisition is analytically irrelevant. This argument is directly contrary to a point of emphasis during oral argument in *Murr*, during which the Court underscored the

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[1] In fact, although the property does not presently have sewer service and would require septic for waste removal, new home construction is underway at 810 Kentmorr Road, Stevensville, MD 21666. This property is a previously vacant waterfront parcel (designated as Block A, Lot 12) and is located in the Kentmorr subdivision. Most of Quinn's parcels are also located in the Kentmorr subdivision.

significance of the sequence of property acquisition and regulation on shaping a property owner's reasonable expectations. *See* Pet. 21-22.

In opposing Quinn's Petition, the County essentially argues that *Murr* has endorsed a view that any forced-merger ordinance can never run afoul of the Fifth Amendment. In so arguing, the County highlights certain language from *Murr* describing lot mergers as a legitimate exercise of government power. This argument misses the mark. *Murr* did not address whether merger ordinances should withstand a Takings Clause challenge; it involved only the threshold question of defining the denominator parcel. Nor did *Murr* endorse a bright-line rule that, in all merger cases, the merged parcels always constitute the denominator parcel. *Murr*, 137 S. Ct. at 1949 ("To the extent the state court treated the two lots as one parcel based on a bright-line rule, nothing in this opinion approves that methodology."). The Court's language confirms that the state and local governments use merger ordinances to reduce the "existing" substandard lots "in a gradual manner." *Id.* at 1947. But the County's forced merger of Quinn's lots is anything but gradual. It is immediate and retroactive.

Quinn does not contend that local governments may never require the merger of commonly owned contiguous lots. Instead, Quinn's Petition is premised on the Fourth Circuit's failure to give any weight to the way in which Quinn's parcels were treated under state and local law. The Court should use this opportunity to reaffirm that that courts must identify the relevant parcel affected by

governmental regulation before proceeding to a takings analysis, and in doing so, they must consider the property owner's reasonable expectations as shaped by the treatment of the owner's parcels under state and local law.

The immediate, retroactive merger of Quinn's lots is absolutely inconsistent with his reasonable expectations, and the Fourth Circuit failed to give any weight to Quinn's reasonable expectations under state and local law. When proper consideration is given to how state and local law has treated Quinn's parcels for decades before the forced-merger Ordinance was enacted, only one conclusion can be drawn: the impact of the forced-merger Ordinance must be assessed against each of Quinn's individual lots. The Court should grant Quinn's Petition.

C. Maryland's Critical Area Law reinforced Quinn's expectations that his lots would be treated as separate.

The County's reliance on the State's Critical Area regulation is entirely misplaced. Quinn's lots are not in the Critical Area. And as of the date Quinn purchased most of them, the State had not even begun to regulate the Critical Area. The Critical Area law affects designated real property that the Maryland General Assembly determined requires extraordinary protection because of its close proximity to the Chesapeake Bay. Those unique environmental concerns are not present with respect to Quinn's land-locked properties. The notion that the Critical Area regulations somehow show that

Quinn should have expected separately recorded lots *outside of the Critical Area* to be merged is absurd.

Maryland's Critical Area law, however, does provide an additional reason Quinn reasonably expected that government regulation of his lots would not affect their separateness. The Critical Area laws imposed density limitations on development in a certain Critical Area. However, the law protected the pre-existing rights of an owner of "recorded" lots in the protected area. This "grandfathering" ensured that a non-conforming lot could be "developed with a single family dwelling" if the lot was "legally of record" when the Critical Area program became effective. Md. Code Regs. 27.01.02.07(B); *see* Solomon Liss & Lee R. Epstein, *The Chesapeake Bay Critical Area Commission Regulations: Process of Enactment and Effect on Private Property Interests*, 16 Univ. Balt. L. Rev. 54, 76-77 (1986) (explaining that the "grandfathering" provisions of the Critical Area law blunted its impact and prevented "the operation of the regulation from being viewed as a taking"). Given the State's historical protection of the rights of owners of "recorded" lots, Quinn reasonably expected that any regulation of his property interests would not alter how the lots were "legally of record" at the time he acquired them. The Ordinance, however, defied these expectations by completely disregarding the historical state-law treatment of Quinn's hundreds of separate lots.

The Critical Area regulations establish other protections for property owners whose rights would be affected by the change in law. For example, the

Critical Area law requires administrative procedures for granting a variance to any person who, "without a variance, … would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested." Md. Code, Nat. Res. § 8-1808(d). The Ordinance here provides no process for varying the application of the merger requirement to account for an owner who "would be denied reasonable and significant use" of the affected property. Rather, without exception, it retroactively prohibits the development or transfer of lots under common ownership unless those lots are merged.

For decades, Quinn held separately recorded, platted, and taxed lots exempt from density restrictions. Quinn could not have expected that these lots would be treated as one long after he acquired them. *See Murr*, 137 S. Ct. at 1945 ("[A] use restriction which is triggered only after, or because of, a change in ownership should also guide a court's assessment of reasonable private expectations.").

D. The Ordinance applies to all of Quinn's hundreds of lots and not only the twelve in the sewer service area.

Attempting to downplay the impact of the Ordinance, the County focuses only on its application to Quinn's twelve lots within the sewer service area. The County disregards Quinn's 223 lots that it carved out of the service area because those lots are not "buildable" without access to sewer. The County's analysis is factually incorrect and misleading.

But for the merger Ordinance, each of Quinn's 223 lots outside of the service area would be separately buildable or transferrable, just as those in the sewer area should be. Existing technology permits the use of zero-discharge septic on property without sewer, despite the high water table. Using that technology, Quinn could obtain a building permit for each of the separately recorded lots outside of the service area. Moreover, even if Quinn elected not to build on the lots, his Transferrable Development Rights and rights to private beach access are eliminated by the merger of Quinn's lots in and outside of the service area. The merger also destroys Quinn's ability to transfer the lots separately. Because the Ordinance applies regardless of any change in ownership after November 12, 2013, not a single one of Quinn's hundreds of lots can be transferred without attaching it to other contiguous Quinn lots.

The County crafted the Ordinance to target Quinn as the owner of the greatest number of residential lots on South Kent Island. The Ordinance has broad application to all of Quinn's hundreds of lots.

CONCLUSION

For the foregoing reasons and those stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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