

**Kansas Attorney General Phill Kline's
Guidelines for Evaluating Proposed Governmental Actions to Identify Potential
Takings of Private Property**

2004 Update

Pursuant to K.S.A. 77-704 of the Private Property Protection Act, the following summary of decisions and pending cases constitutes the 2004 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, Volume 21, No. 1, published January 3, 2002, Volume 21, No. 52, published December 26, 2002 and Volume 23, No.1, published January 1, 2004.

The Guidelines and annual updates may also be found on Attorney General Phill Kline' s website at <http://www.ksag.org/Divisions/Logic/main.htm>.

Lingle v. Chevron, No. 04-163.

The United States Supreme Court has granted certiorari in this case in which the State of Hawaii is appealing the Ninth Circuit Court' s ruling that a Hawaii statute regulating the amount of rent that oil companies can charge gasoline station operators constituted a "taking of property" requiring just compensation because, in the Court' s view, the statute did not substantially advance Hawaii' s interest in controlling gasoline costs paid by consumers.

Hawaii will argue that the Just Compensation Clause does not require that generally-applicable legislation "substantially advance" a legitimate government interest, and that the Court should have given more weight to the fact that the statute did not prevent Chevron from being able to make a profit, dispelling any argument that the statute deprived them of all economically viable uses of the property. The decision below is *Chevron U.S.A., Inc. v. Cayetano*, 57 F.Supp.2d 1003 (D. Hawaii 1998), *vacated and remanded*, 224 F.3d 1030 (9th Cir. 2000), *on remand*, 198 F.Supp.2d 1182 (D. Hawaii 2002), *affirmed sub nom*, *Chevron U.S.A., Inc. v. Lingle*, 363 F.3d 846 (9th Cir. April 1, 2004).

Kelo v. City of New London, Conn., No. 04-108.

The United States Supreme Court has also granted petition for review of the Connecticut Supreme Courts decision that economic development constitutes a valid public use under the Takings Clause.

Petitioners in this case sought to enjoin the City of New London and the New London Development Corporation from exercising eminent domain powers to condemn petitioners' property "in furtherance of an economic development plan that was projected to create in excess of 1,000 jobs, to increase tax and other revenues to the city, and to revitalize an economically distressed city, including its downtown and waterfront areas."

Kelo v. New London, 268 Conn. 1, 843 A.2d 500 (March 9, 2004). The trial court denied the petitioners request for injunction on one parcel involved, finding that economic development is a valid public use under the Takings Clause, that these takings would sufficiently benefit the public and bear reasonable assurances of future public use and that the taking of the property was reasonably necessary to the development plan; it granted petitioners' request for injunction on another parcel finding that the condemnation of that parcel was not reasonably necessary to accomplish the development plan. The Supreme Court of Connecticut affirmed the trial court' s ruling on the first parcel, and reversed the decision on the second parcel, finding that there was no violation of the Takings Clause for any of the condemned property.

The Connecticut Supreme Court' s decision in this case is diametrically opposed to a ruling earlier this year by the Supreme Court of Michigan. In *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (July 30, 2004), the Michigan Supreme Court held that an economic development plan wherein the county intended to transfer the condemned properties to private parties for a 1,300-acre business and technology park was not consistent with the common understanding of "public use" as required by the Michigan Constitution. *County of Wayne v. Hathcock* dealt only with Michigan statutes and constitutional provisions, whereas *Kelo* involves a takings analysis under the United States Constitution, so the decision in *Kelo* will not affect the Michigan decision, but the two decisions reflect the difference of opinion in this area of takings jurisprudence.

Bock v. Westar Energy, Inc., 87 P.3d 375 (Kan.App. April 9, 2004)

This case does not contain a takings analysis, but does discuss inverse condemnation and eminent domain under K.S.A. 26-501 *et seq.*