

**Kansas Attorney General Phill Kline's
2006 Update of
Guidelines for Evaluating Proposed Governmental Actions
to Identify Potential Takings of Private Property**

Pursuant to K.S.A. 77-704 of the Private Property Protection Act, the following summary of decisions and pending cases constitutes the 2006 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 and Volume 24, No. 47, published November 24, 2005.

The Guidelines and annual updates may also be found on Attorney General Phill Kline's website at <http://www.ksag.org/Divisions/Logic/main.htm>.

Robbins v. Wilkie, 433 F.3d 755 (10th Cir. 2006).

Plaintiff brought action against employees of the Bureau of Land Management, claiming that they attempted to extort a right-of-way across his property in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO)¹ 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 and the Tenth Circuit Court of Appeals affirmed "[b]ecause the right to be free from retaliation for the exercise of Fifth Amendment rights is clearly established"

Discussing an individual's Fifth Amendment right to exclude others from that individual's property, the Court stated:

"The right to exclude [is] universally held to be a fundamental element of the property right.' *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); *see also Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). The right has long been recognized as one of the main rights attaching to property. *Rakas v. Illinois*. 439 U.S. 128, 143 n. 12, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (citing Blackstone Commentaries).

...
"A property owner's right to exclude extends to private individuals as well as the government. *See United States v. Lyons*, 992 F.2d 1029, 1031 (10th Cir.

¹ We do not further discuss this claim, but focus rather on the takings issue.

1993) (the expectations of privacy that are the cornerstone of Fourth Amendment protection against governmental search and seizure derive in part from the right to exclude others, including government officials, from one's property)." 433 F.3d at 765.

While the Bureau had authority to take Plaintiff's property for public use, upon providing just compensation, through eminent domain, they could not attempt to extort a right-of-way thus avoiding the requirement of just compensation. "If the right to exclude means anything, it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause." 433 F.3d at 766. The Court then concluded:

"Because retaliation tends to chill citizens' exercise of their Fifth Amendment right to exclude the government from private property, the Fifth Amendment prohibits such retaliation as a means of ensuring that the right is meaningful." 433 F.3d at 766.

Kau Kau Take Home No. 1 v. City of Wichita, 281 Kan. 1185 (2006).

Plaintiff brought an inverse condemnation action against the City for damages allegedly caused by the City's road contractors. Plaintiff also complained that the City's road project, in diverting the flow of traffic from his business, constituted a taking. The district court granted the City's motion for summary judgment; the Supreme Court affirmed that decision.

The Kansas Supreme Court held:

"Damage to private property caused by contractors working on a public road construction project does not support a cause of action for inverse condemnation if the damage is not necessary to complete the road construction project" 281 Kan. 1185, syl. ¶ 1.

To establish a claim for inverse condemnation, an interest in real property and a compensable taking of that must be established. A compensable taking requires not only acquiring possession of property, but also the rightful possession and control of the property. Because the property damaged in this case was not needed to complete the road construction project, any possession or control over it was not rightful and therefore the claim should be one brought as a tort action, not an inverse condemnation action.

The Court also held:

"An abutting property owner has no right to the continuation of a flow of traffic from nearby highways to the owner's property. The regulation of traffic flow does not involve a taking if it furthers the government's police power to promote the safety, peace, health, morals and general welfare of the people.

"State action resulting merely in a diminution in property value is not a taking.

and

"Under the facts of this case, increasing the driving distance between a landowner's property and nearby roadways is not a compensable taking."
281 Kan. at syl. ¶¶ 3, 4, 5.

2006 Substitute for Senate Bill No. 323

Responding, in part, to the United States Supreme Court's decision in *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), several bills were introduced in the 2006 Session of the Kansas Legislature to limit government takings. The only such bill to pass was Substitute for Senate Bill No. 323. The Bill prohibits the taking of private property except for public use and limits the ability of government to take private property for the purpose of selling, leasing or otherwise transferring the property to any private entity.

This new legislation has not yet been the subject of any reported court decision or Attorney General Opinion.