Case Law Update
They Can Take Our Raisins, But They Will Never Take Our Freedom: The Supreme Court 'Raisin Case' Part Deux

by Evan Seeman, Esq.

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After more than a decade of litigation, the Supreme Court, in *Horne v. Department of Agriculture*, has ruled that the federal government's requirement that raisin growers give up a percentage of their crops free of charge is an unconstitutional taking of property under the Fifth Amendment. While the regulation of raisin sales does not involve traditional planning principles or even land use, it is an important decision that could lead to new challenges for local governments in land use regulation.

The tale begins with the 1937 Agricultural Marketing Agreement Act, under which the government regulates the sale and delivery of various agricultural crops to stabilize crop prices by creating an artificial scarcity in the domestic market. It does so by requiring crop growers to give up some percentage of their crop free of charge, with the percentage of crops diverted to reserves that vary each year according to that crop's output. The government sells, allocates, or otherwise disposes of the raisins to maintain an orderly market. Proceeds from the sale of the crops are used to finance the government's administrative costs, with remaining funds distributed to raisin producers. In the years at issue in *Horne*, the proceeds distributed to the producers were less than the cost of producing raisins one year and nothing the following year.

Enter Marvin and Laura Horne, California raisin growers since 1969. In 2002, the government ordered all raisin growers to give up 47% of their crop. The Hornes did not believe they were legally bound to do so and refused entry to government trucks that arrived at 8:00 a.m. one morning to collect the raisins. The government fined the Hornes $480,000, representing the market value of the missing raisins, and issued a civil penalty of $200,000 for the Hornes' "disobedience."

After the U.S. Department of Agriculture rejected the Hornes' takings defense in an administrative proceeding, the Hornes turned to the courts. The Ninth Circuit concluded that it lacked jurisdiction because, under the Tucker Act, a takings claim could not be raised as a defense. According to the Ninth Circuit, the Hornes would first have to pay the fine and then sue to recover their costs. In 2013, the U.S. Supreme Court first considered the matter and reversed the decision of the Ninth Circuit because "it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding." *Horne v. Dep't of Agriculture*, 133 S. Ct. 2053, 2063 (2013). The case was sent back to the Ninth Circuit to consider the merits.

On remand, the Ninth Circuit viewed the government's raisin requirement under the more forgiving regulatory taking standard and concluded that the Takings Clause affords less protection to private property, as opposed to real property. Because the Hornes were not completely divested of their raisin rights (since growers retained an interest in the proceeds of any sale of reserve raisins by the government), the Ninth Circuit found no taking. It compared the raisin requirement to a government condition on the granting of a land use permit, explaining that in such permit cases, the government may impose a condition in exchange for a government benefit.

The Supreme Court again reversed. First, it found that the Takings Clause is equally applicable to a physical appropriation of private property as to real property: "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." *Horne v. Dep't of Agriculture*, 192 L. Ed. 2d 388, 397 (2015).

Second, the Supreme Court decided that the government's raisin requirement was a clear physical taking because raisin growers lose the entire "bundle" of property rights in the appropriated raisins. It rejected the government's argument that there is no taking since raisin growers retain an interest in the net proceeds of the government's sale of the appropriated raisins. Unlike regulatory takings claims – in which the question is whether the owner has been deprived of all economically viable use of his or her land – *Horne* reiterated that in the context of physical takings cases, all

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that matters is that some physical taking has occurred, regardless of whether the owner has lost all economically viable uses.

Third, the Supreme Court rejected the government's contention that the raisin requirement is not a taking because raisin growers voluntarily choose to participate in the market. "Let them sell wine," said the Court, "is probably not much more comforting to the raisin growers than similar reports have been to others throughout history." *Id.* at 401. The Court looked to its earlier decision in *Loretto v. Teleprompter Manhattan CATV Corp.* to note that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for physical occupation." 458 U.S. 419 (1982).

The Supreme Court also considered whether the Hornes had received some valuable government benefit by selling raisins. Unlike *Ruckelshaus v. Monsanto Co.*, where the sale of dangerous pesticides in the market was deemed a government benefit, 467 U.S. 986 (1984), *Horne* determined there is no government benefit associated with the sale of raisins. It also noted that the right to build on one's own property is not a government benefit. *Horne*, 192 L. Ed. 2d at 401-02. Had there been some government benefit associated with the sale of raisins, perhaps the result would be different. But, "[r]aisins are not dangerous pesticides; they are a healthy snack." *Id.* at 402.

WHILE THE REGULATION OF RAISIN SALES DOES NOT INVOLVE TRADITIONAL PLANNING PRINCIPLES OR EVEN LAND USE, IT IS AN IMPORTANT DECISION THAT COULD LEAD TO NEW CHALLENGES FOR LOCAL GOVERNMENTS IN LAND USE REGULATION.

In the end, the Hornes were relieved of paying the government's fine and civil penalty. So what impact will *Horne* have?

The Department of Agriculture should be shaking in its government boots out of concern that growers of raisins, and other crops subject to the set-aside requirement, will assert similar takings defenses or sue. There are seven other set-aside programs in various states covering almonds, dates, dried prunes, walnuts, tart cherries, and spearmint oil. The Department should take a hint from the Supreme Court's distinction between physical takings and regulatory takings jurisprudence. *See id.* at 399 ("A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends."). In other words, if the government regulates the number of crops that may be sold in the market, it would likely increase its odds of prevailing on a takings claim "under the more flexible and forgiving standard for a regulatory taking." *Id.* at 395.

Could *Horne* also affect land use takings challenges? Exactions imposed by governments as conditions of development approval come to mind most when reading *Horne*, e.g. site plans, special permits, rezones, etc. But this was addressed by the Supreme Court in *Koontz v. St. Johns Water Management District*, where monetary exactions were found to be subject to the heightened scrutiny analysis established by a pair of Supreme Court cases, *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. Land use exactions may be permissible, and are not per se takings, because of the well-recognized principle that "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy...." *Koontz v. St. Johns Water Management District*, 133 S. Ct. 2586, 2595 (2013) (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

In *Horne*, the Supreme Court opted to go against the Ninth Circuit's approach of analyzing the takings claim as a land use exaction. Might savvy developers and applicants now attempt to recast their takings claims to fit the *Horne* framework, perhaps under the guise of interstate commerce? Maybe. *Horne* states that "[s]elling produce in interstate commerce, although

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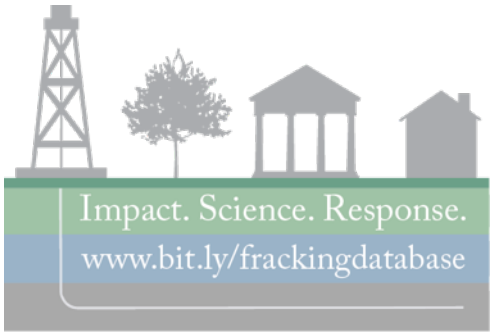
certainly subject to reasonable government regulation, is similarly not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection." *Horne*, 192 L. Ed. 2d at 402.

Consider also inclusionary zoning. Under inclusionary zoning ordinances, local governments may require that developers set-aside their "crops" (regular priced building units) to stabilize the market. This sounds like *Horne* to some extent, and it would appear that inclusionary zoning would likely fall under the land use ambit and be subject to heightened scrutiny as an exaction. Recently, however, the California Supreme Court rejected a takings claim challenging an inclusionary zoning ordinance as an unconstitutional land use exaction, in *Building Industry Association of Central California v. City of San Jose*. San Jose's ordinance requires that, for all new residential developments with twenty or more units, at least fifteen percent of the units must be sold at prices affordable to low- or moderate-income households. Relying on *Koontz*, the California Supreme Court concluded that the ordinance was not an exaction because the ordinance only restricts the *use* of property without demanding conveyance of some identifiable property interest to the government. 61 Cal. 4th 435 (2015).

If not an exaction, could *Horne* come into play? It appears that a "no exaction" finding, as in the *City of San Jose* case, could be vulnerable to attack based on *Horne's* reiteration that the government's control and use of property – as opposed to possession of title – can give rise to a takings claim. Then again, the Supreme Court may be strained to find a taking in such a situation, since it has already held (in the context of rent control) that "[w]hen a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge…without automatically having to pay compensation." *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992). There had been some speculation that *Horne* could come into play if the Supreme Court had agreed to review the *City of San Jose* case. But the Supreme Court declined to do so on February 29, 2016. Time will tell whether *Horne* will come to pass in the context of inclusionary zoning or rent control. For now, however, local governments should continue with inclusionary zoning and rent control as they normally would, but should be prepared, at the very least, for new challenges brought under the *Horne* framework. ♦

INDUSTRY RESOURCE



New Resource: Database on the Local Impacts of Hydraulic Fracturing

Governing the local impacts of hydraulic fracturing is a daunting task that demands information sharing and collaboration between local leaders. The purpose of this database is to facilitate that information sharing by cataloguing the most common local impacts of hydraulic fracturing and local legal responses. Developed by the Land Use Collaborative, this resource does not have all the answers, but it can serve as an initial point of collaboration and information sharing to help local governments make informed decisions about governing the local impacts of hydraulic fracturing.

Look for us at the National Planning Conference and Webinar Coming Late Summer.

About the Land Use Collaborative

The Land Use Collaborative is organized by the Yale School of Forestry and Environmental Studies and the Land Use Law Center at Pace Law School. For more information about the Collaborative, please visit http://landuse.yale.edu.

Land Use Collaborative