

## **FALL 2015 NEWSLETTER**

### **LAND USE, ZONING and REGULATORY TAKING**

**By John F. Roehm III**

#### **UNITED STATES SUPREME COURT**

***Horne, et al v. Department of Agriculture, 135 S.Ct. 2419 (June 22, 2015)***

The U.S. Secretary of Agriculture promulgated “marketing orders” to help maintain stable markets for particular agricultural products pursuant to the Agricultural Marketing Agreement Act of 1937. The marketing order for raisins established a Raisin Administrative Committee that imposed a reserve requirement – i.e. a requirement that growers set aside a certain percentage of their crops for the account of the Government, free of charge. The Government makes use of those raisins by selling them in noncompetitive markets, donating them, or disposing of them by any means consistent with the purpose of the program. If any profits are left over after subtracting the government’s expenses for administering the program, the net proceeds are distributed back to the raisin growers.

The Petitioners are raisin growers who refused to set aside any raisins for the government on the grounds that the reserve requirement was an unconstitutional taking of their property for public use without just compensation. The government fined Petitioners for failing to obey the raisin marketing order.

Petitioners filed suit in federal court arguing that the reserve requirement was an unconstitutional taking of their property under the Fifth Amendment. The matter was appealed to the Ninth Circuit Court of Appeals on the issue of jurisdiction/lacking of standing. The U.S. Supreme Court remanded the case back to the Court of Appeals to address the merits of the case.

The Petitioners argued that the reserve requirement was a physical appropriation of property and, thus a *per se* taking. The Court of Appeals found that the Takings Clause afforded less protection for personal property than for real property and that the Petitioners, who retained an interest in any net proceeds from the program, were not completely divested of their property. The Court viewed the reserve requirement as a use restriction, similar to a government condition on the grant of a land use permit. The government imposed a condition (the reserve requirement) in exchange for a government benefit (an orderly raisin market) and the Petitioners could avoid relinquishing large percentages of their crops by planting different crops. The Court found that the reserve requirement was a proportional response to the government’s interest in ensuring an orderly raisin market, and not a taking under the Fifth Amendment. Petitioners appealed to the U.S. Supreme Court.

The U.S. Supreme Court found that the Fifth Amendment requires the government to pay just compensation when it takes personal property just as when it takes real property. The Court

rejected the government's contention that there has been no taking because the growers are entitled to the net proceeds. The Court found that the reserve requirement imposed by the Raisin Committee is a clear physical taking in that the actual raisins are transferred from the growers to the government and the government's formal demand that the Petitioners turn over a percentage of their raisin crops without charge, for the government's control and use, is of such unique character that it is a taking without regard to other factors that the Court might ordinarily examine. The Court found that raisin growers subject to the reserve requirement thus lose the entire bundle of property rights in the appropriated raisins – i.e. right to possess, use, and dispose of them. The government's actual taking of possession and control of the reserve gives rise to a taking as clearly as if the government held full title on ownership which it essentially does. The Court found that any net proceeds the raisin growers received from the sale of the reserve raisins goes to the amount of compensation that they have received for that taking – it does not mean that the raisins have not been appropriated for government use. As an aside, the Court found that the Petitioners did not receive any net proceeds from the Raisin Committee sales for the years at issue, because they had not set aside any reserve raisins for those years.

The Supreme Court rejected the government's contention that the reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market and if the raisin owners do not like it, they can plant different crops or sell their raisin-variety grapes as table grapes or for use in juice or wine. The Court held that selling produce in interstate commerce, although certainly subject to reasonable governmental regulation, is similarly not a special governmental benefit that the government may hold hostage, to be ransomed by the waiver of constitutional protection. Raisins are private property and any physical taking of them for public use must be accompanied by just compensation.

The Court found that there was a taking and reversed the judgment of the Ninth Circuit Court of Appeals.

### **TEXAS SUPREME COURT**

***Harris County Flood Control District and Harris County, Texas v. Edward A. and Norma Kerr, et al., \_\_S.W. 3d\_\_ (2015 WL 3641517) (June 12, 2015).***

A property owner can defeat a government entity's plea to the jurisdiction by raising fact issues as to each element of a takings claim.

Homeowners located in the upper White Oak Bayou watershed in Harris County sustained flooding to their properties in 2001 and 2002. The homeowners filed an inverse condemnation suit against Harris County and the Harris County Flood District. The homeowners alleged that the government entities approved new upstream development without implementing appropriate flood control measures knowing that certain flooding would occur as a result. The government entities filed a combined plea to the jurisdiction and motion for summary judgment contending that no genuine issue of material fact had been raised on the elements of the takings claim.

The homeowners presented evidence that the government entities have long known that expanding development in the watershed could cause flooding. The U.S. Army Corp of Engineers prepared a report on the upper White Oak Bayou wherein it noted recurrent damaging floods which it attributed primarily to inadequate channel capacities of the stream and this problem was compounded by the continuing increase of suburban development which reduced the infiltration of rainfall and increased and accelerated runoff to the streams. The report found that inadequate street drainage and storm sewers also caused severe localized flooding and predicted that additional residential development is expected to occur with or without an adequate plan for controlling the floods. The Corp proposed channel improvements and other changes to reduce flooding caused by existing and future development. The plan was to be funded primarily by the federal government. The local governmental entities concurred with the Corp's findings and agreed to facilitate the project. However, due to delays in federal funding, the County officials developed their own flood-control plan. The local government entities commissioned Pate Engineers to develop a plan. A plan was proposed to eliminate flooding along the upper bayou for 100 year flood events. A flood occurred in 1989 which revealed flaws in the Pate Plan's engineering analysis and the District commissioned another report on the upper White Oak Bayou watershed. This report concluded that the Pate Plan seriously underestimated the bayou's flood flows and levels, and a new plan was adopted and modeled around containing a 10 year as opposed to a 100 year flood events. The local government entities adopted these changes.

The trial court denied the motion and the court of appeals affirmed the denial of the plea to the jurisdiction.

The issue before the Texas Supreme Court was whether the homeowners raised a fact issue as to the elements of a takings claim- intent, causation, and public use. The homeowners urged that the entities approved private development in the White Oak Bayou watershed without mitigating its consequences, being substantially certain that unmitigated development would bring flooding with it. The government entities responded that they did not intend the flooding.

The Court found that a fact issue exists regarding whether the government entities were substantially certain their actions in approving development without appropriately mitigating it would cause the plaintiffs' homes to flood. The various plans commissioned by the government entities confirmed that they had known for several decades that development in the bayou watershed exacerbates flooding in the upper bayou. The homeowners pointed to evidence that the county approved development without the previously required on-site detention and the last report led the entities to plan for 10 year flood events rather than 100 year flood events as called for in the Pate Plan. The local government entities' expert explained that the District's knowledge of the watershed changed significantly over time and continued to change with the advent of new technologies and with observations of actual events and thus, the changing flood plains and changing plans were not premeditated but rather resulted from new data and knowledge. The Court found that this competing evidence demonstrates the factual complexity surrounding this issue and the difficulty of pinpointing precisely what the governmental entities knew about flooding in the upper watershed and when they knew it. Evidence existed that the entities approved development without appropriately mitigating it and that at times they deviated

from their early policy of requiring on-site detention ponds and they abandoned plans protecting against 100 flood events to plans targeting only a 10 year flood event. The Court found that though none of the evidence on its own might raise a fact issue, together it raises a question of fact as to the entities' intent to take the homeowners property to facilitate new development without appropriate mitigation. The recurring nature of a flood event is evidence of intent and the extent of the taking.

As for the issue of causation, the homeowners argued that the primary cause of flooding in the White Oak Bayou was development without the implementation of proper storm water management measures. The homeowners presented evidence that the entities latest plan targeted only 10 year flood events whereas the previous Pate Plan targeted 100 year floods and thus, the entities had knowledge that their latest plan would provide less protection from a major flood event than the Pate Plan and would result in more flooding. The entities presented evidence that the expanding flood plain was caused, at least in part, by new knowledge about existing conditions as opposed to changes in the condition and intense unexpected rainfall, not their own actions, caused the floods. The Court found that a fact issue existed regarding the cause of the floods.

Finally, the Court found that the homeowners raised a fact issue as to public use. While the entities made no conscious decision to sacrifice the plaintiffs' property for public use, the homeowners contend that the entities approved development in drainage plan decisions for the sake of the public. The Court found that at least some evidence existed that in approving new development and drainage plans causing flooding the entities were acting for a public use. To the extent the government entities were substantially certain the homeowners' homes would flood because of unmitigated development, they sacrificed their homes for the sake of new development, and this was for public use.

The Court concluded a fact issue existed as to each element of the homeowners' takings claim and as a result, the government entities plea to the jurisdiction is denied.