2015 YEAR IN REVIEW

LAND USE, ZONING and REGULATORY TAKING

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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.

<u>TEXAS SUPREME COURT</u>

***State of Texas v. Clear Channel Outdoor, Inc., 2015 WL 1870306, __ S.W. 3d. __ (Tex. 2015)* (April 24, 2015).**

Compensation for the taking, damaging or destroying of billboard structures is the cost of the structures themselves, not the revenue generated from the structures

The State of Texas condemned land which contained billboards. The State contended that the condemnation of the realty did not include the billboards themselves because they were removable personal property for which no compensation was due. The Special Commissioners' award did not include compensation for the billboard structures. The landowners and lessee, Clear Channel, objected to the award and Clear Channel counterclaimed for inverse condemnation of the sign structures. The State moved to dismiss the counterclaim on the grounds that Clear Channel's right under its lease to remove the structure established that theey were not fixtures but personalty. The trial court denied the State's request and the State appealed. The court of appeals affirmed.

The State settled with the landowners and Clear Channel for the compensation for their fee and leasehold interests. However, the parties disagreed on whether Clear Channel was entitled to separate compensation for the billboard structures. The State argued that if Clear Channel was entitled to any compensation, the compensation should be limited to the cost to build them. Clear Channel argued that it was entitled to be compensation for the value of the billboards based on the business revenue they generated and that this amount was not included in the settlement. At trial the jury entered an award based on Clear Channel's theory of compensation for the billboards. The State appealed and the court of appeals affirmed.

The State argued that it did not take the billboards themselves because they were not fixtures but personalty which could have been removed under the lease. However, the U.S. Supreme Court has held that a tenant's right to remove improvements when the lease ends cannot be invoked by the condemnor to limit compensation for a taking. This court has found that an improvement can be a fixture even if removal is physically possible. The State argued that it could not have taken the billboard structures because it never took physical possession of them. However, the State required the billboards to be destroyed and under the Texas Constitution, its guarantees compensation if private property is "taken, damaged, or destroyed for or applied to public use without adequate compensation."

As for the compensation for the billboard structures, the Court, in a previous decision in *State v. Cent. Expressway Sign Assocs.,* 302 S.W.3d 866 (Tex. 2009), found that Texas law provides that "income from a business operated on the property is not recoverable and should not be included in a condemnation award," even when there is evidence that the business's location is crucial to its success.

The State did not take Clear Channel's business but rather took only the land and the billboard structures. Clear Channel can continue the business elsewhere, subject to the restrictions imposed on the new site. The compensation the State owed for the land taken, given that its highest and best use was for outdoor advertising, should have taken into account the facts that the necessary permits were in place and that the site was especially suited to that use. Valuation should have taken into account the rents the owner could command from so desirable a location. The court presumed that the parties considered all these factors in arriving at an agreement on the compensation due and if they did not, their settlement forecloses all these issues. Since the cost of the billboard structures themselves were excluded from the settlement and the compensation due for them can be based only on their cost, the judgment of the court of appeals is reversed and the case is remanded to the trial court for determination of the cost of the billboard structures.

<u>TEXAS SUPREME COURT</u>

***City of Houston v. Carlson,* 2014 Tex. App. LEXIS 1209 (Tex. Sup. Ct., December 19, 2014).**

A challenge to a procedural regulation does not necessarily equate to a taking.

The City investigated safety concerns at a condominium complex and declared the condominiums uninhabitable and posted notice that a certificate of occupancy must be obtained. The condominium owners did not apply for an occupancy certificate and the City, rather than issue a citation, ordered all residents to vacate the complex. The City conducted an administrative hearing and upheld the order to vacate. The condominium owners sued and obtained a permanent injunction that they were not afforded due process of law. The trial court reversed the order to vacate and the Court of Appeals affirmed. The parties did not appeal to the Supreme Court and the homeowners association sold the complex for redevelopment.

A group of owners filed suit against the City for inverse condemnation – i.e., alleging that their property was taken when residents were forced to vacate. The trial court granted the City's plea to the jurisdiction concluding that the property owners did not allege a taking. The Court of Appeals reversed. The City filed a petition for review with the Texas Supreme Court.

The Supreme Court found that the owners' allegations did not support a regulatory takings claim. A regulatory taking is a condition of use "so onerous that its effect is tantamount to a direct appropriation or ouster." The owners did not contest any of the City's property-use restrictions, did not argue it was unreasonable to require multi-family residential facilities to obtain occupancy certificates and did not challenge the City's various codes. Rather, the owners objected to the penalty imposed and the manner in which the City enforced its standards. The owners were challenging the procedure utilized by the City – not a land use restriction. The Court acknowledged that it has never recognized a purely procedural regulatory taking.

The Court found that the property was not "taken for public use" within the meaning of the Constitution. Where a party objects only to the "infirmity of the process," no taking has been alleged. The owners have not alleged a viable inverse condemnation case and the Court reversed the Court of Appeals' decision.