

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

2007 Update

The information below sets forth issues that were examined in decisions decided by the United States Supreme Court, Tenth Circuit, and Kansas Supreme Court relating to government takings of privately owned real property. Pursuant to K.S.A. 77-704 of the Private Property Protection Act, the following summary of decisions constitutes the 2007 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, Volume 23, No. 1, published January 1, 2004, Volume 24, No. 1, published January 6, 2005, Volume 24, No. 47, published November 24, 2005, Volume 25, No. 52, published December 28, 2006, and Volume 27, No. 1, published on January 3, 2008.

The Guidelines and annual updates may also be found on the Attorney General's website at <http://www.ksag.org/content/page/id/66>.

Robbins v. Wilkie, 127 S.Ct. 2588, 168 L.Ed. 2d 389 (2007).

Plaintiff brought action against employees of the Bureau of Land Management (BLM), claiming that they attempted to extort a right-of-way across his property in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) and retaliated against him for exercising his Fifth Amendment right to exclude others from his property.

The district court denied defendants' motion for summary judgment on grounds of qualified immunity. The Tenth Circuit Court of Appeals affirmed. The United States Supreme Court reversed and remanded the Tenth Circuit's decision.

The United States Supreme Court held: (1) the landowner did not have a private action

against employees with the Bureau of Land Development for damages of the sort recognized under Bivens; (2) alleged violations of the Hobbs Act by employees of the BLM in their efforts to obtain an easement over landowner's property for the exclusive benefit of the Government did not qualify as a predicate offense for a RICO action; and (3) alleged violations of Wyoming's blackmail statute did not qualify as a predicate offense for a RICO action.

The unfavorable agency actions at issue involved a 1995 cancellation of the right-of-way given to Robbins's predecessor in return for the Government's unrecorded easement, a 1995 decision to reduce the Special Recreation Use Permit (SRUP) from five years to one, and in 1999, the SRUP's termination and a grazing permit's revocation. Administrative review was available for each claim, subject to ultimate judicial review under the Administrative Procedure Act. Robbins did not appeal the 1995 decisions, stopped after an Interior Board of Land Appeals (IBLA) appeal of the SRUP denial, and obtained an IBLA stay of the grazing permit revocation.

Robbins conceded that any single action might have been brushed aside as a small imposition, but contended that the cumulative effect of the campaign against him amounted to coercion to gain the easement and should be redressed collectively.

The Court reasoned that most of the offending actions by the Government were legitimate tactics designed to improve the Government's negotiating position. Although the Government is no ordinary landowner, in many ways it deals with its neighbors as one owner among the rest. So long as the defendants had authority to withhold or withdraw Robbins's permission to use Government land and to enforce the trespass and land-use rules, they were within their rights to make it plain that Robbins's willingness to give an easement would determine how complaisant they would be about his trespasses on public land.

The Court declined to entertain Robbins's more abstract Bivens claim. Robbins asserted he was being retaliated against for resisting Government impositions on his property rights. The Court concluded that to hear this claim would invite claims in every sphere of legitimate governmental action affecting property interests, from negotiating tax claim settlements to enforcing Occupational Safety and Health Administration regulations.

Finally, the Court opined that RICO did not give Robbins a claim against defendants in their individual capacities. The claim failed because the Hobbs Act does not apply when the National Government is the intended beneficiary of allegedly extortionate acts. The Court explained that it is not reasonable to assume that the Hobbs Act (let alone RICO) was intended to

expose all federal employees to extortion charges whenever they try to enforce Government property claims. Because defendants' conduct did not fit the traditional definition of extortion, it also did not qualify as a RICO predicate offense.

Mount St. Scholastica, Inc. v. City of Atchison, Kansas, 482 F.Supp.2d 1281 (D. Kan. 2007).

The Tenth Circuit concluded that the plaintiff failed to show that it suffered a regulatory taking. Without a taking, plaintiff's constitutional rights under the Fifth and Fourteenth Amendments were not violated. Plaintiff's 42 U.S.C. § 1983 claim based on those rights also failed. Defendant's request for judgment was granted; plaintiff's request for judgment was denied.

A monastic community owned a dormant property within city. The community brought state court action against city, alleging that, by unreasonably denying a demolition permit under a state historical preservation act, the city violated the community's state and federal constitutional rights. City obtained removal to federal court. City moved for judgment on the pleadings and community brought cross motion for summary judgment. The Court found that the defendant's actions violated the plaintiff's First Amendment rights and granted the plaintiff's motion for summary judgment in part.

The Court agreed that a forced sale was not a feasible alternative, but concluded that there were other alternatives. Defendant's denial was supported by the evidence and not fraudulent, arbitrary, or capricious. Further, the record indicated that defendant took the required hard look at relevant factors, and made its decision on the evidence. Evidence established that several of the city commissioners considered "mothballing" to be a feasible and prudent alternative and there was sufficient evidence to support this conclusion. Plaintiff did not meet its burden of showing that there were no feasible and prudent alternatives.

The Court also decided that the city met the individualized exemption exception. Under this exception a city has the ability to grant or deny the requested construction based on subjective criteria. In this case, because the decision was made on a case-by-case basis with individualized scrutiny, the individualized exemption exception was satisfied. By meeting this exception, the City's decision was subject to strict scrutiny, meaning "the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest." The Court concluded that no court has found historic preservation to be a compelling government interest.

Plaintiff further asserted that by denying the demolition permit, defendant restricted its use of the property without just compensation. Defendant countered that plaintiff's claim was not ripe for adjudication, and even if it were, defendant's actions were not a regulatory taking.

The Court explained that Kansas has procedures for providing compensation for takings claims. First, Kansas courts recognize inverse condemnation actions for compensation when a government entity takes private property. To establish a claim for inverse condemnation, a party must establish an interest in the real property and a taking. When evaluating an inverse condemnation action, whether there has been a taking is a question of law. The Tenth Circuit noted that it is unclear under Kansas law whether the facts at hand could be characterized as a taking to establish an inverse condemnation action, but the Court ultimately decided that because Kansas courts likely would not recognize a taking in this context, plaintiff would not have an inverse condemnation action in Kansas or in this case.

Instead, the Court reasoned that because plaintiff did not allege that it physically occupied the parcel, plaintiff's claim was one of regulatory taking. The Tenth Circuit decides whether a governmental action is a "total regulatory taking" by applying the "economically beneficial use test" and determines whether all economically beneficial use is prohibited for the entire parcel.

The Court concluded that in this case, the plaintiff maintained some economically beneficial use in the parcel as a whole. The Court further stated that just because plaintiff incorrectly assumed that it had the property right to demolish the building for the last sixteen years, such an assumption does not in and of itself create a taking.

City of Mission Hills v. Sexton, 284 Kan. 414, 160 P.3d 812 (2007).

City brought action to condemn two temporary easements as part of sewer rehabilitation project. The District Court entered judgment on jury verdict as to compensation and landowners appealed.

Under K.S.A. 26-513(a), "[p]rivate property shall not be taken or damaged for public use without just compensation." In cases of a partial taking where "only a part of a tract of land or interest is taken," such as the City's taking of two temporary easements in this case, the statute provides that "the compensation and measure of damages is the difference between the fair market value of the entire property or interest immediately before the taking, and the value of that portion of the tract or interest remaining immediately after the taking." K.S.A. 26-513(c).

The Kansas Supreme Court opined that, in order to calculate the fair market value, the use of the rental value methodology was acceptable. Further, the trial court was correct. There was no basis for granting a new trial because of Shaner's expert testimony or because the jury accepted that testimony as the basis for its verdict.

Next, the Court explained that the property rights taken by a condemnor are to be determined by the language in the petition for eminent domain and the appraisers' report. A condemnor bears the burden of drafting its petition to show the limitations in its taking. “[O]nce the nature of the interest to be taken is identified in the [petition and] appraisers' report, parol evidence will not be admitted for the purpose of establishing a lesser interest based on the condemnor's intended use. The rights acquired, not the intended use of those rights, are the basis for assessing landowners' damages. [Citation omitted.]” 254 Kan. at 703, 869 P.2d 587.

The Court stated that the rationale for such a principle is apparent because “ ‘[i]f the landowners are not compensated in full for the full use, as set out in the [appraisers'] report, the condemnor can take the full use in the future without further compensation to the landowners.’ [Citation omitted.]” 254 Kan. at 703, 869 P.2d 587; see Hudson, 246 Kan. 395, Syl. ¶ 2, 790 P.2d 933. Property rights taken by the condemnor are determined by the language in the condemnation petition and appraisers' report; condemnor bears the burden of drafting the petition to show the limitations in its taking. The Court further noted that K.S.A. 26-513(d), lists nonexclusive factors to consider in ascertaining the amount of compensation and damages and “convenience” is listed as a factor. K.S.A. 26-513(d)(4). Finally, compensating a party for loss of access is appropriate only when access has been completely denied or the access provided is unreasonable. The landowners' opportunity to use or access the property subject to the temporary easements can be considered a convenience. Thus, the Court reasoned that it could not conclude the trial court abused its discretion by allowing testimony pertaining to portions of the amended petition.

Korytkowski v. City of Ottawa, 283 Kan. 122, 152 P.3d 53 (2007).

Property owners operating a motel and tow shop brought action against city and the secretary of the Kansas Department of Transportation (KDOT). Property owners alleged that a highway construction project created unreasonable access to the state highway system and restricted access to their properties so as to constitute a taking without just compensation.

The Kansas Supreme Court held that (1) the city and KDOT did not block or take away property owners' "right of access," as would have resulted in a compensable taking and (2) the construction project was not an unreasonable exercise of government's police power and did not unreasonably restrict access to landowners' business properties.

The Court explained that in order to establish a claim for inverse condemnation, a party must establish an interest in the real property and a taking. The question of whether there has been a compensable taking is one of law.

Interference with a "right of access" and unreasonably "restricted access" are legally distinct under Kansas law. When the government actually blocks or takes away existing access to and from property, the landowner is generally entitled to compensation. However, an abutting landowner has no automatic right to the continuation of a flow of traffic from nearby highways.

When an abutting landowner's right of access to an abutting roadway has been taken, there has been an exercise of eminent domain which may require just compensation. When there has been an exercise of the government's police power, that use of power must have been reasonable. When the government reasonably uses its police power, there is no taking. Thus, an inverse condemnation action will not stand.

Although reasonableness is the standard by which a court determines whether a government's exercise of police power is valid, reasonableness is not the appropriate standard to determine whether a government action affecting real property in private hands constitutes a taking. Instead, the court considers: (1) whether an abutting property owner has no right to the continuation of a flow of traffic to and from nearby highways; (2) if the regulation of traffic flow does not involve a taking, whether the government exercised its police power to promote the safety, peace, health, morals or general welfare of the people; (3) whether the State action resulted in a mere diminution of property value, meaning there is no taking; and (4) the increased driving distance between a landowner's property and nearby roadways.

In Korytkowski, the Court affirmed the lower court, concluding that there was no taking in this case. Specifically, the Court reasoned that the landowners' property was not physically taken. Access to the abutting roadway was not disturbed and the new necessity of a more indirect route to and from the landowners' property did not constitute a taking under Kansas law

based on either “right of access” or “restricted access.”

Young Partners, LLC v. Board of Educ., Unified School Dist. No. 214, 284 Kan. 397, 160 P.3d 830 (2007).

School district acquired property in 1947 subject to a reversionary interest. The school district used and maintained the property for over 50 years. During those years the school district constructed substantial improvements on the property. The Court ruled that under such circumstances, the legislature has deemed that it is in the public interest for the school district to protect its public investment against a reversionary interest by authorizing condemnation of the reversionary interest. Thus, in this case, the requirement that a taking be made for a “public purpose” was fulfilled by the two conditions set forth in K.S.A. 72-8212a(b).

Simply stated, the Court concluded that the provisions of K.S.A. 72-8212a are not unconstitutional, and that in this case, a valid public purpose existed to support the condemnation action filed by the school district. Accordingly, the Court reversed the decision of the district court enjoining the school district's original eminent domain action.