

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

2013 Update

The Private Property Protection 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 is one case to include in the 2013 update to the Attorney General's Guidelines⁴:

In *Koontz v. St. Johns River Water Management District*, 507 U.S. ___, 133 S. Ct. 2586 (2013), a water management district denied a property owner's request for a land use permit but stated that the permit would be approved if the property owner paid for improvements to land owned by the district a few miles away. The property owner sued, claiming that the district's demand violated the U.S. Supreme Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). These cases held that a taking occurs when the government conditions approval of a land use permit on a property owner's agreement to give up a property interest and there is not a "nexus" and "rough proportionality" between the government's demand and the effects of the requested land use.

The Florida Supreme Court concluded that no Takings Clause violation occurred because (1) *Nollan* and *Dolan* only apply when a permit is conditionally granted, not when a permit is denied, and (2) *Nollan* and *Dolan* do not govern when the government demands money, rather than an interest in real property, in exchange for a land use permit.

The U.S. Supreme Court reversed, rejecting both of these conclusions. The Justices unanimously agreed that there is no distinction between conditionally granting a land use permit and denying a land use permit while stating that the permit will be approved if certain conditions are met. On the second issue, the Court split 5-4, with the majority concluding that demands for money can give rise to a takings claim. While recognizing that taxes and user fees are not takings, the Court held that monetary exactions that burden a specific parcel of land must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.

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).