

## Attorney General

### 2021 Update to Guidelines for Evaluating Proposed Governmental Actions to Identify Potential Takings of Private Property

The Private Property Protection Act, K.S.A. 77-701 *et seq.*, requires the Attorney General to compile and annually update guidelines<sup>1</sup> to be used by state agencies in determining whether proposed government actions may constitute a taking of private property. These guidelines are to be based on cases decided by the United States Supreme Court and the Kansas Supreme Court.<sup>2</sup> Government action is defined as legislation, regulations or directives, or agency guidelines and procedures for the issuing of licenses or permits.<sup>3</sup> The Act expressly excludes other types of activity, such as the formal exercise of eminent domain.<sup>4</sup>

Under the criteria of the Act, there is one case to include in the 2021 update to the Attorney General's Guidelines, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

In *Cedar Point Nursery*, the United States Supreme Court held that a California regulation that granted union organizers a right to enter an agricultural employer's property constituted a *per se* physical taking under the Fifth and Fourteenth Amendments to the United States Constitution. The "right to take access" granted by the regulation allowed union organizers access for up to three hours per day during four 30-day periods, for a total of 120 days per year. Two growers filed a lawsuit seeking to enjoin enforcement of the regulation, arguing that it granted a right equivalent to an easement.

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." A physical taking occurs when the government appropriates property through a condemnation proceeding or when the government enters – or authorizes others to enter – upon a landowner's property. In addition to such *per se* physical takings, a taking may occur when a government regulation restricts an owner's ability to use the property. It is a bright-line rule that physical takings require the government to give just compensation to the landowner, but use restrictions are evaluated under the flexible approach set out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

In *Cedar Point Nursery*, the Supreme Court concluded that the regulation at issue was not a use restriction because it did not restrict the growers' use of their own property, but was instead a *per se* physical taking because it encumbered one of the most fundamental rights of property ownership – the right to exclude others. The Court relied on its previous decisions to conclude that even though the regulation placed time limitations on the right

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<sup>1</sup> The original guidelines are published at 14 Kan. Reg. 1690-92 (Dec. 21, 1995).

<sup>2</sup> K.S.A. 77-704.

<sup>3</sup> K.S.A. 77-703(b)(1).

<sup>4</sup> K.S.A. 77-703(b)(2).

of union organizers to physically enter the growers' property, it was nonetheless a physical taking and required just compensation.

Importantly, the Court rejected the state's argument that this conclusion would jeopardize the ability of the government to enter private property to conduct health and safety inspections. It stated that "government health and safety inspection regimes will generally not constitute takings."<sup>5</sup> The government may require an owner to grant access for inspections as one of the conditions of receiving a license, permit, or registration to operate a business.

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<sup>5</sup> 141 S. Ct. at 2079.