KANSAS ATTORNEY GENERAL'S TAKINGS GUIDELINES EVALUATING PROPOSED GOVERNMENTAL ACTIONS and IDENTIFYING POTENTIAL TAKING OF PRIVATE PROPERTY

2009 Update

The information below sets forth issues that were examined in decisions decided by the United States Supreme Court, Tenth Circuit, and Kansas appellate courts 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 2009 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, Volume16, 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, Volume 27, No. 1, published January 3, 2008, and Volume 27, No. 51, published December 18, 2008.

Harsch v. Debra L. Miller, Secretary of Transportation of the State of Kansas, 288 Kan. 280, 200 P.3d 467 (2009). The Secretary of the Kansas Department of Transportation (KDOT) instituted eminent domain proceedings against property owned by the Harsches. Pursuant to K.S.A. 2007 Supp. 26-508, the Harsches appealed the appraiser's amount of damages award in Coffey County District Court, and later filed a separate action contending that K.S.A. 26-513(c) of the Eminent Domain Procedure Act (EDPA) was unconstitutional on its face and as applied. With the filing of the constitutional challenge, the Harsches moved to stay the K.S.A. 26-508 damages appeal. They also filed an action in the U.S. District Court challenging constitutionality. The action filed in state court challenging constitutionality was dismissed.

Although a jury trial was scheduled in district court for February 7, 2008, the Harsches filed a docketing statement with the Kansas Appellate Courts, which included acknowledgment that the order being appealed was not final. The Harsches argued that the collateral order doctrine applied and that the district court did not have jurisdiction with the appellate court filing. The district court did not agree it lacked jurisdiction and proceeded with the trial. The Harsches and counsel did not appear for trial. The district court dismissed the awards damages action for lack of prosecution, confirmed the

appraiser's award of damages, and held Harsches' counsel in contempt, which included costs and fees against counsel personally. The Harsches appealed.

The Kansas Supreme Court addressed three issues, primarily procedural but with Issue #2 touching on the EDPA, and ultimately held: 1) the Harsches' act in filing a docketing statement with the appellate court did not deprive the district court of jurisdiction; 2) the Harsches would not have "acquiesced" to the district court's refusal to stay proceedings in the eminent domain case by participating in trial; 3) the district court acted within its discretion by denying the Harsches' motion to stay proceedings; and 4) the contempt order imposed again the Harsches' attorney failed to comply with K.S.A. 20-1203 and was void for lack of jurisdiction.

Issue #2 involved whether the district court abused its discretion in denying Harsches' motion to stay and ordering a jury trial on the damages issue, also included an analysis, albeit not on the merits, of the property owners' constitutional challenges. The Supreme Court concluded that the Harsches' constitutional challenge should not have been filed in the Coffey County District Court eminent domain proceedings *or* in the appeal of those proceedings. "The court has no jurisdiction to hear such claims there." (citing *Miller v. Bartle*, 283 Kan. 108, 150 P.3d 1282 (2007)). The other aspect worth noting of the Supreme Court's analysis in light of these guidelines is that under K.S.A. 26-504, "appeals of final orders under the EDPA shall take precedence over other cases, which suggest legislative intent to expedite such appeals." (Emphasis added.)

In essence, the Harsches did not have a final order to appeal under K.S.A. 26-504 (appeals to the supreme court may be taken from any final order under the provisions of the EDPA.) The court affirmed the decision that dismissed for lack of prosecution the Harsches' appeal of the appraiser's award. The Harsches constitutional challenge was not addressed on its merits.

<u>Knop v. Gardner Edgerton Unified School District No. 231</u>, 41 Kan. App. 2d 698, 205 P.3d 755 (2009). Landowners were contacted by a school district, U.S.D. 231, interested in purchasing 80 acres in Johnson County, Kansas. U.S.D. 231 informed the landowners it had purchased 40 acres of land adjacent to their land and "repeatedly indicated to the [landowners] that if they did not sell the property, then the school district intended to condemn the land by use of its powers of eminent domain."

Landowners sold the land by contract for $1,433,154.30 (approx. 77.5 acres at $18,500 per acre). Schools were not built and nineteen months later, the school district sold the land for approx. $32,000 per acre to a developer. Landowners filed an action for breach

of contract in Johnson County District Court, and sought $1,043,316.10 representing their lost profit.

The district court granted the school district's motion to dismiss for failure to state a claim for breach of contract. The landowners appealed. The Kansas Court of Appeals held, among other determinations, that K.S.A. 2008 Supp. 72-8212a, which requires that a school district offer original landowners the option to repurchase land at the contract price if the school district fails to use the property for school purposes, did not apply to this set of facts. The court's rationale was that K.S.A. 2008 Supp. 72-8212a is triggered by entry of a final judgment under K.S.A. 26-511 (EDPA). Because these parties entered into a contractual agreement, the school district had no responsibility or legal obligation to give landowners the option to buy back. The Kansas Court of Appeals affirmed the district court's dismissal of the landowners' suit.
In essence, because there was no final judgment entered under the EDPA, K.S.A. 2008 Supp. 72-8212a(a) did not apply to this transaction. "Stated differently, acquiring property under the threat of condemnation is not the same as acquiring property under an actual eminent domain proceeding."

Frick v. City of Salina, Kansas, a Municipal Corporation, 289 Kan. 1, 208 P.3d 739 (2009). This case is decided on other statutory provisions' interpretation. However, the Kansas Supreme Court analyzed distinctions between the dispositive provisions in this case and K.S.A. 26-501, 26-506, 26-508; therefore, the case may also be a resource for those researching the EDPA. See Frick, 289 Kan. at 22-23.

Shipe v. Public Wholesale Water Supply District No. 25, 289 Kan. 160, 210 P.3d 105 (2009). Wholesale Water Supply District 25 (District 25) filed applications in which to seek permits to groundwater rights. District 25 sought to obtain temporary access for preliminary testing of three tracts of land to evaluate which tract would be the best location for a final (permanent) well. The tracts' landowners - the Shipes owning one of the three tracts - attempted negotiations with District 25, but these failed and District 25 filed a petition for eminent domain in Douglas County District Court.

The district court found that District 25 had the power of eminent domain. The Shipes filed a motion for a temporary injunction in the eminent domain proceeding and filed a separate action seeking injunction. Thereafter, appraisers filed their reports, District 25 submitted the 'partial takings damages' funds, and the Shipes returned the award to the court refusing to acquiesce in the award.

The district court denied Shipes' request for temporary injunction and granted District 25's motion to dismiss. The Shipes "appeal the denial of the injunction, on the grounds

that the [Wholesale Water Supply] Act does not grant [District 25] the power to acquire water rights by eminent domain."

The Kansas Supreme Court concluded that landowners had standing to object to the temporary easement but that the issue of whether District 25 could condemn their property for the water was not ripe, and any such decision would be advisory. The court affirmed the district court's dismissal but on different grounds, specifically, for lack of jurisdiction. "The issue which is ripe in this action is whether District 25 can proceed with an action to obtain a temporary easement. Because the temporary easement would not give District 25 rights to water and the Shipes have not stated any objections other than those relating to water rights, the Shipes' objections do not provide a basis for enjoining the temporary easement."

Kirkpatrick v. City of Olathe, __ Kan. __, 215 P.3d 561 (2009). Reversing the Court of Appeals. See Kirkpatrick, 39 Kan. App.2d 162, 178 P.3d 667 (2008), discussed in 2008 Guidelines, published December 18, 2008, Volume 27, No. 51. City condemned Kirkpatrick's land to construct a traffic roundabout. After completion of the construction, Kirkpatrick experienced water in his basement that he asserted was caused by the roundabout's construction. He [and later his estate] filed a Tort Claims action contending that the City "had damaged or taken his property." The district court analyzing the inverse condemnation claim concluded that the City had "taken" Kirkpatrick's property by virtue of its failure to pay for the damages caused by the construction. The Kansas Court of Appeals reversed the district court - agreeing with the City's position that its actions did not constitute a compensable "taking." Kirkpatrick's estate filed a petition for review.

The Kansas Supreme Court noted that to succeed on a claim for inverse condemnation, a party must establish that he or she has an interest in real property affected by a public improvement project and that a taking has occurred. The question of whether there has been a compensable taking is one of law. The analysis that followed included review of K.S.A. 26-513, which provides a nonexclusive list of factors taken into consideration when determining the compensation due the landowner [estate], and an extensive history of Kansas condemnation and eminent domain case law.

In short, the Court, in applying the "plain language of K.S.A. 26-513(a)", determined that "compensation was required for damage to the Estate's property that was the substantial, direct, and inevitable result of the construction of the roundabout in question." The district court's award of $17,000 in damages to the Estate was affirmed. Because of the reinstatement of the damages for inverse condemnation to the Estate's property, the district court's award of attorney fees and litigation expenses was also

affirmed. In essence, the Supreme Court relied on the “plain language of the EDPA” and thereby clarified what the Court of Appeals stated was the “fundamental tension” between the statutory framework and Kansas case law.