

Kansas Attorney General's Guidelines for Evaluating Proposed Governmental Actions to Identify Potential Takings of Private Property—2002 Update

The following cases contain analysis of issues relating to government takings of privately owned real property. Pursuant to K.S.A. 77-704 of the Private Property Protection Act, this summary of decisions constitutes the 2002 update to the Attorney General's Guidelines. The original Guidelines may be found in Volume 14, Number 51 of the Kansas Register, published on December 15, 1995. Annual updates may be found in the Kansas Register at Volume 16, Number 1, published January 2, 1997, Volume 16, Number 52, published December 25, 1997, Volume 17, Number 53, published December 31, Volume 18, Number 52, published December 30, 1999, Volume 20, No. 1, published January 4, 2001 and Volume 21, No. 1, published January 3, 2002.

Tahoe-Sierra Preservation Council, Inc., v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

The United States Supreme Court declined to create a categorical rule for temporary regulatory land-use restrictions, even when such actions deny a property owner all economically viable use of their property. In this case a 32 month moratorium on development was imposed on property during the government's process of devising a comprehensive land-use plan. The Court stated:

"The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries,' *Penn Central*, 438 U.S., at 124, designed to allow 'careful examination and weighing of all the relevant circumstances.' *Palazzolo*, 533 U.S., at 636 (O'Connor, J., concurring).

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"This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa. . . . Land-use regulations are ubiquitous

and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford.” *Tahoe-Sierra Preservation*, 122 S.Ct. at 1478-79 (footnotes omitted).

National Compressed Steel Corporation v. The Unified Government of Wyandotte County/Kansas City, Kansas, 38 P.3d 723 (Kan. 2002).

The Kansas Supreme Court discusses eminent domain and inverse condemnation in this case. In holding the Unified Government exceeded its powers in conducting subsoil testing under the guise of K.S.A. 26-512, the Court stated:

“The power of eminent domain must be exercised in strict accordance with its essential elements in order to protect the constitutional right of the citizen to own and possess property against an unlawful perversion of such right. The power of eminent domain may be exercised only on the occasion and in the mode and manner prescribed by the legislature. Statutes conferring and circumscribing the power of eminent domain must be strictly construed.”

Attorney General Opinion No. 2002-24.

Whether a reduction of a water right constitutes a compensable taking depends upon the purpose for which the reduction is made. Without consideration of the purpose for which the reduction is made, no balancing test can be applied to determine whether the taking is compensable.