

1996 Update to the Kansas Attorney General's Guidelines for Evaluating Proposed Governmental Actions to Identify Potential Takings of Private Property

[The original guidelines published in volume 14, number 51 of the Kansas Register on December 15, 1995, with updated citations, are reprinted here for convenience. Additional information is under the heading Cases Reported Subsequent to 1995, appearing just before the list of cases cited.]

Pursuant to K.S.A. 1995 Supp. 77-704 of the private property protection act, the Attorney General is required to establish and update annually guidelines "to assist state agencies in evaluating proposed governmental actions and in determining whether such actions may constitute a taking." These guidelines are intended solely as an internal aid to state agencies in their performance of governmental functions, and should not be construed as an opinion of the Attorney General on whether a specific action constitutes a taking. Each action must be reviewed by the appropriate agency and its legal counsel using these guidelines as a basis for review. Neither these guidelines nor the private property protection act establish or create a new private cause of action or limit any right of action pursuant to other statutes or common law.

Private Property Protection Act

The policy underlying the private property protection act is to require state agencies to identify and account for the obligations imposed by the fifth and fourteenth amendments of the constitution of the United States, and section 18 of the bill of rights of the constitution of the state of Kansas, in an effort to reduce the risk of undue or inadvertent burdens on private property rights resulting from certain governmental actions. K.S.A. 1995 Supp. 77-702. For purposes of the act, taking is defined as any governmental action affecting private property such that compensation to the owner of the property is required under the cited constitutional provisions. K.S.A. 1995 Supp. 77-703(a). Private property is defined in the act as any real property or interest in real property that is protected by these constitutional provisions. K.S.A. 1995 Supp. 77-703(c). State agency is defined to include any officer, department, division or unit of the executive branch of the state that is authorized to propose, adopt or enforce rules and regulations, but specifically excludes the legislative and judicial branches of the state and all political or taxing subdivisions of the state. K.S.A. 1995 Supp. 77-703(d). Finally, affected governmental actions include proposing legislation, proposing regulations or directives and proposing agency guidelines and procedures concerning the process of issuing licenses or permits if such action may constitute a taking of private real property. K.S.A. 1995 Supp. 77-703(b)(1). Specifically excluded from the definition of governmental action are the formal exercise of eminent domain powers, the repeal or amendment of regulations or elimination of government programs if limitations on use of private real property are reduced or removed, the

forfeiture or seizure of private property by law enforcement agencies for violations of law or as evidence of a crime, and agency action, authorized by statute or court order, in response to a violation of state law.

Persons and entities falling within the definition of a state agency are required to utilize these guidelines when performing one of the listed governmental actions, K.S.A. 1995 Supp. 77-704, 77-705, 77-706, and when reviewing existing rules and regulations pursuant to K.S.A. 1995 Supp. 77-707, to evaluate such actions for their takings implications on private real property. If, based on these guidelines, the proposed action may constitute a taking, the state agency is to prepare a written report in conformance with K.S.A. 1995 Supp. 77-706 of the private property protection act. K.S.A. 1995 Supp. 77-706.

General Takings Clause and Due Process Principles

The fifth amendment to the United States constitution provides that private property shall not be taken for public use without just compensation. This restriction applies to the states through the fourteenth amendment. **Chicago B. & Q. R. Co. v. Chicago**, 166 U.S. 226, 241, 41 L.Ed. 979, 986 (1897). The fourteenth amendment to the United States constitution and section 18 of the bill of rights of the Kansas constitution provide due process rights protecting individuals' property from arbitrary regulation. **State ex rel. Stephan v. Smith**, 242 Kan. 336, syl. ¶ 9, 747 P.2d 816 (1987) . Accordingly, the government may not "take" private property for public purposes without payment of just compensation, and may not impose arbitrary or oppressive regulations on private property. **See Smith, id.** at 362 (if a protected property interest is taken, the test for determining whether due process has been afforded is whether the regulation has a real and substantial relation to the objective sought, whether it is reasonable in relation to the subject, and whether it was adopted in the interest of the community); **Joe Self Chevrolet, Inc. v. Board of Sedgwick County Comm'rs**, 247 Kan. 625, 630, 802 P.2d 1231 (1990) (the basic elements of procedural due process are notice and a meaningful opportunity to be heard); **Noel v. Menninger Foundation**, 175 Kan. 751, 763, 267 P.2d 934 (1954) (section 18 means that for wrongs recognized by law, the court shall be open and afford a remedy).

Clearly the takings clause applies to direct physical appropriations of property. **Legal Tender Cases**, 79 U.S. (12 Wall) 457, 551, 20 L.Ed. 287 (1871). Additionally, while the state has the right to regulate or limit the use of property under its police power to protect the public health, safety and welfare, "if regulation goes too far it will be recognized as a taking." **Pennsylvania Coal Co. v. Mahon**, 260 U.S. 393, 415, 67 L.Ed. 322, 326, 43 S.Ct. 158, 28 A.L.R. 1321 (1922). The United States Supreme Court has generally avoided establishing a set formula for determining how far is too far, choosing instead to balance the asserted public interest against the diminution in value. **Agins v. Tiburon**, 447 U.S. 255, 260, 65 L.Ed.2d 106, 112, 100 S.Ct. 2138 (1980). The court has, however, identified two categories of regulatory action requiring just compensation regardless of the importance of the public interest advanced: regulations resulting in the permanent physical occupancy or permanent physical invasion of property, **Loretto v. Teleprompter**

Manhattan CATV Corp., 458 U.S. 419, 434-435, 73 L.Ed.2d 868, 882, 102 S.Ct. 3164 (1982); and regulations that effectively eliminate all economically productive or beneficial use of the property, **see Agins, supra, Keystone Bituminous Coal Assn. v. DeBenedictis**, 480 U.S. 470, 495, 94 L.Ed.2d 472, 495, 107 S.Ct. 1232 (1987); **Clajon Production Corp. v. Petera**, 70 F.3d 1566 (10th Cir. 1995).

The government may by regulation abate public nuisances, prohibit illegal activity, assert a public easement, regulate roadways, establish building codes, safety standards and sanitary requirements, limit use of property through land use planning, zoning ordinances, setback requirements and environmental regulations, etc., either directly or as a condition for a permit, generally without creating a compensable taking. However, if any one of these regulations "goes too far," compensation may be required unless the government can demonstrate that the common law doctrine of nuisance or other limitations on the use of the property preexisted the owner's interest in the property. **Lucas, supra** at 821. In general, a permanent physical occupancy or invasion requires compensation no matter how minute the intrusion, and no matter how weighty the public purpose behind it. Requiring the outright uncompensated conveyance of a permanent easement is an example of a permanent physical occupation that would violate the fourteenth amendment.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 120 L.Ed.2d 798, 812, 112 S.Ct. 2886 (1992), citing **Loretto, supra**. Temporary physical invasions of property may also give rise to a compensable taking if the invasions are of a recurring or substantial nature. **United States v. Causby**, 328 U.S. 256, 265, 90 L.Ed. 1206, 1212, 66 S.Ct. 1062 (1946). Whether a particular temporary physical invasion requires compensation must be determined on a case-by-case basis, balancing the nature of the government action against the economic impact on the landowner and determining whether less intrusive means of accomplishing the government's interest may be available. Further, compensation may be required in situations where a regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his or her land," **Agins, supra**.

Nuisance Law

As mentioned previously, the state's common law doctrine of nuisance may serve as a defense against a takings challenge. In Kansas, "any use of property by its owner which gives offense to or endangers life or health, violates the laws of decency, or obstructs the reasonable and comfortable use of property of another, may be said to be a nuisance." **Baldwin v. City of Overland Park**, 205 Kan. 1, 4, 468 P.2d 168 (1970), quoting **Jeakins v. City of El Dorado**, 143 Kan. 206, syl. ¶ 2, 53 P.2d 798 (1936). A public nuisance is one that affects an interest common to the general public, one which annoys a substantial portion of the community. **Culwell v. Abbott Construction Co.**, 211 Kan. 359, 363, 506 P.2d 1191 (1973).

"At common law a public nuisance was always a crime and punishable as such. Down through the years, the concept of public nuisance has been broadly expanded to include a

multitude of acts deemed inimical to public health, safety, comfort, peace, convenience or morals. Some examples of public nuisances are houses of prostitution, gambling dens, hog pens, illegal liquor establishments, indecent exhibitions, bullfights, unauthorized prize fights and the illegal practice of law and medicine." **Id.**

See also Lucas, 120 L.Ed.2d at 822. Whether a nuisance has been created depends on many factors, such as the type of neighborhood, the nature of the thing or wrong complained of, its proximity to those alleging injury or damage, its frequency, continuity or duration, and the damage or annoyance resulting and each case must necessarily depend on its particular facts and circumstances. **Culwell**, 211 Kan at 365.

Takings Checklist

State agencies should follow this checklist in reviewing any governmental action for purposes of determining its potential takings implications. If the action in question appears to meet one of the checklist criteria, agency staff should carefully review the proposed action with legal counsel to determine whether, in that particular instance, compensation is required. Meeting one or more criteria does not per se constitute a taking.

1. Does the government action result in a permanent or temporary physical occupation or invasion of private property?

Examples of permanent or temporary physical occupancy situations may include flooding and other water related intrusions, utility easements, access easements and aviation/ overflight easements. If government regulation results in a permanent physical occupation or invasion, compensation is required unless the government's right to the intrusion preexisted the owner's interest in the property. [Conversely, a private property owner may be entitled to compensation only if the ownership interest existed at the time of the taking. **Riddle v. State Highway Commission**, 184 Kan. 603, 610-611, 339 P.2d 301 (1959).] If government regulation results in a temporary physical occupation or invasion, compensation may be required depending upon the extent of the intrusion and the purpose for it.

2. Does the governmental action deny or abrogate a fundamental property right?

If a governmental action destroys a fundamental property right, such as the right to possess, exclude others from or dispose of property, compensation may be required. However, compensation would not be required if the limitation preexisted the owner's property interest.

3. Does the governmental action deprive the owner of all economically viable uses of the property?

If the regulation categorically prohibits **all** economically beneficial use of land, destroying its economic value for private ownership, and the use prohibited is not a common law nuisance or preexisting limitation, the regulation is effectively equivalent to a permanent physical occupation and therefore a compensable taking. **Florida Rock Industries, Inc. v. United States**, 18 F.3d 1560 (Fed.Cir. 1994). In determining the economic impact of a land use regulation, the tenth circuit court of appeals has held that the impact on the parcel as a whole should be considered rather than the impact on just the part of the parcel (or the stick in the bundle of property rights) that is subject to the regulation. **Clajon, supra** at 7, citing **Penn Central Transp. Co. v. City of New York**, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978); **Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California**, 508 U.S. ___, 124 L.Ed.2d 539, 578, 113 S.Ct. 2264 (1993); **Keystone**, 480 U.S. at 497. **But see Florida Rock, supra** at 1572 n.32.

4. Does the governmental action substantially further a legitimate state interest?

With regard to development exactions, where property is required to be dedicated in exchange for a permit, if no nexus exists between the asserted government purpose and the regulation, a taking may be found for lack of a legitimate government interest. **Nollan v. California Coastal Comm'n**, 483 U.S. 825, 837, 97 L.Ed.2d 677, 689, 107 S.Ct. 3141 (1987). For example, a condition on the granting of a land use permit that serves the same legitimate police-power purpose as a refusal to grant the permit will not be found to be a taking if the refusal to grant the permit would not constitute a taking, but if the condition substituted for the prohibition fails to further the end advanced as the justification for the prohibition, a compensable taking has occurred. If a nexus does exist, the degree of exaction demanded by the regulation must be roughly proportional to the impact of the use to which the property is being put. **Dolan v. City of Tigard**, 512 U.S. ___, 129 L.Ed.2d 304, 320, 114 S.Ct. 2309 (1994). The tenth circuit court of appeals has ruled that the "essential nexus" and "rough proportionality" tests expressed in **Nollan** and **Dolan** "are limited to the context of development exactions where there is a physical taking or its equivalent." **Clajon, supra** at 8, citing **Harris v. City of Wichita**, 862 F.Supp. 287, 293 (D.Kan. 1994).

5. Are the proscribed uses or physical occupation part of a preexisting limitation on the landowner's title?

If the limitation is inherent in the owner's title due to state property and nuisance laws or otherwise, no taking has occurred by a regulation imposing the same limitation. **Lucas, supra**, 120 L.Ed.2d at 820-823. Similarly, if a physical occupation is the exercise of a right that preexisted the owner's interest, no compensable taking has occurred when the right is exercised. **Id.**; **Scranton v. Wheeler**, 179 U.S. 141, 163, 45 L.Ed. 126, 21 S.Ct. 48 (1900).

Cases Reported Subsequent to 1995

The following United States and Kansas Supreme Court cases and Attorney General opinions, rendered after the effective date of the Attorney General's original takings guidelines, contain additional private property takings analysis.

Bennis v. Michigan, 516 U.S. ___, 134 L.Ed.2d 68, 116 S.Ct. ___ (1996)

In ***Bennis***, petitioner was a joint owner, with her husband, of an automobile in which her husband engaged in a sexual activity with a prostitute and was convicted of gross indecency. A Michigan court ordered the automobile forfeited as a public nuisance, with no offset for petitioner's interest. Petitioner claimed that because she was innocent of any wrongdoing and the automobile was not used for this purpose with her consent, that forfeiture of it without compensating her was in violation of the takings clause of the fifth amendment. The Court held that because the forfeiture proceeding did not violate the fourteenth amendment due process clause, and the petitioner's property interest was transferred to the government pursuant to that proceeding, that the government had already lawfully acquired the property and thus no compensation was required. The court specifically excepted acquisition of property pursuant to eminent domain from this holding.

Bennis cites ***United State v Fuller***, 409 US 488, 492, 35 L Ed 2d 16, 93 S Ct 801 (1973) and ***United States v Rands***, 389 US 121, 125, 19 L Ed 2d 329, 88 S Ct 265 (1967) for authority on this point. In ***Fuller***, the Court spoke of a general principal that "the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain." 409 U.S. at 492, 35 L.Ed.2d at 21. In ***Rands***, the property involved was riparian rights in a navigable stream. Because the federal government may grant or deny such rights as it chooses, "To require the United States to pay for this . . . value would be to create private claims in the public domain." 389 U.S. at 125, 19 L.Ed.2d at 334, quoting from ***United States v. Twin City Power Co.***, 350 U.S. 222, 100 L.Ed. 240, 76 S.Ct 259 (1956).

Marshall v. Board of County Commissioners for Johnson County, 912 F.Supp. 1456 (D.Wyo. 1996)

The court held that a planning commission's conditioning issuance of a subdivision permit on increasing the lot sizes (thus reducing the number of individual lots for sale) and constructing certain improvements was not an uncompensable taking in violation of the fifth amendment. The court quoted extensively from the tenth circuit's decision in ***Clajon Production Corp. V. Petera***, 70 F.3d 1566 (10th Cir. 1995) in reaching its conclusion that zoning regulations over the use and development of unincorporated land are for the public health, safety and welfare and thus serve a legitimate government interest, and that the developers investment backed expectations had not been destroyed in their entirety.

Garrett v. City of Topeka, 259 Kan. 896, 916 P.2d 21 (1996)

"Landowner initiated an inverse condemnation action, claiming that a city resolution placed limits on the right of commercial access from her property to the street and constituted a taking of the property." The resolution in question stated that it was enacted to safeguard public health, safety and welfare in anticipation of commercial development and to place reasonable restraints on the traffic flow in the affected area. The landowner's property was affected in that her means of access was altered making it more difficult to enter her property. She argued that the resolution denied her all or substantially all economically viable use of her land.

The majority concluded that the resolution constituted an economic regulatory taking of the landowner's property, ***Garrett***, 259 Kan. at 910, and that compensation was required because the economic impact of the resolution outweighed the city's interest in regulating traffic. 259 Kan. at 917.

In a dissent joined by Justice Six, Chief Justice McFarland concluded that the city's action did not constitute a taking at all, that regulatory takings involve regulation of the use of land which was not the situation here, and that this case should have been decided using a separate body of law dealing with restrictions on access to land abutting public streets. Chief Justice McFarland's dissent is a very concise and helpful analysis of regulatory takings law:

"[T]here are three types of regulatory takings: Physical, title, and economic. A physical taking, sometimes referred to as a 'possessory' or 'trespassory' taking, occurs when the regulatory action authorizes physical intrusion upon the land. . . . A title regulatory taking involves the governmental body demanding development exaction from the landowner as a condition to allowing the landowner's proposed development, such is the case in ***Nollan v. California Coastal***

Comm'n, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987), wherein landowners had to grant the public an easement to use their beach in exchange for obtaining a permit to replace their small beachfront bungalow with a larger house.

“These two categories have been discussed briefly to show they always involve the actual use of the land, as does the third category of regulatory taking, economic, found to exist herein by the majority. Economic regulatory taking is discussed at great length in **Lucas v. South Carolina Coastal Council**, 505 U.S. 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992).

....

“Economic regulation cases essentially are zoning or zoning equivalent cases and generally hold that no compensable taking has occurred unless all economically viable use of the property has been precluded.” **Garrett**, 259 Kan. at 921-922.

Attorney General Opinion No. 96-21

In this opinion, Attorney General Stovall was asked to determine whether rescission of a county resolution that had authorized corporate farming would constitute a taking. The opinion concludes that, in light of the facts given, no physical taking was being contemplated. The Attorney General then considered whether a regulatory taking would occur and determined that if the landowners are not deprived of all economically viable use of their property, there would be no taking because rescission of the resolution would advance a legitimate governmental interest and would be effectuated in furtherance of the county’s police power.

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