

KANSAS ATTORNEY GENERAL'S TAKINGS GUIDELINES FOR EVALUATING
PROPOSED GOVERNMENTAL ACTIONS TO IDENTIFY POTENTIAL TAKINGS
OF PRIVATE PROPERTY

2012 Update

The Private Property Protection Act (Act), K.S.A. 77-701 *et seq.*, requires the Attorney General to compile and annually update guidelines to be used by state agencies in determining whether proposed government action 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.¹ Government action is defined as legislation, regulations or directives, or agency guidelines and procedures for the issuing of licenses or permits.² The Act expressly excludes other types of activity, such as the formal exercise of eminent domain.³

Under the criteria of the Act, there are three cases to include in the 2012 update to the Attorney General's Guidelines⁴:

Arkansas Game and Fish Commission v. United States, 133 S. Ct. 511 (2012). The United States Supreme Court reversed the Federal Circuit's holding that government-induced flooding constitutes a taking only if the flooding is permanent or inevitably recurring. The Supreme Court reiterated that "takings temporary in duration can be compensable" and declined to adopt a "blanket temporary-flooding exception to [its] Takings Clause jurisprudence."

Kansas One-Call System, Inc. v. State, 294 Kan. 220 (2012). A company that operated an excavation notification center for public utilities argued that a statute limiting the fees it could charge certain utilities violated the company's constitutional rights under the Takings Clause. The Kansas Supreme Court disagreed, holding that the fee limitation did not constitute a taking because the company was not legally required to operate the notification center but instead "voluntarily agreed to participate in a price-regulated program or activity." Alternatively, the Court held, the company's takings claim was foreclosed by the fact that it could adjust other fees to cover the additional expenses. "Where an entity can pass along costs to others, such as customers or members, just compensation is available for any taking that may have occurred, negating any Fifth Amendment [takings] claim."

Zimmerman v. Hudson, 293 Kan. 332 (2011). Landowners who had entered into contracts for the development of commercial wind farms on their properties filed suit after the board of county commissioners adopted zoning restrictions prohibiting such wind farms. On appeal, the Kansas Supreme Court explained that the district court erred in holding that the reasonableness of the governmental action is the appropriate

¹ K.S.A. 77-704.

² K.S.A. 77-703(b)(1).

³ K.S.A. 77-703(b)(2).

⁴ The original guidelines are published at 14 Kan. Reg. 1690-92 (Dec. 21, 1995).

standard to be used in determining whether a taking occurred, but the Supreme Court affirmed the district court's rejection of the takings claims on other grounds. Even before the new zoning restrictions, construction of the wind farms was contingent on obtaining conditional use permits, and the county commissioners had absolute discretion to grant or deny these permits. Accordingly, the landowners had no "vested right" in the construction of wind farms. Without such a right, the landowners had no viable takings claim.

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