

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

2010 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 2010 update to the Attorney General's Guidelines.

Stop the Beach Renourishment, Inc., v. Florida Department of Environmental Protection, 560 U.S. ___, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010). Although the facts of this case involving private ocean beachfront (littoral property with accretions and avulsions) and state-owned property (title to submerged land adjacent littoral property, *i.e.*, ocean seabed abutting the water line) would not be pertinent in Kansas, general principles regarding *judicial* "takings" could apply to a different factual scenario in Kansas.

The Florida Supreme Court had held that application of Florida's Beach and Shore Preservation Act to owners of beachfront property bordering a beach restoration project did not unconstitutionally deprive the owners of littoral rights without compensation. The U.S. Supreme Court affirmed, under the facts of this case, that the Florida Supreme Court, through its construction of the Act, did not take property without just compensation.

In relation to future cases, the judicial takings discussion of the Court's opinion (joined by 4 of the 9 justices), which may well be the pertinent portion of the opinion, was summarized as follows:

"In sum, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state *actor* is irrelevant. If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." (Emphasis original.)

Frick v. City of Salina, 290 Kan 869, 235 P.3d 1211 (2010). The City of Salina acquired property as part of a public improvement project (Project), which involved the reconstruction of a city street, the construction of a bridge over railway lines, and the redesign and reconstruction of appurtenant side roads. The Project included improvements to a street that abutted property owned by the Fricks; that property was

also the location to which the Fricks attempted to relocate some of their businesses that were dislocated by the Project.

Prior to the Project, the Fricks' property was served by one access road, a field entrance dirt driveway. At the time that construction of the Project was beginning, the Fricks constructed two dirt-fill driveway approaches without first requesting or receiving a permit. These dirt driveways were installed in the construction zone and within the City's right-of-way. Around the same time the City enacted a moratorium prohibiting the construction or installation of any driveway crossing, culverts or other improvements within the public right-of-way located within the Project. The Fricks' proposed relocation site was located within this area.

According to the Fricks, their attempt to move their businesses to the relocation site was thwarted by the "inappropriate regulatory" actions of the City. The Fricks thus brought six counts alleging inverse condemnation claims for a compensable taking, based on:

- the City's denial of reasonable access to the relocation site during the Project;

When the government actually blocks or takes away *existing access* to and from property and an abutting road, the landowner is generally entitled to compensation under the Eminent Domain Procedure Act for damages for loss of a private road and the replacement cost to the extent that such loss affects the value of the property remaining. Here, however, the Fricks failed to provide any evidence that the two constructed driveways existed before the Project began. Consequently, there was no compensable taking.

- the City's requirement that driveway entrances built by the Fricks be removed;

Reasonable regulation of private property under the police power is not a taking and therefore does not require payment of just compensation. Here, the Fricks had constructed the driveways in violation of the City ordinance that required a permit. Government land-use regulations may under extreme circumstances amount to a "taking" of the affected property, but the mere imposition of a permitting or regulatory process does not imply that a taking has occurred.

- the City's adoption of a 3 year moratorium ordinance restricting the installation of driveways, culverts, or other improvements within the right-of-way encompassed by the Project zone;

The United States Supreme Court has identified two types of regulatory action that constitute categorical or per se takings. First, where government requires an owner to suffer a permanent physical occasion of his property – however minor – it must provide just compensation. Second, when regulations that completely deprive an owner of all economically beneficial use. If the facts of a governmental takings case do not fit within these two categories, then the takings claim must be analyzed under the catch-all standard promulgated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98

S.Ct. 2646, 57 L.Ed.2d 631 (1978). The *Penn Central* factors are applicable when an alleged taking is temporary in nature. Three of these factors had "particular significance" in the case at hand: (1) the economic impact of the regulation on the claimant, (2) the extent by which the regulation has interfered with distinct, investment-backed expectations, and (3) the character of the governmental action.

Regarding the third factor, the U.S. Supreme Court observed: "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." The Kansas Supreme Court echoed this sentiment by stating that where the government reasonably concludes that the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land, compensation need not accompany a reasonable prohibition.

Here, the moratorium did not result in a compensable taking of the Fricks' relocation site. Regarding the first two *Penn Central* factors, it was not the driveway moratorium but the Fricks' failure to obtain a building permit that prevented investment of tax credit proceeds into the development of the relocation site; the moratorium itself did not interfere with the Fricks' building application process.

Further, if there was any effect on economic viability by temporarily disallowing the installation of driveways, the economic viability of the relocation site was delayed rather than destroyed. Delaying the sale or development of property during the governmental decision-making process may cause fluctuations in value that, absent extraordinary delay, are incidents of ownership rather than compensable takings.

Regarding the third factor, the Project included the property of landowners other than the Fricks and the moratorium applied to all properties in the Project area, facilitated a public purpose, and existed for a reasonable length of time corresponding to the Project period and the establishment of traffic flow in the area. The public safety, general welfare, and economic concerns associated with the moratorium constituted reasonable regulation by the City, and the moratorium did not result in a taking.

- the City's failure to issue a building permit to the Fricks;

Mere imposition of a permitting or regulatory process does not imply that a taking has occurred. It is only under extreme circumstances that a land use regulation will amount to a 'taking' of the affected property. However, the delay was not caused by the City but by the Fricks' failure to submit a completed application.

- the City's construction activities that cause damages to the relocation site;
- the City's construction activities that altered drainage, causing water to be retained, and resulted in flooding of and damages to the relocation site.

Here, on a motion for summary judgment, the city presented evidence that the Project improved the drainage and the Fricks failed to provide Rule 141 support for their assertions. Consequently, summary judgment for the City was appropriate although on different grounds than entered by the district court.

State v. Graham, 42 Kan.App.2d 1030, 220 P.2d 1105 (2009). Cemetery property in Kansas enjoys a unique status and is not subject to the laws of ordinary property. A cemetery corporation is organized for a public rather than private purpose, and the cemetery management is in the nature of a trust. When a cemetery has been abandoned and its property is transferred to a municipality pursuant to K.S.A. 17-1367, there is no compensable taking of the property of the cemetery corporation because the transfer is a noncompensable exercise of the police power.