

Kansas Attorney General's Guidelines for Evaluating Proposed Governmental Actions to Identify Potential Takings of Private Property--1998 Update

The following United States Supreme Court and Kansas Supreme Court cases and Kansas Attorney General Opinions, rendered after the completion of the Attorney General's 1997 update to the takings guidelines, contain private property takings analysis. Pursuant to K.S.A. 77-704 of the Private Property Protection Act, this summary of decisions constitutes the 1998 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. The 1996 Update may be found in Volume 16, Number 1 of the Kansas Register, published January 2, 1997. The 1997 Update may be found in Volume 16, Number 52 of the Kansas Register, published December 25, 1997.

Phillips v. Washington Legal Foundation, 66 U.S.L.W. 4468, 141 L.Ed.2d 174, 118 S.Ct. 1925 (June 15, 1998)

The existence of a property interest protected by the Fifth Amendment to the United States Constitution is to be determined by reference to existing state or local law, or some federal provision independent of the Fifth Amendment. If a long-recognized traditional property interest exists, a state may not sidestep the Takings Clause by disavowing it. *Held*: Interest earned on client funds held in IOLTA accounts is "private property" of the client for purposes of the Takings Clause. There was no determination made as to whether there was a compensable taking in this case.

Eastern Enterprises v. Apfel, 66 U.S.L.W. 4566, 141 L.Ed.2d 451, 118 S.Ct. 2131 (June 25, 1998)

The aim of the Fifth Amendment Takings Clause is to prevent government from placing public burdens on one or a few persons that should be borne by the public as a whole. *Held*: In retroactively requiring a former coal operator to fund health benefits, to the tune of \$50 to \$100 million, for retired miners who had worked for the operator before 1996, "the Coal Industry Retiree Health Benefit Act (Coal Act) improperly placed a severe, disproportionate and extremely retroactive burden on the operator and, thus, as applied, effected an unconstitutional taking."

On at least three prior occasions, the Court has upheld federal legislation that retroactively imposed economic burdens on a few for the good of the many because the government action involved in those cases was temporary, less economically burdensome than in the present case, or was otherwise justified. Each non-per se Takings case must be decided on an ad hoc basis taking into consideration the factors of economic impact, interference with reasonable investment backed expectations and the character of the governmental action.

Monterey, California v. Del Monte Dunes, Case No. 97-1235

The United States Supreme Court heard oral arguments in this case on October

7, 1998. The issues presented were 1) whether an action under 42 U.S.C. § 1983 for a regulatory taking may be decided by a jury; 2) whether a jury may reweigh evidence concerning the reasonableness of a public entity's land use decisions; and 3) whether the "rough proportionality" test was properly considered. The lower court's decision may be found at 95 F.3d 1422 (9th Cir. 1996), *cert. granted*, 66 U.S.L.W. 3509, 118 S.Ct. 1359, 140 L.Ed.2d 509 (U.S. March 30, 1998).

City of Overland Park v. Dale F. Jenkins Revocable Trust, 263 Kan. 470, 949 P.2d 1115 (1997)

A lessee is an owner of property entitled to just compensation if the leasehold interest is damaged from the exercise of eminent domain. Where leased property is taken by eminent domain, the compensation for the property taken or damaged, determined as though held in single ownership, is apportioned between the lessor and lessee according to their respective interests.

Deisher v. Kansas Department of Transportation, 264 Kan. 762, 958 P.2d 656 (1998)

Inverse condemnation, a proceeding recognized in Kansas, is an action brought by a party whose property is taken for public use without formal condemnation proceedings. In this case, however, the property damage incurred was found to have resulted from a tortious act rather than a taking.

State, ex rel. Tomasic v. The Unified Government of Wyandotte County/Kansas City, Kansas, 265 Kan. 779, 962 P.2d. 543 (1998)

The Fifth Amendment Takings Clause sets a minimum entitlement when private property is taken for public use; it does not prohibit a condemning authority from paying more than what is determined to be just compensation.

Attorney General Opinion No. 98-10

Placing a moratorium on new water pollution control permits for new confined feeding facilities would not effect a *per se* compensable taking under the Fifth Amendment Takings Clause if no physical invasion of the property or elimination of all economically beneficial uses of the property are involved. Whether such a moratorium otherwise results in a compensable taking depends on 1) the nature of the governmental action, 2) the severity of any economic impact on the affected property owner and 3) the degree of interference with the affected property owner's reasonable investment-backed expectations. Such determination is fact-intensive and must be made on an ad hoc basis.